

(1999) 07 KAR CK 0021

In the Karnataka High Court

Case No : ITRC No. 440 of 1998 31 July 1999

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

GOD GRANITES

RESPONDENT

Date of Decision : 31-07-1999

Acts Referred:

Income Tax Act, 1961 — Section 143 (1) (a), 80 HHC

Citation : (1999) 156 CTR 327

Hon'ble Judges : R. Gururajan, J;Ashok Bhan, J

Bench : Full Bench

Advocate : E.R. Indrakumar, for the RevenueChidambaram for M.R. Achar, Yishore Mallya and N Mohole, for the Assessee, for the Appellant;

Judgement

Ashok Bhan, J. This judgment shall dispose of WA 3783/1995 arising from the order passed in WP No. 15449/1995 relating to the assessment year 1992-93, ITRC No. 440/1998 also related to the assessment year 1992-93, WP No. 18303/1996 relating to the assessment year 1991-92 and WP No. 12270/1996 relating to the assessment year 1993-94, as the central dispute between the parties in these cases is same/similar. Difference of facts leading to multiple and divergent proceedings is being indicated. Due to multiple and divergent proceedings different reliefs have to be given which are also being indicated. Facts in different cases are referred to in the order in which they were argued before us by the counsel for the parties.

2. At the first instance arguments were addressed in the reference petition ITRC No. 440/1998 relating to the assessment year 1992-93 and facts are narrated from that. Since the writ appeal also relates to the same assessment year facts leading to the filing of the writ appeal shall be referred to as well.

3. Assessee is engaged in the business of export of granite blocks extracted from quarries. For this year, one nil return, revised by another nil return showing different figures of income, claiming exemption of the entire amount of income as shown in the returns under the provisions of section 80HHC of the Income Tax

Act, 1961 (for short, "the Act") were filed successively. Assessing officer processed the returns filed by the assessee u/s 143(1)(a) by disallowing the claim of the assessee towards exemption u/s 80HHC. The assessing officer rejected the claims of the assessee on the ground that since the assessee was exporting rough granites, it would not be entitled to the deduction u/s 80HHC in view of the prohibition contained in sub-clause (ii) of cl. (b) of sub-section (2) of section 80HHC r/w item No. (x) of the Twelfth Schedule to the Act. It was also stated that in the adjustment note accompanying the intimation u/s 143(1)(a) the matter had been clarified by the Circular of Central Board of Direct Taxes (for short, "CBDT") No. 693, dated 17th Nov., 1994. (published at (1994) 122 CTR (sc) 131)

4. Assessee filed Writ Petition No. 15149/1995 in this Court against the above mentioned action of the assessing officer challenging firstly the validity of Circular No. 693 dated 17th Nov., 1994 (supra), and secondly the legality of the adjustment made in the intimation u/s 143(1)(a) disallowing the claim of the assessee u/s 80HHC therein. Single Judge rejected the first contention of the assessee and held the Circular No. 693, dated 17th Nov., 1994 (supra) to be valid. The adjustment made in the intimation u/s 143(1)(a) was held to be illegal and beyond the scope of "prima facie adjustments" as envisaged u/s 143(1)(a). The assessing officer was directed to reconsider the matter afresh in this regard. This judgment is *GOD GRANITES Vs. CENTRAL BOARD OF DIRECT TAXES and Others*, . Against the order of the single Judge writ appeal which is being disposed of by this order has been filed.

5. Since the intimation dated 31st March, 1995, regarding the adjustment made u/s 143(1)(a) were set aside and the assessing officer was directed to reconsider the return of the assessee, the assessing officer once more referred to the circular of the CBDT dated 17th Nov., 1994, and disallowed the claim of the assessee towards deduction u/s 80HHC. The action of the assessing officer was confirmed in the first appeal, Assessee filed further appeal before the Tribunal, Bangalore, which was accepted in view of the subsequent Circular No. 729, dated 1st Nov., 1995 (published at (1995) 129 CTR (St) 11, (hereinafter referred to as "the subsequent circular"). Tribunal in its order recorded a finding of fact that the assessee was cutting and polishing the granite blocks to some extent before their export. The finding of the Tribunal is:

"Ultimately, therefore, we are of the view that although some amount of cutting and polishing is rendered to the granite blocks before export, it is not physically plausible to put them into finally cut and polished form at that stage. The Karnataka High Court came to the conclusion, on the basis of the earlier circular of CBDT that only crude granite blocks without any processing are exported by the assessee. On the basis of the factual submissions before us and also the latter circular of CWT dated 1st Nov., 1995, however, we finally come to the conclusion that it is the "cut and polished" granite blocks (although may not be finally cut and precisely polished), which are being exported. "

(Emphasis, italicised in print, supplied)

6. Regarding this finding of the Tribunal no question of law has been claimed before us. Tribunal allowed the appeal and held that the assessee was qualified for deduction under s, 80HHC in accordance with the Twelfth Schedule of the Act. Aggrieved against this the Revenue has come up in reference. At the instance of the Revenue following question of law has been referred to this Court for its opinion :

"Whether, on facts and in the circumstances of the case, the Tribunal was right in law in allowing deduction u/s 80HHC in respect of export of rough rock or granite for the assessment year 1992-93 ?"

7. Relevant provision of the statute which are necessary for the adjudication of the dispute may be referred to at this stage, Sec. 80HHC reads :

"(1) 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 the subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of the (profits) derived by the assessee from the export of such goods or merchandise

Provided

(b) This section does not apply to the following goods" or merchandise, namely
(i) Mineral oil; and

(ii) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule)."

8. Item No. (x) of the Twelfth Schedule relating to minerals and rocks reads

"(i) to (ix) xxxxx xxxxx xxxxx

(x) Cut and polished minerals and rocks including cut and polished granite.

Explanation : For the purposes of this Schedule, "processed", in relation to any mineral or ore, means :

(a) dressing through mechanical means to obtain concentrate after removal of gangue and unwanted deleterious substances or through other means without altering the mineralogical identity;

(b) pulverisation, calcinations or micronisation; (c) agglomeration from fines; (d) cutting and polishing,(e) washing and levigation; (f) beneficiation by mechanical crushing and screening through dry process;

(g) sizing by crushing, screening, washing and classification through wet process;

(h) other upgrading techniques such as removal of impurities through chemical treatment, refining by gravity separation, bleaching, floatation or filtration."

9. Para 3 of Circular No. 693, dated 17th Nov., 1994, referred to in the foregoing paragraph reads :

"3. The entry in the Twelfth Schedule is very clear and unambiguous and uses the term "cut and polished". Therefore, for availing of benefit u/s 80HHC, it is necessary that the rock is not only cut into blocks but also polished before it is exported. This is in line with Government's policy to encourage export of polished granite and other rocks where value addition before export is high and to discourage export of raw blocks where value addition is low."

10. Single Judge in his order while upholding the validity of the circular held

"Circular No. 693, dated 17th Nov., 1994, clarifying that rock should not only be cut into blocks, but also be polished, before it is exported to avail of the benefit of section 80HHC, is valid as it is in accordance with section 80HHC and the Twelfth Schedule to the Act. The Government's policy to encourage export of polished granite and other rocks where value addition before export is high and to discourage export of raw blocks where value addition is low, is evident from section 80HHC, as it extends its benefit not to all minerals, but only to "processed minerals specified in the Twelfth Schedule" and the word "processed" with reference to rocks/granite, means "cut and polished"."

11. On a representation made by the Association of Exporters of Granite, the CBDT issued a subsequent Circular No. 729, dated 1st Nov., 1995, retracting its earlier view on the question of availability of deduction u/s 80HHC of exports of granite blocks and took a different view, very much favourable to the exporters. Para 3 of the subsequent circular reads :

"3. The Board is, therefore, of the view that while granite can alone be considered as mineral, any process applied to granite would deprive the quality of rough mineral from the dimensional blocks of granite, which is a value added marketable commodity. When rough granite is cut to dimensional blocks of uniform colour and size, it not only undergoes mechanical process of cutting and also certain amount of dressing and polishing is involved to remove various natural flaws such as colour variations, grain variations, joints, fissures, moles patches, hairline cracks, etc. The profits derived from the export of such granite dimensional blocks would accordingly be eligible for deduction u/s 80HHC of the Act."

Relying on the subsequent circular the appeal was accepted by the Tribunal.

12. Sri Indra Kumar appearing for the department supported the arguments which had been raised and rejected by the Tribunal that the circulars issued by the Board are not binding on the Tribunal; that only the judgments of the jurisdictional High Courts are binding.

13. Without burdening this judgment with various citations of the Supreme Court of India interpreting section 119 of the Income Tax Act it can be said that the circulars issued by the CBDT are binding on the authorities and other persons

employed in the execution of the Income Tax Act and they are required to observe and follow the instructions and directions issued by the Board. The point is not that whether the circular issued by the Board is binding on the Tribunal or not. The question is whether the authorities under the Act took a view contrary to the instructions and directions issued by the Board. If the answer is in the affirmative then the Revenue cannot take a stand contrary to the instructions and directions issued by the Board. We reject this contention and hold that the instructions and directions issued by the CBDT to the ITI authorities or any other person employed in the execution of the Act are binding on them.

14. Counsel for the Revenue then contended that the subsequent circular issued in the year 1995, by the CBDT would be prospective in its application", that the CBDT by its communication dated 12th Feb., 1997, had clarified to the Chief CIT, Karnataka, that the subsequent circular would be applicable prospectively for the assessment year 1996-97 only and not in respect of the earlier years. Once the High Court had held that the earlier circular of the CBDT dated 17th Nov., 1994, to be valid and applicable to the cases of exporters of granite then the Tribunal could not resort to the subsequent circular in preference to the earlier circular.

15. Per contra the senior counsel appearing for the assessee argued that the circular being explanatory and clarificatory is retrospective in its operation and would apply to the earlier assessment years as well.

GOD GRANITES Vs. CENTRAL BOARD OF DIRECT TAXES and Others, while upholding the earlier circular issued by the CBDT did not preclude the CBDT from taking a different view. On a representation filed by the association of exporters of granite that CBDT had misunderstood the import of the Finance Act No. 2 of 1991 bringing about the amendment to the provision of section 80HHC of the Act by inserting Twelfth Schedule in the correct perspective the CBDT revised its opinion and issued the subsequent circular extending the benefit to the exporters of cut and polished granite blocks and not to the finally cut and precisely polished granite or rocks as it understood it earlier.

16. On examination of the judgment of the Single Judge it can be seen that the assessee's own case before the Single Judge was that the adjective "cut and polished" as used in item (x) of the Twelfth Schedule before the word "minerals" should not be extended to the next word i.e., "rocks". In other words rocks in any form should be considered as covered by item No. (x). Since granites are nothing but rocks, even uncut granites also should qualify for the deduction u/s 80HHC. High Court negated the contention of the assessee and held that minerals include rocks and rocks include granites. As, item No. (x) of the Twelfth Schedule referred to only cut and polished granites it was held that the Circular No. 693 was perfectly valid and in accordance with the same the export of granite rocks which were not cut and polished would not entitle the exporter to the deduction u/s 80HHC. The single Judge was influenced by the view expressed by the CBDT in its circular dated 17th Nov., 1994. The said view of the CBDT was, however, revised on factual basis in its circular dated 1st Nov., 1995. The CBDT in

its latter circular found that before being exported the granite ores and boulders extracted from the quarries are cut to certain suitable sizes and in this process dimensional blocks of granite are made. Not only the granite boulders are cut into dimensional blocks, certain amount of dressing and polishing is given to them to remove various natural flaws such as colour variations, grain variations, joints, fissures, moles, patches, etc. Under the Twelfth Schedule what is required is only cut and polished minerals including granites should be exported for entitlement to deduction u/s 80HHC. In the explanation to the Twelfth Schedule "processed" has been defined to mean in relation to any mineral or ore mentioned in items (a) to (h). The Act does not prescribe the degree or extent of cutting and polishing to be applied to granite ores or boulders. Any process applied to the rough mineral which adds value to the marketable commodity would create an eligibility for deduction. When rough granites are cut into dimensional blocks of uniform colour and size and also certain amount of dressing and polishing which would remove various natural flaws such as colour variations, etc., would certainly amount to processing of the granite and adds value to its marketability. The Act does not specifically say that the minerals and granites should be given the final cut and be finally polished before they are exported. If such a view is taken the purpose of allowing the benefit to cut and polished minerals including granite blocks towards deduction u/s 80HHC would get frustrated.

17. It is the ultimate users of granites who would determine the shape, size and thickness of the granite blocks to be used by them and hence it is required that the final cutting of the granite blocks would have to be taken at their end. The same consideration would apply to the final polishing. The extent of final polishing required to granite blocks would depend on their actual use. It is common knowledge that for granite blocks being used for flooring purpose, the polishing need not be very "fine" as it would make the floor slippery, whereas, on the other hand, granite blocks to be used as decorative pieces on walls and other places would require a very fine and mirror like polishing. The granite blocks are required to be exported in the form of large pieces of blocks. The cutting of the granite blocks has to take place at the end of the importer who would cut it to shapes and sizes according to the use to which it is to be put. Final polishing cannot be given before exporting the blocks.

18. The contention of the department that the subsequent circular should be considered applicable for the assessment year 1996-97 cannot be accepted. The subsequent circular modifies the view of CBDT about the some facts relating to the condition in which granite blocks are exported. There is no change in the procedure undertaken by the exporters-of late which have necessitated the CBDT to issue the subsequent circular. The procedure remains the same. MT being of the view that earlier it had taken a wrong view about the nature of export of granite blocks, on full appraisal of facts expressed a correct factual view in its latter circular. Clarificatory amendments in law are always retrospective unless the statute provides otherwise. In view of the subsequent circular the earlier

circulars ceases to exist and it cannot be said that the earlier circular shall apply to the assessment years till the issuance of the subsequent circular and that the subsequent circular would apply to the assessment years after it was issued. Tribunal has recorded a firm-finding of fact which we have recorded in the earlier part of the judgment regarding which department has not claimed a question of law that the assessee was exporting "cut and polished" granite blocks though not finally cut and precisely polished. As the assessee had processed the rough mineral by cutting and processing, it added a value to the marketable commodity thus entitling it to the deduction u/s 80HHC.

19. The question of law framed is not very happily worded. From the reading of the question it seems as if the assessee was exporting rough rocks and granite whereas the finding recorded by the Tribunal is that the assessee was exporting the "cut and polished" (though not finally cut and polished) granite blocks. The finding that the assessee was exporting partly "cut and polished" granite blocks has not been questioned by the department by raising a question of law on the ground of perversity being not based on any evidence. Rather we find from the record that it was the case of the parties before the authorities that the assessee was exporting cut and polished granite blocks.

20. After the conclusion of the arguments and reserving the order, judgment of the Supreme Court in *Stonecraft Enterprises v. CIT* (1999) 153 CTR (SC) 86 : (1999) 237 ITR 181, came to our notice by which the view taken by this Court in *Muddeereswara Mining Industries Vs. Commissioner of Income Tax*, was affirmed. We heard the counsel for the parties afresh regarding the applicability of this judgment to the facts of this case. In our view this judgment would not affect the merits of the present case as it is relatable to the assessment years before the coming into force of Finance (No. 2) Act of 1991.

21. *Stonecraft Enterprises*" case (supra) was concerned with the asst. yrs. 1985-86, 1987-88 and 1988-89. Sec. 80HHC(2)(b) excluded the application of the section to "minerals and ores". This was the position until 31st March, 1991. It was only with effect from 1st April, 1991, the words "other than processed minerals and ores specified in the Twelfth Schedule" were added by Finance (No. 2) Act of 1991. Hence, until 31st March, 1991, there was no question of claiming any exemption in respect of the profits from exports of minerals and ores. The only argument available to the assessee was that granite was not a mineral. If granite was not a mineral, then the non-application of the section would not have been attracted and consequently the assessee claimed exemption. The assessee's argument was that granite was not a mineral. Supreme Court rejected the contention of the assessee and held that granite is a mineral. Reference to the circular dated 1st Nov., 1995, by the Supreme Court was purely tangential. Circular obviously has relevance only after 1st April, 1991, when an exception was made in respect of minerals and ores specified in the Twelfth Schedule. It seems the attention of the Supreme Court was not drawn to the fact that a crucial amendment was made with effect from 1st April, 1991, and the

circular, if at all, had relevance only in respect of the period after 1st April, 1991. Supreme Court has also recorded a finding that there was nothing on record to indicate that what the assessee exports is value-added granite. Supreme Court had, therefore, declined to examine the question. On the contrary in the present case there is a positive finding of the Tribunal that the assessee did in fact do cutting and dressing, including some polishing and that what was exported was dimensional granite blocks which are a value-added item. The case of *Stonecraft Enterprises* (supra) would not make any difference to the arguments advanced in the present case.

22. Incidentally Supreme Court in *Stonecraft Enterprises* judgment (supra) has observed that the circular is explanatory, and therefore, can, relate back to the year in question. The view taken by "us is also in conformity with the observations made by the Supreme Court in the said case. This lends support to the view that the subsequent circular would be applicable to the assessment years previous to the issuance of this circular as well.

23. For the reasons stated above we answer the question referred to us in the affirmative i.e., against the Revenue and in favour of the assessee.

W.A. No. 3783 of 1995

24. Counsel for the assessee had argued that in case this Court on interpretation of the subsequent circular holds that the assessee would be entitled to deduction under s, 80HHC then he does not question the correctness or otherwise of the view taken by the-Single Judge. In view of the interpretation put by us on the subsequent circular it is held that the assessee would be entitled to the deduction u/s 80HHC for the assessment year 1992-93. To that extent the order of the single Judge would not be binding on the petitioner. Regarding the validity or otherwise of the earlier circular no opinion is expressed.

WP. No. 18303 of 1996

25. It relates to the assessment year 1991-92. The return of income for the assessment year 1991-92 (Financial year 1st April, 1991 to 31st March, 1992) was filed by the assessee declaring the income as nil in view of the claim of deduction u/s 80HHC of the Act. Assessment thereon was completed u/s 143(3) of the Act on 24th March, 1994, on a total income of Rs. 1,84,531. The benefit of the deduction u/s 80HHC was denied by the assessing officer following the decision of this Court in *Muddeereswara Mining Industries v. CIT* (supra) which has later been affirmed by the Supreme Court in *Stonecraft Enterprises v. CIT* (supra).

26. A revision petition u/s 264 of the Act was filed. The revisional authority noted that in view of the Board Circular No. 729, date 1st Nov., 1995, deduction u/s 80HHC is allowable for the assessment year .1991-92. Revisional authority held that the clarification of the Board in Circular No. 729, date 1st Nov., 1995, being in the nature of concession it would be prospective in nature and as such

applicable for the assessment year 1996-97 onwards. Accordingly, the revisional authority concluded that the deduction on the basis of the subsequent circular cannot be allowed for the assessment year 1991-92 and hence declined to interfere with the order of the assessing authority.

27. Aggrieved against the above conclusions the assessee has filed the present writ petition. As we have taken the view that Circular No. 729, dated 1st Nov., 1995, would be applicable to the assessment years previous to 1996-97 as well, the order of the revisional authority and that of the assessing authority are set aside. Direction is given to the authorities to grant the benefit of deduction u/s 80HHC of the Act.

WP No. 12270 of 1996

28. This relates to the assessment year 1993-94. Assessee filed the return for the assessment year 1993-94 before the Income Tax Officer, Ward-V (3), Bangalore, claiming deduction of the sum of Rs. 37,13,849 representing the profits from the export sales of granite outside India entitling the petitioner to the benefit of section 80HHC as amended by Finance (No. 2) Act 1991. The assessing officer following his own order dated 24th March, 1995, made by him in respect of the assessment year 1992-93 straightaway issued an intimation u/s 143(1)(a) holding that the assessee was not entitled to the benefit of section 80HHC.

29. In the earlier order Income Tax Officer had relied upon the Circular No. 693, dated 17th Nov., 1994. Regarding intimation of the Income Tax Officer u/s 143(1)(a) was accepted and the challenge to the validity of Circular No. 693, dated 17th Nov., 1994, was declined by the single Judge. Keeping this in view the assessing officer passed a fresh order for assessment year in question on 22nd March, 1996, copy of which has been attached as Annexure-A. The assessing officer held that the subsequent Circular No. 729, dated 1st Nov., 1995, was prospective and did not apply to the assessment year in question. Assessee filed an appeal against this order on 31st Dec., 1996. The appeal was dismissed by the Commissioner (Appeals) on 25th Jan., 1996, on the ground that the same was barred by limitation. Further, appeal filed before the Tribunal was also dismissed on 26th June, 1998, thereby confirming the order of the Appellate Authority. The orders which were passed in appeal by the first Appellate Authority and the Tribunal has not been challenged by amending the writ petition or by filing a reference petition u/s 256 claiming a question of law said to be arising from the order of the Tribunal. Any order passed in this writ petition under the circumstances can result in bringing into force two contradictory orders. We decline to allow this writ petition leaving it open to the assessee to seek his remedy under the Act if available.

30. The cases are disposed of in the terms indicated in this order.