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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-07-2007

Judge : G Pannu, J Singh

Appellant : Orient Craft Ltd.

Respondent : Dy. Cit

Judgement :

1. We find it expedient to dispose of both these appeals by way of a common order. The two appeals are by the assessee against the order passed by the Commissioner of Income Tax (hereinafter referred of as 'Commissioner') under Section 263 of the Income Tax Act, 1961 (in short, 'the Act') relating to the assessment years 2000-01 and 2001-02.

The Commissioner has passed similarly worded orders whereby the assessment orders passed by the assessing officer under Section 143(3) of the Act for the impugned years have been cancelled since, in his opinion, they were erroneous, insofar as it were prejudicial to the interests of the revenue. The Commissioner has held that the assessing officer shall pass fresh orders of assessment. Since the fact situation is identical for the two years, we may refer to assessment year 2000-01 for details. The issue in dispute relates to the claim of the assessee for deduction under Section 80HHC of the Act. In this regard, the pertinent facts are that the assessee filed a return of income for the assessment year 2000-01 wherein a deduction under Section 80HHC was claimed at Rs. 19,13,58,168. The return of the assessee was subjected to an assessment under Section 143(3) of

the Act and the assessing officer vide his order 28-2-2003 duly accepted the claim of the assessee for deduction under Section 80HHC of the Act. The Commissioner has in the impugned order directed that the premium received by the assessee-company on sale of quota rights be treated as "other receipts" as defined in the Explanation (baa) to Section 80HHC of the Act. In the view of the Commissioner, the entire receipts on account of sale of quota receipts could not constitute a part of the profits and gains of business or profession for the purposes of computing "profits of business" under Explanation (baa) to Section 80HHC. According to the Commissioner, such an action of the assessing officer done while finalizing the assessment under Section 143(3) on 28-2-2003 rendered such assessment as erroneous insofar as it was prejudicial to the interest of the revenue. He, therefore, assumed jurisdiction under Section 263 of the Act. The Commissioner directed that 90 per cent of the receipts on account of sale of quota rights were liable to be excluded while computing the profits of business in terms of Explanation (baa) to Section 80HHC of the Act. In other words, grant of deduction under Section 80HHC of the Act to the assessee on the entire receipts of sale of quota rights, according to the Commissioner, resulted in allowing of excessive deduction to the assessee, thereby vesting the Commissioner with jurisdiction envisaged under Section 263 of the Act.

2. In the above background, the assessee is in appeal before the Tribunal challenging the jurisdiction assumed by the Commissioner by invoking the provisions of Section 263 of the Act with regard to the deduction allowed under Section 80HHC to the assessee in respect of the profits earned by the assessee on sale of quota rights. The learned Counsel for the assessee has vehemently argued that the scope of the powers vested under Section 263 of the Act with the Commissioner have been wrongly considered in the present case. The learned Counsel submitted that it is not each and every mistake in the order of assessment, which can be subject to the revisionary jurisdiction vested with the Commissioner under Section 263 of the Act. According to him, in order to assume the requisite jurisdiction, it is imperative that the Commissioner must find the order of assessment as erroneous as well as prejudicial to the interests of revenue. It was emphasised that both the conditions, namely, order being erroneous and it being prejudicial to the interest of revenue must be satisfied before the jurisdiction

under Section 263 can be assumed. For this proposition, the learned Counsel referred to and relied upon the judgment of the Supreme Court in the case of *Malabar Industrial Co. Ltd. v. CIT* (2000) 243 ITR 83 (SC). A reference to the judgment of the Hon'ble Delhi High Court in the case of *Nabha Investments (P.) Ltd. v. Union of India* (2000) 246 ITR 41 (Del) was also made. In this background, the learned Counsel referred to the show-cause notice issued by the Commissioner under Section 263 of the Act 20-12-2004, a copy of which has been placed in the Paper Book at page 22 to show that there is no allegation much less an effort on the part of the Commissioner to show as to how the order of assessment passed by the assessing officer was erroneous. Submitting further the learned Counsel argued that on a perusal of the show-cause notice and the impugned order passed by the Commissioner, it is evident that there is no allegation that the order of assessment has been framed on an incorrect assumption of facts or incorrect application of law or without application of mind. The learned Counsel, in the above background, submitted that there is no material brought on record by the Commissioner to reach an inference that the deduction under Section 80HHC of the Act was not admissible to the assessee in the manner determined by the assessing officer in respect of the profits from sale of quota rights. It was, therefore, submitted that the show-cause notice issued by the Commissioner was vague and it depicted an arbitrary approach in assuming jurisdiction under Section 263 of the Act. Coming to the impugned order, the learned Counsel pointed out that in para 9, the Commissioner has observed that the assessment was completed and the claim of the deduction under Section 80HHC was allowed to the assessee without verifying as to whether the impugned receipts fell with the provisions of Section 28(iia), 28(iib) and 28(iic) of the Act so as to merit deduction. The learned Counsel pointed out that the said observation of the Commissioner was not contained in the show-cause notice issued to the assessee. It was pointed out that the basis adopted by the Commissioner in para 9 to justify assumption of jurisdiction under Section 263 of the Act, namely, lack of application of mind by the assessing officer was not a ground taken in the show-cause notice 28-12-2004 issued to the assessee. Therefore, the Commissioner could not justify the assuming of jurisdiction on an issue not put to the assessee. In this connection, reference was made to the judgment of the Chennai Bench of

the Tribunal in the case of S.S.I. Ltd. v. Dy. CIT(IT Appeal No. 1384 (Mad.) of 2004, 3-12-2004). Submitting further, it was pointed out that notwithstanding the aforesaid, in the instant case, the assessing officer had duly examined the claim of the assessee made under Section 80HHC of the Act. It was pointed out that in the course of assessment proceedings, the assessing officer had issued a notice under Section 142(1) of the Act on 11-12-2002 along with a questionnaire wherein a specific query was raised to justify the claim of deduction under Section 80HHC of the Act. In reply to this query, the assessee had made submission 30-12-2002, a copy of which has been placed in the Paper Book at pages 18 to 20. It was, therefore, contested that under such circumstances, the order of the assessing officer could not be labelled as an order passed without application of mind. In the end, the learned Counsel submitted that in nutshell, the Commissioner has merely attempted to substitute his opinion in place of the opinion of the assessing officer and that such an approach was subjective in nature which clearly does not fall within the scope of the jurisdiction envisaged under Section 263 of the Act.

3. Notwithstanding the aforesaid and without prejudice, the learned Counsel submitted that even otherwise, it could not be said that as a result of passing of the order by the assessing officer, it resulted in a loss of revenue. It was submitted that the profit on sale of quota rights is found to be eligible for the benefits of Section 80HHC even by the Central Board of Direct Taxes in its Instructions Bearing No.133/137/97-TCL,dated 23-2-1998, a copy of which has been placed in the Paper Book at page 47.It was contended that in para 4 of the said Instruction, the premium on sale of export quotas has been held to be entitled to receive the same treatment as profits on sale of import licences, cash assistance and duty drawback. Considered in this light, the learned Counsel submitted that the assessee would be eligible to claim the benefit of Section 80HHC on such income by virtue of the proviso to Section 80HHC(3) thereby resulting in a quantum of deduction under Section 80HHC even higher than what has been claimed and allowed in the assessment proceedings. In this regard, reliance was placed on the decision of the Mumbai Bench of the Tribunal in the case of Anil L.

Shah v. Asstt. CIT . It was, therefore, submitted that the assumption of jurisdiction by the Commissioner under Section 263 of the Act and his subsequent decision to

set aside the order of assessment and directing the assessing officer to make the assessment afresh was a fruitless exercise Act and it was not required in law. On this basis also, the assessee has challenged the order of Commissioner passed under Section 263 of the Act and reliance was placed on the judgment of the Hon'ble Madras High Court in the case of CIT v. Sakthi Charities .

4. On the other hand, the learned Commissioner Departmental Representative appearing on behalf of the revenue has merely placed reliance on the order of the Commissioner and has not controverted any of the factual or legal matrix brought out by the counsel for the appellant.

5. In the above background, we have considered the pleas of the assessee as well as the stand of the revenue manifested by the order of the Commissioner. We have also perused the order of assessment framed by the assessing officer under Section 143(3) of the Act as well as the other material placed on record, to which our attention was drawn during the course of the hearing. The crux of the dispute before us relates to the efficacy of the exercise of jurisdiction by the Commissioner under Section 263 of the Act whereby the order of assessment 28-2-2003 passed by the assessing officer under Section 143(3) of the Act has been held as erroneous insofar as it was prejudicial to the interest of the revenue with regard to an element of deduction allowable under Section 80HHC of the Act to the assessee. The first and the foremost grievance of the assessee is that the assumption of jurisdiction by the Commissioner under Section 263 itself is flawed for the reason that the twin conditions required to satisfy the invocation of Section 263 have not been complied with. The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. (supra) held that the Commissioner, under Section 263, has to be satisfied of twin conditions, namely, that the order of the assessing officer sought to be revised is erroneous and that it is prejudicial to the interest of the revenue.

The twin conditions have to be cumulatively satisfied. Even if one of them is absent, i.e., if the order of the assessing officer is erroneous but not prejudicial to the interest of revenue or if the order of the assessing officer is not erroneous but is prejudicial to the interest of revenue, no recourse can be made to the provisions

of Section 263 of the Act. With this short discussion, we proceed to examine the factual contours of the present controversy.

6. In the instant case, we may first examine as to the manner in which the assessee has claimed deduction under Section 80HHC of the Act.

Evidently, the assessee claimed deduction under Section 80HHC of Rs. 19,13,58,168 in the return of income which was also accompanied by the report of an accountant in terms of Section 80HHC(4) of the Act. A copy of the requisite report was also being placed in the Paper Book filed before the Tribunal. It is observed that the receipt by way of sale of quota rights have been shown as a part of total turnover. Secondly, the said gross receipts were taken as part of local turnover and consequently it constituted a part of the "profits of the business". It was on this basis the assessee has thereafter computed its claim under Section 80HHC at Rs. 19,13,15,168 which has since been accepted by the assessing officer in the course of assessment under Section 143(3) of the Act. The first and the foremost aspect that we find expedient to examine is as to whether the claim so made by the assessee and also allowed by the assessing officer in the assessment finalised under Section 143(3) could be said to be prejudicial to the interest of revenue in the context of the stand of the Commissioner that the claim of the assessee had been allowed in a manner not admissible under the Act in respect of the profit on sale of quota rights. In this context, a reference is necessary to the Instruction 23-2-1998 (supra) issued by the CBDT regarding the treatment of premiums received on the transfer of quotas for the purposes of computing deduction under Section 80HHC of the Act, a copy of which has been placed in the Paper Book. We find it convenient to reproduce herein paras 3 and 4 of said Instruction which reads as under: 3. Technically export premium can be equated with the items mentioned in Section 28(iia) (profit on sale of import licences), Section 28(iic) (cash assistance) and Section (iic) (duty drawback).

4. Therefore the present item, viz., the premium on sale of export quotas statutorily receive the same treatment as profits on sale of import licences, cash assistance and duty drawback.

In terms of said Instructions, it is clarified that the profit on sale of quota rights are to be equated with the items mentioned in Section 28(iia) (profits on sale of import licences), 28(iib) (cash assistance) and Section 28(iic) (duty drawback). This would imply that the treatment meted under Section 80HHC to the items specified in Section 28(iia), 28(iib) and 28(iic) is also to be accorded to the income earned by the assessee as profit on sale of quota rights.

Therefore, the proviso to Section 80HHC(3) comes into play whereby the assessee is eligible to further deduction of the amount which bears to 90 per cent of any sum referred to in Section 28(iia), 28(iib) and 28(iic), the sum proportion as the export turnover bears to the total turnover of the assessee. At this stage, it would also be appropriate to refer to the Mumbai Bench decision of the Tribunal in the case of Anil L. Shah (supra) wherein an identical situation has been considered by the Tribunal. The Tribunal held that the quota premium was not includible in computing total turnover but the same was liable to be excluded to the extent of 90 per cent in terms of Explanation (baa) to Section 80HHC of the Act. Thereupon, in terms of CBDT Circular (supra), such income is liable for the deduction in terms of the proviso below Section 80HHC(3) of the Act. Now, once the deduction in this manner is reworked and held to be admissible to the assessee as per law, there does not remain any prejudice to the revenue because of the manner in which the assessing officer has finalised the assessment under Section 143(3) of the Act for the reason that the deduction claimed and allowed by the assessing officer stands on a lower footing. Indeed the Commissioner was correct to say that the assessing officer was wrong in not excluding 90 per cent of the income from sale of quota rights from the 'profits of business' in terms of Explanation (baa) to Section 80HHC but he failed to notice further that such amount is required to be again subjected to relief under Section 80HHC in terms of the proviso to Section 80HHC(3) as mandated by the CBDT Circular 23-2-1998 (supra). It is, therefore, abundantly clear that the income resulting to the assessee from the sale of quota rights is exigible for the benefits envisaged under Section 80HHC and such position has been upheld by the Tribunal in the case of Anil L. Shah (supra) and also in line with the Instruction issued by the CBDT (supra). Thus, in principle, the assessee is entitled to seek relief under Section 80HHC even in respect of the impugned income. However, coming back to the present

controversy, on the basis of the aforesaid discussion, even if we are to uphold the charge of the Commissioner that the assessing officer erred in not applying the correct law to compute the deduction under Section 80HHC yet after the application of the correct legal position, there does not remain any prejudice to the revenue in the order of assessment with respect to computation of deduction under Section 80HHC of the Act. There does remain an error in the assessment but certainly as the facts speak, there does not remain any prejudice to the revenue. Therefore, the twin conditions required to be satisfied by the Commissioner before invoking Section 263, under the present circumstances, does not stand satisfied. Hence, on this preliminary aspect itself, we find that the assumption of jurisdiction by the Commissioner to interfere in the order of assessment made by the assessing officer under Section 143(3), by resorting to Section 263 stands vitiated. As a result, the order of the Commissioner dated 1-2-2005 is liable to be quashed. We hold so.

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