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Court : Income Tax Appellate Tribunal ITAT Chandigarh

Decided On : Jan-04-2005

Reported in : (2005)3SOT861(Chd.)

Appellant : Mascon Technical Services Ltd.

Respondent : Asstt. Cit, Central Circle Iii (2)

Judgement :

These appeals by the assessee and the department involve certain common issues, they were heard together and are being disposed of by this common order for the sake of convenience.

ITA No. 450/Mds./98In this appeal, the revenue has raised the following effective ground of appeal: "2.1 The CIT(A) has erred in holding that the assessee has a choice to claim the deduction under section 80HHE or 80-O.2.2 The CIT(A) ought to have appreciated that a comprehensive fiscal incentive was given to the Software Industry by giving deduction under section 80HHE. Customs duty concession, non-levy of income-tax on lump sum payable for using the software, concessional rate of tax under section 15A for royalty payment for use of software vide Finance (No.2) Act, 1991 and as explained in Circular No. 621.

2.3 The CIT(A) ought to have appreciated that by introducing the new section 80HHE, the Legislature intended to give deduction under section 80HHE only with regard to the software export.

2,4 The CIT(A) ought to have appreciated that the principle "Special bus Non Derogant is applicable to the assessee's case." The brief facts of the case are that the assessee had claimed deduction under section 80-O because the assessee-company was providing technical and professional services to persons outside India. However, the assessing officer was of the view that there was specific provision under section 80HHE of the Act allowing deduction in respect of profit from export of computer software, etc. According to him, the assessee was mainly engaged in the export of computer software. Therefore, it should have claimed deduction under section 80HHE. In this background, the assessing officer rejected the claim of the assessee company for deduction under section 80-O and allowed under section 80HHE. Before the learned CIT(A) it was mainly argued that the assessee was engaged not in computer software exports but it was providing technical services outside India though it was admitted that agreements with Overseas Technologies (OST) and Constella Inc. (C.I.) could be considered as agreements for providing technical services outside India in connection with development of computer software which fell under category II of section 80HHE(1). It was further submitted that where parallel deduction was available under sections 80HHE and 80-O, then the assessee was right to choose the section which was more beneficial, with restriction that deduction shall be claimed only under one of the two provisions. It was also contended that the Central Board of Direct Taxes had apprised the agreements with these companies for the Purpose of deduction under section 80-O of the Act. The learned CIT(A) after considering these contentions and some judicial pronouncements came to the conclusion that there was no bar in section 80HHE that deduction could not be claimed under section 80-O. Since section 80-O was also existing in the statute, therefore, the assessee could have claimed deduction under section 80-O.Before us the learned Departmental Representative referred to the contents of the assessment order at page 2 where the assessing officer had given a finding that in this case specific provision was available under section 80HHE. Therefore, the assessee was entitled to claim deduction only under that section. He strongly supported the order of the assessing officer.

On the other hand, the learned authorised representative of the assessee reiterated the contentions raised before the learned CIT(Appeals) and emphasized

that the assessee cannot strictly be said to be engaged in export of software development services. He referred to page 3 of the assessment order, where the nature of services provided by the assessee company has been discussed which mainly comprised of system study at customer Site, translation of system findings to functional specifications, design preparation, programming, testing, site implementation and customer inter-face. Overseas clients were sending their products to the assessee-company which were modified according to the requirements of the customers of overseas and supplied accordingly. These activities cannot strictly be called export of computer software programmes. Then he referred to page 6 of the order of the CIT(A) where it has been found that approval of agreements was granted by the CBDT for the purpose of deduction under section 80-O in earlier years. No such approval was required after the amendment was made by the Finance Act, 1991, with effect from 1-4-1992.

He then referred to section 80HHB. He brought to our attention sub-section (5) of this section in which it is provided that against the income from foreign project, no deduction can be claimed under this Chapter under the heading, "C.-Deductions in respect of certain incomes". He argued that some income from foreign projects was eligible for deduction under section 80-O but when section 80HHB was introduced in 1982 with effect from 1-4-1983, it was specifically provided by sub-section (5) that henceforth deduction will be available only under section 80HHB. However, no such restriction has been provided under section 80HHE. Subsection (5) of section 80HHE only provides that where deduction has been claimed under section 80HHE, then no deduction shall be allowed in relation to such profits under any other provisions of this Act. He also contended that after the introduction of section 80HHE, section 80-O was not omitted and still remained in the statute.

So the assessee had the choice of claiming the deduction under section 80-O or 80HHE of the Act.

We have considered the rival submissions carefully and have also gone through the relevant material on record. We find force in the contention of the learned authorised representative of the assessee. We find that the scope of section 80-O and section 80HHB was considered in detail by the Hon'ble Supreme Court in the

case of Continental Construction Ltd. v. CIT (1992) 195 ITR 81. In that case it was observed by the court that once approval is granted for the agreements, the assessing officer cannot go behind or question of claim of maintainability for deduction under section 80-O and he was bound to allow such deduction after verifying that receipts have been received by the assessee in terms of the agreement approved and after verifying the other arithmetical calculations. It was further observed that because of specific provisions by said sub-section (5) of section 80HHB, deduction cannot be claimed under section 80-O. However, there could be cases where some of the receipts would fall under section 80-O and some of the receipts may fall under section 80HHB. Sub-section (5) of section 80HHB reads as under : "(5) Notwithstanding anything contained in any other provision of this Chapter under the heading 'C.Deductions in respect of certain incomes', no part of the consideration or of the income comprised in the consideration payable to the assessee for the execution of a foreign project referred to in clause (a) of sub-section (1) or of any work referred to in clause (b) of that sub-section shall qualify for deduction for any assessment year under any such other provision." "(5) Where a deduction under this section is claimed and allowed in respect of profits of the business referred to in sub-section (1) for any assessment year, no deduction shall be allowed in relation to such profits under any other provision of this Act for the same or any other assessment year." When both the provisions are read together, it becomes clear that in the case of section 80HHB, the assessee was specifically prohibited to claim deduction under any other provisions of Chapter VI-A in respect of receipts from foreign projects whereas sub-section (5) of section 80HHE only provides that if deduction has been claimed under this section, then no further deduction is to be allowed in relation to such profits under any other provisions of this Act. Thus, there can be a situation where services provided by the assessee fall under section 80HHE as well as under section 80-O. In that case we are of the considered opinion that the assessee would have liberty to claim deduction under any provision chosen by it because both the provisions remained in the Act. Before the amendment made by the Finance Act, 1997 with effect from 1-4-1998, section 80-O was also available for "any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or foreign

enterprise in consideration for the use outside India of any patent, invention, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee". In this regard we would further like to point out that the Hon'ble Supreme Court, in the case of Continental Construction Ltd. (supra) where the assessee was engaged in the business of executing contracts which included erection of dams, irrigation and hydel projects, water supply etc., the scope of provision of technical services was examined and it was observed as under: "Again, an assessee may have achieved some speciality and he may agree to lend his services to some other person and stipulate a consideration there for which may be variously described. The nature of the asset, right, information or services which can be brought under this provision may be varied and the consideration stipulated for allowing another to avail of the assessee's asset, knowledge or service can likewise assume multifarious forms. The word 'similar' connotes that the payment made to the assessee need not be in the nature of royalty, commission or fees only; it could be any payment of like nature, i.e., made in consideration for the use or supply of such an asset, knowledge or services in the same manner as royalty, fees or consideration could be. We are, therefore, of the view that, that any type of payment received by an assessee would qualify for deduction under the section so long only as it is a payment made in consideration of one of the two types of transactions referred to in the section." "But, even assuming that there could be some difference of opinion on the above issue, there can be no doubt at all that, under the contract, technical services were rendered by the assessee to the foreign Government. In our opinion, the attempt of Sri Ahuja to differentiate the technical services rendered to the assessee by its employees and technicians from technical services rendered by the assessee to a foreign constituent and urge that the latter alone can qualify for relief under section 80-O on the ground that the project in question was a turnkey project which has succeeded before High Court, proceeds on an unduly narrow interpretation of the section. In our view, the assessee was undoubtedly

rendering services to the foreign Government by executing the water supply project. These services were no doubt technical services as they required specialized knowledge, experience and skill for their proper execution. The argument seems to be that the services in the present case would not be covered by the section because there was no privity of contract between the employees who contributed their technical skill to the foreign Government. We think that this argument cannot be accepted. The assessee is a company and any technical services rendered by it could only be through the medium of its employees, skilled and unskilled, and, even if the contract had not related to a turnkey project, the assessee's employees would have been answerable only to the assessee and none else though, perhaps, in such an event, the other party to the contract may have retained a larger degree of control and supervision in the execution of the contract. Even where the contractor is an individual or firm and not a company, a contract of this magnitude can be executed only through the medium of employees or other personnel engaged by the assessee. The fact that, physically speaking, it is only such employees that render services and that, so far as they are concerned, they render services only to their employer and not to the other contracting party are in no way inconsistent with, or repugnant to, the notion that, so far as the foreign Government is concerned, it looks only to the assessee for the rendering of the technical services under the contract. The High Court pointed out that a person who manufactures a television set ordered by another cannot be said to render technical services to the latter. In our view, that analogy is not apposite in the context of a contract of the nature, magnitude and specialization with which we are concerned here. Where a person employs an architect or an engineer to construct a house or some other complicated type of structure such as a theatre, scientific laboratory or the like for him, it will not be incorrect to say that the engineer is, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by the staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks opinion from him on some issue, the advice provided by the lawyer would be a piece of technical service provided by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law. Sri Ahuja tried to negative this line of thinking by

urging that 'professional services' have been brought within the scope of section 80-O only by an amendment by the Finance (No. 2) Act, 1991, and that too, with effect from 1-4-1992, which is proposing to substitute the words 'technical or professional services' in place of the words 'technical services' now used in the section. It seems to us that this amendment may be only of a clarificatory nature. The expression 'technical services' has a very Broad connotation and it has been used elsewhere in the statute also so widely as to comprehend professional services vide section 9(1)(vii) referred to earlier. But we need not digress on this aspect for two reasons. Firstly, whatever may be the position regarding other 'professional services', there can hardly be any doubt that services involving specialized knowledge, experience and skill in the field of constructional operations are 'technical services'. The Board's guidelines to which reference is made later specifically say so.

Secondly, the question whether 'professional services' would be 'technical services' or not has no impact on the point we are trying to make, viz., that, in order to say that a person is rendering such services to another, it is not necessary that the services should be rendered by the former personally and not through the medium of others.

For the reasons discussed above, we have come to the conclusion that, under the contracts in question, the assessee had made available technical information to the foreign Government for use outside India and had also rendered technical services to the foreign Government outside India." From the above it becomes clear that the term "provision of technical services" has to be interpreted liberally considering all aspects of execution of the contract. In the case before us some of the services may be overlapping into the area of export of software development but some are also covered under the heading "Provision of technical services". The assessee had the choice of claiming deduction under section 80-O or 80HHE and the sense of any restriction in any of these provisions deduction was claimed under section 80-O and which cannot be denied by the revenue. In these circumstances, we find nothing wrong in the order of the learned CIT(A) and confirm the same. Therefore, the revenue's appeal is dismissed.

ITA Nos. 865 & 866/Mds./98In both these appeals the order passed under section 263 of the Income Tax Act by the Commissioner of Income Tax, Central-II, Chennai has been impugned. In both these cases same issue is involved, viz., whether, the assessee is entitled to the deduction under section 80HHE or 80-O. In addition to the arguments made on merits, which have been discussed by us, while adjudicating the revenue's appeal for assessment year 1995-96 in the above-noted paras.

It was further pointed out by the learned authorised representative of the assessee that in the last para of the order under section 263 the CIT had observed : "However, the assessee has contended that some of the activities of the assessee qualify for deduction under section 80-O as they are not connected with the development of software". After this observation, the CIT further observed that these aspects can be verified only after examination of the agreements which means that the learned CIT was not sure whether the assessment order was erroneous or not.

The learned Departmental Representative, on the other hand, strongly supported the orders of the Commissioner of Income Tax.

After considering the rival submissions, we agree with the contention of the learned authorised representative of the assessee that from the reading of the last para of the CIT's order it is apparent that the CIT was not very sure as to what was the error in the assessment order and unless and until the order is found to be erroneous and prejudicial to the interests of the revenue, the power of revision cannot be exercised as has been observed by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83. With regard to the merits, we have already discussed this issue in detail in the above-noted appeal and have decided the same in favour of the assessee.

In these circumstances, we quash the order passed by the CIT under section 263 of the Act. Thus, both the appeals filed by the assessee are allowed.

ITA Nos. 448 & 449/Mds./98After the order under section 263 was passed, the assessing officer passed fresh orders and deduction was allowed to the assessee

under section 80HHE and the deduction allowed under section 80-O was withdrawn. The learned CIT(A) reversed the situation and directed the assessing officer to allow deduction under section 80-O. We have already adjudicated this issue in detail in the above noted appeal and following that decision, these two appeals of the revenue are dismissed.

In the result, the departmental appeals are dismissed while the assessee's appeals are allowed.

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