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Court : Gujarat

Decided On : Sep-28-1995

Reported in : [1996]219ITR721(Guj)

Judge : M.S. Shah and; Rajesh Balia, JJ.

Acts : Finance Act, 1975 - Sections 80J

Appeal No. : IT Ref. No. 338 of 1983

Appellant : Zenith Processing Mills

Respondent : Commissioner of Income Tax

Judgement :

Rajesh Balia, J.

1. At the instance of the assessee, the Tribunal, Ahmedabad Bench-C referred following questions of law arising out of its order dt. 15th Sept., 1982 in ITA No. 1030/Ahd/81 for the asst. yr. 1976-77.

'1. Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the assessee was not entitled to an opportunity to file the statutory audit report in the Form No. 10D in revisional proceedings before the CIT

2. Whether, on the facts and circumstances of the case, the Tribunal was justified in law in observing and/or holding that provisions of s. 80J(6A) were mandatory and not directory as claimed and pointed out by the assessee ?'

We first take up question No. 2.

The assessee is a firm. For the asst. yr. 1976-77 the ITO framed order on 22nd March, 1979. While framing the assessment the ITO allowed the assessee's claim for deduction in respect of profits and loss arising from its newly established undertaking. With effect from 1st April, 1976 sub-s. (6A) was inserted in s. 80J vide Finance Act, 1975 which reads as under :

'(6A) Where the assessee is a person other than a company or a co-operative society, the deduction under sub-s. (1) from the profits and gains derived from an industrial undertaking shall not be admissible unless accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Expln. below sub-s. (2) of s. 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.'

The CIT exercising his powers under s. 263 considered the allowance of deduction under s. 80J inter alia along with allowance of initial depreciation in so far as it is against the interest of Revenue issued notice to the assessee. While the assessee did not contest the notice under s. 263 with respect to initial depreciation the assessee contested the withdrawal of relief under s. 80J. According to the CIT, sub-s. (6A) of s. 80J lays down mandatory requirement that before a claim under s. 80J is admissible for any assessment year the assessee must have his accounts of the relevant previous year audited by an accountant and the assessee must furnish along with his return of income report of such audit in the prescribed form duly signed and verified by such accountant. According to the CIT the assessee had not furnished the report of such audit in the prescribed form duly signed and verified by the accountant, the assessee was not entitled to relief under s. 80J. The assessee had claimed that furnishing of report of such audit in the prescribed form which is Form No. 10D under the Rules r/w r. 18C, is not

mandatory but a directory provision and, therefore, when question of disallowance on that ground is considered, the assessee may be permitted to furnish them. This contention did not find favour with the CIT and he directed that the ITO should make necessary amendment in the assessment order for year 1976-77. The assessee appealed against the order of the Tribunal. The Tribunal came to the conclusion that provisions of s. 80J(6A) are mandatory and that the assessee has filed return for the asst. yr. 1976-77 on 26th Aug., 1976 without audited statement of accounts and the prescribed report. In this connection a further finding which needs be noticed is that the assessee had also contended that the assessee had filed audited accounts before the ITO. However, the statement of accounts with stamped remarks that the Chartered Accountant also found correct were not read by the CIT. In these circumstances the appeal of the assessee was dismissed.

We have heard the learned counsel for the parties.

2. From perusal of sub-s. (6A) it is apparent that compliance of two things is necessary. First requirement is that statement of accounts for the previous year relevant to the assessment year for which deduction is claimed must have been audited by an accountant and second part is that the assessee must furnish along with his return of income the report of such audit in the prescribed form duly signed and verified by such accountant. It can be stated without fear of contradiction that the former is the requirement which furnishes substantial foundation for claiming allowance and the latter is the requirement of furnishing proof that foundation for claiming such deduction has been laid. In our opinion while compliance of the former before the deduction is claimed is mandatory and so far as manner of submitting proof of such compliance of filing along with the return is concerned, is directory because such requirement falls in the realm of procedure for furnishing evidence in support of the claim and which can be furnished at the time while allowance or disallowance under s. 80J is being considered by the concerned authority.

This Court in the case of CIT vs . Gujarat Oil & Allied Industries : [1993]201ITR325(Guj) had an occasion to consider the very same provision. The Court held the provision [of furnishing the auditor's report in the prescribed form

along with the return] to be directory adopting the view of the Allahabad High Court in Addl. CIT vs . Muralidhar Mathura Prasad : [1979]118ITR392(All) and the Patna High Court in the case of CIT vs . Sitaram Bhagwandas : [1976]102ITR560(Patna) in interpreting the phrase 'along with' appearing in s. 184(7). The Court opined that merely because the auditor's report has not physically accompanied the return, it cannot be said that it cannot be produced for merits for deciding the claim of deduction under s. 80J(1) of the Act when the ITO sits down for framing the assessment on merits. It is the only stage at which all the requirements of s. 80J(1) of the Act r/w sub-s. (6A) thereof are to be ascertained. In our view the aforesaid reasoning of the Allahabad High Court and the Patna High Court would squarely apply to the facts of the present case. The provision about furnishing of the auditors report along with the return has to be treated as procedural provision, directory in nature, and substantial compliance should suffice.

3. In view of the aforesaid discussion, question No. 2 referred to above is to be answered in the negative by holding that provision of s. 80J(6A) to the extent it requires furnishing of auditor's report in the prescribed form along with the return is directory in nature and not mandatory.

4. Coming to the first question, we are of the opinion that as provision of furnishing of report in the prescribed form is held to be directory, the assessee can be permitted to produce such report at a later stage when question for disallowance arise during the course of the proceedings in a given case, it will depend upon the facts and circumstances of each case and, therefore, the assessee may be permitted to produce such report, if it has not been produced earlier.

5. The learned advocate for the Revenue vehemently contended that on the basis of the observations made in Gujarat Oil & Allied Industries (supra) that compliance of furnishing of auditor's report in the prescribed form has to be complied before the assessment is completed and the assessee cannot claim deductions under s. 80J by producing the report later on. We are unable to sustain his contention. In the Gujarat Oil & Allied Industries (supra) the question about non-furnishing of 'proof of the accounts being audited' was not furnished along with the return in support of the claim. However, during the course of the proceedings when the ITO

was considering the claim, he disallowed the assessee's request for furnishing the auditor's report in the prescribed form at that stage and the claim was disallowed. It was in these circumstances the claim for disallowance was being considered by the ITO. The ITO had made it known, that he is not to allow deduction under s. 80J unless a certificate is accompanied with the form and assessee having known for no reasons for said disallowance has promptly submitted report which was not submitted earlier. It is in these circumstances, that observations were made that a report should be made available to the ITO. We may notice that it has been held by this Court with which we agree that requirement of furnishing auditor's report is in the realm of furnishing proof about the fact that accounts have been audited and substantial compliance of this provision has been held to be sufficient compliance. During the course of assessment the assessee has furnished accounts stamped with auditor's seal as noticed above which were treated by the assessee as well as the AO to be sufficient compliance of giving proof of the fact that accounts have, in fact, been audited and on that basis the assessment was framed. It was only during the course of proceedings before the CIT under s. 263 that question was considered whether document furnished by the assessee amounts to sufficient compliance of furnishing such proof or not and that having been negatived the occasion arose to furnish the proof which according to the CIT was wanting in declaration that the accounts have been duly audited which is required by sub-s. (6A) of s. 80J and if the assessee requires production of evidence before the allowance made by the ITO under s. 80J was withdrawn, in our opinion that would have been sufficient compliance with the requirement and the assessee ought not to have been visited with the disallowance or withdrawal of the allowance already made without affording opportunity to do so. It may be noted that in a given case assessee's return having a claim of deduction under s. 80J may be accepted by the ITO without holding an inquiry, though it may not have been accompanied with proof of accounts being audited in the manner prescribed. The question of furnishing proof of such audited accounts in the prescribed form at later stage arises only when the matter is being actively considered for disallowance by the concerned authority. If the assessee does not offer to furnish proof even at the stage when it is pointed out to him that requirements of law are not fulfilled to sustain the claim made by him and he fails to fulfil the requirements of law at that

stage, it can be said that the assessee had failed to rectify the defect at earlier opportunity offered to him.

It is inherent part of s. 143(3) that where the AO is not inclined to accept the return submitted by the assessee and if he wants to modify the assessment from the return a show cause notice is required to be given to the assessee. Giving of this opportunity will include opportunity to rectify procedural defect, if any, which are directory in nature. If we examine the matter from that point of view we are satisfied that in the present case, the claim made by the assessee was, though not admissible for want of auditor's report on record yet the same was allowed under a mistake by the AO leaving no opportunity to the assessee to complete the requirements. The condition of non-fulfilment of requirement under sub-s. (6A) was made known to the assessee during the proceedings under s. 263 although the assessee asked for an opportunity to produce the auditor's report to fulfil the requirement under s. 80J(6A) the CIT ought to have afforded an opportunity to the assessee to furnish that proof and then examined the admissibility of the claim in the light of the proof furnished.

As a result of the aforesaid discussion we answer the question No. 1 also in the negative i.e. in favour of the assessee and against the Revenue.

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