

(1997) 10 MP CK 0033

In the Madhya Pradesh High Court

Case No : Income-tax Reference No. 4 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Rajaram Maize Products

RESPONDENT

Date of Decision : 01-10-1997

Acts Referred:

Income Tax Act, 1961 — Section 32AB, 80AB, 80B, 80B(5), 80HH

Citation : (1998) 144 CTR 267 : (1998) ILR (MP) 351 : (1998) 234 ITR 667 : (1998) 99 TAXMAN 121

Hon'ble Judges : A.K. Mathur, C.J.; Dipak Misra, J

Bench : Division Bench

Advocate : V.K. Tankha, for the Appellant; B.L. Nema, for the Respondent

Judgement

Dipak Misra, J.—At the instance of the Revenue, the following questions have been referred to this court by the Income Tax Appellate Tribunal, Nagpur Bench (hereinafter referred to as the "Tribunal"), u/s 256(1) of the Income Tax Act, 1961 (in short the "Act") :

"(i) Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of Sections 80AB and 80B(5) of the Income Tax Act, 1961, are not applicable while computing deductions under Sections 80HH and 80I of the Income Tax Act, 1961 ?

(ii) Whether, on the facts and circumstances of the case, the Tribunal was justified in law in directing to allow deductions under Sections 80HH and 80I of the Income Tax Act, 1961, before allowing deductions u/s 32AB of the Income Tax Act, 1961 ?

(iii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the power subsidy received by the assessee was a capital receipt, not liable to be taxed within the meaning of Section 28(iv) of the Income Tax Act, 1961 ?"

2. The facts, in brief, are that the assessee, a registered firm, derived income

from manufacture and sale of starch, liquid glucose and cattle feed in the main unit and also commenced a new business activity of manufacture and sale of dextrose mono hydrate in a second unit which commenced operation from January 16, 1988. The Assessing Officer noticed that the assessee had claimed depreciation for the entire period from January 7, 1987 to March 31, 1989, in respect of an entirely separate unit. Since the unit commenced its production from January 16, 1988, the Assessing Officer allowed depreciation for a period of 15 months in view of the third proviso to Sub-section (2) of Section 3 of the Act read with rule 5 of the Tenth Schedule to the Act. Similarly, the Assessing Officer allowed the assessee's claim under Sections 80HH and 80I of the Act on the income after allowing deduction u/s 32AB of the Act. While completing the assessment the Assessing Officer treated the power subsidy amounting to Rs. 14,38,007 as revenue receipt as against capital receipt claimed by the assessee.

3. Challenging the aforesaid order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who confirmed the finding reached by the Assessing Officer relating to computation under Sections 80HH and 80I of the Act but as far as the power subsidy was concerned the appellate authority accepted the claim of the assessee. Feeling aggrieved by the order passed by the appellate authority both the assessee and the Department preferred appeals before the Tribunal. The Tribunal allowed the appeal of the assessee and granted benefit to the assessee as claimed by him under Sections 80HH and 80I, and dismissed the appeal preferred by the Department. After the dismissal of the appeal an application was filed for reference of four questions to this court. The Tribunal on consideration of the submissions of the parties referred the questions which have been quoted above.

4. We have heard Mr. V.K. Tankha and Mr. Abhay Sapre, learned counsel for the Revenue, and Mr. B.L. Nema, learned counsel for the assessee.

5. Though the Tribunal has framed three questions, the first two questions in their conceptual eventuality are integrally interlinked and, therefore, we shall proceed to deal with them in a composite manner. On a perusal of the order passed by the Tribunal, we find that the Tribunal has taken note of the fact that the Assessing Officer has deducted a sum of Rs. 2,80,555 from the "gross total income" computed by him and thereafter granted deductions under Sections 80HH and 80I of the Act. In the opinion of the Tribunal, deductions u/s 32AB have to be treated on par with deductions u/s 32, that is to say, depreciation, and hence the assessee would be entitled to deductions under Sections 80HH and 80I on the income before deduction u/s 32AB is allowed.

6. Sections 80HH(1) and 80I(1) which are relevant for our present purpose, read as follows :

"80HH. (1) Where the gross total income of the assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, 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 from such profits and gains of an amount equal to twenty per cent. thereof."

"80-I. (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, 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 from such profits and gains of an amount equal to twenty per cent. thereof :

Provided that in the case of an assessee, being a company, the provisions of this Sub-section shall have effect, as if for the words "twenty per cent.", the words "twenty five per cent." had been substituted."

7. From the aforesaid provisions it is clearly perceivable that certain benefits are conferred on the industrial undertakings on certain conditions being satisfied.

8. As the factual matrix is portrayed it is noticeable that the Assessing Officer had granted benefit under Sections 80HH and 80I to the assessee but after computing the deductions as provided u/s 32AB.

9. Section 80AB refers to deductions to be made with reference to the income included in the "gross total income". The said provision has been brought into the statute book by way of an amendment by the Finance (No. 2) Act, 1980 (44 of 1980), with effect from April 1, 1968. Section 80B(5) defines "gross total income". The said provisions being relevant for our present purpose, are reproduced below :

"80AB. Deductions to be made with reference to the income included in the gross total income.--Where any deduction is required to be made or allowed under any Section (except Section 80M) included in this Chapter under the heading "C--Deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter), shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

"80B. (5) "gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

10. The question that falls for consideration is that if Sections 80AB and 80B(5) are made applicable while computing deductions under Sections 80HH and 80I of the Act then the computation by the Assessing Officer who had allowed deductions under Sections 80HH and 80I of the Act after allowing deductions u/s 32AB of the Act would be justified. The Tribunal has accepted the claim of the

assessee solely on the basis that deduction u/s 32AB is comparable to depreciation granted u/s 32 of the Act.

11. u/s 80B(5) of the Act the expression "gross total income" has been defined to mean the total income computed in accordance with the provisions of this Act. The apex court in the case of *Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad*, , while dealing with a case relating to the benefits conferred by Section 80E of the Act has held that the profit u/s 41(2) had to be taken into consideration while allowing deduction. In this context we may refer to the decision rendered in the case of *Commissioner of Income Tax, Tamil Nadu-V, Madras Vs. Kotagiri Industrial Co-operative Tea Factory Ltd., Kotagiri*, , wherein the apex court while dealing with deduction u/s 80P of the Act took into consideration the provision envisaged u/s 80B(5) of the Act and held as follows (page 609) :

"Having regard to the law as laid down by this court in *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, and *H. H. Sir Rama Varma's case* [1994] 205 ITR 453, it must be held that before considering the matter of deduction u/s 80P(2), the Income Tax Officer had rightly set off the carried forward losses of the earlier years in accordance with Section 72 of the Act and on finding that the said losses exceeded the income, he rightly did not allow any deduction u/s 80P(2) and the Appellate Assistant Commissioner as well as the Tribunal and the High Court were in error in taking a contrary view.

The principle of statutory construction invoked by Mrs. Ramachandran has no application in construing the expression "gross total income" in Sub-section (1) of Section 80P. In view of the express provision defining the said expression in Section 80B(5) for the purpose of Chapter VI-A, there is no scope for construing the said expression differently in Section 80P."

12. At this juncture, it is worthwhile to refer to the decision rendered in the case of *H.H. Sir Rama Varma Vs. Commissioner of Income Tax, Kerala*, , wherein the apex court has held that a long-term capital loss brought forward from earlier assessment years had to be first set off against the long-term capital gains of the current assessment year before the deduction contemplated u/s 80T of the Act is allowed. Their Lordships expressed as follows (headnote) :

"Long-term capital losses brought forward from earlier assessment years have to be first set off against the long-term capital gains of the current assessment year before the deduction contemplated by Section 80T of the Income Tax Act, 1961, is allowed. In other words, the relief u/s 80T is to be given only for the amount of long-term capital gains of the current assessment year after the long-term capital loss of the earlier years brought forward is set off."

13. It is relevant to note that the definition of "gross total income" means the total income computed in accordance with the provisions of the Act, before making any deduction under Chapter VI-A. Section 80HH envisages that the computation of the income is to be made in accordance with and subject to the

provisions of this section. The same language also finds place in Section 80I and that would indubitably attract the definition of "gross total income" as enjoined u/s 80B(5) of the Act which means total income to be computed in accordance with the other provisions of the Act and after the same exercise is completed, deductions under the said Chapter are to be given. Chapter VI-A deals with special deductions and these benefits are to be restricted only to the extent of such profits and gains which are included in the "gross total income" on which the deduction is available. On a fair reading of all the provisions it becomes crystal clear that deductions allowed under Sections 80HH and 80I are to be calculated at 20 per cent. of the net profits and gains after the deductions in accordance with the provisions of the Act are computed. The deductions are to be given only after other deductions take place. In this context we may further refer to the decision of the apex court in the case of CIT v. P.K. Jhaveri [1990] 181 ITR 79, wherein the apex court reiterated the principles laid down in the case of Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad, , while dealing with deductions u/s 80K of the Act.

14. From the preceding analysis, we are of the considered view that Sections 80HH and 80I have to be read along with the provisions of Sections 80AB and 80B(5) and the deductions granted under Chapter VI-A have to be allowed after computing the "gross total income" as contemplated u/s 80B(5).

15. At this juncture, we may hasten to add that sometimes a doubt arises as to while computing deduction u/s 80I of the Act relief granted u/s 80HH should be deducted from the "gross total income" or not. This court in the case of J.P. Tobacco Products Pvt. Ltd. Vs. Commissioner of Income Tax, , has held that as far as the benefit of Section 80I is concerned, it has to be granted on the "gross total income" and not on the income reduced by the amount allowed u/s 80HH.

16. From the aforesaid analysis, these two questions are answered in favour of the Revenue and against the assessee.

17. The third and most important question pertains to the correctness of the finding of the Tribunal in holding that the power subsidy received by the assessee is a capital receipt, not liable to be taxed within the meaning of Section 28(iv) of the Act. On a perusal of the order passed by the Tribunal, we find that the Tribunal has placed reliance on the decisions of this court rendered in the cases of Commissioner of Income Tax Vs. Dusad Industries, and Gadia Wires Vs. Commissioner of Income Tax, , wherein this court had opined that the sales tax subsidy is a capital receipt and cannot be taxed as a revenue receipt. It was contended before the Tribunal that the amount which was granted as a subsidy is a sort of rebate but the said contention did not find favour with the Tribunal. The Tribunal has also referred to the rules framed by the State of Madhya Pradesh relating to grant of subsidy in respect of new industries and has come to hold that such a subsidy does not arise out of "normal business activity" of the assessee and as such the subsidy cannot be treated as income u/s 2(24) of the

Act.

18. To appreciate the factual scenario in the proper perspective, it is essential to refer to the scheme under which this subsidy is granted. On a perusal of the scheme we find that the State of Madhya Pradesh with the purpose of having industrial development in backward areas decided to grant certain concessions to the industries which started commercial production after April 1, 1981. The invitation of the State Government which forms a part of booklet called Package of Concession for Industries reads as follows ;

"Several of the existing schemes have been revised in June, 1981, and the new concessions are available to industries which start commercial production after April 1, 1981, except where otherwise stated. These are also available to the co-operative sector, joint sector and the State public sector.

While we would essentially like your decision to set up an industry in Madhya Pradesh to be on the basis of its numerous plus points in the form of a central location, peaceful labour situation, abundant natural resources, a comfortable power supply position and a stable and forward looking administration, we do feel that this package goes a long way in mitigating some of the difficulties of setting up a unit in a backward place. It puts a premium on enterprise and pioneering spirit and we are confident that you will find it attractive."

19. In the introductory part of the said booklet it is mentioned that the State Government affords a graded system of incentives to facilitate industrial growth in all parts of the State and the 45 districts of M. P. have been divided into three categories, namely, Category A, Category B and Category C districts. In the said booklet it is provided that new industrial units coming into production after April 1, 1981, will be allowed power subsidy for a period of five years from the date of commencement of production. Different rates of subsidy are prescribed depending upon the nature of industry and the area in which it is established. Apart from the said documents, a set of rules has been framed which are called "Power Subsidy Rides" for industrial units in M. P. The rules which are relevant for our present purpose are reproduced below :

"3. The amount and period of availability of subsidy under these rules will be in accordance with the scales and conditions specified in Schedule A.

4. The concessions in rule three will be made available to the traditional industries enumerated below subject to the condition that the new industrial unit is situated outside at least 8 kms. radius of the boundary of municipal committee/corporation/notified area :

- (1) Flour mills (excluding roller flour mills) ;
- (2) Oil mills (excluding solvent extraction plants) ;
- (3) Dal mills ;
- (4) Saw mills ;

- (5) Rice mills ;
- (6) Printing press of all types ;
- (7) Cotton ginning and pressing factories ;
- (8) Ice factories and
- (9) Such other industries as may be notified by the State Government from time to time. . . .

6. An industrial unit eligible for this concession will apply to the general manager of the Distt. Industries Centres of the district concerned in Form "A" for verification of the date of commencement of production and certifying eligibility of the unit for subsidy. The General Manager of Distt. Industries Centre will verify in accordance with rules 4 and 5 and send within 15 days of the receipt of application his verification report to the office of the M. P. Electricity Board or the Rural Electric Co-operative Society responsible for billing the unit concerned with a copy to the Director of Industries. A copy will also be furnished to the applicant.

7. The M. P. Electricity Board or the Rural Electric Co-operative Society on receipt of certificate of verification of the date of commencement of production and eligibility of the unit for subsidy will pass on the benefit of subsidy to the unit in accordance with rule 3 above by a reduction in their bill for the specified period. Subsidy for the period between the verified date of commencement of production and the date of receipt of certificate by the Board or society will be allowed in the subsequent bills. However, before passing on the benefit to small scale industrial units, M. P. Electricity Board/Rural Electric Co-operative Society will also ensure that the unit has consumed a minimum of 40 units per month per KW of the concerned loan in advance and Category "A" backward districts. In the case of such districts which have a population of less than 10,000 the minimum consumption restriction will be 20 units per KW. In Category B and C distt. however, there will be no restriction of minimum consumption.

8. (i) The Divisional Engineer of the M. P. Electricity Board or the office of the Rural Electric Co-operative Society who prepares the bill and grants the concession to the industrial unit by deduction from the bill shall send particulars of all such deductions made in a quarter to the General Manager of the District Industries Centre of the district wherein the industry is located along with a copy of the same to the M. P. Electricity Board or the Managing Director of the Rural Electric Co-operative Society, as the case may be.

(ii) The M. P. Electricity Board shall compile such particulars for the whole State and prefer a claim with the Director of Industries, Madhya Pradesh. The General Manager of the District Industries Centre shall similarly intimate the Director of Industries about the claim preferred by the Divisional Engineer of the M. P. Electricity Board.

(iii) The Managing Director of the Rural Electric Co-operative Society shall

complete the particulars for the jurisdiction of the society to which the concession has been extended and prefer a claim with the general manager of the District Industries Centre of the District concerned. The general manager shall sanction the claim within thirty days of the receipt thereof and intimate the Director of Industries, Madhya Pradesh, about the sanction issued. Adequate funds shall be placed at the disposal of the Rural Electric Co-operative Society."

20. It is relevant to produce "Schedule-A" as that would give an idea with regard to the amount and period of availability of subsidy under the rules:

SCHEDULE "A" Amount and period of availability of subsidy under rules for grant of power subsidy to new industries in Madhya Pradesh

Category of district in which the unit is located

Amount of subsidy

Period of availability from the date of commencement of production

Small scale industry

Large/medium industry

Small scale industry

Large & medium industry

Advanced district

4.5 paise unit limited to Rs. 5 lakhs

4% of electricity charges limited to Rs. 10 lakhs

5 years

5 years

Backward districts "A" Category

6.0 paise/unit limited to Rs. 7.5 lakhs

15% of electricity charges limited to Rs. 15 lakhs

5 years

5 years

Backward districts "B" Category

7.0 paise/unit limited to Rs. 10 lakhs

20% of electricity charges limited to Rs. 20 lakhs

5 years

5 years

Backward districts "C" Category.

9.0 paise/unit limited to Rs. 12.5 lakhs

30% of electricity charges limited to Rs. 30 lakhs

5 years

5 years

Note : The classification of advanced and backward districts will be as may be notified by the State Government from time to time.

21. On a perusal of the aforesaid rules, the schedule and the scheme in general, we find that the scheme has been introduced with a goal to achieve, i.e., improvement of industries in the State. At this juncture, we may refer to the decision rendered in the case of Commissioner of Income Tax, Hyderabad Vs. M/s. P.J. Chemicals Ltd., wherein the apex court while dealing with the concept of actual cost in the matter of depreciation and reduction of a portion of the cost met by Governmental subsidy as incentive for setting up of industries in backward areas opined that the amount of subsidy is not to be deducted in computing the actual cost of assets u/s 43(1) of the Act for the purpose of calculation of depreciation. After referring to divergent views of the various High Courts, their Lordships expressed thus (page 841) :

"On a consideration of the matter the view that commends itself as acceptable is the one which has commended itself to the majority of the High Courts. It is, of course, not the numerical strength that prevails--though the fact that a particular view has commended itself to a majority of the High Courts in the country is a matter for consideration--but the tensile strength of the acceptable logic in those decisions. It is aptly said that "a judge who announces a decision must be able to demonstrate that he began from recognised legal principles and reasoned in an intellectually coherent and politically neutral way to his result". In the present case the reasoning underlying, and implicit in, the conclusion reached by the majority of the High Courts cannot be said to be an unreasonable view and on a preponderance of preferability that view commends itself particularly in the context of a taxing statute. The expression "actual cost" needs to be interpreted liberally. The subsidy of the nature we are concerned with, does not partake of the incidents which attract the conditions for their deductibility from "actual cost"."

22. Their Lordships further proceeded to lay down (page 841) :

"The Government subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the "actual cost"."

23. Thus, we notice that a Governmental subsidy is given as an incentive and it

may not be for the specific purpose of meeting a portion of the cost though it is quantified on the basis of the cost factor. In this context, we may refer to the decision rendered in the case of Commissioner of Income Tax Vs. Ambica Electrolytic Capacitors Pvt. Ltd. and Others, , wherein the court took note of all the judgments of various courts in the country and after referring to the meaning of subsidy as given in various dictionaries held that the subsidy is in the nature of pecuniary assistance from the Government to entrepreneurs so as to encourage the establishment of industries in all backward areas. On the basis of this analysis the court arrived at the conclusion that subsidy could not be excluded from the actual cost for giving the benefit of depreciation. In the said case one of us (A.K. Mathur J., as his Lordship then was) speaking for the court expressed thus (headnote) :

"The subsidy or investment subsidy given by the Government for the development of industries in backward areas cannot be deducted from the actual cost for purposes of depreciation or investment allowance. A perusal of the Central Outright Grant or Subsidy Scheme, 1971, shows that the subsidy is given to industrial units in certain backward areas with a view to promoting the growth of industries in these areas, The subsidy is not qualified in any manner. It is an ex gratia allowance to industries in selected backward areas or districts. The meaning of the term "subsidy" as given in the dictionary is "financial aid given by Government towards expenses of an undertaking or institution held to be of public utility, or to producers of commodities, etc., to enable goods or services to be provided at lower cost to the consumer". From the definition of subsidy, it appears that it is in the nature of pecuniary assistance from the Government to the entrepreneurs so as to encourage the establishment of industries in all backward areas. Therefore, such subsidy/ investment subsidy cannot be excluded from the actual cost for giving the benefit of depreciation. This assistance will certainly form part of the total assets of the assessee."

24. The High Court of Orissa in the case of Commissioner of Income Tax Vs. Orissa Industries Ltd., , also took the view that the subsidy is not paid to meet the cost of any asset of the assessee but it is given as an incentive for setting up industrial units in backward areas and the formula contained for grant of subsidy is a measure for determining the amount of subsidy. Similar view was expressed by the High Court of Delhi in the case of CIT v. Ravindra Tubes Ltd. [1994] 206 ITR 676. We would like to note that these decisions were considered by the apex court in the case of Commissioner of Income Tax, Hyderabad Vs. M/s. P.J. Chemicals Ltd., and were approved. Our main purpose in referring to these decisions is that their Lordships of various High Courts have dealt with the concept of subsidy and have held that the purpose of grant of subsidy is for attracting industrialists to set up industries.

25. It is worthwhile to refer to the decision of this court rendered in the case of Commissioner of Income Tax Vs. Dusad Industries, , wherein this court taking into consideration the scheme of things held that sales tax subsidy to the

industries set up in backward areas is to be regarded as capital receipt. We quote with profit (page 787) :

"Thus, after hearing learned counsel and after going through the case law cited, we are of the opinion that the authorities cited on behalf of the Revenue are distinguishable ; there being no dispute that the subsidy is given on the basis of a particular scheme for a specified period in respect of the industries situated in backward areas only, obviously the same is given by way of an incentive for capital investment and not by way of addition to the profit of the assessee as is clear from the facts and circumstances of the case as found by the Tribunal. In this situation, in our opinion, the reference has to be answered in favour of the assessee and against the Department."

26. Applying the aforesaid enunciation of law to the obtaining factual matrix, it can safely be concluded that power subsidy cannot be distinguished from any other subsidy, the same being given as an incentive to the entrepreneurs for development and growth of industries in backward areas. This incentive is also given to induce and encourage the entrepreneurs to proceed to the undeveloped and underdeveloped areas so that the said areas can witness industrial growth, and in the long run, march on the path of economic progress. This is the quintessential purpose behind the grant of subsidy. It is also noticeable that the power subsidy is given not only for a specific period but also up to a specified quantum as in sales tax subsidy, capital subsidy and cash subsidy a percentage or a period is mentioned and an amount is fixed on the basis of total cost price. Here in the case of power subsidy, a quantum has been fixed. Thus, no distinction can be made between the power subsidy or any other subsidy. Therefore, we are of the considered view that such a grant of subsidy does not arise out of normal business activity and, therefore, we have no hesitation in holding that the same would not amount to a revenue receipt but a capital receipt. Accordingly, we hold that the Tribunal was justified in its conclusion. Resultantly, the question is answered in favour of the assessee and against the Revenue.

27. In the ultimate result, the first two questions are answered in favour of the Revenue and against the assessee and the third question is answered in favour of the assessee and against the Revenue.