
(2004) 05 MAD CK 0021
In the Madras High Court
Case No : Tax Case No. 65 of 2000

Commissioner of Income Tax	Vs	APPELLANT
P.R. Prabhakar		RESPONDENT

Date of Decision : 18-05-2004

Acts Referred:

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

Citation : (2005) 198 CTR 492 : (2005) 276 ITR 176

Hon'ble Judges : P.K. Misra, J;A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : J. Naresh Kumar, for the Appellant; P.P.S. Janardhana Raja, for the Respondent

Judgement

This Judgment has been overruled by : P.R. Prabhakar Vs. Commissioner of Income Tax, Coimbatore, (2006) 204 CTR 27 : (2006) 284 ITR 548 : (2006) 7 SCALE 191 : (2006) 6 SCC 86 : (2006) 3 SCR 645 Supp : (2006) AIRSCW 3695 : (2006) 6 Supreme 99

P.K. Misra, J.—The following questions have been referred to the High Court pursuant to the order dated September 13, 1996, in T. C. P. No. 42 of 1996 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee is entitled to deduction u/s 80HHC of the Income Tax Act, even though the export business resulted in a loss of Rs. 6,372 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that commission and brokerage for procuring export contracts for other exporters is exempt u/s 80HHC of the Act on the ground that the same is export profits ?"

2. The matter relates to the assessment year 1990-91. For the aforesaid assessment year, the gross total income derived by the assessee as commission and brokerage for procuring export contracts for other exporters was to the tune of Rs. 56,69,321. The assessee had also exported goods outside India to the

extent of Rs. 3,67,600. However, in respect of such export, the assessee had incurred a loss of Rs. 6,372. In other words, his gross total income was based mainly on the commission and brokerage received by him from other Indian exporters. The assessee had claimed deduction in respect of the aforesaid income u/s 80HHC of the Income Tax Act. The Assessing Officer came to the conclusion that since the assessee had incurred loss in respect of export business, no exemption could be granted u/s 80HHC. The assessee filed an appeal, which was rejected by the Commissioner of Income Tax (Appeals). However, on further appeal, the Income Tax Appellate Tribunal relying upon an earlier decision of the Special Bench of the Tribunal reported in Commissioner of Income Tax Vs. Dandeli Ferro Alloys Pvt. Ltd., came to the conclusion that the commission received from other exporters was also profit derived from export and accordingly the benefit u/s 80HHC was available in respect of such profit derived as commission/brokerage. The matter has been brought to this court at the instance of the Revenue in the present reference.

3. For considering the questions raised, it is necessary to notice the relevant provisions applicable at the relevant time. The relevant portion of Section 80HHC is extracted hereunder :

"80HHC.(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 and 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 ;

(proviso is not quoted as unnecessary) . . .

(3) For the purposes of Sub-section (1), profits derived from the export of goods or merchandise out of India shall be the amount which bears to the profits of the business (as computed under the head "profit and gains of business or professions"), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee."

4. Learned counsel appearing for the Department has submitted that so far as the first question is concerned, a similar matter had been already decided by a Division Bench of this court in the decision reported in Jeyar Consultant and Investment Pvt. Ltd. Vs. Commissioner of Income Tax, . In the said decision, the assessee was a financial consultant who during the assessment year had exported marine products. It was observed (page 251) :

"In this case, the assessee admittedly had not earned any profits from the export of the marine products. On the other hand, it had suffered a loss. The deduction permissible u/s 80HHC is only a deduction of the profits of the assessee from the export of the goods or merchandise. By the very terms of Section 80HHC, it is clear that the assessee was not entitled to any benefit thereunder in the absence of any profits."

5. Learned counsel appearing for the assessee has however submitted that the aforesaid decision should not be relied upon as no reference was made in the decision to the provision contained in Section 80HHC(3), as it stood at the relevant time. Learned counsel appearing for the assessee has further submitted that in view of the circular issued by the Central Board of Direct Taxes, the entire income has to be exempted notwithstanding the fact that there was loss in respect of the exported items.

6. Learned counsel appearing for the assessee has relied upon the decisions of the Kerala High Court and the Bombay High Court, respectively, reported in Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd., and Commissioner of Income Tax Vs. Shirke Construction Equipments Ltd., . He has submitted that the real intention of the Legislature was to encourage export, and therefore, irrespective of the profit in the export itself, exemption is to be granted.

7. To combat the aforesaid submission, learned counsel appearing for the Department on the other hand has relied upon another decision of the Bombay High Court reported in IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax, .

8. The decision of the Kerala High Court reported in Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd., was relied upon by the Bombay High Court in Commissioner of Income Tax Vs. Shirke Construction Equipments Ltd., . These two decisions, evidently support the contention raised by the assessee. On the other hand, the decision of the Bombay High Court in IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax, supports the contention raised by the Department. The decision reported in IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax, was challenged in the Supreme Court and such appeal has been dismissed in the decision reported in IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax, Mumbai, . In the aforesaid decision, the Supreme Court while disapproving the observations made by the Bombay High Court in Commissioner of Income Tax Vs. Shirke Construction Equipments Ltd., , has specifically affirmed the decision reported in IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax, . In the aforesaid decision, the Supreme Court while considering the scope of Section 80HHC(3) has categorically observed that the expression "profit" in 80HHC(3) will mean profits after taking into account the losses, if any. It was further observed (page 531) "More importantly, in our view, the term "profit" in Section 80HHC both in Sub-section (1) and in Sub-section (3) means a positive profit worked out after taking into consideration the losses, if any. Thus the word "profit" has the same meaning in Section 80HHC(1) and (3)". It is of course true that the Supreme Court was considering a case where Sub-section (3) had been amended with effect from April 1, 1992. However, the observation of the Supreme Court that the word "profits" has the same meaning in Section 80HHC(1) and (3) is very significant, which means that such profit must be taken to be "positive profit" and not "loss".

9. The observation of the Supreme Court would be equally applicable in the

present case wherein there being a loss from export business, the question of getting deduction of the income derived from other business would not arise. As a matter of fact, any other construction would give rise to an absurd situation. For example, if a person has got income from other business unconnected with the export worth crores of rupees and he makes some token export incurring "loss", he would claim exemption in respect of the entire income from other sources. Such a construction, which would give rise to absurdity cannot be accepted. The decision of the Madras High Court reported in Jeyar Consultant and Investment Pvt. Ltd. Vs. Commissioner of Income Tax, , considered in the light of the subsequent Supreme Court decision, must be taken to be applicable.

10. The second point relates to the question as to whether the income derived by the assessee as commission/brokerage for procuring export orders in respect of other exporting houses is to be exempted. The answer to such a question cannot be anything but in the negative. If such profit would be exempted, a situation would give rise to granting exemption to the export house who has actually exported as well as to the broker, who procures the contract.

11. As a matter of fact, the Explanation, which was inserted by way of amendment, makes the point clear. Learned counsel for the assessee has however contended that since such Explanation has been added with effect from April 1, 1992, such Explanation did not have any applicability to the present case, which is prior to April 1, 1992. As apparent from the speech of the Finance Minister as well as the Central Board of Direct Taxes circulars, which is so vehemently relied upon by the assessee, the Explanation was added by way of clarification. It is of course true that ordinarily a provision is considered to be prospective unless a clear intention appears otherwise. So far as the clarificatory or declaratory provisions are concerned, the normal presumption is that clarificatory or declaratory provisions are retrospective in operation. Even though it is not necessary to refer to various decisions on this aspect, suffice it to say, such principle has been highlighted in Lucas TVS Ltd. Vs. Commissioner of Income Tax, and Commissioner of Income Tax Vs. Mohanlal Bhagwati Prosad, .

12. For the aforesaid reasons, we answer both the questions raised in the negative and in favour of the Revenue.