

ito Vs. Laxmi Packers

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-23-2007

Judge : P Kumar, P M Devi

Appellant : ito

Respondent : Laxmi Packers

Judgement :

1. This appeal of the revenue is directed against Commissioner (Appeals)'s order elated 30-9-2003 for the assessment year 2001-02.

1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that the time of formation of an undertaking is only at a particular time without appreciating the fact that the formation of industrial undertaking is a continuous process till the point when all the Plant & Machinery required for the production purples are put in place.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that second hand machinery has no relevance as the same has been acquired after the production has been started, without appreciating the fact that the second hand machinery in dispute has been acquired during the same financial year and the value of which, exceeds more than 20% of the total cost of Plant & Machinery.

3. The appellant prays that the order of the Commissioner (Appeals) on the above grounds be set aside and that of the assessing officer restored.

3. Brief facts of the case are that the assessee is engaged in manufacture of corrugated boxes and this is the first year of assessment. During the course of assessment proceedings the assessing officer noticed that the assessee has purchased one second hand cutting and creasing machine for Rs. 2,83,401 from Brown Cartons and that the value of the second hand machine exceeds 20% of the total value of the plant and machinery i.e. Rs. 9,41,601. Observing that the assessee has not fulfilled the conditions under Section 80-IB he disallowed the said claim. Aggrieved, assessee filed an appeal before the Commissioner (Appeals) who deleted the addition on the ground that the terminology used in Section 80-IB clearly shows that the conditions are to be fulfilled only at the time of formation of the new industrial undertaking and there is a restriction in the use of second hand machinery. He held that there is no restriction to subsequent addition of the industrial undertaking capacity through acquisition of second hand machinery. Thus observing that the assessee's new industrial undertaking was formed in April, 2000 and the assessee had not brought any second hand machinery in excess of 20% of its total investment in plant and machinery in April 2000, he held the assessee to be eligible for deduction under Section 80-IB and allowed the assessee's claim. The revenue is in appeal before us.

4. The Id. Counsel for the assessee supported the order of the Commissioner (Appeals), while the Id. D.R. relied upon the order of the assessing officer.

5. Having heard both the parties and having considered their rival contentions, we find following undisputed facts- (i) This unit of the assessee was formed in December, 1999 when the assessee constructed new building and purchased new machinery.

(ii) The unit commenced production of colligated boxes in April, 2000. Subsequently in November, 2000 the assessee to meet its additional requirement, purchased a second hand platter machine.

Whether the addition of the platter machine would attract the provisions of Sub-section (2) of Section 80-IB is a question before us.

For proper appreciation of the case, Section 80-IB(2) reads as under- Sub-section (2). This section applies to any industrial undertaking which fulfils all the following conditions, namely: (i) it is not formed by splitting up, or reconstruction, of a business already in existence: Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in Section 33B, in the circumstances and within the period specified in that section; (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Clause (ii) prohibits the use of second hand plant and machinery in the formation of the industrial undertaking claiming deduction under Section 80-IB. In the case on hand the assessee-company was formed in December, 99 and had started the production also by April, 2000. Thus, at the time of the commencement of production, the assessee was not using any plant or machinery previously used for any purpose. The subsequent requirement of the assessee necessitated purchase of the second hand machinery. The section does not provide that the second hand plant or machinery shall not be purchased during the year of formation of the industrial undertaking. The crucial question here is when is the industrial undertaking formed? The plain dictionary meaning of the word 'form' is 'visible shape or configuration'. Thus to have a visible shape or configuration, an industrial undertaking has to acquire all the requisite paraphernalia necessary to start its production. It can thus be said to have been formed when it starts the production. In the case on hand, the assessee started its production in April, 2000. It is not the case of the revenue that this second hand machinery was required to achieve its capacity of production. As seen from the statement of facts before the Commissioner (Appeals), the assessee decided to purchase the platter machine to meet the additional requirement of its major customer M/s.

Cipla. This fact has not been controverted by the revenue. Thus as rightly held by the Commissioner (Appeals) in para 14 of his order, it is not the intention of the

Legislature that even after the formation of the industrial undertaking, it should not purchase any second hand machinery to meet its future demands. The only prohibition is against the formation of the industrial undertaking using the second hand machinery. In this view of the matter, we are not inclined to interfere with the order of the Commissioner (Appeals).

Further the Delhi High Court in the case of Orissa Cement Ltd. v. CIT while dealing with deduction under Section 80.1 and the conditions precedent under Section 80A(4)(ii) has held that second hand machinery purchased from another party was new as far as the assessee is concerned and therefore the condition was fulfilled making the assessee entitled to deduction even without the help of.

Explanation 2 to Section 80J(4). This view has further been reiterated by the Delhi High Court in the case of CIT v. Orissa Cement Ltd. .

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