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(2012) 02 SC CK 0013

In the Supreme Court Of India

Case No : Civil Appeal No. 1914 of 2012 (Arising out of SLP (C) No. 32450 of 2010) and Civil Appeal No. 4534 of 2008

ACG Associated Capsules Pvt. Ltd. (Formerly Associated Capsules Pvt. Ltd.) — APPELLANT

Vs

The Commissioner of Income Tax, Central-IV, Mumbai
The Commissioner of Income Tax, New Delhi Vs Bharat Rasayan Limited — RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:
Income Tax Act, 1961 — Section 28, 29, 30, 31, 32

Citation : (2012) AIRSCW 2276 : (2012) 247 CTR 372 : (2012) 343 ITR 89 : (2012) 2 JT 362 : (2012) 2 KLT 60 SN : (2012) 2 SCALE 374 : (2012) 3 SCC 321 : (2012) 205 TAXMAN 136

Hon'ble Judges : S.H. Kapadia, C.J.;Swatanter Kumar, J;A.K. Patnaik, J

Bench : Full Bench

Advocate : Rashmikumar Manilal Vithlani, for the Appellant; B.V. Balram Das and N. Ganpathy, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.

CIVIL APPEAL No. OF 2012 (Arising out of SLP (C) No. 32450 of 2010)

1. Leave granted.

2. This is an appeal against the judgment and order dated 06.08.2010 of the Bombay High Court in ITA(L) No. 1276 of 2010 deciding two issues against the Assessee. On the first issue, the High Court has held, relying on its judgment in Commissioner of the Income Tax v. Kalpataru Colors and Chemicals ITA(L) 2887 of 2009, that the entire amount received by an Assessee on sale of the Duty Entitlement Pass Book (for short 'the DEPB') represents profit on transfer of DEPB u/s 28(iiid) of the Income Tax Act, 1961 (for short 'the Act'). We have already decided this issue in favor of the Assessee in a separate judgment in M/s

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Topman Exports v. Commissioner of Income Tax, Bombay, and other connected matters and we have held that not the entire amount received by the Assessee on sale of DEPB, but the sale value less the face value of the DEPB will represent profit on transfer of DEPB by the Assessee. The first issue is, therefore, decided accordingly.

3. For appreciating the second issue, we may refer very briefly to the facts of the case. For the assessment year 2003-04, the Assessee filed a return of income claiming a deduction of Rs. 34,44,24,827/- u/s 80HHC of the Act. The Assessing Officer passed the assessment order deducting ninety per cent of the gross interest and gross rent received from the profits of business while computing the deduction u/s 80HHC and accordingly restricted the deduction u/s 80HHC to Rs. 2,36,25,053/-. The Assessee filed an appeal against the assessment order before the Commissioner of income tax (Appeals), who confirmed the order of the Assessing Officer excluding ninety per cent of the gross interest and gross rent received by the Assessee while computing the profits of the business for the purposes of Section 80HHC. Aggrieved, the Assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal'). The Tribunal held, relying on the decision of the Delhi High Court in Rishi Dev Batra Vs. Dr. (Mrs.) Anup Suri , that netting of the interest could be allowed if the Assessee is able to prove the nexus between the interest expenditure and interest income and remanded the matter to the file of the Assessing Officer. The Tribunal also remanded the issue of netting of the rent to the Assessing Officer with the direction to find out whether the Assessee has paid the rent on the same flats against which rent has been received from the staff and if such rent was paid then such rent is to be reduced from the rental income for the purpose of exclusion of business income for computing the deduction u/s 80HHC. Against the order of the Tribunal, the Revenue filed an appeal before the High Court and the High Court has directed that on remand the Assessing Officer will decide the issue in accordance with the judgment of the High Court in Commissioner of income tax v. Asian Star Company Ltd. (2010) 326 ITR 56 (Bom) in which it has been held that while determining the profits of the business as defined in Explanation (baa) to Section 80HHC, ninety per cent of the gross receipts towards interest and not ninety per cent of the net receipts towards interest on fixed deposits in banks received by the Assessee would be excluded for the purpose of working out the deduction u/s 80HHC of the Act.

4. Learned Counsel for the Appellant submitted that it will be clear from the Explanation (baa) that ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits will be excluded for determining the profits and gains of business or profession. He argued that as the net receipts and not the gross receipts towards interest and rent are included in profits and gains of business or profession, ninety per cent of such net interest and net rent and not ninety per cent of gross interest and gross rent are to be excluded for determining the profits of the business under Explanation (baa) to Section 80HHC of the Act.

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5. In support of this argument, Learned Counsel for the Appellant relied on the decision of this Court in Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, in which a Constitution Bench of this Court has held that only the dividends computed in accordance with the provisions of the Act, which is included in the gross total income of the domestic company, shall be taken into account for working out the relief u/s 80M of the Act. He cited the judgment in Commissioner of income tax v. Shri Ram Honda Power Equip (supra) in which the Delhi High Court has taken a view that the word 'interest' in Explanation (baa) to Section 80HHC connotes 'net interest' and not 'gross interest' and, therefore, in deducting such interest, the Assessing Officer will have to take into account the net interest, i.e. gross interest as reduced by expenditure incurred for earning such interest. He submitted that the Karnataka High Court in Commissioner of income tax v. Gokuldas Exports, etc. (2011) 333 ITR 214 (Karn) has taken a similar view relying on the decision of the High Court in Commissioner of income tax v. Shri Ram Honda Power Equip (supra).

6. Learned Counsel for the Appellant referred to the Memorandum to Finance (No. 2) Bill, 1991 explaining the rationale of Explanation (baa) in which inter alia it is stated that as some expenditure might be incurred in earning such incomes, which in the generality of cases is part of common expenses, and thus ad-hoc 10 per cent deduction from such incomes have been provided for to account for these expenses. He submitted that the High Court has not correctly appreciated the Memorandum and has held, relying on the Memorandum, that gross interest and gross rent have to be deducted under Explanation (baa) to Section 80HHC to avoid a distorted figure of export profits.

7. Learned Counsel for the Revenue, on the other hand, relied on the reasons given by the Bombay High Court in Commissioner of income tax v. Asian Star Company Ltd. (supra) and submitted that the Bombay High Court has rightly held that ninety per cent of the gross amount received towards interest and rent have to be excluded from the profits and gains of business for computing the profits of the business as defined in Explanation (baa) to Section 80HHC of the Act. He also relied on the Memorandum to the Finance (No. 2) Bill 1991 in support of his submission that ninety percent of the gross interest and gross rent has to be deducted from the profits of the Assessee under Explanation (baa).

8. Before we deal with the contentions of Learned Counsel for the parties, we may extract Explanation (baa) to Section 80HHC of the Act.

Explanation: For the purposes of this section,-

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

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(2) the profits of any branch, office, warehouse or any other establishment of the Assessee situate outside India.

9. Explanation (baa) extracted above states that "profits of the business" means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by the receipts of the nature mentioned in Clauses (1) and (2) of the Explanation (baa). Thus, profits of the business of an Assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of Section 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business u/s 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the Assessee computed under the head "Profits and Gains of Business or Profession" from which deductions are to made under Clauses (1) and (2) of Explanation (baa).

10. Under Clause (1) of Explanation (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "Profits and Gains of Business or Profession". The expression "included any such profits" in Clause (1) of the Explanation (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "Profits and Gains of Business or Profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of receipts cannot be reduced under Clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in Clause (1) which is actually included in the profits of the Assessee is to be deducted from the profits of the Assessee for determining "profits of the business" of the Assessee under Explanation (baa) to Section 80HHC.

11. For this interpretation of Explanation (baa) to Section 80HHC of the Act, we rely on the judgment of the Constitution Bench of this Court in Distributors (Baroda) P. Ltd. v. Union of India and Ors. (supra). Section 80M of the Act provided for deduction in respect of certain intercorporate dividends and it provided in Sub-section (1) of Section 80M that "where the gross total income of an Assessee being a company includes any income by way of dividends received by it from a domestic company, there shall, in accordance with and subject to the provisions of this Section, be allowed, in computing the total income of the

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Assessee, a deduction from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this Section. The Constitution Bench held that the Court must construe Section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in Sub-section (1) of Section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included. Similarly, Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in Clause (1) of Explanation (baa) has not been included in the profits of business of an Assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC.

12. If we now apply Explanation (baa) as interpreted by us in this judgment to the facts of the case before us, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax u/s 28 of the Act, and if any quantum of the rent or interest of the Assessee is allowable as an expense in accordance with Sections 30 to 44D of the Act and is not to be included in the profits of the business of the Assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt of rent or interest will not be deducted under Clause (1) of Explanation (baa) to Section 80HHC. In other words, ninety per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the Assessee as computed under the head "Profits and Gains of Business or Profession", is to be deducted under clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business.

13. The view that we have taken of Explanation (baa) to Section 80HHC is also the view of the Delhi High Court in Commissioner of income tax v. Shri Ram Honda Power Equip (supra) and the Tribunal in the present case has followed the judgment of the Delhi High Court. On appeal being filed by the Revenue against the order of the Tribunal, the High Court has set aside the order of the Tribunal and directed the Assessing Officer to dispose of the issue in accordance with the judgment of the Bombay High Court in Commissioner of income tax v. Asian Star Company Ltd. (supra). We must, thus, examine whether reasons given by the High Court in its judgment in Commissioner of income tax v. Asian Star Company Ltd. (supra) were correct in law.

14. On a perusal of the judgment of the High Court in Commissioner of income

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tax v. Asian Star Company Ltd. (supra), we find that the reason which weighed with the High Court for taking a different view, is that rent, commission, interest and brokerage do not possess any nexus with export turnover and, therefore, the inclusion of such items in the profits of the business would result in a distortion of the figure of export profits. The High Court has relied on a decision of this Court in Commissioner, Income Tax, Thiruvananthapuram Vs. K. Ravindranathan Nair, in which the issue raised before this Court was entirely different from the issue raised in this case. In that case, the Assessee owned a factory in which he processed cashew nuts grown in his farm and he exported the cashew nuts as an exporter. At the same time, the Assessee processed cashew nuts which were supplied to him by exporters on job work basis and he collected processing charges for the same. He, however, did not include such processing charges collected on job work basis in his total turnover for the purpose of computing the deduction u/s 80HHC(3) of the Act and as a result this turnover of collection charges was left out in the computation of profits and gains of business of the Assessee and as a result ninety per cent of the profits of the Assessee arising out of the receipt of processing charges was not deducted under Clauses (1) of the Explanation (baa) to Section 80HHC. This Court held that the processing charges was included in the gross total income from cashew business and hence in terms of Explanation (baa), ninety per cent of the gross total income arising from processing charges had to be deducted under Explanation (baa) to arrive at the profits of the business. In this case, this Court held that the processing charges received by the Assessee were part of the business turnover and accordingly the income arising there from should have been included in the profits and gains of business of the Assessee and ninety per cent of this income also would have to be deducted under Explanation (baa) u/s 80HHC of the Act. In this case, this Court was not deciding the issue whether ninety per cent deduction is to be made from the gross or net income of any of the receipts mentioned in Clause (1) of the Explanation (baa).

15. The Bombay High Court has also relied on the Memorandum explaining the clauses of the Finance Bill, 1991 contained in the circular dated 19.12.1991 of the Central Board of Direct Taxes to come to the conclusion that the Parliament intended to exclude items which were unrelated to the export turnover from the computation of deduction and while excluding such items which are unrelated to export for the purpose of Section 80HHC, Parliament has taken due note of the fact that the exporter Assessee would have incurred such expenditure in earning the profits and to avoid a distorted figure of export profits, ninety per cent of the receipts like brokerage, commission, interest, rent, charges are sought to be excluded from the profits of the business. In our considered opinion, it was not necessary to refer to the explanatory Memorandum when the language of Explanation (baa) to Section 80HHC was clear that only ninety per cent of receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits computed under the head profits and gains of business of an Assessee could be deducted under Clause (1)

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of Explanation (baa) and not ninety per cent of the quantum of any of the aforesaid receipts which are allowed as expenses and therefore not included in the profits of business of the assessee.

16. In the result, we allow the appeal and set aside the impugned order of the High Court and remand the matter to the Assessing Officer to work out the deductions from rent and interest in accordance with this judgment. No costs.

CIVIL APPEAL No. 4534 of 2008

17. This is an appeal against the order dated 19.01.2007 of the Delhi High Court in I.T.A. No. 541 of 2006.

18. The facts of this case very briefly are that Bharat Rasayan Limited (for short 'the Assessee') filed a return of income tax claiming a deduction of Rs. 72,76,405/- u/s 80HHC of the Act. In the assessment order, the Assessing Officer held that ninety per cent of the gross interest has to be excluded from the profits of the business of the Assessee under Explanation (baa) to Section 80HHC of the Act and deducted ninety per cent of the gross interest of Rs. 50,26,284/- from the profits of the business of the Assessee. The Assessee preferred an appeal contending that only ninety per cent of the net interest should have been deducted from the profits of the business of the Assessee under Explanation (baa) to Section 80HHC, but the Commissioner of Income Tax (Appeals) rejected this contention of the Assessee. Aggrieved, the Assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal') and the Tribunal allowed the appeal of the Assessee and held that the Assessee was entitled to deduct the expenses from the interest received and only ninety per cent of the net amount of interest could be excluded under Explanation (baa) to Section 80HHC and remitted the matter to the Assessing Officer to examine whether there is factually an excess between the interest paid and interest received and take a fresh decision. The Revenue filed an appeal against the order of the Tribunal before the High Court, but by the impugned order the High Court following its decision in Commissioner of income tax v. Shri Ram Honda Power Equip (supra) sustained the order of the Tribunal and dismissed the appeal.

19. We have held in our judgment in the case of M/s ACG Associated Capsules Pvt. Ltd. v. Commissioner of Income Tax that ninety per cent of not the gross interest but only the net interest, which has been included in the profits of the business of the Assessee as computed under the heads 'Profits and Gains of Business or Profession' is to be deducted under Clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business. Since, the view taken by the High Court in the impugned order is consistent with our aforesaid view, we find no merit in this appeal and we accordingly dismiss the same. There shall be no order as to costs.

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