(2013) 01 MAD CK 0255

In the Madras High Court

Case No : Tax Case (Appeal) No''s. 2667 to 2670 of 2006

CIT APPELLANT

Vs

Vijay Granites (P.) Ltd. RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:

Citation : (2013) 01 MAD CK 0255

Hon'ble Judges : S. Vimala, J;N. Paul Vasantha Kumar, J

Bench : Division Bench

Advocate : TN. V. Balaji for J. Narayanaswamy, for the Appellant; P.J. Risikesh, for the Respondent

Final Decision : Disposed Off

Judgement

S. Vimala, J.—The Revenue has preferred the above appeals against the orders of the income tax Appellate Tribunal, dated February 28, 2001, in I.T.A. Nos. 2022, 2023, 2024 and 2025/Mds/1992, covering the assessment years 1986-87, 1987-88, 1988-89 and 1989-90, respectively. In all these cases, as common question of law arises for consideration and also as the common order has been passed by the income tax Appellate Tribunal, common judgment is pronounced.

2. The assessee is the company engaged in the business of granites in the name of M/s. Vijay Granites Pvt. Ltd. The assessee-company filed its returns for the years 1986-87, 1987-88, 1988-89 and 1989-90. In respect of the assessment years 1986-87 to 1988-89, assessment was reopened u/s 147 of the income tax Act, 1961 (hereinafter will be referred to as "the Act") and in respect of the assessment year 1989-90, there was regular assessment u/s 143(3) of the Act.

3. In the original assessment, in respect of the assessment years 1986-87 to 1988-89, the assessees claim for investment allowance under sections 32A and 32AB of the Act was rejected by the Assessing Officer on the ground that assessee is not engaged in any industrial activity. On the very same ground, the assessees claim for deduction u/s 80I was also rejected. However, the assessee

was granted deduction u/s 80HHC for the years 1986-87 to 1988-89.

4. On appeal, the Commissioner of income tax (Appeals) directed the Assessing Officer to grant investment allowance and also deduction u/s 80I for all these years. Aggrieved over that, the Revenue preferred appeals to the income tax Appellate Tribunal. The Tribunal sustained the orders of the Commissioner of income tax.

5. Though the deduction u/s 80HHC was allowed by the Assessing Officer for all the three years the assessments were reopened u/s 148 of the Act to withdraw the deduction u/s 80HHC pursuant to the decision rendered by the Apex Court in the case of Stonecraft Enterprises Vs. Commissioner of Income Tax, . The original assessment in respect of the year 1989-90 was also completed without giving deduction u/s 80HHC.

6. The assessee went on appeal to the Commissioner of income tax. The Commissioner (Appeals) directed granting of deduction u/s 80HHC for all the four years. On appeal by the Department, the Tribunal also held that assessee is eligible for investment allowance, i.e., deduction u/s 80I and also deduction u/s 80HHC of the Act. The Tribunal distinguished the decision of the Apex Court in the case of Stonecraft Enterprises Vs. Commissioner of Income Tax, , since in that case, details regarding activities carried on by the assessee were not produced before the Apex Court. The Tribunal also relied upon Circular No. 729, dated November 1, 1995 (see (1995) 216 ITR (St.) 141), wherein it has been clarified that once mechanical process, is carried on the granite, deduction u/s 80HHC can be allowed. The contention of the Revenue that the amendment made by the Finance (No. 2) Act of 1991 introducing Schedule XII is effective only from the assessment year 1991-92 and in respect of the earlier years, the granite is covered only by the provisions of section 80HHC(2)(b)(ii) of the Act, was rejected. The Tribunal came to the conclusion that the amendment made through Finance (No. 2) Act of 1991 and the circular dated November 1, 1995 was retrospective in effect.

7. Aggrieved over that, the Revenue has preferred the appeal raising the following substantial questions of law:

(i) Whether, on the facts and in the circumstances of this case, the Tribunal was correct in holding that the deduction u/s 80HHC granted to the assessee, even though the amendment made by the Finance (No. 2) Act of 1991 introducing Schedule XII is effective from the assessment year 1991-92 only is valid in law?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled to the allowance claimed u/s 80HHC retrospectively is valid in law?

(iii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding, even though the assessee is not engaged in the industrial activity, the claim for deduction u/s 80I of the income tax Act is valid in law?

The main contention of the learned counsel for the Revenue-appellant is that the Tribunal was incorrect in holding that the deduction granted to the assessee u/s 80HHC is valid in law, even though the amendment made by the Finance (No. 2) Act of 1991, introducing Schedule II is effective only from the assessment year 1991-92 and that the amendment is retrospective in nature.

7.1. Section 80HHC of the Act provides that where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise, to which this section .applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction equal to the aggregate of 4 per cent of the net foreign exchange, realisation and 50 per cent of so much of the profit derived by the assessee from the export of such goods or merchandise as exceed 4 per cent. of the net foreign exchange realised. Sub-section (2)(b) of section 80HHC of the Act provides that this section does not apply to the following goods or merchandise, namely, (i) mineral oil, and (ii) minerals and ores.

7.2. The contention of the Revenue is governed by the decision reported in Gem Granites Vs. Commissioner of Income Tax, Tamil Nadu, wherein it was held that the cut and polished granite would also be a mineral and export thereof would not qualify for the special deduction under the unamended section 80HHC(2)(b) of the Act it was further held by the Supreme Court that every statute is prima facie prospective, unless it is expressly or by necessary implication made to have retrospective operation.

7.3. Therefore, in view of the Apex Court decision, issue Nos. 1 and 2 is answered in favour of the Revenue and as against the assessee.

8. The second contention of the Revenue is that the assessee is not at all engaged in the industrial activity and, therefore, the claim for deduction u/s 80I of the Act granted by the Appellate Tribunal is not valid in law.

8.1. To claim deduction u/s 80I of the Act, it is necessary that the industrial undertaking should manufacture or produce any article or thing.

8.2. Learned counsel for the Revenue relied upon the following decisions in order to support the contention that the assessee is not engaged in any industrial activity manufacturing or producing any article or thing and, therefore, not entitled to deduction u/s 80I of the Act:

(i) The Commissioner of Income Tax Vs. Vijay Granites P. Ltd., . In the facts and circumstances of the case, it was held that the act of cutting and polishing granite slabs before exporting them did not involve any process of manufacture or production to entitle the assessee to the benefit u/s 32A or section 80I of the Act.

(ii) Contending that when it is not established that the activity of the assessee would amount to manufacturing activity, the assessee is not entitled to deduction u/s 80I of the Act, the decision reported in The Commissioner of Income Tax Vs. Pooshya Exports (P) Ltd., is relied upon, whereunder it has been observed as follows (page 425):

... there is absolutely no materials on record to indicate as to how the rough granite block become value added granite, which were exported by the assessee. In the statement of case, it is stated that the assessee does the business of quarrying and mining of granite and exporting them as finished goods. In the assessment order it is stated that the business of the assessee is export of raw granite blocks and no processing and manufacturing activities are involved. The Commissioner (Appeals) has stated that the assessee has given a long note as to how the work of the assessee involved manufacture. But thoroughly failed to discuss any of the processes as given in the note. The Tribunal in its turn simply jumped to the conclusion on the premise that cutting the rough edges processing in different sizes, shapes colour would amount to manufacture, without discussing the process involved. In the absence of any particulars on record to construe that the exported granites are value added, even assuming that the Circular is explanatory and as such the benefit u/s 80HHC is available for the assessment year under consideration, the benefits in our view cannot be granted to the assessee.

8.3. Relying upon the very same decision, the learned counsel for the assessee contended that the mistake of the CIT/Tribunal shall not cause prejudice to the rights of the assessee and it is a fit case to remand with liberty to both sides to adduce evidence with regard to details regarding the type of activity carried on by the assessee.

8.4. A perusal of the order passed by the Tribunal only goes to show that there is a passing reference about the assessee exporting the granite stones cut and processed to foreign countries. How the processing is done is not explained. Whether the act of cutting and polishing granite slabs would amount to manufacture or production, in the facts and circumstances of these four cases, entitling the assessee to claim the benefit u/s 32A or section 80I of the Act would depend upon the facts and evidence, available/to be produced, by the assessee/ Revenue.

8.5. It is relevant to quote the decision of the Supreme Court ASPINWALL and CO. LTD. Vs. Commissioner of Income Tax, , wherein the word "manufacture" has been extensively dealt with. The important observations reads thus (page 327):

The word manufacture has not been defined in the Act. In the absence of a definition of the word manufacture it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity.

8.6. Considering the ratio of the decision referred to above and considering the order passed by income tax Appellate Tribunal, this court is of the view that there is ho evidence to come to a definite conclusion as to whether the assessee is doing manufacturing activity or not and it is appropriate to remand the matter to the Assessing Officer for the purpose of eliciting and proving the same Therefore, issue No. 3 needs to be remanded to the Assessing Officer.

In the result, the appeal is disposed of, answering issues Nos. 1 and 2 against the assessee and remitting issue No. 3 back to the Assessing Officer. The Assessing Officer is directed to dispose of the tax case within a period of three months from the date of the receipt of the copy of this order. No costs.