(2014) 01 GUJ CK 0143

In the Gujarat High Court

Case No : Tax Appeal No. 811 of 2013

Commissioner of Income Tax APPELLANT

Vs

Nirma Ltd. RESPONDENT

Date of Decision : 27-01-2014

Acts Referred:
Income Tax Act, 1961 — Section 28, 30, 31, 32, 33

Citation : (2014) 367 ITR 12 : (2015) 229 TAXMAN 577

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Nitin K. Mehta, Advocate for the Appellant; S.N. Soparkar, Senior Advocate and B.S. Soparkar, Advocate for the Respondent

Judgement

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Akil Abdul Hamid Kureshi, J.—The Revenue is in appeal against the judgment of the Income-tax Appellate Tribunal ("the Tribunal" for short) dated February 28, 2013, raising the following questions for our consideration:

"1. Whether the Appellate Tribunal is right in law and on facts in restoring the issue back to the Assessing Officer to decide for granting benefits of netting to the assessee and further directing the Assessing Officer to allow expenses after verifying the nexus with various income such as interest on L.C. of Rs. 20,83,941, miscellaneous sales of newspaper Rs. 29,110, truck hire charges of Rs. 33,22,485, interest on loan given to staff of Rs. 55,287, exchange rate difference of Rs. 11,91,096 and insurance claim of Rs. 4,04,133 as not derived from the industrial undertaking and further directing that net income should be excluded from business profit for the purpose of allowing deductions under sections 80I, 80IA and 80HH of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and hence liable to be excluded?

2. Whether the Appellate Tribunal is right in law and on facts in confirming the

order of the Commissioner of Income-tax (Appeals) deleting the disallowances of Rs. 2,95,10,650 made by the Assessing Officer on account of sale of poster papers, iron scrap, gunny bags, etc., for the purpose of calculation of deduction under sections 80I, 80IA and 80HH of the Income-tax Act and directing the Assessing Officer to allow the same, while relying upon its own decisions in the case of Nirma Ltd. and Harjivandas which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

3. Whether the Appellate Tribunal is right in law and on facts in deleting the disallowances of interest from debtors of Rs. 39,26,316 made by the Assessing Officer for the purpose of calculation of deduction under sections 80I, 80IA and 80HHC of the Income-tax Act and further directing the Assessing Officer to allow the same while relying upon its own decisions in the cases of Nirma Ltd. and Harjivandas which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

4. Whether the Appellate Tribunal is right in law and on facts restoring the issue back to the Assessing Officer to decide for granting the benefits of netting to the assessee and further directing the Assessing Officer to allow expenses after verifying the nexus with various income such as insurance claim of Rs. 72,902, truck hire charges of Rs. 1,40,000 and other sales of Rs. 63,08,141 for the purpose of deduction under sections 80I, 80IA and 80HH of the Act for the Trikampura Division of the assessee as not derived from and industrial undertaking and further directing that net income should be excluded from the business profit for the purpose of allowing deductions under sections 80I, 80IA and 80HH of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and, hence/liable to be excluded?

5. Whether the Appellate Tribunal is right in law and on facts restoring the issue back to the Assessing Officer to decide for granting benefits of netting to the assessee and further directing the Assessing Officer to allow the expenses after verifying the nexus with income of Rs. 63,08,141 out of sale of plastic waste, iron scrap, gunny bags, bardan, etc., for the purpose of deduction under sections 80I, 80IA and 80HH of the Act for the Trikampura division of the assessee as not derived from and industrial undertaking and further directing that net income should be excluded from the business profit for the purpose of allowing deductions under sections 80I, 80IA and 80HH of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and, hence, liable to be excluded?

6. Whether the Appellate Tribunal is right in law and on facts in deleting the disallowances of interest from debtors of Rs. 33,63,494, miscellaneous income in respect of printing charges recovered of Rs. 45,326 in respect of the Kanpur

division, made by the Assessing Officer for the purpose of calculation of deduction under sections 80I, 80IA and 80HH of the Income-tax Act and confirmed by the Commissioner of Income-tax (Appeals) while relying upon its own decisions in the cases of Nirma Ltd. and Harjivandas which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

7. Whether the Appellate Tribunal is right in law and on facts restoring the issue back to the Assessing Officer to decide for granting benefits of netting to the assessee and further directing the Assessing Officer to allow the expenses after verifying the nexus with income of Rs. 57,40,830 out of sale gunny bags, bardans for the purpose of deduction under sections 80I, 80IA and 80HH of the Act for the Kanpur division of the assessee as not derived from and industrial undertaking and further directing that net income should be excluded from the business profit for the purpose of allowing deductions under sections 80I, 80IA and 80HH of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and, hence, liable to be excluded?

8. Whether the Appellate Tribunal is right in law and on facts restoring the issue back to the Assessing Officer to decide for granting benefits of netting to the assessee and further directing the Assessing Officer to allow expenses after verifying the nexus with various income such as interest on loan given to staff of Rs. 583 and truck hire charges of Rs. 90,950 for the purpose of deduction under section 80I, 80IA and 80HH of the Act for the Kanpur division of the assessee as not derived from and industrial undertaking and further directing that net income should be excluded from the business profit for the purpose of allowing deductions under sections 80I, 80IA and 80HH of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and, hence, liable to be excluded?

9. Whether the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income-tax (Appeals) deleting the disallowances of interest from debtors of Rs. 2,38,97,496 and Rs. 75,68,786 made by the Assessing Officer on account of interest from debtors and other sales with respect to profit of the Indore division for the purpose of calculation of deduction under sections 80I, 80IA and 80HH of the Income-tax Act while relying upon its own decisions in the cases of Nirma Ltd. and Harjivandas which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

10. Whether the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income-tax (Appeals) to recalculate interest expenditure of Rs. 82,98,93,839 in respect of the Mandali division, Rs. 9,25,330 in respect of the Trikampura division, Rs. 40,38,063, in respect of the Kanpur division and Rs. 4,75,178 in respect of the Indore division from the interest

income while working out the deduction under sections 80I, 80IA and 80HH of the Act and further directing the Assessing Officer to allow netting, if the assessee is able to establish the nexus between the interest expenditure and the interest income?

11. Whether the Appellate Tribunal is right in law and on facts in restoring the issue back to Assessing Officer to decide for granting benefits of netting aspect and to allow netting if the assessee is able to establish the (sic) between sale expenditure and sale income for the purpose of computing deduction allowable to the assessee under sections 80I and 80HH of the Income-tax Act while setting aside the order of the "Commissioner of Income-tax (Appeals) directing not to exclude income from sale of diesel of Rs. 1,05,00,100 while working out deduction under sections 80I and 80HH of the Income-tax Act?

12. Whether the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income-tax (Appeals) directing not to exclude sale of bardan of Rs. 29,962 while working out deduction under sections 80IA and 80HH of the Income-tax Act on Chhatral Division while relying upon its own decisions in the case of cases of Nirma Ltd. and Harjivandas which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

13. Whether the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income-tax (Appeals) deleting the disallowance of soda ash project interest expenses of Rs. 3,33,23,108 and Rs. 12,27,78,792 lab project interest expenses?

14. Whether the Appellate Tribunal is right in law and on facts in confirming the order of the Commissioner of Income-tax (Appeals) deleting the disallowance of claim of Rs. 16,78,93,425 under section 35AB of the Act?

15. Whether the Appellate Tribunal is right in law and on facts in holding that interest of Rs. 4,48,36,000 from debtors is to be considered as part of sale price and, hence, no inclusion is called for in respect of such interest from business for the purpose of computing the deduction allowable to the assessee under section 80HHC of the Act, while following its decision in the case of Nirma Industries Ltd., which has not reached to finality?"

In so far as question Nos. 1, 4, 8, 10 and 11 are concerned, they have a common element, namely, whenever certain income is to be excluded for the purpose of deduction under sections 80I, 80IA and 80HH, etc., gross income is to be excluded or only the net thereof is the question. In a separate order passed by us today in Tax Appeal No. 810 of 2013, we have rejected the Revenue''s appeal making the following observations:

"The question is when certain income of the assessee is excluded from the claim of deduction under section 80I or section 80HH of the Act, should the gross income be excluded or should it be only net, that is, the total receipt minus the expenditure incurred by the assessee for earning such income which should be so excluded.

Such a question in the context of deduction under section 80HHC came up for consideration before the Supreme Court in the case of ACG Associated Capsules Pvt. Ltd. (Formerly Associated Capsules Pvt. Ltd.) Vs. The Commissioner of Income Tax, Central-IV, Mumbai, . The Supreme Court held that for the purpose section 80HHC of the Act, it is not the entire amount received by the assessee on sale of DEPB credit, but the sale value of less the face value of the DEPB that will represent profit on transfer of DEPB credit by the assessee. Heavy reliance was placed in the case of Topman Exports Vs. Commissioner of Income Tax, Mumbai, . Extending such logic, it was further held that even other amounts, such as, interest or rent when are to be excluded for the purpose of Explanation (baa) to section 80HHC of the Act. Ninety per cent of not the gross rent or gross interest, but the net thereof shall have be excluded. It was observed as under:

''If we now apply Explanation (baa) as interpreted by us in this judgment to the facts of the case before us, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under section 28 of the Act, and if any quantum of the rent or interest of the assessee is allowable as expense in accordance with sections 30 to 44D of the Act and is not to be included in the profits of the business of the assessee as computed under the head "Profits and gains of business or profession", ninety per cent of such quantum of the receipt of rent or interest will not be deducted under clause (1) of Explanation (baa) to section 80HHC. In other words, ninety per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the assessee as computed under the head "Profits and gains of business or profession", is to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining the profits of the business.''

In view of such decision, question No. 3 raised by the Revenue gets automatically answered since the amounts referred to in the said question are to be excluded for the purpose of deduction under section 80HHC of the Act.

Learned counsel for the Revenue vehemently contended that the ratio of the decision in the case of ACG Associated Capsules Pvt. Ltd. (supra) cannot be applied to a situation where the exclusion from the claim of deduction relates to section 80HH or section 80I of the Act. He strenuously urged that the language used in both the sets of provisions are different. Section 80HHC is also vitally different and that therefore the concept of netting may not be automatically applied to deduction under sections 80HH and 80I of the Act. He submitted that number of tax appeals have been admitted by this court on this issue and this appeal may also be likewise admitted. He drew our attention to the order dated May 6, 2013 passed by this court in the case of Bloom Decor Ltd. v. Deputy CIT in Tax Appeal No. 447 of 2013 where at the instance of the assessee, similar question was not considered.

On the other hand, learned counsel Shri Soparkar for the assessee, in addition to relying on the decision in the case of ACG Associated Capsules Pvt. Ltd. (supra), also placed heavy reliance on an order dated November 30, 2013 in Tax Appeal No. 213 of 2006 in the case of Rajoo Engineers Ltd. in which the Revenue''s appeal raising such a question came to be dismissed relying on the decision in the case of ACG Associated Capsules Pvt. Ltd. (supra). The counsel also relied on a decision of the Delhi High Court in the case of Essel Shyam Communication Ltd. Vs. Commissioner of Income Tax, , in which in detailed consideration, relying on the decision of the Supreme Court in the case of ACG Associated Capsules Pvt. Ltd. (supra), exclusion was approved for deduction under section 80IA of the Act.

Having heard the learned counsel for the parties, we see no reason to entertain this tax appeal. The Supreme Court in the case of ACG Associated Capsules Pvt. Ltd. (supra) has already laid down the foundation for the logic for excluding the net profit and not the gross profit from the claim of deduction when it is found that the source of income does not quality for such deduction under section 80HHC of the Act. It is true that section 80HHC represents vastly different scheme of deduction and also provides for complex formula for deriving for the eligible profit for deduction under different situations depending on whether the exporter is also engaged in the local business or not.

However, this distinction would not be material in so far as central question of exclusion of certain profit from the activity which is not eligible for deduction under sections 80HH and 80I are concerned. The logic being when the profit is being excluded from the claim of deduction, not the gross profit but the net thereof, that is the gross profit minus the expenditure incurred for earning such profit should be excluded. That is precisely how this court in the case of Rajoo Engineers (supra) viewed the situation. That is how the Delhi High Court in the case of Essel Shyam Communication (supra) held referring to the decision in the case of ACG Associated Capsules Pvt. Ltd. (supra).

It is true that in the case of Bloom Decor Ltd., a question was suggested by the assessee which may have some bearing on the controversy on hand. However, the entire focus of the order of the court was regarding applicability of the decision of the Supreme Court in the case of Topman Exports (supra) and not on the question of netting. In any case, therein, the decision in the case of ACG Associated Capsules Pvt. Ltd. was not noticed."

2. In so far as question Nos. 2, 5, 7 and 12 are concerned, it is an undisputed position that the issues are covered by a decision of this court in the case of Deputy Commissioner of Income Tax Vs. Harjivandas Juthabhai Zaveri, in which the court upheld the decision of the Tribunal granting benefit of deduction under section 80I of the Act on various incomes, such as, job work receipt, sale of empty soda ash bardan, sale of empty barrels and plastic waste. Such questions are, therefore, not required to be considered.

3. So far as questions Nos. 3, 6, 9 and 15 are concerned, the same are stated to be covered by the decision of this court in the case of Nirma Industries Limited Vs. Deputy Commissioner of Income Tax, in which the court upheld the assessee''s claim for deduction under section 80I of the Act on the interest received on late payment of sale consideration as amount derived from eligible business. These questions are, therefore, not required to be considered.

4. Coming to question No. 14, we notice that the issue pertains to the assessee''s claim for deduction under section 35AB of the Act. The Tribunal has in the impugned judgment remanded the matter back to the Assessing Officer for full verification of such claim. It is clarified that the issues are kept open and shall be examined by the Assessing Officer, afresh.

5. The sole surviving question No. 13, pertains to disallowance of soda ash project interest expenses of Rs. 3.33 crores (rounded off) and lab project interest of Rs. 12.27 crores (rounded off). The Assessing Officer, questioned the assessee on these expenses and deleted the same on two grounds, firstly, that the interest was paid by way pre-operative expenditure and, secondly, the assessee had capitalized such expenditure.

6. The assessee carried the matter in appeal. The Commissioner of Income-tax (Appeals) relying on a decision of this court in the case of Commissioner of Income Tax, Gujarat II Vs. Alembic Glass Industries Ltd., held in favour of the assessee. In addition to coming to the conclusion that there was commonality of business it was further held that the expenditure was in connection with the expansion of the existing business. On such ground, the expenditure was held allowable.

7. It is this order of the Commissioner of Income-tax (Appeals) which the Tribunal upheld in the impugned judgment.

8. Having heard the learned counsel for the parties and having perused the documents on record, we notice that the Commissioner of Income-tax (Appeals) and the Tribunal concurrently came to the conclusion that there was interconnection, inter-lacing and inter-dependence of the management, financial and administrative control of various units of Nirma Limited. It was on this ground, the Tribunal held that the business in question is continuation of the existing business and not a new business. In this context, the decision relied on by the authorities below of this court in the case of Alembic Glass Industries Ltd. (supra) laid down tests for ascertaining whether a business was part of existing business or the assessee was starting a new unit. It was held that merely because the unit was coming to a distant point by itself would not mean that it was a new business.

9. If the facts as recorded by the Commissioner of Income-tax (Appeals) and the Tribunal can be said to have achieved finality, it would emerge that the assessee through its existing administrative mechanism started a new facility for production of soda ash and had also set up facility for production of a material

called "lab" for its captive consumption for the purpose of its existing manufacturing business. It is no doubt that the assessee is engaged in the business of manufacture of soap and the soda ash and "lab" so produced is used by way of captive consumption. When such facts viewed in light of the findings of the Commissioner of Income-tax (Appeals) and the Tribunal, we have no reason to interfere with the ultimate conclusion. Had it been a case of entirely a new project undertaken by the assessee as canvassed by the counsel for the Revenue, a serious question of claiming preoperative expenditure of interest by way of revenue expenditure would arise. However, when the authorities below found that it was an expansion of the existing business, applying the tests laid down by this court in the case of Alembic Glass Industries Ltd. (supra), in view of the decision of the Supreme Court in the case of Deputy Commissioner of Income Tax, Ahmedabad Vs. Core Health Care Ltd., , the fact whether the borrowing is capital or revenue expenditure would be of no consequence. In the result, tax appeal is dismissed.