(2013) 11 P&H CK 0274

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No''s. 234 and 277 of 2009

Broadway Overseas Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Citation : (2014) 265 CTR 49

Hon'ble Judges : Rajive Bhalla, J;Bharat Bhushan Parsoon, J

Bench : Division Bench

Advocate : S.K. Mukhi, for the Appellant; Vivek Sethi, for the Respondent

Judgement

Dr. Bharat Bhushan Parsoon, J.—These two appeals arise out of a joint order dt 30th Oct., 2008 (Annex. A-1) passed by the income tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as, the Tribunal) in ITA Nos. 327 and 328/Asr/2008 pertaining to the asst. yrs. 2001-02 and 2003-04. Both the appeals have been taken up together as question of law involved therein is the same. For convenience and clarity, facts of appeal No. 234 of 2009 are being referred to.

2. The appellant-assessee is engaged in the manufacture and export of fence fittings. Assessment for the asst. yr. 2001-02 was finalised under s. 143(3) of the IT Act, 1961 (for short, the Act) by the AO on 27th March, 2006. The assessee had claimed deduction under ss. 80HHC and 80-IB of the Act. The deduction under s. 80HHC of the Act was allowed at Rs. 1,48,94,112 without reducing therefrom the deduction allowed under s. 80-IB at Rs. 47,35,855.

The CIT, Jalandhar-1, Jalandhar invoking the provisions of s. 263 of the Act issued notices dt. 20th March, 2008 and 25th March. 2008 (Annex. A-5). Vide order dt. 28th March. 2008 (Annex. A-2), disagreeing with the stand taken in reply dt. 27th March, 2008 (Annex. A-4) by the assessee, the CIT directed the AO to recompute the total income of the assessee keeping in view the provisions of s. 80-IB(13) r/w s. 80-IA(9) of the Act.

Aggrieved with this order, the assessee had approached the Tribunal where orders of the CIT were affirmed and appeals of the assessee, consequently, were dismissed.

3. In the present appeal, following substantial questions of law had been put forth for answer by the appellant/assessee:

(i) That the Tribunal was not justified on facts and in law in confirming the action of CIT under s. 263 in holding the findings of the AO as erroneous in so far it is prejudicial to the interests of Revenue and thereby setting aside the assessment in holding that the claim of deduction under s. 80HHC and its allowability by the AO without reducing therefrom the deduction under s. 80-IB is bad in law, which is against the established principle of law pertaining to powers of CIT for revision under s. 263, wherein it has been held that in case the AO has adopted one possible view, the order of the AO cannot be held to be erroneous as confirmed by Hon''ble Supreme Court of India in the case of MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, .

(ii) That the Tribunal was not justified on facts and in law in confirming the action of CIT under s. 263 in holding the findings of the AO as erroneous in so far it is prejudicial to the interests of Revenue and thereby revising the assessment in holding that the claim of deduction under s. 80HHC and its allowability by the AO without reducing there from the deduction under s. 80-IB is bad in law, without appreciating the established principles of law as so laid down by Hon''ble Supreme Court of India in the case of Joint Commissioner of Income Tax Vs. Madideep Engg. and Pkg. India (P.) Ltd., . wherein it was held that ''Deductions under various sections i.e., 80HH and 80-I are independent''.

(iii) Whether on the facts and in the circumstances of the case the Tribunal was justified in concurring with the action of the CIT under s. 263 thereby wrongfully revising the assessment and directing the AO to recompute the total income of the assessee by keeping in view the provisions of ss. 80-IB(13) r/w s. 80-IA(9) as Interpreted by the Special Bench of the Tribunal in the case of Rogini Garments (supra) which is bad in law.

(iv) Whether the Tribunal was justified in concurring with the orders of CIT in holding that the order of AO was erroneous by holding that the decision in the case of SCM Creations Vs. Assistant Commissioner of Income Tax, pertains to deduction regarding 80HH and 80-I which did not contain any provisions similar to s. 80-IA(9A) which is factually incorrect as first of all there is no such provision like 80-IA(9A) and even if Tribunal meant 80-IA(9) even then Tribunal is not justified because the decision of the Hon''ble Madras High Court in SCM Creations (supra) was relating to deduction under s. 80-IA and 80HHC and not regarding s. 80HH and 80-I as so held by the Tribunal. Thus meaning thereby Hon''ble Madras High Court has dealt with the provisions of s. 80-IA which does include s. 80-IA(9), so that the holdings of the Tribunal while confirming the orders under s. 263 by the CIT is erroneous and needs interference by this

Hon''ble Court.

(v) That the Tribunal has erred In sustaining the order of CIT under s. 263 on altogether different ground which is unwarranted under any provisions of the IT Act 1961.

(vi) That the orders of the Tribunal and CIT are legally unsustainable and bad in law and perverse.

4. Assailing powers of the CIT of revision under s. 263 of the IT Act, 1961, seeking support from MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , it is claimed by the appellant-assessee that if order of the AO had incidentally resulted in loss to the Revenue, it could not be said to be erroneous particularly when the AO had adopted one of many possible views. It Is claimed that merely because the CIT took recourse to another possible view, he could not have Invoked s. 263 of the Act, as in addition to being prejudicial to the interests of the Revenue, order of the AO co-jointly was required to be adjudged erroneous as well. To buttress his argument, counsel for the appellant has referred to following extract from Malabar Industrial Co. Ltd. (supra):

The phrase prejudicial to the interest of the Revenue'' has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law....

5. It is further urged by learned counsel for the appellant-assessee that the AO was not oblivious of the provisions of s. 80-IB(13) and s. 80-IA(9) of the Act as in notice dt. 2nd Nov., 2005 (Annex. A-7), the AO had made reference to these provisions. Para 3 of the notice repeatedly referred to by the assessee is reproduced as below:

Further it is seen that deduction under s. 80-IB and 80HHC have not been computed considering the provisions of sub s. (13) of s. (9) of s. 80-IA. Show cause why the amount of profits and gains claimed and allowed under s. 80-IB be not allowed under s. 80HHC.

6. Per contra, claim of the Revenue is that the assessee was allowed deduction under s. 80HHC of the Act to the tune of Rs. 1,48,94,112 without reducing therefrom deduction of Rs. 47,35,885 allowed to it under s. 80-IB of the Act. The CIT had come to the prima facie conclusion that the order of the AO was erroneous as also was prejudicial to the interest of the Revenue. Thus, twin conditions i.e. erroneous nature of the order as also it being prejudicial to the interest of the Revenue, had been satisfied by the CIT. Thus, proceedings of CIT under s. 263 of the Act were valid and the Tribunal had rightly upheld the same.

7. We have heard counsel for the parties, while going through the paper books.

8. To adjudicate the matter in controversy, not only provisions of s. 80HHC and 80-IB are to be gone into but even provisions of s. 80-IB(13) and of s. 80-IA(9) are also to be appraised.

9. The AO framing the assessment under s. 143(3) of the Act vide order dt. 27th March. 2006 had allowed assessee''s claim for deduction under s. 80HHC as also under s. 80-IB without application of provisions of s. 80-IB(13) r/w s. 80-IA(9) of the Act.

10. A perusal of the order of the AO reveals that wittingly or unwittingly, consciously or unconsciously, this order does not refer to the provisions of s. 80-IB(13) and s. 80-IA(9) of the Act. It is strange that when the AO had insight into the provisions of s. 80-IB(13) and s. 80-IA(9) as is reflected in notice (Annex. A-7), why no reference was made in the order (Annex. A-3), it is intriguing. It remains a fact that intentionally or unintentionally, no effect was given to the provisions of s. 80-IB(13) and s. 80-IA(9) of the Act. Because of omission of these provisions, order Annex. A-3 was rendered erroneous and undoubtedly was prejudicial to the interest of the Revenue as well.

11. From a co-joint reading of show-cause notice and order Annex. A-3, it transpires that the AO knew it well that the only course available for allowing deductions, was on consideration of provisions of s. 80-IB(13) and s. 80-IA(9) of the Act along with s. 80HHC and 80-IB, but leaving that course, the AO simply allowed deductions under s. 80-IB as also under s. 80HHC without even making reference to the provisions of s. 80-IB(13) and s. 80-IA(9) of the Act. Clearly enough, the view taken by the AO is unsustainable in law.

12. Learned counsel for the appellant-assessee referring to Joint Commissioner of Income Tax Vs. Madideep Engg. and Pkg. India (P.) Ltd., has claimed that both the provisions are independent and do not impinge upon domain and sweep of each Other. When confronted with this issue by the Revenue side, the appellant has conceded that in this authority provisions of ss. 80HHC and 80-IB of the Act, much less in correlation with s. 80-IB(13) and s. 80-IA(9) of the Act, were not in issue. Sequelly, the assessee has not been able to convince as to how Jt. CIT v. Mandideep Eng. & Pkg. Ind. (P) Ltd. (supra) comes to its rescue. Claim of the assessee that reasons for invoking provisions of s. 263 of the Act and justification provided for such invocation in the order of Tribunal are different, also has no merit. When the reasons given for invocation of provisions of s. 263 in the context of show-cause notice of 20th March, 2008 (Annex. P5) are read in relation to detailed discussion made in the impugned order Annex. A-1, it transpires that there is no dichotomy inter se. Relevant portion of show-cause notice Annex. A-5 is reproduced as below:

3. Examination of record further reveals that during the period relevant to the assessment year under consideration the assessee was allowed deduction under s. 80HHC amounting to Rs. 1,48,94,112 without reducing from profit of the

business the deduction under s. 80-IB allowed to the extent of Rs. 47,35,885. The law requires that for computation of deduction under s. 80HHC, deduction allowed under s. 80-IB is to be deducted from the profits and gains of business as required by the provisions of s. 80-IA(9) of the IT Act, 1961....

13. Now reference to order Annex. A-I of Tribunal would be of avail, relevant portion whereof, is appended as below:

9. In s. 80-IA of the Act, deduction is allowable in respect of profits and gains from industrial undertaking or enterprises engaged in infrastructure development etc. equal to 100 per cent of profits and gains derived from such business for 10 consecutive assessment years. Sub-s. (9) provides for computation of procedure which clearly provides that deduction to the extent of such profits and gains shall not be allowed under other provisions of Chapter VI-A on which the assessee has claimed and allowed deduction under s. 80-IA. There does not exist any ambiguity in the mandate of the statute in the context of s. 80-IA(9). The prescription of section makes it very clear that where any amount of profits and gains is claimed and allowed under s. 80-IA for any assessment year deduction to that extent of such profits and gains shall not be allowed under any other provisions of Chapter VI-A.

14. It may be recapitulated that CIT vide order dt. 28th March, 2008 (Annex. A-2), has remitted the case to the AO for recomputing the total income of the assessee keeping in view the provisions of s. 80-IB(13) r/w s. 80-IA(9) in correlation with ss. 80HHC and 80-IB. Reference to Rogini Garments of Special Bench of Tribunal (infra) was merely illustrative. Merely because in order of Tribunal while referring to s. 80-IA(9) due to typographical error, it has been mentioned as s. 80-IA(9A), the order does not become bad in law.

15. Sequelly, authority cited by the appellant reported as Commissioner of Income Tax Vs. Jagadhri Electric Supply and Industrial Co., does not support the case of the appellant as in the said authority, the Tribunal had upheld the action of the CIT on an altogether different ground than the ground taken by CIT while acting under s. 263 of the Act, unlike the position available in the present case, wherein there is no such dichotomy regarding the reasons cited by CIT while invoking s. 263, with the reasons given by the Tribunal while supporting the action of CIT.

16. At this stage, reference may be made to orders dt. 18th April, 2011 passed in IT Appeal No. 469 of 2010 (Asian Exim International v. CIT) and 21st April, 2011 passed in IT Appeal No. 371 of 2007 [CIT v. Davinder Exports] and 20th Sept., 2010 passed in IT Appeal No. 456 of 2010, Friends Castings (P) Ltd. v. CIT, wherein there is consistent view of this High Court. Relevant portion of the judgment dt. 20th Sept., 2010 [reported at Friends Castings (P) Ltd. Vs. Commissioner of Income Tax, Ed.] in Friends Castings (P) Ltd.''s case (supra) reads as under:

8. Learned counsel for the assessee was unable to point out that the approach of

the authorities below was contrary to any statutory provision except to urge that the view taken by the Tribunal is erroneous as under s. 80-IA(9) which are also applicable in view of s. 80-IB(13), the only restriction is that deduction should not exceed the total profits and gains, and the restriction that deduction claimed and allowed under s. 80-IA or 80-IB could not be allowed under any other provision should be read in the light of condition of deduction not exceeding total profits and gains.

9. We are unable to accept the submission.

10. The restriction under s. 80-IA(9) is not only that the total deduction should not exceed profits and gains, there is a further restriction that deduction allowed under s. 80-IA or 80-IB will be a bar to claim deduction under any other provision of the chapter.

17. More recently, this aspect has been dealt with at length in Commissioner of Income Tax Vs. Abhishek Industries Ltd., Ed.]. In this judgment, authority cited as Commissioner of Income Tax Vs. Honda Siel Power Products Ltd., , cited by the assessee has also been referred to. (2007) 108 ITD 49 , CIT v. Honda Siel Power Products Ltd. (supra) as also Commissioner of Income Tax Vs. Max India Ltd., , Coordinate Bench of this Court had come to a firm finding that if an assessee has claimed deduction of profit or gains under s. 80-IB, deduction under s. 80HHC is to be granted after reduction to the extent already allowed under s. 80-IB.

18. Quoting Rogni Garment''s case (supra), para 42 from the said judgment was reproduced which is also being appended here below:

42......Sec. 80HHC is part of Chapter VI-A. Hon''ble jurisdictional High Court in the case of CIT v. Sharon Vaneers (P) Ltd., Tax Case (Appeal) No. 62 of 2004 dt. 26th Feb., 2007 [reported at Commissioner of Income Tax-III Vs. Sharon Vaneers P. Ltd., Ed.], has made it clear that it is not correct to say that s. 80HHC of the Act is a self-contained provision. The deduction cannot be allowed ignoring the restrictive clause contained in s. 80-IA(9). The restrictive clause in s. 80-IA makes it abundantly clear that wherever deduction under any other section of Chapter VI-A(C) is claimed, the computation will be subject to the restrictions laid down in s. 80-IA(9). It precludes ''pro tanto'', all the deductions of such profits and gains claimed under Chapter VI-A(C). Sec. 80HHC is part of Chapter VI-A(C). It is not a self-contained provision. There is absolutely no ambiguity on this aspect. We are therefore of the opinion that relief under s. 80-IA should be deducted from the profits and gains of the business before computing relief under s. 80HHC of the Act.

19. Referring to various other authorities thereafter and taking note of facts of that particular case where disagreeing with CIT, the Tribunal had upheld order of the AO, allowing deductions under ss. 80-IB as also 80HHC of the Act, Coordinate Bench of this Court has held as under:

13. We are, further, of the firm view that nothing should be left at the whims and fancies of the AO while making assessment of income tax on the questions purely of law. Otherwise, it will bring ridicule to the system of assessment and end up with dangerous results. If for example one AO takes a particular view point, out of the two possible views while interpreting the provisions and the AO of another area takes the other possible view, that would lead to anomalous situations. The Tribunal has held in this case that the AO adopted one of the two possible views and therefore, there was nothing wrong. What restrained the Tribunal to discuss and determine the scope of plain meaning of the provisions of s. 80-IA(9)? The decision of Tribunal was always subject to challenge either by the Department or the assessee before the higher forums.

20. Sequelly, reversing order of the Tribunal, order of CIT was restored holding that deduction under s. 80HHC was to be reduced to the extent it had already been allowed under s. 80-IB of the Act.

21. Summing up the entire controversy, in conclusion, it is held that when provisions of s. 80-IB(13) are read in conjunction with s. 80-IA(9) of the Act, it becomes clear that deduction under s. 80HHC of the Act is to be computed on the eligible business profits only after reducing therefrom the portion of profit on which deduction has already been availed by the assessee under this section i.e. s. 80-IB. In other words, if an assessee has claimed deduction of profit or gains under s. 80-IB, deduction to that extent is not to be allowed under s. 80HHC.

22. From the discussion as made earlier, all the questions posed by the appellant are decided in favour of the Revenue and against the assessee. Sequelly, in terms of orders of CIT (Annex. A-2), affirmed by Tribunal (Annex. A-1), the AO has been rightly directed to recompute the total income of the assessee keeping in view provisions of s. 80-IB(13) r/w s. 80-IA(9) of the Act. Dismissed accordingly.

