
(2014) 09 BOM CK 0028

In the Bombay High Court

Case No : Income Tax Reference No. 303 of 1997

Commissioner of Income Tax

APPELLANT

Vs

Hindustan Construction Co. Ltd.

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Income Tax Act, 1961 — Section 154, 80AB, 80E, 80HGB, 80HGB(1)

Citation : (2014) 368 ITR 733

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : Suresh Kumar, Advocate for the Appellant; Sanjiv Shah, Advocate for the Respondent

Judgement

1. The Tribunal has referred the following questions for opinion and answer by this court:

"(1) Whether, on the facts and in the circumstances of the case and in law, the Appellate Tribunal was right in law in holding that the assessee was entitled to deduction under section 80HGB in respect of each project instead of netting up of profits from all the overseas projects and thus directing the Assessing Officer to allow the deduction as claimed by the assessee without setting off the loss suffered in other foreign projects?

(2) Whether, on the facts and in the circumstances of the case and in law, the Appellate Tribunal was right in law in holding that the decision of the Hon'ble Supreme Court in Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, in connection with section 80E is applicable with greater force in relation to the deduction under section 80HGB of the Act although the above decision pertains to the assessment years 1966-67 and 1967-68 whereas section 80AB has been inserted from April 1, 1981, due to which there was material change in the relevant legal provisions?

(3) Whether, on the facts and in the circumstances of the case and in law, the

Appellate Tribunal was right in law in holding that the provisions of section 80AB do not in any way curtail the assessee's claim for deduction under section 80HBB in respect of each unit and that the wordings of section 80HBB are to entitle the assessee the benefits of section 80HBB in respect of each unit?"

It is conceded that questions Nos. 1 to 3 which have been referred, are interrelated. They arise out of the same issue, namely, deduction under section 80HBB of the Income-tax Act, 1961.

2. It is the case of the assessee and which has been accepted by the Tribunal that it is a limited company engaged in construction activity having more than 50 construction sites in India and abroad. While completing the assessment for the assessment year 1984-85, the Assessing Officer did not consider any deduction under section 80HBB of the Act as the assessee's application for condonation of delay in repatriation of funds was pending before the Commissioner of Income-tax, Bombay City-I. The Assessing Officer observed that the deduction will be determined and given under section 154 of the Act once the pending application is disposed of by the Commissioner of Income-tax. The Commissioner of Income-tax passed an order condoning the delay in repatriation of money on September 6, 1988. Thereafter, the Assessing Officer proceeded to pass an order under section 154 of the Act for the purpose of giving deduction under the said section in respect of profits and gains arising from projects out of India. The assessee claimed such deduction at Rs. 1,20,07,654 but the Assessing Officer worked out the relief at Rs. 1,87,69,578. The difference in the relief was the result of netting up of profit from all the overseas projects. The contention of the assessee is that it is entitled to such deduction under this section in respect of each project. This was not accepted by the Department and the assessee aggrieved by this stand approached the first appellate authority, namely, the Commissioner of Income-tax (Appeals) and, lastly, the Tribunal. The Tribunal allowed the assessee's appeal by its order dated March 25, 1996.

3. In doing so, the Tribunal relied upon section 80HBB(1) which, at the relevant time, read as under:

"(1) Where the gross total income of an assessee being an Indian company or a person (other than a company) who is resident in India includes any profits and gains derived from the business of--

(a) The execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him, or

(b) The execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person,

with the Government of a foreign State or any statutory or other public authority or agency in a foreign State, or a foreign enterprise, 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 from such profits and gains of an amount equal to fifty per cent thereof:

Provided that the consideration for the execution of such project or, as the case may be, of such work is payable in convertible foreign exchange."

4. The Tribunal held that the wording of clause (a) and clause (b) of sub-section (1) of this provision, as reproduced above, would not rule out computation of the deductions unit-wise. The requirement appears to be that if the gross total income of an assessee being an Indian company or a person includes any profits and gains derived from the business of the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him or the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person, with the Government of a foreign State, or any statutory or other public authority or agency in a foreign State, or a foreign enterprise and if these are satisfied, there shall be in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to 25 per cent thereof.

5. By the proviso, it is provided that the consideration for the execution of such project or, as the case may be, of such work is payable in convertible foreign exchange. There is no dispute before us that the clauses are attracted and that the assessee has derived the income from the projects undertaken abroad. However, what is disputed is whether the quantum of deduction should be arrived at by taking into consideration the income generated unit-wise or whether the projects abroad have to be aggregated as was done by the Assessing Officer and upheld by the Commissioner.

6. We have heard Mr. Suresh Kumar at some length, appearing for the Revenue and Mr. Shah appearing for the assessee.

7. With their assistance, we have perused the relevant provisions of Chapter VI-A. We have also perused this section which is the subject matter of this reference carefully.

8. We find no basis for any wider question or controversy being decided or dealt with. Whether the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, was the applicable one or whether the judgment delivered by a Division Bench of this court in the case of Synco Industries Ltd. (Formerly known as Synco Textiles Pvt. Ltd.) Vs. Assessing Officer of Income Tax and Others, and confirmed by the Hon'ble Supreme Court, vide its judgment delivered reported in Synco Industries Ltd. Vs. Assessing Officer, Income Tax, Mumbai and Another, , was of any assistance in resolving the issue or controversy. We find that the Tribunal has essentially gone by the facts and peculiar to the assessee. The project in this case and abroad whether undertaken by the assessee in pursuance of a contract or whether the execution of the work

undertaken by him and forming part of a project undertaken by any other person in pursuance of a contract entered into by such other person, has not been detailed before us. Suffice it to note that if the assessee had placed before the Assessing Officer the relevant details and pointed out that it is engaged in construction activity having more than 50 construction sites in India and abroad, then whether such sites were forming part of a foreign project and subject matter of a single contract or whether in relation to individual sites distinct contracts have been entered into and executed by the assessee is something and essentially of facts. In the absence of all the relevant details, the Assessing Officer was not justified in computing the income from such construction activities undertaken abroad and by process of clubbing or netting as has been done in the instant case. The only issue before the Tribunal was whether, as held by the Assessing Officer, the computation of deduction under this section can be made in respect of each unit and that is not prohibited by section 80HHB(1). That has been considered by the Tribunal and in accepting the assessee's stand that it referred to the judgment of the Hon"ble Supreme Court. The judgment referred to in the case of CIT v. Canara Workshops P. Ltd. (supra) has been referred because in that case the Income-tax Officer held that the assessee before the Hon"ble Supreme Court would be entitled to deduction under section 80E on the profits from the manufacture of automobile parts only after setting off the loss in alloy steel manufacture. That was because in the relevant assessment year, the assessee commenced another activity, namely, the manufacture of alloy steels which was an industry. The assessee was engaged in the manufacture of automobile spares. From automobile spares manufacturing, the assessee generated profits but from the alloy steel industry it incurred losses. That is why the matter went up to the Hon"ble Supreme Court from the order of the Tribunal because the Tribunal accepted the contention of the assessee that the deduction was permissible on the entire profits of the automobile parts industry included in the total income without deducting therefrom the losses in the alloy steel manufacture. We do not find the situation of this type and before us. However, the reference to the Hon"ble Supreme Court's decision in Canara Workshops P. Ltd. (supra) was not entirely misplaced as is urged before us. It is only for the purpose of computation of the deductions and whether the section prohibits the assessee from having a computation unit-wise that the Tribunal referred to this judgment. Beyond that, it has not considered any wider question or controversy. In such circumstances, we do not find how the reference was made to this court. There were no question of law and which could possibly require an answer or opinion from this court. The Tribunal has decided the matter essentially in the light of the facts and material placed before it. In such circumstances, and considering the provision in question and the order of the Tribunal, we do not think that the Appellate Tribunal was in error in holding that the assessee was entitled to the deduction under section 80HHB in respect of each project instead of netting up of profits from all the overseas projects. In such circumstances, the Tribunal was in no error in directing the Assessing Officer to allow the deduction as claimed by the assessee without setting off all the losses suffered in other

foreign projects. In such circumstances, the reference is answered in favour of the assessee and against the Revenue. The reference is, accordingly, disposed of. No costs.