

ito Vs. Midas Touch Exports

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-24-2004

Reported in : (2005)1SOT553(Mum.)

Appellant : ito

Respondent : Midas Touch Exports

Judgement :

"1. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding the interest income as income from business, observing that there being a close connection between FDR have been offered as collateral security for availing credit facility for appellants business, ignoring that interest from FDR cannot be business income under provisions of Explanation (baa) of section 80HHC.2. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding the interest income as income from business by relying on the decision of Mumbai High Court decision in the case of Punit Commercial Ltd. 245 ITR 551 (Bom) and Bombay ITAT decision in the case of Pink Star 27 ITD 137 (Bom-Trib).

3. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in holding the above without appreciating the latest decision f Bombay High Court in the case of CIT v. Ravi Ratna Exports (P) Ltd. 246 ITR 443 (Bom) and other decisions of Honble ITAT, Madras in the case of M/s. Krisler Diesel Engines (P) Ltd. v. Asstt.

CIT 74 ITD 414 (Mad). The appeal for the assessment year 1995-96 is still pending before the Honble ITAT on the same issue.

4. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in directing the assessing officer to withdraw the depreciation amounting to Rs. 6,06,170 on galas ignoring the fact there is a proposal in Finance Bill 2001 that the depreciation is to be allowed whether it is claimed or not with retrospective effect which is pending before the Parliament for passing the bill." The first three grounds pertain to one single issue, i.e., whether interest from FDRs is business income, for the purpose of the provisions of Explanation (baa) to section 80HHC. It has not been denied that the investments made by the assessee in fixed deposits and earnest money deposits are because of business constraints and not with a motive to earn interest. Also, the amount transferred to fixed deposit/earnest money deposit are out of the overdraft account with the same bank on which, interest is paid to the bank, which is allowed as deduction from business profits. The assessee is a manufacturer and 100% exporter of readymade garments. The interest received from fixed deposits and earnest money deposits with the Apparel Export Promotion Council, is to obtain "sales quotas. The assessee is required to keep fixed deposit and earnest money deposit with Apparel Export Promotion Council out of business constraints as margin money in order to secure quota rights". These deposits are compulsory in this type of business. The assessee does not have any option whatsoever. The interest income does not reach the assessee at all. Since the assessee has made investment in fixed deposits and earnest money deposits with the help of overdraft facilities the amount in respect of fixed deposits and earnest money deposits are transferred from overdraft bank account and interest on overdraft account is claimed as deduction from business income. So, interest received on fixed deposits and earnest money deposits, is netted off against interest charged by the bank. The net interest is shown as deduction from business income, in the financial statement. If there is any delay in clearing the duties by the assessee or the assessee is unable to fulfill its terms, the Apparel Export Promotion Council legally will be entitled to recover the duties from the fixed deposits interest or the earnest money deposits interest. The fixed deposits and Earnest Money deposits are therefore, an integral part of the business of the assessee. Any income or expenses arising therefrom, therefore,

ought to be considered as "profits and gains of business or profession". Thus, the interest from the Fixed Deposits and Earnest Money deposits is business income.

In view of the matter, the first issue is comprising ground Nos. 1, 2 and 3 is decided in favour of the assessee and against the department.

Ground Nos. 1, 2 and 3 are rejected.

With regard to ground No. 4, the assessee had not claimed depreciation on gala. The assessing officer, however, observed, inter alia, that the main provision of section 32 used the word "shall". Therefore, the depreciation was worked out at Rs. 6,06,176 and allowed. The learned CIT (A) following the decision of the Honble Supreme Court in the case of CIT v. Mahindra Mills (2000) 243 ITR 56 (SC), observed that depreciation cannot be enforced on an assessee against his wish. The assessing officer, thus, directed to withdraw the depreciation granted.

Before us, the learned Departmental Representative has placed reliance on the decision of the Honble Bombay High Court in the case of Indian Rayon Corpn. Ltd. v. CIT (2003) 261 ITR 98 (Bom). The learned Departmental Representative submits that the Honble Bombay High Court has taken into consideration and distinguished Mahindra Mills case (supra). Therefore, the order of the assessing officer was correct when he worked out the depreciation and allowed the same in spite of no claim made by the assessee. In Indian Rayon Corpn. Ltd.s case (supra), the Honble Bombay High Court has held, inter alia, that income tax is a charge on an assessee in respect of his total income computed in accordance with the provisions of the Act. However, in cases where the total taxable income comprises profits derived from a newly established undertaking under section 80HH of the Income Tax Act, then such profits have got to be computed separately as laid down by the Supreme Court in the case of Cambay Electric Supply Industrial Co. Ltd. v. CIT (1978) 113 ITR 84 (SC). There is a distinct dichotomy between cases of computation of normal income under the Act de hors Chapter VI-A and computation of taxable income where the assessee claims the benefit of deduction under Chapter VI-A. The profits and gains of a newly established undertaking therefore, have got to be computed as per the provisions of sections 29 to 43A and if the assessee claims relief under Chapter VI-A of the

Act, then it is not open to the assessee to disclaim depreciation allowance. This is because Chapter VI-A is an independent code by itself for computing these special types of deductions. In other words, one must first calculate the gross total income from which one must deduct a percentage of income contemplated under Chapter VI-A. Therefore, one cannot exclude depreciation allowance while computing profits derived from newly established undertaking for computing deduction under Chapter VI-A. Distinguishing the case of Mahindra Mills (supra), their Lordships held, that there, the depreciation was disclaimed or not claimed, whereas, it was not so in the case before the Honble High Court. Therefore, Mahindra Mills case (supra), had no application. Moreover, the controversy in Mahindra Mills case (supra) was not concerning deduction under Chapter VI-A of the Act. Therefore, this judgment would not apply. The analogy followed for section 32 would not apply in case where an assessee claim special deduction under Chapter VI-A. Also while computing the total claim of the income, the assessee made set off of depreciation against its gross total income. In such case, depreciation was like any other ordinary expenditure. However, such depreciation cannot be equated with the special type of deduction under Chapter VI-A. From the above discussion, it is evident that in Indian Rayon Corpn.

Ltd.s case (supra), their Lordships of the Supreme Court have distinguished Mahindra Mills case (supra) only on facts. In the relm of sections 32 and 34 of the Act, Mahindra Mills case (supra) is very much good law.

"The language of the provisions of sections 32 and 34 of the Income Tax Act, 1961, is specified and admits of no ambiguity. Section 32 allows depreciation as deduction subject to the provisions of section 34.

Section 34 provides that deduction under section 32 shall be allowed only if the prescribed particulars have been furnished. Rule 5AA of the Income Tax Rules, 1962, since deleted, provided for the particulars required for the purpose of deduction under section 32. Even in the absence of rule 5AA, the return of income in the form prescribed itself requires particulars to be furnished if the assessee claims depreciation. These particulars are required to be furnished in great detail. There is a circular of the Board dated 31-8-1965 which provides that depreciation

could not be allowed where the required particulars have not been furnished by the assessee and no claim for the depreciation has been made in the return. The Income Tax Officer in such a case is required to compute the income without allowing depreciation allowance. The circular of the Board dated 11-4-1955 imposes merely a duty on the officers of the department to assist the tax payers in every reasonable way, particularly, in the matter of claiming and securing relief. The officer is required to do no more than to advise the assessee. It does not place any mandatory duty on the officer to allow depreciation if the assessee does not want to claim that. The provision for claim of depreciation is certainly for the benefit of the assessee. If he does not wish to avail of that benefit for some reason, the benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Income under the head "Profit and gains of business or profession" is chargeable to income-tax under section 28 and income under section 29 is to be computed in accordance with the provisions contained in sections 30 to 43A. The argument that since section 32 provides for depreciation it has to be allowed in computing the income of the assessee, cannot in all circumstances be accepted in view of the bar contained in section 34. If section 34 is not satisfied and the particulars are not furnished by the assessee his claim for depreciation under section 32 cannot be allowed. Section 29 is thus to be read with reference to other provisions of the Act. It is not in itself a complete code.

If the revised return is a valid return and the assessee has withdrawn the claim of depreciation it cannot be granted relying on the original return when the assessment is based on the revised return. Allowance of depreciation is calculated on the written down value of the assets which written down value would be the actual cost of acquisition less the aggregate of all deduction actually allowed to the assessee for the past years. Actually allowed does not mean notionally allowed. If the assessee has not claimed deduction of depreciation in any past year it cannot be said that it was notionally allowed to him. A thing is allowed when it is claimed. A subtle distinction, is there when we examine the language used in section 16 and sections 34 and 37 of the Act. It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation. The assessing officer cannot grant depreciation allowance when the same is not claimed by the assessee." (p. 56) The learned counsel of the assessee admitted that the matter

now stands covered in favour of the department by the decision in the case of Indian Rayon Corporation Ltd. (supra), which has considered and distinguished the decision in the case of Mahindra Mills (supra).

Therefore ground No. 4 is accepted.

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