
(1998) 04 DEL CK 0086

In the Delhi High Court

Case No : Income Tax C. No. 41 of 1997

Commissioner of Income Tax

APPELLANT

Vs

Impulse (I) Ltd.

RESPONDENT

Date of Decision : 24-04-1998

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 256(2), 80HHC, 80HHC(3)

Citation : (1998) 233 ITR 615 : (1999) 106 TAXMAN 488

Hon'ble Judges : R.C. Lahoti, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : R.D. Jolly and Premlata Bansal, for the Appellant; C.S. Aggarwal, for the Respondent

Judgement

R.C. Lahoti, J.—By this petition u/s 256(2) of the Income Tax Act, 1961, the Revenue seeks a mandamus to the Tribunal to draw up a statement of case and refer the following questions of law for the opinion of the High Court :

"1. On the facts and circumstances of the case, the Income Tax Appellate Tribunal has erred in directing to exclude commission from the purview of the total turnover for Section 80HHC ?

2. Whether, the Tribunal was correct in not giving categorical decision on the ground of appeal taken by the Department that the Commissioner of Income Tax (Appeals) erred in directing to exclude the commission receipts from the purview of total turnover for purpose of computation of deduction u/s 80HHC ?

3. Whether the Tribunal was correct in applying the ratio of the decision of the Special Bench of the Tribunal in the case of International Research Park Lab Ltd. v. Asst. CIT, 60 ITD 37 and in not appreciating the facts of the case as independent of the facts in the relied upon case and giving a finding thereon ?"

2. The assessment years involved are 1986-87, 1987-88 and 1988-89. The assessee-company is dealing in export garments and is also earning income from commission by transferring the export orders to other Indian exporters. The

assessed claimed exemption u/s 80HHC on the figure of income earned by exporting garments wherein was included the commission income earned from other local exporters as above said. The Assessing Officer held that the commission income was not eligible for deduction u/s 80HHC. In his opinion, the profits eligible for deduction were the profits earned from the export of goods and merchandise out of India while the commission income could not be said to be part of the exports.

3. The Commissioner of Income Tax (Appeals) held that the commission income was included neither in export turnover nor in total turnover for the purpose of working out deduction u/s 80HHC. The assessee was not maintaining separate accounts of export business and other businesses. To determine the profit derived from the export of goods or merchandise out of India, it was the formula provided by Clause (b) of Sub-section (3) of Section 80HHC which was to be applied.

4. The matter went in appeal to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal formed an opinion that the view of the law taken by the Special Bench of the Tribunal in the case of International Research Park Lab Ltd. v. Asst. CIT 60 ITD 37, was relevant and governed the issue. The Special Bench view, as quoted in the order of the Tribunal was as under :

"Commission received was part of the export profit and, Therefore, it was eligible to be included in the profits of the business for the purpose of calculating the relief u/s 80HHC and it was not necessary for the profits to exceed in export business."

5. The Tribunal directed the Assessing Officer to follow the Special Bench view of the law and compute the deduction consistently therewith for all the three years of assessment.

6. The Revenue filed an application u/s 256(1) of the Act seeking reference on the above said three questions which application has been rejected by the Tribunal forming an opinion that the questions did not arise as referable questions of law. During the course of hearing, learned senior standing counsel for the Revenue maintained that the three questions were questions of law and in view of the same arising from the order of the Tribunal, were liable to be referred. Learned counsel for the assessed submitted that the questions were not questions of law but merely raised an issue as to the computation of profits from export business. He submitted that at best it could be a point of law but was not a question of law so as to attract the applicability of Section 256, of the Act.

7. In our opinion, a perusal of the orders passed by different authorities up to the Tribunal goes to show that there has been throughout a serious controversy between the parties centering around three aspects of Section 80HHC, namely (i) whether the income earned by way of commission on transferring the export orders received by the assessed to other Indian exporters could at all be treated as profits derived from the export of goods or merchandise out of India and

hence includible within that expression ? (ii) How and in what manner the proportion of profit was to be worked out under Clause (b) of Sub-section (3) inasmuch as the business carried on by the assessed consisted of the export out of India of the goods or merchandise as also of local sales ? Whether the amount of "commission" was liable to be included in the figure of total turnover as also the figure of export turnover ? and (iii) to attract the applicability of Section 80HHC was it necessary for the assessed to earn profits in export business taken by itself ? In other words, if the assessed had a profit by reference to its total business, i.e., export sales and local sales, but loss in export business (if calculated by segregating the same) still was the assessed entitled to benefit of Section 80HHC ?

8. The above said conclusion flows from the following facts ;

(i) In its appellate order dated January 8, 1996, the Tribunal has directed the Assessing Officer to act in accordance with the Special Bench decision which holds that the amount of commission was to be included in the profits of the business and that it was not necessary for the profits to exist in export business exclusively for the purpose of granting relief u/s 80HHC.

(ii) While rejecting the application u/s 256(1), the Tribunal has in its order dated October 24, 1996, reiterated vide para. 3 that the effect of the Tribunal's order was not to exclude the commission income from the purview of the total turnover of the business for computing the profits derived from the export of goods u/s 80HHC.

(iii) On October 24, 1996, the Tribunal has passed an order entitled corrigendum. The Tribunal has directed the Assessing Officer to include the commission income in export turnover of the assessed and calculate the deductions u/s 80HHC in accordance with the Special Bench decision.

9. Though at the end it will all be a matter of calculation as to how and in what manner the formula contemplated by Section 80HHC has to be worked out, but what would be available or liable to be included in the figure of profits and figures of turnover referable to total, local and exports turnover are all questions of law having material bearing on the interpretation of Section 80HHC. The questions, Therefore, in our opinion, do arise as questions of law from the order of the Tribunal and the Tribunal was not justified in rejecting the application u/s 256(1) of the Act.

10. Before pronouncing upon the operative part of the order, we must take note of a subsequent event brought to our notice by learned counsel for the assessee. It was pointed out that on behalf of the assessed an application dated January 6, 1997, u/s 254(2) of the Act has been moved before the Tribunal whereby the assessed has pointed out that the Tribunal has committed a mistake in directing the Assessing Officer to include the commission income in the export turnover whereas it should have been stated that the Assessing Officer is directed not to include the commission income in the export turnover and the total turnover as

commission income does not form part of the turnover. Rectification in the order of the Tribunal has been prayed for accordingly.

11. At the time of hearing in this ITC we were informed at the Bar that the hearing on this application had taken place on January 23, 1998, but the orders thereon were not communicated to or received by the assessed and as such the assessed was not aware of the outcome of the application. However, it was conceded that if the application filed by the assessed is allowed then part of the questions sought to be referred may be rendered redundant.

12. In the above said facts and circumstances the petition is allowed and the Tribunal is directed to draw up a statement of case and refer the above said three questions for the opinion of the High Court. The statement of case shall also include copy of the application u/s 254(2) and the order made thereon by the Tribunal so that while hearing the reference u/s 256 of the Act, this court may not answer so much part of the questions as may have been rendered redundant in view of the order of the Tribunal u/s 254 of the Act. No order as to costs.