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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-30-2004

Reported in : (2005)2SOT7(Delhi)

Appellant : Jindal Exports Ltd.

Respondent : ito

Judgement :
These two appeals filed by the assessee against the order dated 19-9-2002 and 30-9-2003 of learned CIT-VII, New Delhi raised several grounds as under 1 . On the facts and in the circumstances of the case, the learned CIT(A) has erred, both on facts and in law in confirming the order passed by the assessing officer whereby he has assessed the income of the assessee at Rs. 1, 12,96,881 as against the nil income returned by the assessee.

2. On the facts and in the circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of the assessing officer of allowing deduction of Rs. 35,44,817 under section 80HHC of the Income Tax Act as against Rs. 3,14,84,108 computed by the assessee and allowable under the Act.

3. On the facts and in the circumstances of the case, the learned CIT(A) has erred both on facts and in law in not accepting the contention of the assessee that for the purpose of computing deduction under section 80HHC the negative figure computed under clause (a), (b) or (c) of sub-section (iii) of section 80HHC of the Act has to be ignored in view of the provisions of the Act.

4. On the facts arid circumstances of the case, the learned CIT(A) has erred both on facts and in law in not interpreting the provisions of section 80HHC in accordance with the plain language of the section and also ignoring the judgments of the various Tribunals including that of the jurisdictional Delhi Tribunal on the same issue.

5. On the facts and in the circumstances of the case, the learned CIT(A) has erred both on facts and in law in not accepting the contention of the assessee that interest under sections 234B and 234C of the Act cannot be charged without there being specific order for the levy of such interest in the assessment order.

6. On the facts and in the circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of' the assessee that interest under sections 234B and 234C cannot be levied. On the liability of tax arising by application of provisions of Minimum Alternate Tax under section 115JA of the Act, as the provisions of advance tax are not applicable for, the payment of tax liability of Minimum Alternate Tax." 1. That the learned CIT(A)-VII, New Delhi has erred both on facts and in law in upholding the action of the assessing officer levying interest under section 234B amounting to Rs. 20,02,148 as against Rs. 5,51,640 by initiating the proceedings under section 154 which were entirely without jurisdiction.

2. That in any case and without prejudice the learned CIT(A) has failed to appreciate that the levy of interest under section 234B as determined before granting credit of the MAT being highly debatable and as such cannot be considered to be a mistake apparent from record and liable for rectification under section 154 of the Income Tax Act.

3. That the learned CIT(A) has also failed to appreciate the fact that the credit of MAT tax of earlier years in terms of section 115JA has to be adjusted first against the tax payable by the assessee in the subsequent assessment year which has rightly been done when making the assessment and issuing a demand notice.

4. That the learned CIT(A) rejecting the submission of the appellant with regard to the applicability of the provisions of section 115JAA that the interest under section

234B is to be charged on the 'Net Tax payable' instead of the 'gross amount of tax payable' and by ignoring the deduction of credit of MAT tax of earlier years being the carry forward MAT tax.

5. That the learned CIT(A) has also erred in fully to appreciate that the correct legal position of the provisions of section 115JAA the learned CIT(A) has by upholding the action of the assessing officer completely defeated the main objective of introduction of section 115JAA and as a result, increased the tax liability of the appellant company to the tune of Rs. 14,50,508.

6. That the learned CIT(A) has further erred in upholding the action of the assessing officer levying additional interest of Rs. 1,99,442 for the period from 1-5-2002 to 24-3-2003, without there being any specific order to levy such interest and section under which the same has been charged and that too by upholding the proceedings under section 154 of the Income Tax Act." Ground Nos. 1 to 4 in ITA No. 442/Del./2002 relates to computation of deduction under section 80HHC, the assessee's counsel Shri C.S.Aggarwal argues and reiterated the same arguments through the written submissions as under : 'It was challenged that loss suffered by the assessee, under any of the clause (a), (b) or (c) of section 80HHC(3) deserves to be ignored and deduction be directed to be allowed in respect of amount computed under proviso to section 80HHC(3) of the Income Tax Act as per the computation made by the appellant and as such it was prayed that the deduction claimed be allowed, by ignoring the loss. In support of the aforesaid submissions the appellant had relied on the various orders of the Honble Tribunal i.e. Kolkata Bench as also of the Cochin Bench in the case of T.C. Usha v. DCIT reported in 106 Taxman 305 (Mag). It was submitted though a reference had been sought by the revenue against the aforesaid order, yet the revenue had accepted the order of the Tribunal, so far as the computation of the allowability of deduction under the proviso to section 80HHC(3) of the Income Tax Act which would be evident from the judgment of Hon'ble Kerala High Court reported in 264 ITR 368. It was further submitted the proviso below sub-section (3) of section 80HHC is an independent provision as has been field by the Special Bench of the Income Tax Appellate Tribunal in the case of Lalsons Enterprises v. DCIT, reported in 89 ITD 25 (SB), in view thereof it was respectfully submitted that since the dispute in this appeal has

already been resolved by the Special Bench, the claim of deduction as made be directed to be allowed in accordance with the ratio of the decision of the Special Bench of the Income Tax Appellate Tribunal in the case of Lalsons Enterprises v. DCIT. The appellant thus submitted that the Hon'ble Bench of the ITAT by its order dated 25-2-2004 has since decided the identical issue and the aforesaid order of the Tribunal cannot be regarded as per incuriam as was contended by the revenue, deserves to be followed by this Hon'ble Bench. It was submitted that the Hon'ble Special Bench of the ITAT while disposing of the issue involved in the instant case had duly examined and took into consideration the judgment of the Hon'ble Bombay High Court reported in 251 ITR 401 in the case of IPCA Laboratories Ltd. v. DCIT which judgment has been later affirmed by the Hon'ble Supreme Court in 266 ITR 521. It was thus submitted that there has been either no amendment in law nor there has been further development in the law the order of the Special Bench (which Bench had been constituted to hear and decide the aforesaid issue be followed). It was further stated that the Honble Supreme Court in its judgment reported in 266 ITR 521 in the case of IPCA Laboratories Ltd. v. CIT has merely affirmed the judgment of the Bombay High Court. Of course, by further observing that the deduction under section 80HHC has also to be governed by the provisions of section 80AB of the Income Tax Act, i.e. a deduction allowable cannot exceed more than the total income of the assessee.

It was submitted that so far as the said issue i.e. the deduction in excess to gross total income is concerned the same is not in dispute and it is not a case wherein assessee is seeking to claim a deduction in excess to its total income. In view thereof it was submitted that, what has been laid down by the Special Bench of the ITAT must be respectfully followed as has been held by the Hon'ble Supreme Court in the case of Asstt. Collector of Central Excise v. Dunlop India Ltd. reported in 154 ITR 172 (SC), In the alternative it was submitted if the Honble Bench is of the opinion that it is not able to get persuaded with the view expressed by the Special Bench of the Honble Tribunal. It should make a reference to the Hon'ble President of ITAT for constituting a larger Bench of five members or more. It was submitted that the learned Department Representative in his submission has stated that the order of the Special Bench of ITAT is "per incuriam". It is submitted with great respect, that the said submission is not only incorrect but it is highly

improper and is thus unjustified. Per incuriam means as under: "Per incuriam ": Through want of care, inadvertently. A mistaken decision of a court, it was held in Young v. Bristol Aeroplane Co. Ltd. (1946) 1 All. ER 98 that the court of Appeal (q.v,) was not bound to follow one of its earlier decisions if satisfied that it was reached per incuriam. Application of the doctrine should be made only in the case of 'decision given in ignorance or for get fullness of some inconsistent statutory provision or of some authority binding on the court concerned' (1955) 2 QB 379.

Though inadvertence of through want of care. Through carelessness through inadvertence.

A decision should be treated as given per incuriam when it is given in ignorance in terms of a statute or of a rule having the force of a statute MCD v. Gurnam Kaur AIR 1989 (SC) 38 quoted (Emphasis italised in print, supplied).

It is submitted that the aforesaid decision of the Honble Special Bench of the ITAT cannot be said to be per incuriam as the Hon'ble Bench had duly been drawn attention to the relevant authorities and statute and the Honble Special Bench had decided the issue before it after consideration of the said authorities and the statute. In fact the order of the Special Bench in the case of Lalsons Enterprises (supra) is being followed by all other Benches. In the instant case it is not a case wherein the Honble Special Bench of the ITAT was not aware with the issue or of the statutory provision but is a case wherein the hon'ble Special Bench was directly concerned with the issue in hand and as such the decision rendered by it cannot be said to be either per incuriam or in the nature of obiter. It may be stated that the Hon'ble Bench have specifically in its order in para 5 has specifically referred the question raised for its consideration which reads as under : "We may now take up the questions referred to us for decision seriatim.

As regards the first question it was agreed before us by both the sides that the reference therein to clauses (a) and (b) of sub-section (3) is not apposite since the question of adjustment of the losses against the profits under clauses (a) and (b) cannot possibly arise only under clause (c) because it contains two sub-clauses which provide for the determination of the export profits in respect of an assessee who exports both manufactured goods and traded goods. It is only in his case,

where clause (c) applies that the question of adjusting the loss in one of these two export activities against the profit arising in the other can arise therefore, Mr. Prahlad Singh, the learned CIT Departmental Representative suggested the refraining of' the first question as under which was accepted by the assessee/interveners as representing the correct poser.

Whether the negative profit (loss) from the business of export computed in accordance with sub-clause (i) or (ii) of clause (c) of sub-section (3) of section 80HHC should be ignored or it should be adjusted/set off against export profits computed under the other sub-clause of clause (c) for the purpose of computing deduction under section 80HHC(I) of the Income Tax Act." In para 7 it noted specifically the judgment of the Honble Bombay High Court in the case of IPCA Laboratories Ltd. v. Dy. CIT (No.1) (2001) 251 ITR 401(Bom) and that of the Honble Kerala High Court in the case of CIT v. Smt. T.C. Usha (2003) 132 Taxman 297 (Ker) and after noticing the contentions of the Ld. Counsel of the assessee in paras 20 to 22 observed in para 23 as under : "We have carefully considered the matter. There is no direct authority of any High Court on the interpretation of the proviso. The proviso deals with export incentives. It envisages an additional deduction for export incentives. They are first excluded from the profits of the business by explanation (baa). This only shows that export incentives cannot be treated as part of the profits of the business. But as rightly pointed out on behalf of the assessee, they are brought back within the purview of the deduction by the proviso. In the main provisions of sub-section (3), what is dealt with is only the result of the export, business or businesses. The proviso goes on to enlarge the scope of the deduction by including the export incentives. It seems to us therefore that the proviso stands on its own and has to be interpreted as if it is independent provision. It cannot be understood in the same manner of understanding a proviso proper, in the conventional sense. The function of a proviso normally is to carve out an exception which but for the proviso would have fallen within the main provision. But the insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before (pl. see pages 179-180 of Principles of Statutory Interpretation by G.P. Singh, 8th Edn. 2001), If

this principle is applied, it will be seen the proviso is not one in the real and conventional sense." It is submitted that the Honble Tribunal in its opinion held that there is no direct authority of any High Court for interpretation of the proviso including that of the Hon'ble Bombay High Court (which judgment has merely been affirmed) by the Hon'ble Supreme Court.

In view thereof, it examined the contentions independently though keeping in view the judgment cited before it and held in para 49 as under: (i) For purposes of clause (c) of sub-section (3) of section 80HHC, the loss arising in either the export of manufactured goods or trading goods shall be set off or adjusted against the profits arising in the other business. In other words, the results of the business of export of manufactured goods and the business of export of the trading goods shall be adjusted against each other.

(ii) For the purpose of computing the decision allowable under the proviso to sub-section (3) of section 80HHC in respect of the export incentives mentioned in section 28(iiia), (iiib) and (iiic), the loss, if any, suffered by the assessee under any of the clause (a), (b) or (c) of the sub-section shall be ignored and the deduction shall be allowed in respect of the amount computed under the said proviso.

(iii) For the purpose of applying Explanation (baa) below sub-section (4B) of section 80HHC and while reducing 90 per cent of the receipt by way of interest from the profits of the business, it is only the 90 per cent of the net interest remaining after allowing a set off of' interest paid, which has a nexus with the interest received that can be reduced and not 90 per cent of the gross interest." It is submitted that the Hon'ble Supreme Court in its judgment in the case of S. Shanumugavel Nadar v. State of Tamil Nadu (2003) 263 ITR 658 (SC) has held on the principle of application of rule of precedence.

The Honble Mr. Justice R.C. Lahoti (as His Lordship then was now Chief Justice) speaking for the court observed as under: ".. The application of the doctrine depends on the nature of the appellate or revisional; order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. Recently a three judge Bench of this court had an occasion to deal with doctrine of merger in Kunhayammed v. State of Kerala 6 SCC 359 (2000) 245 ITR 360 and

this court reiterated that the doctrine of merger is not of universal or unlimited application; the nature of jurisdiction exercised by the superior forum and the content of subject-matter of challenge laid or which could have been laid, shall have to be kept in view. In this view of the law, it cannot be said that the decision of this court dated 10-9-1986 had the effect of resulting on merger into the order of this court as regards the statement of law or the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of this court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into." (p. 663) "In the present case, the order dated 10-9-1986 passed by this court can be said to be a declaration of law limited only to two points (i) that in a petition putting in issue the constitutional validity of any State legislation the State is a necessary party and in its absence of the issue cannot be gone into, and (ii) that a belated prayer for impleading a necessary Party may be declined by this court exercising its jurisdiction under article 136 of the Constitution if the granting of the prayer is considered by the court neither necessary nor proper to allow at the given distance of time. By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division Bench of the High Court in Al. Varadaraja Pillai's case (1972) 85 Mad. L.W. 760 had stood merged in the order of this court dated 10-9-1986 in such sense as to amount to declaration of law under article 141 by this court or that the order of this court had affirmed the statement of law contained in the decision of the High Court." (p. 665) "The Full Bench was not dealing with a prayer for review of the earlier decision of the Division Bench in K Varadaraja Pillai's case (1972) 85 Mad. LW 760 and for setting it aside. Had it been so, a different question would have arisen namely whether another Division Bench or a Full Bench had jurisdiction or competence to review an earlier Division Bench decision of that particular court and whether it could be treated as affirmed, for whatsoever reasons, by the Supreme Court on a plea that in view of the decision having been dealt with by the Supreme Court the decision of the High court was no longer available to be reviewed. We need not here go into the question, whether it was a case of review, or whether the review application should have been filed in the High Court or the Supreme Court. Such a question is not arising before us.

Under article 141 of the Constitution, it is the law declared by the Supreme Court, which is binding on all courts within the territory of India inasmuch as no law was declared by this court, the Full Bench was not precluded from going into the question of law arising for decision before it and in that context entering into and examining the correctness or otherwise of the law stated by the Division Bench in M.Varadaraja Pillai's case (1972) Mad. LW 760 and either affirming or overruling the view of the law taken therein leaving the operative part untouched so as to remain binding on the parties thereto. Inasmuch as, in the impugned judgment, the Full Bench has not adjudicated upon the issue arising for decision before it, we do not deem it proper to enter in to the merits of the controversy for the first time in exercise of' the jurisdiction of this court under article 136 of the Constitution.

We must have the benefit of the opinion of the Full Bench of the High Court as to the vires of the State legislation involved.

It is thus submitted that the issue is fully and squarely covered by the judgment of the Hon'ble Special Bench of the ITAT and 'the contention of' the learned Departmental Representative that the order of the Tribunal is per incuriam is based on misconception and is misconceived and as such it deserves to be rejected.

It is reiterated that neither the Hon'ble Bombay High Court nor the Hon'ble Supreme Court had examined the provision contained in proviso below sub-section (3) of section 80HHC of the Income Tax Act and as such it is submitted that the aforesaid order of the Tribunal cannot be said to be suffering from any infirmity as has been projected so as to disregard the same and to hotel the same is distinguishable either in law or on facts." On the other hand gist of oral arguments made by the learned senior Departmental Representative has also been placed on record. The same are reproduced as under : "(i) This is an appeal filed by the assessee against the order of the learned CIT(A).

(ii) There are seven grounds of appeal. The first four grounds are related to allowability of deduction under section 80HHC, Ground Nos. 5 and 6 are against levy of interest under sections 234B arid 234C.Ground No. 7 is of general nature.

(iii) Precise issue raised by the assessee in respect of section 80HHC is that for the purpose of computing deduction under section 80HHC, the negative profit computed under clauses (a), (b) and (c) of sub-section (3) of section 80HHC has to be ignored and deduction should be allowed on export incentives even in cases of loss.

(iv) The Learned Counsel of the assessee argued that his case is covered by the decision of the Hon'ble Special Bench of ITAT, Delhi in the case of M/s. Lalsons Enterprises & Others.

(v) It has been pointed out by the undersigned that in view of the Hon'ble Supreme Court decision in M/s. IPCA Laboratories Ltd. (266 ITR 521) the issue in present case is covered in favour of the revenue. It was also pointed out that since the findings of Hon'ble Special Bench (supra) was in conflict with the order of the Honble Supreme Court as also with the Hon'ble High Court in the case of M/s. IPCA Laboratories (251 ITR 401), the findings of the Hon'ble Special Bench is no more a good law and cannot be followed.

(vi) It was further pointed out that if it is argued that decision of the Special Bench and Bombay High Court in IPCA Laboratories are in harmony, then it will not only be an artificial harmony, but it will lead to an absurd situation wherein the exporter would not get any deduction on incentives in cases of loss. This will cause undue hardship to the tax payers, not intended by the Legislature.

(vii) Accordingly the findings of the Hon'ble Special Bench, the decision of the Hon'ble Supreme Court and High Court in the case of M/s. IPCA Laboratories Ltd. were discussed in detail and contradictions were pointed out. The precise issue with which the present case is concerned has been dealt as Q. No. (ii) by Honble Spl. Bench up to para 22, the Hon'ble Spl. Bench has discussed the arguments of the parties.

Their observations and findings are contained in paras 23, 24, 25, 26 & 27 and their decision is contained in para 49(ii). It was pointed out during the course of argument that the Hon'ble Spl. Bench has made the following observations : (a) There is no direct authority of any High Court on the interpretation of the proviso to

sub-section (3) of section SOHHC. The proviso goes on to enlarge the scope of the deduction by including the export incentives and therefore proviso stands on its own and has to be interpreted as if it is an independent provision (para 23).

(b) 80HHC is a beneficial section and therefore proviso to sub-section (3) should be interpreted in a manner as to encourage even a loss-making exporter because in the opinion of the Hon'ble Bench it would be inconsistent to grant benefit only to the profit-making concerns and denying the same benefit to loss-making concerns (paras 24 & 25).

(c) If there is profit in export business, it shall be further increased by incentives, if there is loss it cannot be further increased. Meaning thereby that word 'profit' used in proviso means only positive profit and not negative profit (para 25).

(d) In IPCA Laboratory, the Bombay High Court was not concerned with the proviso to sub-section (3) of section SOFIHC and the question before the High Court was limited to interpretation of Clause (c) of sub-section (3). That this judgment did not decide the question as to what would happen if the proviso to sub-section is applied to a case of loss under any of the three clauses of the sub-section. That the judgment of the Bombay High Court in IPCA Laboratory cannot be brought in aid of the department's stand vis-a-vis the proviso (paras 26 & 27), (e) Therefore, the loss if any suffered by the assessee under any of' the clause (a), (b) or (c) of the sub-section shall be ignored and the deduction shall be allowed in respect of the amount computed under the said proviso (paras 49(ii))." It was pointed out that the facts of IPCA Laboratories Ltd.s case (supra) and the IPCA Lab, both High Court and Supreme Court have denied any deduction to the exporter. In IPCA Lab. the three items which came for consideration were loss on trading activity, profit on manufacturing activity and export incentives (paras 2 and 3) of High Court order in IPCA Laboratories Ltd.'s case (supra). The question before the Supreme Court in IPCA Laboratories Ltd. v. Dy. CIT (2004) 266 ITR 521 was: "The question for consideration is whether the appellants are entitled to deduction under section 80HHC in respect of the sum of Rs. 3.78 crores by ignoring the loss of Rs. 6.86 crores. . . ." (p. 524) The amount of Rs. 3.78 crores on which the assessee was claiming deduction by ignoring the trading loss

included incentives calculated as per the proviso of sub-section (3) of section 80HHC. Thus the question before the High Court and Supreme Court was whether losses on one item as under clause (c) of sub-section (3) could be set off against profit under another item under clause (c) including incentive.

Thus incentives under proviso of sub-section (3) was very much taken into consideration by both the High Court and Supreme Court. The Hon'ble Spl. Bench therefore erred in holding that incentives were not considered by Bombay High Court in IPCA Laboratories. In IPCA the exporter had suffered losses under clause (c) of sub-section (3). But both the Honble Supreme Court & High Court did not ignore this loss and denied any deduction on incentives also. It cannot be the case of the Hon'ble Spl. Bench that the Hon'ble Justices of High Court did not know what they were doing when they denied any deduction to assessee even on incentives. If there was any doubt, although in the humble opinion of the undersigned, there was no scope of any doubt it has been removed by the Highest court of Land. The Honble Supreme Court has also denied any deduction to the exporter even on incentives in the IPCA Laboratories Ltd.s case (supra) by setting off the trading/manufacturing loss. It must be noted that in the facts of IPCA both High Court & Supreme Court have used the expression profit on manufacturing goods are profit/loss on manufacturing goods plus incentives.

Honble Special Bench interpretation that word 'profit' used in proviso can mean only positive profit is no longer a good law. The Honble Supreme Court in the case of IPCA Laboratories Ltd. (supra) has held that word 'profit' used in sub-section (3) means both positive as well as negative profit. Thus negative profit can also be further adjusted against incentives. And as seen above the losses under sub-section (3) (c) has further been set off by the Hon'ble Supreme Court in the case of IPCL Laboratories Ltd. (supra). Thus, further increase has been interpreted in a more logical manner by further adjustments. Thus the findings of Special Bench that losses can be adjusted against incentives has been rejected by the Hon'ble Supreme Court.

The Hon'ble Special Bench has held that no High Court has considered the proviso while interpreting section 80HHC. Apparently it was not pointed out to the

Hon'ble Bench that in the two cases of IPCA Laboratories Ltd. (supra) and in the case of CIT v. Smt. T.C. Usha (2004) 266 ITR 497 (Ker.) the incentives were part of the question considered by the Hon'ble High Courts. We have already seen how in 1PCA incentives were set off against losses. If the case of Smt. T C. Usha (supra) the following question was before the Hon'1ble High Court: "Whether on the facts and in the circumstances of the case, the negative profit could be set off against the aggregate of the export profit on manufactured goods, incentives and sales to export house." In the case of Smt. TC. Usha (supra) the Honble High Court has not allowed setting off the losses against incentives. But. Honble Special Bench has not followed the T.C. Usha's case on Q. No. 1 referred to them but has followed 1PCA. On Q. No. 2 referred to the Hon'ble Bench they have followed Smt. T.C. Ushas case (supra) and not the IPCA Laboratories Ltd.s case (supra). Since both the High Courts were dealing with identical question, and there was one unified question on both the points before the Honble High Courts, the Honble Bench erred in half accepting and half rejecting from a single verdict of each High Court. It should be noted that Bombay High Court decision in IPCA was cited before the Kerala High Court but it did not find favour with them. Now the Honble Supreme Court has upheld Bombay High Court decision in IPCA Laboratories Ltd.s case (supra) in totality. The Smt.

T.C. Ushas case (supra) stands overruled in all respect including on the question of incentives followed by Special Bench.

An identical argument was taken before the Honble Supreme Court that a liberal interpretation should be put to the provisions of section 80HHC so that maximum incentives accrue to the exporters. The Honble Supreme Court has held as follows : "When though a liberal interpretation has to be given to such a provision the interpretation has to be as per the wording of this section. If the wordings of the section are clear then benefits, which are not available under the section cannot be conferred by ignoring or misinterpreting words in a section." "It is clear from a reading of sub-section (1) of section 80HHC(3) that a deduction can be permitted only if there is positive profit in the exports of both self manufactured goods as well as trading goods. If there is a loss in either of the two then the loss has to be taken into account for the purposes of computing profits." In the light of the above

categorical observation of the Honble Supreme Court it is not open to any one to pick and choose which losses to be adjusted and with what kind of profit.

It has been pointed out by the undersigned that if the working of section 80HHC as contemplated by Honble Special Bench is read with the ratio of the decisions of High Court and Supreme Court in the case of IPCA Laboratories Ltd. (supra) then there will be an anamolous situation wherein assessee would not get any deduction even on incentives in the case of losses. It has been held by High Court in IPCA Laboratories Ltd. (supra): ". . . Computation of deduction is contemplated by section 80HHC(3), whereas the effect to be given to such computed deduction is contemplated in section 80HHC(i) .... if after computing the deduction under section 80HHC(3)(c) in the cases of mixed exports, there is a resultant loss, it cannot be deducted from the gross total income in order to arrive at the total income. Only the resultant profits from the export activities, representing net profits under section 80HHC(3)(c) could be deducted from the gross total income to arrive at the total income/ taxable income. Therefore, word 'profit' in section 80HHC(1) cannot be a loss...." (p. 409) "Therefore the only sub-section under section 80HHC which provides for deduction for profit retained is sub-section (1) and sub-section (3) merely is in aid of sub-section (1) of section 80HHC." "However if on an aggregation the resultant figure is a loss in such losses cannot be used as deduction for the purposes of section 80CC(I) and nor can such losses be ignored." This is an unambiguous dictum. if the losses under clause (c) cannot be ignored then they have to be set off against incentives. The following obiter dictum may also please be considered.

"Hence it is clear that unless there is a profit, there cannot be tax concession to the assessee. If there is a loss, the assessee cannot ignore." Similar view has been taken by the Hon'ble Supreme Court in the case of IPCA Laboratories Ltd. (supra) as noted above. However, the Hon'ble Special Bench has taken a view that proviso is an independent section and losses worked out in sub-section (3) cannot be set off against incentives. The Supreme Court says that if there is a loss in sub-section (3) no deduction of any, kind will be available to the assessee. Reading these two observations together would mean that in the present case no deduction will be allowed to the assessee. Since there is no positive figure under

subsection (3)(c), the assessee would not get any deduction as per the observation of the Hon'ble Special Bench as it will not be entitled to aggregate the figure worked out under sub-section (3)(c) with the incentives under proviso. And since there is no positive figure under sub-section (3) the assessee will not get any deduction under sub-section (1) of section 80HHC. Clearly this cannot be an intention of the Legislature. Neither the plain reading of the section suggests such situation. Therefore, a more logical and liberal interpretation would be that losses under sub-section (3) would mean profit as worked out after aggregating with the incentives.

". . We, therefore, hold that a plain reading of section 80HHC makes it clear that in arriving at the profits earned from export of both self manufactured goods and trading goods, the profits and losses in both the trades have to be taken into consideration. If after such adjustments, there is a positive profit the assessee would be entitled to deduction under section 80HHC(1). If there is a loss he will not be entitled to any deduction" (p. 53 1) After a combined reading of the decision of the High Court and Supreme Court in IPCA the following positions emerge : (a) There is only one sub-section under section 80HHC which provides for deduction. There is no other sub-section which provides for deduction.

(b) Entire sub-section (3) is machinery section. Sub-section (3) also includes incentives.

(c) Deduction under section 80HHC can be claimed only when there is positive profit under section 80HHC(3) which includes incentives.

Losses cannot be ignored.

(d) If there is a loss in export business, exporter would not be entitled to any deduction and that includes incentives.

(e) Even concept of liberal interpretation does not allow misinterpretation of words & statements.

In the case of IPCA Laboratories Ltd. (supra), the Supreme Court has not allowed any deduction on incentives since assessee has suffered losses which could not

be ignored.

We have heard the parties with reference to material on record and precedents referred. The thrust of the appellant's counsel argument is that the Apex Court in IPCA Laboratories Ltd.s case (supra) decided the issue that if an assessee has a composite export activity of exporting manufactured goods as well as traded goods then deduction under section 80HHC will be allowed only on composite profits of both the activities, meaning thereby that if there is a loss in one activity and profit in the other then the loss cannot be ignored and assessee will be entitled to benefit of section 80HHC only on the profits of' the other activity which is left after the set-off of loss from the first activity. The, interpretation involves the determination of quantum of profits for the purposes of clauses (a), (b) and (c) of sub-section (3) of section 80HHC. It has also been a contention that the issue of interpretation of proviso to sub-section (3) was not before the Apex Court and was neither before the Bombay High Court. Therefore, the Apex Court decision is not applicable to the issue before us and the matter is squarely covered by the Special Bench in the case of Lalsons Enterprises v. Dy, CIT (2004) 89 ITD 25 (Delhi) (SB). To support his argument he also drew out- attention to various precedents on record.

We have given our thoughtful consideration to the pleas raised with reference to record before us. At the time, when Special Bench of the Tribunal rendered its decision on 25-2-2004 the Apex Court decision in IPCA Laboratories Ltd. case (supra) had not been pronouced. The Supreme Court rendered the said decision on 11-3-2004. In the said decision Apex Court has laid down that being incentive provision such provision needs to be liberally interpreted but liberal interpretation has to be as per the wording of section 80HHC of the Act. If as per the wordings of the section the benefit is not available, then no benefit can be conferred by ignoring or misinterpreting the words contained in the section.

". .. It would not be denied that the word 'profit' in section 80HHC(I) and sections 80HHC(3)(a) and 3(b) means a positive profit. In other words if there is a loss then no deduction would be available under section 80HHC(I) or 3(a) or 3(b). In arriving at the figure of positive profit both the profits and the losses will have to be

considered. If the net figure is a positive profit then the assessee will be entitled to a deduction. If the net figure is a loss then the assessee will not be entitled to a deduction. . ." (p. 529) A bare perusal of the above paragraph would show that in no uncertain terms court has held that no benefit would be granted in case the net result of the activity is a loss. It would thus mean that while computing export profit not only the result of two activities is to be netted but the same are to be further netted by export incentives.

Otherwise full meaning cannot be given to the Apex Court judgment. If for sub-section (3) as learned counsel is suggesting that profit should be bifurcated between two specie i.e. one from activity of export, be it of manufactured goods or of trading goods and the other of export incentives, then in all cases the export incentives essentially have to be a positive figure irrespective of the fact. whether there is a loss in export of manufacturing goods or from export of trading goods or from both. If this position is accepted, then the loss in all situation has to be ignored and deduction on export incentives, which will always be a positive figure shall have to be allowed. Viewed with this angle in IPCA case also, the assessee should have been entitled to deduction under section 80HHC on export incentives even if export profits after netting the results of the two activities are in negative. However, the Honble Court has held that the assessee would not be allowed any deduction since its net result is a loss. At page 530, in part H the court has also held that provisions of section 80AB are applicable to section 80HHC. The court further held: "Section 80AB makes it clear that the computation of income has to be in accordance with the provisions of the Act. If the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration." Reading the above makes it clear that losses cannot be ignored. The Hon'ble court has reiterated these views : ". . . If after such adjustments there is a positive profit the assessee would be entitled to deduction under section 80HHC(I). If there is a loss he will not be entitled to any deduction." (p. 531) Following respectfully the views expressed and law laid down by Apex Court, the conclusion would be that if there is a loss in the main section then no deduction would be available to the assessee and the question of applicability of proviso would not come into play in such cases.

We are again fortified in our views the Hon'ble court has held as under :- ". .. For purposes of such computation both profits and losses have to be taken into account. Thus the word 'profit' in section 80HHC(3) will mean profits after taking into account losses, if any. More importantly, in our view the term profit' in section 80HHC both in sub-section (1) and in sub-section (3)means a positive profit worked out after taking into consideration the losses, if any. Thus the word 'profit' has the same meaning in section 80HHC sub-sections (1) and (3)." (p. 53 1) Sub-section (1) provides deduction on profit from exports. Sub-section (3) provides the computation of such profits. Honble court has held that profits in both sub-sections means profits after considering losses. Therefore, while construing sub-section (3) we cannot exclude losses as computed in the main section and consider the positive figure of proviso in isolation. Since the Apex Court has passed the order in appeal, article 141 of the Constitution of India, which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India was attracted. If we may say so, then it is not possible to accept or say that the proviso clause has not been considered by the Apex Court. Once the judgment of the Apex Court is final it is presumed that all provisions of the relevant section have been taken into consideration and the doctrine of constructive res judicata shall come into play. We, therefore, do not see any reason to interfere in the decision taken by the learned CIT(A) and accordingly reject grounds raised by the assessee.

The next issue raised in this appeal relates to charging of interest under section 234B at Rs. 5,51,640. It is claimed that there was no specific order or direction to levy interest in the body of the order of assessment and as such no interest could have been levied. Reference was made to the Delhi High Court decision in the case of CIT v. Insilco Ltd. (2003) 261 ITR 220. The notice of demand has to be issued by the assessing officer but the learned CIT(A) gave direction to charge the interest under section 234B or 234C with reference to the total income assessed.

On the other hand, the learned Departmental Representative relies on the order of learned CIT(A). In the assessment order, the assessing officer has directed 'charge interest'. The interest in question has been specifically, mentioned, computed and charged in Income tax computation Form ITNS 150 which was

signed by the assessing officer and formed part of assessment order. This computation is a part of the assessment order and charge of interest is valid has been held by Punjab & Haryana High Court in the case of Vinod Khurana v. CIT (2002) 253 ITR 578. Furthermore, the learned CIT(A) has coterminus powers as that of the assessing officer. Reliance was placed to the Apex Court decision in the case of CIT v. Kanpur Coal Syndicate (1964) 53 ITR 225 and accordingly by application of doctrine of merger, the speaking order for charge of interest is there.

We have heard the parties with reference to material on record and precedents brought to our notice as arguments and also through written submissions. The assessee has been assessed under the jurisdiction of Hon'ble court of judicature at Delhi. The decision taken by the Honble Delhi High Court shall therefore bind the issue. The assessing officer merely gave direction to charge interest. He did not pass any specific order. However, in computation form forming part of assessment order.

Section under which interest is charged was clearly mentioned and the interest stood computed and quantified. The assessment order stood modified by the decision of the learned CIT(A) who had coterminus powers with that of assessing officer to amend assessment. The assessing officer had already raised demand on account of interest pursuant to computation Form ITNS 150 which was signed by the assessing officer. In Kanpur Coal Syndicate's case (supra). The Apex Court while speaking on plenary power of the first appellate authority has expressed its opinion as under : "...The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is conterminous will that of the Income Tax Officer. He can do what the Income Tax Officer can do and also direct him to do what he has failed to do. If the Income Tax Officer has the option to assess one or other of the entities in the alternative, the Appellate Assistant Commissioner can direct him to do what he should have done in the circumstances of the case (p. 229) The assessee's counsel however relied on the decision of Insilico Ltd. of the jurisdictional High Court where the assessing officer has not made any specific order for charging of interest. This case however is not of much help to the assessee as the order of the assessing officer stood modified by the order of the learned CIT(A) and under such peculiar facts it cannot be held

that there was no speaking order for charging of interest under section 234B of the Act. In that view of the matter the decision taken by the learned CIT(A) to reject the assessee's ground on such count needs no interference.

In ITA No. 5568/DeL/2003 briefly the facts are that the assessing officer charged interest under section 234B after allowing credit of MAT brought forward from assessment year 1998-99. The assessing officer issued notice under section 154/155 of the Act for enhancing the interest liability. The assessing officer after receiving the reply of the assessee and rectified the order by charging interest under section 234B of the Act without giving any credit for tax paid under MAT under section 115JA/115JAA of the Act.

We have heard the parties with reference to material on record and precedents referred. The assessee's counsel has referred to the Circular No. 763 explaining the rational for insertion of section 11 5JAA and the allowance of MAT tax credit on the following words: "The Act has also inserted a new section 115JAA to provide for a tax credit scheme by which the MAT paid can be carried forward for set off against regular tax payable during the subsequent five years period subject to certain conditions, as under: (1) When a company pays tax under MAT, the tax credits by it shall be an amount which is the difference between the amount payable under MAT and the regular tax. Regular tax in this case means the tax payable on the basis of normal computation of total income of the company.

(2) MAT credit will be allowed carry forward facility for a period of five assessment years immediately, succeeding the assessment year in which MAT is paid unabsorbed MAT credit will be allowed to be accumulated subject to the five year carry forward limit.

(3) In the assessment year when regular tax becomes payable, the difference between the regular tax and tax computed under MAT for that year will be set off against the MAT credit. available.

The issue of chargeability of interest is therefore a highly debatable issue and was therefore beyond the scope and ambit of rectification under section 154 of the Act. There is also a cleavage of opinion as to whether interest at all can be charged

under section 234B where the proviso of section 115JA is applicable on regular assessment. The one view favourable to the assessee has been taken by the Honble Madras High Court in the case in CIT v. Holiday Travels (P.) Ltd. (2003) 263 ITR 307 by holding that section 234B does not exclude the provision of section 115J and there is no mention that section 115JA is not applicable, thereby coming to the conclusion that the assessee's company is liable to interest under section 234B irrespective of the fact that section 115J was invoked subsequently. However, in Kwalily Biscuits Ltd. v. CIT (2000) 243 ITR 519 (Kar.) a different view has been taken where the court held that the entire exercise of computing income or the book profits of the company could be done only at the end of the financial year and hence the provision of sections 207, 208, 209 and 210 (precursor 234B & 234C) are not applicable until and unless the accounts are audited and the balance sheet is prepared, because till then even the assessee may, not know whether the provision of section 115J would be applied or not. In the present case before us the circular clearly speaks that when regular tax becomes payable, the difference between the regular tax and tax computed under MAT for that year will be set off against the MAT credit available. By deviating by this position and charging interest under section 234B without giving set off of MAT credit available the issue was highly contentious and open to debate. The learned CIT(A) therefore has erred in upholding the action of rectification made by the assessing officer on this count.

We, therefore, set aside the decision of the authorities below on this count and allow the ground of the assessee accordingly.

In the result, the assessee's appeal in ITA No. 5568/Del/2003 stands allowed while appeal No. 4442/Del/2003 stands dismissed.

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