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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Dec-04-2002

Reported in : (2004)89ITD551(Mum.)

Judge : R Easwar, S Mehrotra

Appellant : Tolani Ltd.

Respondent : Dcit, Special Range 31

Judgement :

1. The following grounds have been taken by the assessee in this appeal: "1. Payment of tax in Foreign Countries on Freight Earning Rs. 9,45,665/-. The learned CIT (Appeal) has erred in confirming the disallowance of a sum of Rs 9,45,665/- incurred by the company as income Tax on Foreign Ports on freight earning not following the judgment of Bombay High Court in the case of South East Asia Shipping Co. Ltd. in which case Bombay High Court rejected the reference application of the Department allowing the tax on foreign port as deductible expenditure. The Bombay High Court Judgment is binding on the department (page 4 of the assessment order) Kanga and Palkhiwala's Income Tax Law Book, 8th Edition, Page 701, 1st para and note no. 1 (page 4 of Ass. Order and para 2.2. of CIT(A)'s order).

2. Deduction u/s. 80-I out of Profits Derived from Shipping Business (Rs. 20,00,020/-) The learned CIT(Appeal) has erred in computing deduction u/s 80-I at nil by considering the deduction of allowance of 33 AC on account of RESERVE

created for utilisation for acquiring new ship within a period of eight years as expenditure out of Profit for ship Prabhu Das overlooking the following facts of the case and principles decided by the courts (page 5 of the assessment order and para 4.1 to 4.7 of Appeal order of CIT).

3. Alternatively without prejudice to above the Learned CIT(A) has erred in not considering that let apart the income from other sources, the business income itself is Rs,28,776/- after deducting allowance u/s. 33 AC as per assessment order and therefore the appellant company is entitled to deduction u/s. 80-I from profit of the ship "Prabhu Das" to the extent of Rs.20,00,020/- as claimed by the appellant company." The assessee is domestic company in which the public are not substantive interested it is carrying on business in shipping Besides, it also derived income by way of capital gains and dividends.

2. The first ground is that the departmental authorities are not justified in not allowing deduction in respect of the tax of Rs. 9,45,665 paid by the assessee in foreign ports against the freight earnings. This issue is now covered in favour of the assessee by the order of the Tribunal for the asst year 91-92 in its own case (copy filed) in ITA No.889/Bom/95 dated 20th May 2002. In this order, the Tribunal has followed the judgment of the Bombay High Court in CIT v Amabalal Kailachand & Tulsidas Kilachand (2003-TAXINDIAONLINE-74-HC-MUM-IT) (210 ITR 844) and the judgment in the case of South East Asia Shipping Co. (P) Ltd by which the Department's reference application for reference of a question of law u/s.256(2) against the order of the Tribunal was rejected by the Bombay High Court (pl.see commentary of Kanga & Palkhiwala, 8th ed., page 701). Respectfully following the judgments and the order of the Tribunal cited supra, we direct the income tax authorities to allow deduction in respect of the foreign tax.

3. The second ground relates to the deduction u/s.80-I. U/s. 33AC, a shipping company is entitled to a deduction in respect of reserves created for shipping business. Accordingly, the assessee claimed a deduction of Rs. 2,50,00,000 under the section. There is no dispute regarding the eligibility of the assessee to this deduction or the amount thereof. The dispute centers around the allowability of the deduction under section 80-I. The deduction was claimed by the assessee at

Rs.20,13,944 as per the revised statement which is at page 31 of the paperbook. This deduction is in respect of the ship by name, "Prabhu Das" which was acquired on 12-9-1988. The assessee also owns another ship by name "Prabhu Gopal", but in the present appeal, we are not concerned with this ship. There is a slight confusion as to whether the correct amount of claim is Rs. 20,13,944 or Rs. 20,00,020, which is the figure referred to in the grounds of appeal. However, since the difference is small, the same is ignored. Reverting to the facts, while completing the assessment u/s. 143(3) of the Act. the Assessing Officer dealt with assessee's claim u/s. 80-I as follows :- Deduction u/s 80-I is allowable out of the profits derived from the ship named, Prabhu Das. As per the computation furnished by the assessee in columnar form, the excess of receipts over direct expenses is shown at Rs. 1,38,06,689/-. This includes receipts of Rs.4,79,904/- relating to the earlier year. This was not provided for in the previous year, relevant to the A.Yr. 1991-92. Since deduction u/s. 80-I is allowed each year out of the profit of the year, this amount has to be excluded out of the receipts of this year. Thus, gross income of the year would come to Rs. 1,33,26,785/-. After deducting the H.O.expenses, depreciation and disallowance under Rule D as submitted by the assessee, net income from this Ship would work out to Rs. 75,20,175/-. It is claimed that while computing income from this ship, deduction allowed u/s. 33AC should not be taken into account for the purpose of deduction u/s. 80-I. It is argued that the deduction u/s.

32AC is allowable out of the total income (before allowing any deduction under Chapter VIA). The assessee's contention is not acceptable for following reasons:- As per sub-section (6) of section 80-I, the profits and gains of the ship has to be computed as if such ship was the only source of income of the assessee. If the fiction of having "Prabhu Das" the only source of income is taken to its logical conclusion, we cannot compute profit from the Ship, ignoring the deduction allowable u/s.

33AC. It is only after allowing all deductions available for computing the profits and gains of business under the Act, that the profit from the dripping business can be computed.

In this case deduction u/s. 33AC has been allowed to the extent of Rs. 2,50,00,000/-. As mentioned above gross income from this ship is calculated at Rs. 75,20,175/- only. Had this ship been the only source of income deduction u/s 33AC would have been allowed to the extent of Rs.75,20,175/-. After deduction of this amount, no profit is left, out of which deduction u/s. 80-I could be allowed.

Therefore, the amount deductible u/s. 80-I is determined to be Nil.

It will be seen from the above that the AO did not allow the assessee's claim.

4. On appeal, the CIT(A) dealt with the assessee's claim in para 4 of his order. He broadly endorsed the view taken by the AO and therefore, it is not necessary to examine his order in detail.

5. The assessee is in further appeal. The Id. representative for the assessee drew our attention to the order of the Tribunal in its own case for the assessment year 1991-92 cited supra and submitted that the identical issue has been decided in favour of the assessee in that year and therefore the same should be followed. He also contended that the deduction u/s. 80-I is to be given on the profits from the particular ship, which have been computed by the AO himself at Rs. 75,20,175 and therefore, 25% thereof has to be allowed as deduction. It is submitted that the deduction u/s. 33AC cannot be given against the profits of the ship "Prabhu Das" and that it has to be given against the total income of the assessee which includes the profits of "Prabhu Gopal" as well as the other sources of income. Our attention was drawn to the amendment made to section 33AC w.e.f. 1.4.1996. Prior there to, the position was that the deduction would be given against the total income of the assessee which included income arising from other business as well as income falling under other heads of income. The amendment made changed this position by providing that the deduction (at a reduced 50%) would be available only against the income derived from the business of operation of ships. The amendment took effect from the assessment year 1996-97. The assessee's case relates to the assessment year 1992-93. It was therefore submitted that the deduction u/s. 33AC cannot be adjusted against the profits from the ship "Prabhu Das" only. It is accordingly contended that the AO erred in holding that the deduction of Rs. 2,50,00,000/- u/s. 33AC should be adjusted against the profits of Rs. 75,20,175

from "Prabhu Das" and thereafter there would be no profit left from which the deduction u/s. 80-I could be allowed. In the alternative, it is contended that the AO himself has computed the income from shipping business at Rs. 65,28,776 which has also been included in the gross total income and therefore, 25% of this amount should be allowed as deduction u/s. 80-I.6. In support of the above contentions, the Id. representative for the assessee drew our attention to the following orders and judgments:- (1) Tribunal's orders in the assessee's own case for the A.Y. 1991-92 (supra) (3) Synco Industries Ltd. v. Assessing Officer & Ors. (254 ITR 608) (Bom) 7. On behalf of the Revenue, strong reliance was placed on the orders of the departmental authorities. Our attention was also drawn to section 80AB and it was contended that profits of the ship concerned have to be computed in accordance with the provisions of the Act and while doing so, the deduction u/s. 33AC will have to be adjusted as was done by the Assessing Officer and if in the process, no profits are left to absorb the deduction u/s. 80-I, there was no question of allowing any deduction. Our attention was also drawn to sub-section (6) of section 80-I which provided that for the purpose of determining the quantum of deduction under sub-section (1), the profits of the ship shall be computed as if such ship were the only source of income of the assessee during the relevant previous year. On the basis of this provision, it was contended that the Assessing Officer was right in allowing the deduction u/s. 33AC against the profits of "Prabhu Das" only. It was also pointed out that sub-section (6) of section 80-I starts with a non-obstante clause and therefore, even assuming that under section 33AC, as it stood before the amendment, the deduction will have to be given against all sources of income of the assessee, in view of the non-obstante clause in sub-section (6) of section 80-I, the effect of section 33AC will have to be ignored and the determination of the profits from the ship will have to be made as if the assessee had not other source of income. On this basis, it was contended that the assessee's claim was rightly denied by the departmental authorities.

8. On a careful consideration of the issue, we are of the view that the assessee is not entitled to succeed. U/s. 80-I (1), where the gross total income of an assessee includes any profits and gains derived from a ship, a deduction shall be allowed, in computing the total income, from such profits and gains of an amount equal to 25% of such profits.

Sub-section (6) provides for the method of computing the profits of the ship in respect of which the assessee is eligible to the deduction. It says that such profits shall be computed as if the ship is the only source of income of the assessee during the relevant previous year. It has to be borne in mind that the sub-section starts with a non-obstante clause. Therefore, the effect of the other provisions of the Act has to be ignored while computing the profits of the ship concerned under the sub-section. This means that the effect of section 33AC, as it stood before the amendment, will also have to be ignored. This is what the AO has done. For purposes of determining the quantum of deduction under sub-section (1) of section 80-I, he has proceeded to compute the profits of "Prabhu Das" in accordance with sub-section (6), by assuming that the only source of income of the assessee during the relevant previous year was the ship "Prabhu Das". He has arrived at the gross income of Prabhu Das at Rs. 1,33,26,785 and after deducting the head office expenses, depreciation and making disallowance under rule 6D as submitted by the assessee, has arrived at the net profit from the ship at Rs. 75,20,175. The deduction allowable u/s 33AC, about which there is no dispute, is Rs. 2,50,00,000. The AO has adjusted this deduction against the income of Rs. 75,20,175. The entire profits from the ship would absorb part of the deduction u/s. 33AC. Thereafter, as rightly pointed out by the AO, no profits would be left, against which the AO could allow deduction u/s. 80-I. He has therefore rightly determined the amount deductible u/s. 80-I to be Nil. His working of the deduction is in complete accord with the provisions of sub-section (6) of section 80-I.9. But, then, the contention of the Id. representative of the assessee was that the AO has misunderstood the provisions of section 33AC. According to him, the position before the amendment of the section was that the deduction thereunder for reserves created by shipping companies was to be given against the total income of an assessee, which included all sources of income and all heads of income and not merely the income from the particular ship, which was eligible for deduction u/s. 80-I. We have already adverted to his further contention that the position was changed by the amendment made w.e.f. the assessment year 1996-97, when it was made clear that the deduction would be available only against the income derived from the business of operation of ships and thus, the income arising from other business or falling under other heads of income would be taken outside the

scope of the section. Since we are concerned with the position prior to the amendment, it was contended that the deduction u/s. 33AC will have to be allowed against all the sources of income of the assessee, including the income from the ship "Prabhu Gopal", dividends and capital gains.

There are two reasons why this contention cannot be accepted. Section 33AC, prior to the amendment w.e.f. 1.4.1996 read as under:- "In the case of an assessee, being a Government company or a public company formed and registered in India with the main object of carrying on the business of operation of ships, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction of an amount, not exceeding the total income (computed before making any deduction under this section and Chapter VI-A), as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilized in the manner laid down in sub-section(2)".

It will be seen from the language employed in the above section that the assessee's contention that the deduction is to be given against all sources of the assessee's income is not correct. Firstly, the section appears in Chapter IV - D- Profits and gains of business or profession, of the Act. It is thus clear that the section has reference only to the profits and gains of the business. Under section 29, the profits and gains of the business shall be computed in accordance with the provisions contained in sections 30 to 43D. Section 33AC falls within these sections. Thus, the section does not provide for a deduction against the total income of the assessee, but it allows deduction only against the business income, that too, the business of operation of ships. The reference in the section to the total income is only to place a cap on the quantum of deduction. The quantum of deduction cannot exceed the total income. This is all the language employed in the section, prior to the amendment means. After the amendment, the upper limit of the deduction was restricted to 50% of the profits derived from the business of operation of ships. The only effect of the amendment is to replace the upper limit by prescribing a lesser upper limit. But, both before and after the amendment, the basic principle underlying the section viz., that it is a deduction while computing the profits of the shipping business remains the same without any alteration. We

are, therefore, unable to accept the contention of the Id. representative for the assessee that section 33AC, before the amendment, provided for a deduction against the total income of an assessee.

10. Secondly, even assuming that the Id. representative for the assessee is right in his contention, because of the non-obstante clause in sub-section (6) of section 80-I, the provisions of section 33AC cannot be allowed to have any say in the computation of quantum of deduction under sub-section (1) of section 80-I. Sub-section (6) of section 80-I creates a fiction, as rightly pointed out by the Assessing Officer, and the fiction is that the profits of the ship have to be computed as if the ship were the only source of income. The non-obstante clause has been advisedly used so that an argument such as the one which was advanced before us regarding the effect of section 33AC upon sub-section (6) of section 80-I, cannot be accepted. In view of the non-obstante clause, we hold that the computation of the profits under sub-section (6) of section 80-I is in no way controlled or influenced by the provisions of section 33AC, even if the contention of the assessee regarding the effect of section 33AC, as it existed prior to the amendment, is held to be correct for the sake of argument.

Therefore, even in this view of the matter, the assessee's claim cannot be accepted.

11. The present section 80-I was inserted by the Finance (No.2) Act, 1980 w.e.f. 1.4.1981. The scope and effect of this section have been elaborated in Circular No. 281 dated 22.9.1980. Paragraph 19.4(iii) of the Circular is relevant and brings out the intention of sub-section (6). This portion of the Circular is reproduced below :- "In computing the quantum of "tax holiday" profits in all cases, taxable income derived from the new industrial units, etc. will be determined as if such unit were an independent unit owned by an assessee who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, shop or approved hotel will be taken into account in determining the quantum of deduction admissible under the new section 80-I even though they may actually have been set off against the profits of the assessee firm from other sources." 12. The

judgment of the Bombay High Court in Synco Industries Ltd. (supra) does not assist the assessee's case. There, with reference to sub-section (6) of section 80-I, it was held that the loss in one division of the business cannot be taken into account because the sub-section contemplates that only the profits shall be taken into account as if it was the only source of income. In that case, the assessee had two divisions - oil division and chemical division. The assessee's contention was that the loss in the oil division cannot be taken into account because under sub-section (6), only the profits of the chemical division shall be taken into account. With reference to this contention, it was held by the High Court that the effect of sections 80A(2) and section 80B(5) is not restricted by the non-obstante clause in section 80-I(6). It was therefore held that under section 80-I(6), the profits of the chemical division are required to be treated as if they were the only source of income and that the losses from oil division were required to be ignored. From these observations, it was sought to be contended on behalf of the assessee before us that the deduction u/s. 33AC cannot be adjusted against the profits from the ship "Prabhu Das". We are unable to accept the contention because the question whether any deduction specified in sections 30 to 43D can be adjusted against the profits from the ship which is eligible for deduction u/s. 80-I, while computing the eligible profits was not specifically considered by the High Court. The question before the High Court was whether the Assessing Officer was right in rejecting the claim of the assessee on the ground that the gross total income, computed according to the Act, was Nil. The contention of the assessee was that though the gross total income was Nil, since u/s (6) of section 80-I, there were profits from the chemical division, it was entitled to the deduction the department's contention was that the ultimate computation of the gross total income was Rs. Nil and therefore the assessee was not entitled to any deduction though there were profits from the chemical division under sub section (6) of section 80-I. This contention of the department was accepted by the High Court. While doing so, it was held that though sub-section (6) of section 80-I starts with a non-obstante clause, that cannot restrict the application of sections 80A(2) and 80B(5). It may be noted here that section 80A(2) says that the aggregate amount of the deductions under Chapter VIA shall not exceed the gross total income of the assessee and section 80B(5) defines gross total income as the total income

computed in accordance with the provisions of the Act, before making any deduction under Chapter VIA. In our humble opinion, there is nothing in the judgment of the High Court which supports the assessee's case before us.

13. The judgment of the Orissa High Court in the case of Tarun Udyog (supra) was concerned with the provisions of section 80HH. The question was whether while computing the profits of the industrial undertaking eligible for the deduction u/s. 80HH, the Assessing Officer can adjust the investment allowance u/s. 32A and reduce the profits and consequently the deduction. It was held that the relief u/s. 80HH was to be allowed on the profits of the industrial undertaking before deducting the investment allowance. It may be noted that section 80HH did not contain any provision similar to sub-section (6) of section 80-I. Therefore, this judgment is also of no help to the assessee.

14. We now turn to the order of the tribunal for the assessment year 1991-92 in the assessee's own case (supra). the relevant portion of the Tribunal's order, which is undoubtedly in favour of the assessee, is reproduced below :- "2. The learned CIT(A) has erred in confirming the reduction of company's claim from Rs. 29,56,017/- to Rs. 1,07,987 u/s. 80-I by rejecting the contention of Appellant company that deduction u/s.

80-I should be allowed on the profit before deducting unabsorbed Invest Allowance of earlier year (page 6 of Assessment order and para 18 to 20 of CIT(A)'s order))" 4. After hearing both the parties. we hold that the issue stands covered in favour of the assessee and against the revenue by the judgment of Orissa High court in CIT v. Tarun Udyog (191 ITR 688) and the decision of the Indore Bench of the Tribunal ITO v. Hindustan Heavy Electricals (41 ITD 223). Judgment in the case of Cambay Electric supply co. (113 ITR 84 (SC)) followed by the learned AO as well as the learned CIT(A) and now relied upon by the DR, has been referred to by the Hon'ble Orissa High Court in the case of Tarun Udyog (supra) and rightly distinguished. Accordingly, this ground is allowed and the A.O. is directed that deduction u/s. 80-I should be allowed on profits before deducting unabsorbed Investment Allowance of earlier years" It will be seen from the above that the Tribunal has followed the judgment of the Orissa High Court in Tarun

Udyog (supra). We have already seen that the Orissa High Court was concerned with section 80HH which did not contain a provision similar to sub-section (6) of section 80-I. Further, it appears that the attention of the Tribunal was not drawn to the provisions of sub-section (6) of section 80-I of the Act.

Normally, an order of the Tribunal rendered by a co-ordinate Bench is binding on the later Tribunal and should be followed. However, since the provisions of sub-section (6) of section 80-I have not been brought to the notice of the Tribunal, as seen from its order, and also since the Tribunal does not appear to have been invited to notice the distinction between the provisions of section 80HH, which were the subject matter of consideration before the Orissa High Court, and the provisions of section 80-I, we are constrained to regard, with great respect, the Tribunal's order as having been rendered "per incuriam" Therefore would hesitate to give effect to the same for the year under consideration.

15. We now turn to the alternative claim made by the assessee to the effect that since the AO himself has computed the profits from the business at Rs. 65,28,776, after allowing the full deduction of Rs. 2,50,00,000 under sec.33AC, 25% thereof should be allowed as deduction u/s 80-I. This claim also cannot be accepted because this figure not only includes the profits from the ship "Prabhu Das" but also includes the profits of the ship "Prabhu Gopal" which is not eligible for deduction u/s. 80-I. The deduction can be given only from the profits of "Prabhu Das" and in the absence of anything to show what amount of profits from "Prabhu Das" are included in the said figure, even the alternative claim of the assessee cannot be accepted.

16. We therefore uphold the orders of the departmental authorities, with regard to the assessee's claim u/s. 80-I and dismiss the second ground.

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