

Choice Trading Corpn. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Cochin

Decided On : Jan-31-1995

Reported in : (1995)54ITD216(Coch.)

Judge : G Santhanam, P Ammini

Appellant : Choice Trading Corpn.

Respondent : Assistant Commissioner of

Judgement :

2. The assessee is a private limited company having income from exports, construction and shipping commission. It claimed deduction under section 80HHC of the IT Act as per certificate in Form No. 10CCAC issued by the Chartered Accountants under Rule 18BBA(3) of the Income-tax Rules, in a sum of Rs. 2,46,41,400.69, as follows : goods of Direct Export : Profit of the Adjusted Export business X Turnover= 1,18,33,856:40 20,14,47,244.75 (as per statement X = Rs. 1,06,76,099.79. attached) 22,32,92,945.19 90% of Export Incentive X ----- Adj. Total Turnover= Rs. 1,54,79,750.91 X ----- = 1,39,65,300.90 22,32,92,945.19I. SEA FOOD DIVISION: Rs. Rs.Direct Export Sales(F.O.B.) 20,14,47,244.75Local Sales 11,05,146.03D/C Scrap Sales 3,20,053.08Quality Bonus on Export 6,62,291.00Freezing charges 177.50 20,35,34,912.36 As per Schedule I to the accounts 1,25,45,839.00 As per Schedule J to the accounts 79,500.00 As per Schedule K to the accounts 71,32,693.83 Total turnover 22,32,92,945.19 The assessee also claimed deduction under Section 80-1 of the Act in respect of its seafood division as

follows :attached after charging depreciation 2,76,07,082.73Add: Depreciation allowable under section 32 79,42,358.16ciation on the basis of turnover 19,66,36,511.31 ----- X 3,55,49,440.89Profit of new IQF Industrial undertaking 2,86,71,559.25Less : Depreciation of IQF Industrial undertaking(as per statement attached) 76,14,489.25Profit of IQF Industrial undertaking 2,10,57,070.00Deduction under Section 80-1 (30% on above) 63,17,121.00 Further, a claim was made in respect of the Construction Division under section 80-1 as follows:--Deduction under Section 80-1: Rs.Total turnover as per Annexure 24,38,06,692.75Less: Turnover of IQF 19,66,36,511.31Balance Turnover of other divisions : 4,71,70,181.44Profit under Section 80-1 of Construction Division:Chargeable income as per statement attached 2,76,07,082.73Less : Profit of new IQF Industrial undertaking(computed above) 2,10,57,070.00Total profit of all other divisions 65,50,012.73Undertaking- Choice Park 71,32,693.83 ----- X 65,50,012.73 Undertaking- Choice Park 9,90,440.00Deduction under Section 80-1-- 30% thereon 2,97,132.00 The assessee limited the sum total of the above deductions to the gross total income and, thus, arrived at a 'nil' total income. The Assessing Officer computed the deduction under Section 80HHC as follows : Assessee's figures Adjusted figures(i) On direct export: 1,18,33,856 X 20,14,47,244 ----- and further restricted it only to the export income and not to the total income. In computing the total turnover for purpose of deduction under section 80HH he included the gross construction receipts as turnover apart from the profit on such construction and thus arrived at a total turnover of Rs. 25,24,99,693 as against Rs. 22,32,92,945 reported by the assessee. This computation is as follows :-- Assessee's figures Adjusted figures 22,32,92,945 tion receipts 3,60,80,430 25,93,73,375 He denied benefit to the assessee in respect of the deduction under section 80-1 as there was no balance of export income after allowing deduction under Section 80HHC. However, he computed the turnover for the purpose of Section 80-1 as follows : Assessee's figures Adjusted figures (admitted by the 24,38,06,692 as against Rs. 24,38,06,692 reported by the assessee. These adjustments were made as prima facie adjustments in the intimation sent under Section 143(1)(a) of the Income-tax Act, 1961. As a result, there was levy of additional tax in a sum of Rs. 9,96,509 under Section 143(1 A) of the Act. The assessee objected to the determination of

the total income on the basis of the adjustments made in the intimation sent to it under Section 143(1)(a). Its case was that these are not prima facie adjustments that could be made without scrutiny. The assessee's objections are contained in its letter dated 1-12-1993 and may be briefly summarised as follows: The total turnover of the business as computed by the Assessing Officer was not in accordance with the method of accounting followed by it. The receipts received from the flat owners/investors did not form part of the total turnover. It was only treated as advance against which the expenditure was booked. The only remuneration the assessee is entitled to receive in the construction activity is the contract fees as shown in the accounts. The word "turnover" would only relate to turning over one's own stock and not other's stock. The construction activity was carried on for and on behalf of the flat owners and by no stretch of imagination the total receipts by way of advance can be treated as the total turnover of the assessee. The export profits determined by the Assessing Officer was not in accordance with the Income-tax Act. The allocation between the export income and other income after adjustment of a sum of Rs. 27,32,313 representing the carry forward unabsorbed depreciation of the assessment year 1991-92 was not in accordance with the relief contemplated under Section 80HHC of the IT Act. Further, the allocation was assailed on the ground that the assessee was engaged in the business of export of IQF product for which claim for deduction under Section 80-1 had been made and in the process the Assessing Officer has omitted to consider the profit attributable to the export of Block Frozen Products which was also the business of the assessee. It was further submitted that the profits of the business are to be determined in a commercial sense and in accordance with the specific provisions of the Income-tax Act, 1961 for determining the income under the head "Profits and gains of business". Objection was taken in not allowing the deduction under Section 80G of the IT Act, in a sum of Rs. 20,000.

Lastly, the levy of additional tax was assailed, as the income determined was not based on prima facie adjustments but are adjustments of debatable nature. The denial of Section 80-1 deduction was against the ratio laid down by the various Benches of the Income-tax Appellate Tribunal rendered in the following cases: It was also vehemently contended that at the time when the return of income was filed in December 1992, the interpretation of the appellate authority was that the

assessee was entitled to claim deduction under Section 80-1 in respect of the construction activities engaged by it and the decision of the Supreme Court in CIT v. N. C. Budhiraja [1 993] 203 ITR (St.) 121 and relied on by the revenue was rendered as late as 7-9-1993 and, therefore, no additional tax can be levied on that basis.

Further, the inclusion of Rs. 2,92,06,748 in the total turnover cannot be viewed as a prima facie adjustment. On the above basis, rectification of the intimation under Section 154 was prayed for by the assessee. The Assessing Officer passed a detailed order under Section 154(1)(b) of the Income-tax Act, 1961. He held that since the assessee was not maintaining separate accounts to arrive at the income from construction division and sea food division on which deduction under Sections 80HHC and 80-1 are to be allowed, the adjustments made in the intimation under Section 143(1)(a) are proper. The entire gross receipts received from the flat owners for construction of flats represented the sale price of each flat and hence the total amount received by the assessee constituted its turnover. For claiming deduction under Section 80-1 it cannot be said that the assessee has constructed or produced any article or thing in its construction activity and its disallowance was proper. As for the objection of the assessee for deduction of the unabsorbed depreciation carried forward from earlier years, the Assessing Officer saw no reason to interfere with it to bifurcate the export income and non-export income as that would result in granting higher deduction under Section 80HHC. He accepted the contention of the assessee that the export income as adopted in the intimation sent to the assessee under Section 143(1)(a) did not include the income from frozen slab exports and to that extent he was prepared to rectify the assessment. Since the assessee had claimed Section 80-1 deduction on its construction activity also, he held that in the construction activity, the assessee was not manufacturing or producing any article or thing and, therefore, the assessee is not entitled to the deduction under Section 80-1. Further excessive deductions had been claimed under Section 80HHC as a result of the assessee's method of maintenance of accounts in not bringing the correct sea food income and restricting the deduction to the quantum of qualifying income. The assessee ought to have restricted the claim under Sections 80HHC and 80-1 to the qualifying amounts and as there was failure to do so and higher income has been

determined by making adjustments under the proviso to Section 143(1)(a) of the IT Act, the levy of additional tax was justified. Thus, the Assessing Officer gave part relief in his order under section 154(1)(b) of the Act. Not satisfied with the relief granted, the assessee carried the matter in appeal but without success. The learned CIT (Appeals) saw no reason to interfere with the order of the Assessing Officer except to the extent of granting relief in respect of the donations made by the assessee under Section 80G of the Act. The assessee is in second appeal.

3. Sri R. Vijayaraghavan, the learned counsel for the assessee submitted that only prima facie adjustments can be made in an intimation under Section 143(1)(a). He relied on the Circular No. 688 dated 24-8-1994 (209 ITR St. 75) to buttress the point that adjustments which are very apparent above can be made in an intimation under Section 143(1)(a) and not the kind of adjustments that have been made by the Assessing Officer. What constitutes "turnover" and what constitutes "total turnover" are not simple propositions. There could be any amount of debate or discussion on the same. The assessee's version of the turnover and the qualifying amount of deduction under Section 80HHC has been certified by the Chartered Accountant in the form prescribed in accordance with Subsection (4A) of Section 80HHC. Thus, the claim made by the assessee on the basis of the accounts and the certificate issued by the Chartered Accountant accompanying the return is not a fanciful claim. If the Assessing Officer had different perceptions or views on the same, he should have taken up the assessment for scrutiny without resorting to meddling with the figures adopted by the assessee as if they are prima facie adjustments. He further relied on the Circular No. 554 dated 5-7-1990 of the Central Board of Direct Taxes reported in p. 278 Statutes of CTR Yearly Digest 1990-91 to emphasise the point that there can be no concept of "turnover" unless there is sale of a product. In the construction division, the assessee was only constructing flats on behalf of the flat owners receiving payments and defraying expenses. No sale was effected by the assessee in favour of the flat owners who have invested their funds. The construction activity is governed by an agreement with the flat owners and the construction is carried on for and on behalf of the owners. Therefore, the amount received from the flat owners in instalments cannot be viewed as sale proceeds in the hands of the assessee and, therefore, such gross receipts cannot constitute turnover of the

assessee. What the assessee was carrying on in its construction division can be viewed only as a works contract and the gross receipts in respect of works contract cannot be called "turnover" for inclusion in the total turnover, in the light of the decision of the Supreme Court in the case of the State of Madras v. Gannon Dunkerley & Co.

(Madras) Ltd. 9 STC 353. Sri Vijayaraghavan further argued that the Assessing Officer erred in restricting the deduction under Section 80HHC only with reference to the export income. The Assessing Officer further erred in placing restrictive interpretation of the provisions of Section 80HHC read with Section 80AB of the Act. Section 80HHC grants deduction of the profits derived by the assessee from the export of goods or merchandise. Profits derived from such exports has been defined in Sub-section (3) of Section 80HHC. How to compute the profits and what adjustments are required are prescribed in that sub-section and the proviso thereto and also under the Explanation to Sub-section (4A) of Section 80HHC. Even the definition of "total turnover" under Clause (ba) of Explanation to Sub-section (4A) is suggestive of the fact that there should be some sale as otherwise there is absolutely no need to include freight or insurance attributable to transport of goods or merchandise beyond the customs station as defined in the Customs Act, 1962. There was also no need to exclude any sum received by way of cash assistance or other export incentives. At any rate, these are debatable issues, which cannot be thrashed out as prima facie adjustments in an intimation under Section 143(1)(a) of the IT Act.

4. Sri C. Abraham, the learned senior departmental representative submitted that the assessee was building flats for others. The expression "total turnover" has not been positively defined as it excludes only certain items of expenses or receipts. Therefore, it should be construed as an inclusive definition which will take in its sweep the contract receipts received from the flat owners. There is no warrant to read the ingredient of sale into the expression "turnover" or "total turnover" because if the profit is confined only to the profits of exports of goods or merchandise then perhaps the argument of the learned counsel for the assessee might be credible. By a fiction the entire business profit is taken into account for purpose of arriving at the profits derived from the export of goods and in the case

of the assessee it having both exports and inland trading or business, a proportion of the total profit is to be taken as profit derived from exports. Therefore, there is no substance in the argument of the assessee that there should be a sale in order to constitute "turnover". Section 80HHC falls under Chapter VI-A but the overall restrictions are to be found in Section 80AB which begins with a non obstante clause. Therefore, the Assessing Officer was justified in restricting the benefit to the export income rather than to the gross total income. In the construction activity, the assessee has offered the profit as turnover and that means the assessee recognises profit.

Unless there is turnover in that business how can there be profit therefrom. The CBDT Circular No. 564 dated 5-7-1990 has only taken up an illustration of sale for purpose of explaining the provisions of Section 80HHC and this illustrative example cannot be stretched to say that there can be no turnover unless there is sale. The assessee is not entitled to any deduction under Section 80-1 in respect of its construction activity and its claim for such deduction, though based on the earlier decisions of the High Courts and other Courts cannot be upheld in view of the decision of the Supreme Court in N.C. Budhiraja & Co. 's case (supra) and, therefore, it was rightly rejected. As a result, income was determined in a sum much larger than the admitted income reported by the assessee and, therefore, the levy of additional tax under Section 143(1 A) of the IT Act, was justified. Thus, he supported the order of the learned CIT (Appeals).

5. Having heard rival submissions, we allow the appeal of the assessee.

The adjustments that have been made and detailed in para 2 above are, in our considered opinion, not in the realm of prima facie adjustments envisaged in the proviso to Section 143(1)(a) of the IT Act. First, the quantum of total turnover as given by the assessee and as determined by the Assessing Officer leaves room for much debate or discussion. The definition of "total turnover" as given in Clause (ba) of Sub-section (4A) of Section 80HHC is nebulous. There could be more than one view on the meaning and import of "total turnover" as found in the said clause.

One view is that the expression is an inclusive expression and this is the view canvassed by Sri C. Abraham, the learned senior departmental representative.

Another possible view is that it should be with reference to the sale of goods whether by way of export or otherwise as reference is made to freight and insurance attributable to the transport of goods or merchandise beyond the customs station as defined in the Customs Act, 1962 and as reference is made to profits on sale of licence, cash assistance received against export and customs duty or excise repaid or repayable as drawbacks against exports. These items are either for inclusion or for exclusion from the total turnover. As reference to these items are normally associated with sale of goods, it is possible that a view can be taken that the "total turnover" as defined in Clause (ba) under the Explanation to subsection (4A) of Section 80HHC must necessarily refer to the sale of goods or merchandise. Thus, two views are possible. Once this position is admitted, it can be reasonably concluded that it cannot fall under the prima facie adjustments of the nature envisaged in the proviso to Section 143(1)(a) of the IT Act.

6. Whether the deduction admissible under Section 80HHC should be restricted only to the export income reported by the assessee or whether it should be from out of the profits derived from the export business as defined in Section 80HHC is another moot point which cannot admit of prima facie adjustments. Very elaborate arguments were ably addressed by both Sri Abraham and Sri Vijayaraghavan for and against the proposition and by the very length of the arguments we have no hesitation in concluding that the issue cannot be decided one way or the other without a meaningful debate. Thus, it will not fall under prima facie adjustments. The Board in a recent Circular No. 689 dated 24-8-1994 had indicated the nature of prima facie adjustments that can be made in an intimation sent under Section 143(1)(a) of the Act and the Circular is as follows: Subject: Scope of prima facie disallowances under Section 143(1)(a) of the Income-tax Act, 1961- Regarding.

Section 143(1)(a) authorises, with effect from the assessment year 1989-90, inter alia, disallowance of any loss carried forward, deduction, allowance or relief claimed which, on the basis of information available in the return or the accompanying accounts or documents, is prima facie inadmissible. The earlier instructions of the Board were the effect that no disallowance should be made of items on which two opinions are possible. The matter has been further considered by the Board in the light of the recommendations of the 'Tax Reforms Committee'

headed by Prof. Raja J. Chelliah and it has been decided that prima facie disallowances shall be made only in respect of the following types of claims :-- (a) an incorrect claim, if such incorrect claim is apparent from the existence of other information in the return or the accompanying accounts or documents.

If a deduction has been claimed under the head 'Capital gains' under Section 54F, and if there is information in the return of income or the accompanying accounts or documents to show that the unutilised net consideration had not been deposited in an account specified in the notified scheme as stipulated under Section 54F(4), the claim is incorrect and can be disallowed as a prima facie adjustment.

(b) any claim in respect of which there is an omission of information which is required, under the specific provisions of the Act or the Rules, to be furnished along with the return to substantiate such claim.

If the audit report specified under Section 80HHC(4), which is required to be filed along with the return of income is not so filed, the deduction claimed under that section can be disallowed as a prima facie adjustment. Some more examples in this regard are the non-filing of audit reports or other evidence along with the return of income as required under Sections 12A(h), 33AB(2), 35E(6), 43B (first proviso), 54(2), 54B(2), 54D(2), 54F(4), 54G(2), 80HH(5), 80HHA(4), 80HHB(3), 80HHD(6), 80HHE(4), 80-1(7), 80-IA(8) and the like. But if evidence is subsequently furnished, rectification under Section 154 should be carried out to the extent permitted by the Board's Circular No. 669, dated 25-10-1993. No prima facie disallowance shall, however, be made if any evidence, required to be filed along with the return of income only in pursuance of the non-statutory guidance notes for filing in the return of income, is not so filed.

(c) A claim for deduction or rebate of any amount which exceeds statutory limit imposed, if such limit is expressed either as a specific mandatory amount or as a percentage, ratio or a fraction, and if the information relevant to application of the statutory limits appear in the return or the accompanying accounts for documents.

(i) If under Section 24(1)(i) the deduction in respect of repairs and collection charges is claimed in excess of one-fifth of the annual value (applicable with effect

from the assessment year 1993-94), such excess can be disallowed as a prima facie adjustment.

(ii) If the rebate on contribution eligible under Section 88 is claimed in excess of 20% of such contribution, the excess can be disallowed, provided there is indication of the total amount of such contribution in the return or the accompanying accounts or documents.

Deduction of items like income-tax, wealth-tax, personal expenses, depreciation claimed on conveyances under the head 'Salary', depreciation claimed under the head 'House property and the like'.

The items of disallowance should be such that no two opinions are possible on their inadmissibility.

3. The Board desires that no other prima facie disallowance should be made except with the previous approval of the Commissioner of Income-tax who will, after according approval in suitable cases, bring the same to the notice of the Board.

4. The above procedure applies to all returns pending processing under Section 143(1) on the date of issue of this circular.

7. Though it has been stated in the Circular that the procedure prescribed therein applies to all returns pending processing under Section 143(1) on the date of issue of the Circular, in our considered opinion, the salient features of prima facie adjustments that have been notified in the Circular can be called to aid in disposing of the issues before us. This is only to strengthen our conclusion that the adjustments of the nature resorted to by the Assessing Officer and approved by the learned CIT (Appeals) cannot be classified as prima facie adjustments. As a result, the levy of additional tax also stands deleted.

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