
(2000) 08 KL CK 0047

In the High Court Of Kerala

Case No : IT Ref. No's. 59, 61 and 62 of 1994 24 August 2000 A.Y. 1989-90 and 1990-91

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

G.T.N. TEXTILES LTD.

RESPONDENT

Date of Decision : 24-08-2000

Acts Referred:

COMPANIES ACT, 1956 — Section 205

Income Tax Act, 1961 — Section 115J, 80HHC, 80HHD

Citation : (2001) 164 CTR 185

Hon'ble Judges : S. Sankarasubban, J;G. Sivarajan, J

Bench : Full Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Revenue C. N. Ramachandran Nair, for the Assessee, for the Appellant;

Judgement

S. Sankarasubban, J.

These Income Tax references are references made by the Commissioner, Cochin, at the instance of the revenue . The questions of law referred for consideration are :

"(1) Whether on the facts and in the circumstances of the case, the manner and method of computation of deduction u/s 80HHC for the purpose of section 115J of the Income Tax Act as considered by the assessee and upheld by the Tribunal is correct and in accordance with law ?

(2) Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the computation of the net profit of the assessee for the purpose of estimating its export profit u/s 80HHC, for allowing deduction u/s 115J, should not be made in the regular way of computation of income from business or profession by applying all the relevant provisions of the Income Tax Act and, on the other hand, should be made in the limited way by restricting only to the additions and deductions as are required to be made in accordance with

the Explanation to section 115J(IA) of the Income Tax Act ?"

The relevant assessment years are 1989-90 and 1990-91.

2. The assessee is engaged in the manufacture of goods, most of which are exported outside India. According to the assessee, because of the substantial amount of depreciation and investment allowance, the assessee did not have any taxable income for these assessment years on computation under the provisions of the Act. Therefore, the assessing authority made assessment u/s 115J of the Income Tax Act (hereinafter referred to as "the Act"). According to this section, when the total income is less than 30 per cent of the book profit, the income will be considered as 30 per cent of the book profit and the assessee will be assessed accordingly. u/s 115J of the Act, the net profit is to be added to certain amounts which are given under that section. u/s 115J(1A)(iii) of the Act, the amounts as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and (ii) attributable to the business, the profits from which are eligible for deduction u/s 80HHC or section 80HHD, so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section 3(A) of section 80HHC or sub-section (3) of section 80HHC as the case may be. According to the assessee, it is exporting most of its products and, therefore, substantial profit is from export business. It claimed deduction of export profit in the computation of book profit as provided under Explanation to section 115J(IA)(iii) of the Act. According to the assessee, the deduction should be in the manner provided in section 80HHC(3) of the Act, that is, by applying the formula:

Export turnover

X

net profit credited in profit & loss account.

Total turnover

The assessing authority rejected the said computation and worked out the eligible deduction of export profit u/s 115J(1A)(iii) read with section 80HHC of the Act as "Nil" by applying the formula :

Export turnover

X

Profit computed under the provisions of Income Tax Act,. i.e. after setting off depreciation and investment allowance of current year and the unabsorbed portion of it carry forward from earlier years.

Total turnover

The question for consideration u/s 80HHC in this case is what is the profit that should be taken into consideration.

3. As already stated, section 115J of the Act is the special provisions relating to certain companies. It says that : "Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company other than a company engaged in the business of generation or distribution of electricity, the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1-4-1988, but before the 1-4-1991 hereafter in this section referred to as the relevant previous year, is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit". Sub-section (1A) says that the assessee, for the purposes of this section is directed to prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act. There is an Explanation to sub-section (1A) (of section 115J) of the Act, which says thus "For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (1A), as increased by or is reduced by.....". Section 115J of the Act, therefore, involves two processes. Firstly, the assessing authority has to determine the income of the company under the provisions of the Act and secondly, the book profit is to be worked out in accordance with the Explanation to section 115J(1) of the Act and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section 115J would be invoked if the income determined under the first process is less than 30 per cent of the book profit. Originally, section 115J of the Act did not contain exemption u/s 80HHC and section 80HHD of the Act. Section 80HHC of the Act provides for deduction in respect of export profits earned by the exporters or supporting manufacturers. Thus, these sections seek to encourage exports by providing tax deduction in respect of profits from such activities. But section 115J of the Act levies a minimum tax on book profits. Section 115J of the Act as it originally stood, did not include exemption allowed to exporters. It was restricted by the provisions of section 115J, under which they would have been obliged to pay tax at least on 30 per cent of the profits, which otherwise would have been exempted u/s 80HHC of the Act. It was then decided to amend section 115J of the Act by incorporating the Explanation by which clause (iii)(1A) was added. The amendment came into force with effect from 1-4-1989. As per the amendment, for the purpose of the computation of book profits, the net profit shall be reduced by the amount attributable to the business, the profits of which are liable for deduction, u/s 80HHC or section 80HHD; the amounts are to be computed in the manner specified in the section. Section 80HHD of the Act deals with deduction in respect of earnings in convertible foreign exchange.

4. The question to be considered is with regard to the interpretation of the words occurring in Explanation of clause (iii) of section 115J(1A) of the Act, "so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3A) of section 80HHC or sub-section (3) of section 80HHD, as

the case may be". Now, we shall turn to section 80HHC(3) and (3A) and section 80HHD(3) as it stood at the relevant time. u/s 80HHC(3), the profits derived from the export of goods or merchandise out of India shall be, (a) in a case where the business carried on by the assessee consists exclusively of the export out of India of the goods or merchandise to which this section applies, the profits of the business as computed under the head "profits and gains of business or profession". Under clause (b) where the business carried on by the assessee does not consist exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head "profits and gains of business or profession"). Under clause (3A) for the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be described. There also what is to be taken into consideration is the profit of the business as computed under the head "profits and gains of business or profession." u/s 80HHD(3) for the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be, (a) in a case where the business carried on by the assessee consists exclusively of services provided to foreign tourists resulting in receipts in convertible foreign exchange, the profits of the business as computed under the head "profits and gains of business or profession." Under clause (b), where the business carried on by the assessee does not consist exclusively of services provided to foreign tourists resulting in receipts in convertible foreign exchange, the amount which bears to the profits of the business (as computed under the head "profits and gains of business or profession") the same proportion as the receipts in convertible foreign exchange bear to the total receipts of the business carried on by the assessee. Thus, a perusal of section 80HHC(3) and (3A) and section 80HHD(3) of the Act will show that what is mentioned in these sections is profits and gains of business or profession.

5. The question to be considered is whether for the purpose of Explanation to section 115J(iii) of the Act, profits and gains of business or profession had to be taken into account. While the learned counsel for the revenue will argue that in interpreting clause (iii) of Explanation to section 115J, we have to bodily lift section 80HHC(3) and (3A) and section 80HHD(3) and the profits should be calculated in the same way as it is done under that section. But the learned counsel for the assessee will argue that what section provides is only that the deduction should be calculated in the manner laid down under sections 80HHC and 80HHD. Learned counsel submits that the profits of the firm (sic-company) are to be deemed 30 per cent of the book profit. Hence, for the purpose of clause (iii) of section 115J, the amount of profit from business should not be incorporated. We agree with the argument of the learned counsel for the respondent-assessee. Section 115J begins with non obstante clause. According to this clause, book profit is to be treated as net profit. Section 80HHC(3) and (3A) gives concession to the exporters and section 80HHD gives certain concessions to those people, who earned in convertible foreign exchange. Originally, section

115J of the Act did not take into account the deduction u/s 80HHC and section 80HHD. It was only included subsequently, as it was found that non-inclusion of the provision u/s 80HHC and section 80HHD will cause great hardship to the assessee. If the profit is to be computed on the basis of the profits and gains of business or profession, that will go against the very object of section 115J of the Act. Section 115J(1A)(iv) says that the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act are applicable. Thus, in clause (iv) we can see that provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act are entirely made applicable. Such an intention is not there in clause (iii). Hence, we are of the view that under clause (iii) Explanation it is not the profit as computed under the head "profits and gains of business or profession" that is to be applied. According to us, instead of the words "profits and gains of business or profession" occurred in sub-sections (3) and (3A) of section 80HHC or sub-section (3) of section 80HHD, the word profit that is mentioned in section 115J has to be applied.

6. Learned counsel for the revenue brought to our notice a decision of the Supreme Court in *M/s. Surana Steels Pvt. Ltd. Vs. The Deputy Commissioner of Income Tax and Ors.*, . That was a case dealing with the interpretation of clause (iv) of Explanation to section 115J of the Act. Clause (iv) states thus :

"the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous years as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act, 1956 (1 of 1956), are applicable."

The question arose whether the loss can take into account in depreciation. The Supreme Court held that under clause (iv) section 205 of the Companies Act has been incorporated in section 115J of the Act. It is a piece of legislation by incorporation. It was held that section 205 of the Companies Act stand bodily lifted and incorporated into the body of section 115J of the Act. u/s 205(1) of the Companies Act brings out the unabsorbed portion of the amount of depreciation already provided for computing the loss for the year. It was in that context that the Supreme Court interpreted clause (iv) of section 115J .

But so far as the present case is concerned, clause (iii) does not say that section 80HHC of the Act is applicable as such. It only says that the profit shall be determined in the manner provided in that section. Section 80HHC of the Act is made applicable to the extent only for calculating the deduction.

7. Hence, we are of the view that the Tribunal was correct in interpreting that u/s 115J(1A)(iii) of the Act, profit will be taken into consideration as profit as per the books of accounts and not calculated under the Act. Learned counsel for the revenue also brought to our notice a judgment of this court in IT Ref. No. 178 of 1997 (reported as *CHINTHA PRINTING and PUBLISHING CO. (P) LTD. Vs.*

COMMISSIONER OF INCOME TAX, That was a case interpreting clause (iv) of Explanation to section 115J of the Act. In the above judgment, the Division Bench followed the decision of the Supreme Court in V.V. Trans-investments (P.) Ltd. Vs. Commissioner of Income Tax, . The facts of that decision are not applicable to the facts of the case in hand.

8. Learned counsel for the assessee also brought to our notice two circulars in this context. One is Circular No. 559, dated 4-5-1990, issued by the Central Board of Direct Taxes and the other is Circular No. 680, dated 21-2-1994. A portion of the circular dated 4-5-1990, reads as follows :

"An Explanation in the section provides for the manner of computation of "book profits" for the purposes of the section. The Amending Act, 1989, has carried out the following amendments in the said Explanation :

(a) A new clause (iii) has been inserted in the Explanation to provide that for the purposes of computation of "book profits", the net profit shall be reduced by the amount of net profits derived from the business of exports or from services provided to foreign tourists by approved hotels and tour operators or by travel agents, which are eligible for deduction under sections 80HHC and 80HHD. For this purpose the net profit to be excluded shall be computed in the same manner as provided for in sub-sections (3) and (3A) of section 80HHC or sub-section (3) of section 80HHD, as the case may be". Similarly, in the Circular dated 21-2-1994, it is stated as follows :

"(i) it should be first decided whether the assessee carries on a business, the profits from which are eligible for deduction u/s 80HHC or 80HHD;

(ii) if so, the net profit, shown in the profit and loss account of the relevant previous year should be adjusted as per clauses (a) to (f) and (i) of the said Explanation;

(iii) if the business exclusively consists of the types of business which are eligible for deduction u/s 80HHC/80HHD the whole of such amount arrived at as per (ii) above should be allowed as deduction; and

(iv) if not, the proportion of the export turnover of the total turnover of the business carried on by the assessee as required u/s 80HHD(3)(b) or the proportion of the turnover in respect of the sales made to export house or trading house to the total turnover of the business carried on by the assessee as required u/s 80HHD(3A)(b) or, as the case may be, the proportion of the receipts specified in section 80HHD(2) to the total receipts of the business carried on by the assessee should be determined and the said proportion should be applied to the amount arrived at (ii) above to determine the quantum of deduction u/s 115J. "

Learned counsel for the revenue submitted that the circulars cannot be looked into. We cannot completely accept this contention. According to us, these circulars are not against the section and they can be looked into. According to us,

the circulars are also in tune with the interpretation given by us to section 115J of the Act.

9. In the above view of the matter, the questions referred to us are answered in the affirmative and against the revenue .