Acit Vs. Malhar Information Services

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Oct-05-2007

Judge : K Thangal, Vice, R Syal

Appellant : Acit

Respondent : Malhar Information Services

Judgement :

1. These appeals are preferred by the Revenue against the respective orders of the CIT(A).

2. The only ground of objection by the Revenue is directed against the order of the CIT(A) in holding that the assessee has fulfilled all the mandatory requirements of Section 80HHE and therefore directing the Assessing Officer to allow the claim under Section 80HHE.3. Assessee is engaged in the business of information vending. During the year under consideration assessee declared sale turnover of Rs. 76,49,949/- and gross profit of Rs. 43,54,225/- @ 60.84%. The net profit shown was Rs. 43,23,039/- @ 56.51%. Assessee claimed deduction under Section 80HHE of Rs. 44,16,671/-. Assessing Officer held that to claim deduction under Section 80HHC the assessee has to comply with the following conditions: (i) Exports out of India, i.e. the assessee is actually exporting computer software (actual exporter). There must be an export; (ii) Consideration in respect of such software received in or brought into India by the assessee; and (iii) Such consideration is received or brought into India in convertible foreign exchange.

Assessee was asked about the nature of business and was required to produce evidence with regard to actual export of computer software/data transmitted out of India by any mode and to establish the nexus between the foreign exchange receipt by the assessee and the export claim by the assessee.

At the hearing on 15^th November, 2002 you had asked about the business and our claim Under Section 80HHE of the Act. Below we are giving in simple layman's terms the nature of business and basis of our claim.

The financial data is stored in our computer and is delivered to our clients via the internet (e-mail and/or FTP) thus there is no customs clearance or shipment, etc. which is required for normal export of goods. We would like to point out that before transmitting the customized electronic data to our customers, we collect various documents, segregate the same, capture the relevant data into a proprietary data base and extract only the required data from the proprietary data base into a format customized and designed earlier specifically for each client and then transmit the same. Between the process of collection and transmission of the data, the same undergoes process of segregation, capture and conversion into customized format.

In data processing projects, the client sends us the documents (physical or as images). The information contained in the documents is captured by us into data files, using internally developed project specific programmes. The data contained in these data files undergoes several quality checks. Upon completion of quality checks the data is extracted from the files, using a project specific conversion programme into a format that has been specified by the client. The converted data is then transmitted to the client via the internet.

Due to the nature of business which involves delivery of data via modern telecommunication facilities, there is no requirement for any customs formalities.

...There are no formal orders. Work is obtained after several interactions with the clients and payments are made by the client for the work delivered.

There is no requirement for registration with any export promotion councils or boards.

We satisfy the conditions required for deduction Under Section 80HHE of the Act and, therefore, we are entitled to deduction of Rs. 44,16,671/- being the profit from export out of India of computer software as defined in Clause (b) of Explanation to Section 80HHE on its transmission from India to places outside India.

5. After discussing the issue in detail Assessing Officer came to the conclusion that assessee could not produce any evidence to establish that software/data has been transmitted out of India. What assessee claimed is that he is engaged in the business of information vending and assessee could not produce any evidence to establishing the nexus between export claim and the consideration received. Assessing Officer further came to the conclusion that assessee failed to comply with RBI regulations. It is pertinent to note that RBI is the competent authority under Section 80HHE r.w.s. 80HHC of the Act. He held that if the export is made out of India and it is established that consideration has been received in lieu of such export then deduction under Section 80HHE would be available to such person. In the instant case assessee has failed to establish and substantiate that there has been export out of India. He further held that assessee could not establish the nexus between export activity and the receipt of foreign exchange. Aggrieved by the above order assessee approached the first appellate authority.

6. It was submitted before the CIT(A) that assessee had satisfied all the three conditions which were essential to claim the benefit of Section 80HHE. Firstly, assessee is in the business of exporting customized data as defined in Clause (b) of Explanation 2 of Section 80HHE. Secondly, assessee has received the entire consideration from export of customized data in convertible foreign exchange within six months of the close of the accounting year and thirdly, assesses has furnished with the return of income for the Assessment Year 2001-02 report of the Chartered Accountants and Auditors M/s. Natvarlal Vepari & Co. certificate in Form No. 10CCAF. It was submitted that, without giving any further opportunity Assessing Officer rejected the claim of the assessee with regard to 80HHE, which violated the principles of natural justice. He collected the information with out

giving opportunity to the assessee and decided the issue against the assessee.

One of the reasons given by the Assessing Officer was that assessee failed to comply with the requirements of RBI. It was submitted before the CIT(A) that the Administrative Directors (AD) (M.A. Series) Circular No. 1 dated 8^th January 1999 categorically says that it is modifying the existing procedure applicable to export of software and the revised procedure is stated in para 2 of the said circular. The circular came into effect from 1^st February 1999. Assessee applied to RBI through its letter dated 24^th January 2003 for rcgularization of the procedure and the RBI by its letter dated 22^nd February 2003 has asked the Union Bank of India, the authorized dealer to regularize the transaction and it was regularized subsequently. With regard to the remand report, it was contended that it harps, absence of the nexus between export of customized vending data and the consideration received. Assessee's Chartered Accountant in para 2(a) of Form 10CCAF has categorically certified that the consideration for export of customized vending data has been received by the assessee in convertible foreign exchange. It was contended that under the existing provision of Section 80HHE, 100% deduction is allowed on profits derived from export of computer software provided the sale consideration is received in or brought into India in convertible foreign exchange. With a view to increasing India's market share in the international arena, the Explanation (b) below Section 80HHE was introduced. Now by virtue of this Explanation the scope has been extended to include any customized electronic data within the meaning of computer software. The benefit of deduction has also been extended to supporting software developers. It was further submitted that with this in view, the proviso to Sub-section (1) and Sub-sections (1A), (3A) and (4A) were also inserted by the Act so that the benefit of export can also be passed on to software developers by software exporting companies. The CIT(A) held that the assessee in fact satisfies all the conditions to avail the benefit of 80HHE. First of all, he held that, the definition of computer software in Clause (b) was amended by Finance (No. 2) Act, 1998 w.e.f. the Assessment Year 1999-2000 to include any programme or any customized electronic data which is transmitted from India to a place outside India by any means.

The claim of the assessee was allowed by the CIT(A) observing as under: Considering the fact that the appellant has fulfilled all the mandatory conditions of Section 80HHE of the Act, the deduction claimed by the appellant cannot be denied by the AO. For the technical objection raised by the AO, as per para 9.6 of the assessment order which is based on the letter received from Dy.

Commissioner of Customs (Appg), Mumbai, dated 30^th January, 2003.

During the course of appellate proceedings, the appellant pointed out that the said letter was not made available to the appellant and the AO relied on the said letter for the purpose of rejecting the claim of the appellant. In the remand report, by the Income Tax Officer, Ward-14(3)-3, Mumbai dated 25^th July, 2003 has mentioned that the letter received from Customs Authorities, contents of which are reproduced in para 8.4 of page 9 of the assessment order, 'this is clearly just the position of law and not any specific detail or evidence about either the assessee or the case under consideration'.

Athe AO has not provided the copy of the letter received from Custom Authorities because it is just a position of law. In such a case, the specific reference to the letter received from the Custom Authority was not required to be mentioned. The basic principle is that if a particular material is used against the appellant, it has to be supplied for rebuttal. In my opinion, the letter should have been supplied to the appellant before it is used for disallowing the claim Under Section 80HHE of the Act. Taking into account, the fact that all the mandatory requirement of Section 80HHE has been fulfilled by the appellant, the deduction claimed by the appellant cannot be denied. The AO, is therefore, directed to allow deduction Under Section 80HHE of the Act to the Appellant.

7. While coming to the above conclusion the CIT(A) also noted that "assessee's clients include reputed companies like James Capel Quantitative Techniques, Edinburgh, UK, Extel Financials, London, UK, Bloomberg LP, USA, MSEI, Geneva, Switzerland who are all big companies and assessee has earned Rs. 53,37,534/- by sending the information which was sought by these Companies. Hence, the activity of the appellant is clearly an export of customized electronic data." Aggrieved by the above order Revenue is in appeal before the Tribunal.

8. The learned DR, on the other hand, supported the order of the Assessing Officer.

9. The learned Counsel for the assessee brought our attention to paper book page 20 to 27, which is a letter addressed to the Assessing Officer dated 21/01/2003. It is mentioned that as regard to declaration, valuation, etc. referred to in the letter by the Assessing Officer were within the domain of Reserve Bank of India and FEMA. By not complying with the procedural aspect of export of computer software in non-physical forms, assessee might have committed technical violation of FEMA but nonetheless assessee substantially adhered to the requirements of FEMA regarding the export of customized electronic data. It was submitted that assessee raised invoice on assessee's customers abroad, remittance for the invoice was received through banking channels and the money was received within 180 days of raising the invoice. Hence, assessee satisfied the conditions. It was further submitted that assessee had taken up the matter with the RBI to regularize the requirement of SOFTEX Form etc. which was necessary procedure to be carried out by the assessee. Assessee's representative again brought our attention to paper book page 29, a letter addressed to RBI for regularization of software export in non-physical form. It is mentioned that assessee was in this field of activity since 1995 and started providing data processing services to clients since 1999 and the data is transmitted using telecommunication facilities through internet and all the details are further given. Page 31 is a letter from the Union Bank of India dated 24th January 2003 with regard to the export of software in non-physical form. The letter is addressed to the Deputy General Manager, RBI. It reads as under: In reference to ADMA Series Circular No. 1 dated 8^th January, 1999, our exporter customers, M/s. Malhar Information Services have submitted details of software exports made by them in non-physical form for the period January, 1999 to December, 2002.

We are forwarding the said details duly certified by us seeking your permission to regularize the transactions. We may mention here that the said exports could not be declared under SOFTEX forms since the exporters/branch were not aware of the provisions. This anomaly was pointed out by the R.B.I. inspectors during their recent inspection of foreign exchange transactions of our branch.

We request you to condone the lapse and permit regularization of transactions.

10. Counsel again brought our attention to paper book page 35, which is a letter from Union Bank of India, which certifies that the transactions of M/s. Malhar Information Services (assessee) that have been referred to RBI have been regularized as per their instructions dated 22^nd February 2003. Assessee's representative submitted that in view of the above the appeals by the Revenue are liable to be dismissed as the irregularities pointed out by the Assessing Officer had been regularized by the RBI.11. Considering the rival submissions and going through the orders of the Revenue authorities, we are of the view that the appeals of the Revenue are liable to be dismissed. Reason for disallowance of assessee's claim of 80HHE was that assessee has violated certain procedural norms. Vide their letter dated 22^nd February 2003, RBI had condoned the procedural lapse and regularized it. Even otherwise in the earlier years on same set of facts under the same circumstances assessee was claiming 80HHE and it was always been allowed. The only difference between the earlier years and the subsequent years is that now the transmission is not by export zone but through internet. As rightly pointed out by assessee's representative, by introduction of Explanation (b) below Section 80HHE w.e.f. 01/04/1999, which reads as under, assessee has undisputedly exported customized electronic data from India to places outside India and it is to be treated as valid export for the purpose of Section 80HHE: Computer software means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data which is transmitted from India to a place outside India by any means.

Therefore, we are of the view that the order of the CIT(A) is in consonance with the law.