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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Mar-30-2007

Judge : P Malhotra, K Bansal

Appellant : Dy. Cit

Respondent : Binary Semantics Ltd.

Judgement :

1. This appeal of the revenue emanates from the order of the Commissioner (Appeals)-1V, New Delhi, passed on 8-11-2004. The order of assessment was passed by the Assistant Commissioner, Circle 3(1), New Delhi (hereinafter called the assessing officer), under the provisions of Section 143(3) of the Income Tax Act, 1961 (the Act for short), on 24-12-2003, assessing the total income at Rs. 2,95,55,170. The revenue has taken two grounds in the appeal to the effect that on the facts and in the circumstances of the case, the learned Commissioner (Appeals) erred in directing to exclude from the total turnover : (i) expenditure incurred in foreign exchange in making payments to software professionals outside India; (ii) expenditure incurred in foreign exchange in sending software professional abroad, while computing deduction under Section 10A of the Act.

2. In the assessment order, it is mentioned that the assessee company is engaged in the activity of trading of generic software, and providing customized software development services for domestic and US market, through its two units situated in Software Technology Park, Gurgaon. The assessee claimed exemption under Section 10A of the Act.

This section is applicable to an undertaking if the sale proceeds of the articles, things or computer software, exported out of India, is received in or brought into India in convertible foreign exchange within a period of six months from the end of previous year, or within such further period as the competent authority may allow. It is further mentioned that the details of realization of export proceeds, in respect of which the exemption was claimed, were furnished. The details of expenses incurred in foreign exchange for providing technical services were also furnished. On examination of these details, it was found that the assessee incurred expenditure in foreign exchange in sending software professionals abroad as per the agreements with the foreign constituents. Such expenses in both the units amounted to Rs. 1,82,610 in Indian rupees. The assessing officer was of the view that these expenses are required to be deducted from the export turnover for the purpose of computing deduction under Section 10A. It is also mentioned that while total receipts in respect of unit No. 1 and unit No. 2 were Rs. 14.52 crores and Rs. 3.13 crores, the total turnover of these units was taken at Rs. 5.62 crores and Rs. 2.30 crores respectively. It was explained that in order to execute the software development orders, the assessee recruited software professionals in the USA. These professionals were paid remuneration on the basis of man-hour or man-month of work done by them. These payments were made out of the sale proceeds received abroad. That did not mean that the export turnover had to be decreased by the amount of remuneration paid to the foreign professionals in the USA. The assessing officer pointed out that while Section 10A specifically defined the term "export turnover" it did not define the term "total turnover". The total turnover- is nothing but a sum of domestic turnover and export turnover. Further, he was of the view that the total turnover includes that part of the export turnover also which has not been received in or brought into India in convertible foreign exchange. Thus, while computing the total turnover, payments made to foreign professionals in USA could not have been excluded. Accordingly he took the total turnover by taking into account the payments made to foreign professionals in the USA.

3. Aggrieved by this order, the assessee moved an appeal before the Commissioner (Appeals)-IV, New Delhi. The case of the assessee before the first appellate authority was that the terms "export turnover" and "total turnover" ought to be understood in the same manner. Thus, if expenses incurred in foreign

exchange are not to be included in the export turnover, they should also not be included in the total turnover. Otherwise, complexion of the numerator will be different from the complexion of the denominator in the ratio used in Section 10A for the purpose of computing the deduction under the section. The learned Commissioner (Appeals) considered the assessment order and the assessee's submission. He agreed with the assessee that if expenses incurred in foreign exchange for providing technical services outside India, are to be excluded from the export turnover, in accordance with the definition of the aforesaid term, then, such expenses should also be excluded from the total turnover. In view of this finding, he allowed the appeal of the assessee in this matter.

4. Aggrieved by this order, the revenue is in appeal before us. The learned departmental Representative pointed out that Section 10A, below Sub-section (8), contains the definition of the term "export turnover" in Clause (iv) of Expln. 2. The term has been defined to mean the consideration in respect of export by undertaking of all articles, things or computer software received in, or brought into India, by the assessee in convertible foreign exchange in accordance with Sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India.

Further, he pointed out that the term "total turnover" has not been defined in the section. Therefore, while finding out total turnover of the assessee, the natural meaning of this term, as understood in the common parlance, will have to be adopted. If that is done, one cannot exclude the expenses incurred outside India from the total turnover. In other words, his contention was that in respect of the term, which has not been defined in the statute, there cannot be any departure from the natural and commonly understood meaning of the term.

5. As against the aforesaid, the learned counsel for the assessee pointed out that a number of statutory examples are there where departure has been specifically made from the natural or commonly understood meaning of the term. He referred to the definition of the term "total turnover" given in Clause (ba) of the Explanation

below Sub-section (4C) of Section 80HHC. It has been provided that the total turnover shall not include freight or insurance attributable to the transport or goods or merchandise beyond the customs station as defined in the Customs Act, 1962. In Clause (b) of the Explanation, "export turnover" has been defined to mean the sale proceeds received in or brought into India by the assessee in convertible foreign exchange but does not include freight or insurance attributable to the transport of goods or merchandise beyond the customs station. On the basis of the aforesaid definition of the total turnover, it was contended that even when "export turnover" has not been defined under Section 10A, its contextual meaning will have to be found out by taking into account the definition of the term "export turnover". In other words, his case was that notwithstanding the fact that both the terms have not been defined under Section 10A as done in Section 80HHC, yet by following the analogy of the definitions in Section 80HHC, the contextual meaning of the "total turnover" will have to be taken for the purpose of Section 10A also. If that is done, then, items excluded from the "export turnover" in the definition will also have to be excluded from the total turnover.

5.1 Coming to the decided cases on the issue, he relied on the decision of Hon'ble Delhi High Court in the case of Jaypee Hotels Ltd. in IT Appeal Nos. 1146 and 1223 of 2006, dated 4-1-2007, a copy of which was placed before us. The question before the Hon'ble court was whether, the expression "total receipts of the business" in Section 80HHD(3) of the Income Tax Act relates only to the receipts concerning the services provided by the assessee to foreign tourists or the receipts relating to all the business activities of the assessee. The facts of that case were that the assessee was engaged in running five-star hotels in Delhi. The assessee had obtained a license for acting as a restricted money-changer. The foreign exchange receipts of the assessee inter alia included the receipts from the business of the money-changer. The assessee claimed deduction under Section 80HHD in respect of this activity also. The assessing officer excluded the sum received by the assessee through its money-changing activity for computing deduction under Section 80HHD on the ground that this activity does not qualify to be termed as the services rendered to the foreign tourists. In para 5 of the judgment, the Hon'ble court referred to their judgment in the case of CIT v. Lotus Trans Travels (P) Ltd. in IT Appeal No. 936 of 2006, dated 7-12-2006 (reported as

CIT v. Lotus Trans Travels (P) Ltd. (2007) 207 CTR (Del) 105'Ed.), in which it was held that the term "total receipts" for the purpose of the denominator of the ratio applied for computing deduction under Sub-section (3) of Section 80HHD, will admit the same construction as the numerator (foreign exchange receipts). In doing so, the court adopted the reasons furnished by Hon'ble Bombay High Court in the cases of CIT v. Sudarshan Chemicals Industries Ltd. , which was followed in the case of CIT v. Chloride India Ltd. , CIT v. Wheels India Ltd. (2005) 197 CTR (Mad) 284 and CIT v. K. Rajendranathan Nair .

In view of this finding, the Hon'ble court upheld the decision of the Tribunal in which the foreign exchange receipts from the money-changing business were excluded from the foreign exchange receipts.

5.2 Further, the learned counsel relied on the decision of Hon'ble Delhi High Court in the case of CIT v. Lotus Trans Travel (P) Ltd. in IT Appeal No. 963 of 2006. While discussing the contents of the case of Jaypee Hotels Ltd. (supra), it has been pointed out that this case was considered by the Hon'ble High Court and followed in that case. He also relied on the decision of the Hon'ble High Court in the case of CIT v. Auto Ignition Ltd. in IT Appeal No. 364 of 2004, dated 8-8-2005, a copy of which was filed before us. In that case, the excise duty and the sales-tax paid by the assessee were held to be excludible from the total turnover by following the decision in the case of Sudarshan Chemicals Ltd. (supra).

5.3 The learned counsel also relied on the decision of Hon'ble Supreme Court in the case of J.B. Boda & Co. (P) Ltd. v. CBDT . The Hon'ble Court, at p. 281, pointed out that the facts brought out in the case are clear as to how the remittance to the foreign reinsurance company was made through the RBI in conformity with the agreement between the assessee and the foreign reinsurers, and that the remittance statement filed along with Annex. 'A' which evidences that the amount due to the foreign reinsurers as also the brokerage to the assessee and the balance due to the foreign reinsurers was remitted. It was common ground that the entire transaction, effected through the medium of RBI, was expressed in foreign exchange and in effect the reduction of the fee due to the assessee was in dollars.

This amounted to receipt of income in convertible foreign exchange. The Hon'ble court further pointed out that a two-way traffic was unnecessary. To insist on a formal remittance to the foreign reinsurers first and thereafter to receive the commission from the foreign reinsurer will be an empty formality and a meaningless ritual.

Therefore, the Hon'ble court held that the income under the agreement was not generated in India or that the amount was received in convertible foreign exchange. On the basis of this decision, the case of the learned counsel was that remuneration to the foreign software professionals in the USA could have been paid by obtaining permission to remit the foreign exchange from India, after taking approval of the RBI. However, since the assessee was permitted to retain foreign exchange in the USA, out of which the aforesaid payment was made, such a remittance would have amounted to performing an empty ritual. The substance of the transaction cannot be judged on the basis of such a ritual. Therefore, the whole of the receipt, without deducting remuneration paid in foreign exchange, should be taken as the export turnover.

6. In the rejoinder, the learned departmental Representative pointed out that in the case of Lotus Turns Travels (P) Ltd. (supra) the Hon'ble court had relied on the decision in the case of Sudarshan Chemicals Industries Ltd. (supra) In that case, the sales-tax and the excise duty were excluded from the total turnover because no profit element was involved in receipt and payment of the tax and the duty.

The question in the case of Jaypee Hotels Ltd. (supra) was whether the receipts from money-changing business were out of any service rendered to the tourists. The case of J.B. Boda & Co. (P) Ltd. (supra) involved receipt and payment in convertible foreign exchange with the reinsurer, which was held to be an empty formality. However, in the instant case, the receipts and payments are from and to two different parties.

7. We have considered the facts of the case and rival submissions. The question before us is-whether, in absence of the definition of the term "total turnover" in Section 10A, it should be interpreted by having recourse to the definition of the term "export turnover" furnished in the section. We have furnished the definition of

the term "export turnover" already. It has also been pointed out that the deduction has to be computed under Sub-section (4) on the basis of the ratio of "export turnover" to the "total turnover". In the case of Sudarshan Chemicals Industries Ltd., (supra) a similar question confronted the Hon'ble Bombay High Court under Section 80HHC. In that section the profits derived from the export business had to be worked out on the basis of a formula which involved the finding out the ratio of export turnover to the total turnover. Excise duty and sales-tax were not payable in respect of the export turnover while the duty and the tax were payable in respect of inland turnover, which formed part of the total turnover. The Hon'ble court pointed out that Section 80HHC is a code by itself and, therefore, general definition of the word "turnover" or the cases under the sales-tax could not have been imported while interpreting the term "total turnover". Thus, even when the definition was given in the section, which did not exclude excise duty and sales-tax from the turnover, the Hon'ble Court came to the conclusion that the aforesaid two levies will have to be excluded from the "total turnover" on the ground that the deduction cannot be reduced artificially by including statutory levies in the denominator, namely, total turnover while the same did not find a place in the numerator, namely, the export turnover. In other words, to arrive at a fair computation of the deduction the export turnover and the total turnover have to be understood in the same manner, namely that if certain amounts are not to be included in the export turnover, the same should also not be included in the total turnover. In the words, such exclusion will have to be read by interpreting the two terms in the same manner. This decision was approved by the Hon'ble Delhi High Court being the jurisdictional Court, in the case of Jaypee Hotels Ltd. (supra) Thus the interpretation of Hon'ble Bombay High Court regarding contextual meaning, excluding the commonplace meaning, will have to be taken into account while computing the numerator and the denominator. The definition of the "export turnover", in Section 10A excludes from its ambit any expenses incurred in foreign exchange in providing technical services outside India. In view of the decision in the case of Sudarshan Chemicals Industries Ltd. (supra), such expenses will have to be included (sic-excluded) from the total turnover also. Therefore, we are of the view that the learned Commissioner (Appeals) was right in holding that the total turnover shall not include expenses incurred in foreign exchange in providing

technical services outside India.

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