

Rupal Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Dec-30-1993

Reported in : (1994)49ITD484(Mum.)

Judge : O Jain, V Sinha

Appellant : Rupal

Respondent : Assistant Commissioner of

Judgement :

1. This is an appeal filed by the assessee against an order under Section 263, of the Income-tax Act, 1961 passed by the Commissioner of Income-tax.
2. The facts of the case are that the assessee is an exporter of dress material and also had local sales. He claimed deduction under Section 80HHC of the Act in respect of the export turnover. Sub-section (1) of that section allowed a deduction of an amount not exceeding 50 per cent of the profits derived by the assessee from export of specified goods or merchandise. The profits derived from the export of goods or merchandise out of India in a case where there were exports as well as local sales were to be computed in accordance with Clause (b) of Sub-section (3) of Section 80HHC of the Act. It was specified therein that such profits would be the amount which bears to the profits of the business the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. Thereafter, Explanation (b) defined "export turnover" as under: 'export turnover' means the sale proceeds receivable by the assessee in convertible

foreign exchange of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962).

3. It will be seen from the above that the export turnover did not include freight or insurance attributable to the transport of the goods. However, there was nothing in the Explanation to exclude freight or insurance from the "total turnover" as distinct from "export turnover". The assessee excluded the freight and insurance from the total turnover also in the computation of export profit, as per Section 80HHC(3)(b) of the Act and the Assessing Officer accepted the computation in the assessment order, without any discussion.

4. On these facts, the Commissioner of Income-tax passed an order under Section 263 of the Act, holding that the assessment was erroneous and prejudicial to the interests of the revenue insofar as freight and insurance had been deducted from the "total turnover" and he directed the Assessing Officer to recompute the deduction under Section 80HHC after excluding the freight and insurance from the total turnover. The assessee is aggrieved by this decision and is now in appeal before us.

5. The learned counsel for the assessee has invited our attention to Explanation (ba) below Section 80HHC, inserted by Finance (No. 2) Act, 1991 with effect from 1-4-1987, according to which "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station. This Explanation was effective from assessment year 1987-88 whereas the matter before us relates to assessment year 1986-87.

6. The learned counsel for the assessee submitted before us further that the above retrospective amendment had been made in order to remove an anomaly as was clear from the following extract from CBDT Circular No. 621, dated 19th December, 1991, containing Explanatory notes on the provisions relating to Direct Taxes contained in Finance (No. 2) Act, 1991 and which was available at 195 ITR 154 (St.) at 179 : 32.18 Whereas the definition of the term 'export turnover' excludes freight and insurance attributable to transport, no such exclusion has

been specified in respect of the term 'total turnover'. As a result, in CIF transactions, while the export turnover is taken at FOB value, the total turnover includes the sale proceeds of exports at CIF value.

32.19 With a view to removing this anomaly, it has now been clarified that 'total turnover' will also not include such freight or insurance.

32.20 This amendment takes effect retrospectively from 1st day of April, 1987, the day from which 'total turnover' became relevant for the purpose of computation of deduction under Section 80HHC. It will, accordingly, apply in relation to assessment year 1987-88 and subsequent years.

7. It was presumed in the above circular that the anomaly came into existence from assessment year 1987-88 whereas the learned counsel for the assessee submitted before us that the anomaly actually came into existence in assessment year 1986-87. In view of this, he argued that the amendment should be treated as clarificatory and applicable to assessment year 1986-87 also. For this argument, he also drew support from the decision of the Patna High Court in the case of Jamshedpur Motor Accessories Stores v. Union of India [1991] 189 ITR 70. Thus, he submitted that freight and insurance had been rightly deducted from the total turnover and the order under Section 263 of the Act, should be struck down.

8. The learned Departmental Representative, on the other hand, relied on the order of the Commissioner under Section 263 of the Act and also emphasised that Explanation (ba) below Section 80HHC does not use an expression "for the removal of doubts" and gives a specific date of 1-4-1987 for retrospective operation. In the light of this, according to him, the Explanation in question could not be made retrospective from 1-4-1986 and, therefore, the order under Section 263 of the Act, should be confirmed.

9. We have considered the rival submissions carefully. If we look at the original Section 80HHC, introduced by the Finance Act, 1983 with effect from 1-4-1983, the scheme for deduction in respect of export turnover was quite different. The deduction available was of an amount equal to 1 per cent of the export turnover of the specified goods or merchandise and a further deduction of an amount equal to

5 per cent of the amount by which the export turnover of the specified goods or merchandise exceeded the export turnover during the immediately preceding year. The concept of "export turnover" existed even at that time and it was defined in Explanation (b) to mean the sale-proceeds of any goods or merchandise exported out of India but not including freight or insurance. It was essentially the same as the definition with effect from 1-4-1986 which has been extracted above. Thereafter, Section 80HHC was substituted by the Finance Act, 1985 with effect from 1-4-1986 and a different scheme of deduction was introduced. This deduction was allowed in respect of profits retained for export business and the concept of profits derived from export of goods or merchandise out of India was introduced in Sub-section (3) of Section 80HHC of the Act. Clause (b) thereof related to a case where the assessee had export turnover as well as local turnover and the profits in question in such cases was the amount which bears to the profits of the business the same proportion as the export turnover bears to the total turnover of the business. The concept of "total turnover" was brought in for the first time, but no definition thereof was given in the Explanation below the section.

10. To put it simply, the profit derived from the export of goods was computed in the following manner: 11. In the above formula, if freight and insurance were excluded from the "export turnover", but not excluded from the "total turnover", then certainly an anomaly came into existence inasmuch as, the profit derived from export of goods became over-stated. It was only to remove this anomaly that Explanation (ba) was inserted by the Finance (No. 2) Act, 1991 retrospectively. However, due to an oversight, the date from which "total turnover" became relevant for the purpose of computation of deduction under Section 80HHC was taken to be 1-4-1987 and not 1-4-1986. This is evident from para 32.20 of the CBDT circular reproduced above.

12. In the case of Jamshedpur Motor Accessories Stores (supra), the Patna High Court was considering the amendment to Section 43B, by the Finance Act, 1987, with effect from 1-4-1988. In this connection, it was held that the rule of reasonable construction should be followed and literal construction may be avoided if that defeats the manifest object and purport of the Act. Reliance was placed, inter alia, on the judgment of the Supreme Court in the case of Goodyear India Ltd. v. State

of Haryana [1991] 188 ITR 402. In the light of the above, the Hon'ble High Court came to the cable to assessment year 1984-85. In our opinion, the ratio will be applicable to the facts of the present case also. Explanation (ba) was inserted by the Finance (No. 2) Act, 1991, retrospectively to remove an anomaly which came into existence from 1-4-1986 and not 1-4-1987. We, therefore, hold that Explanation (ba) is clariflcatory and should be applied retrospectively from 1-4-1986. In this view of the matter, freight and insurance have been rightly deducted by the assessee from the "total turnover" and the Commissioner of Income-tax was not justified in directing the Assessing Officer not to deduct theame. In this regard, we have also noted that the order under Section 263 of the Act was passed on 30-12-1988 when the benefit of the amendment brought by the Finance (No. 2) Act, 1991, mentioned above, was not available to the Commissioner.

13. For the above reasons, we vacate the order of the Commissioner, passed under Section 263 of the Act, and restore the assessment order.

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