

(1998) 03 MAD CK 0018

In the Madras High Court

Case No : TC No's. 186 to 189 of 1985 and 1456 and 1738 of 1986

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

SUBRAMANIAN and CO.

RESPONDENT

Date of Decision : 03-03-1998

Acts Referred:

Citation : (1998) 149 CTR 256

Hon'ble Judges : R. Jayasimha Babu, J;N.V. Balasubramanian, J

Bench : Full Bench

Judgement

N.V. BALASUBRAMANIAN, J.:

At the instance of the Revenue, the following common questions of law have been referred to us for our consideration for the asst. yrs. 1977-78 to

1979-80, 1981-82 and 1980-81 :

I. Whether, on the facts and circumstances of the case, the Tribunal was correct in law in deciding that the assessee is entitled to relief under s.

80J of the Act in respect of its industrial undertaking in which plant and machinery previously used by a person other than the assessee had been

installed?

2. Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the assessee is entitled to relief under s. 80HH of the

Act in respect of machinery and plant previously used in non-backward area?

2. The assessee is a partnership firm. The assessee's business consists of tannery and export of hides and skins. The assessee-firm was evidenced

by a deed of partnership dt. 15th April, 1976 and it commenced its business activities on 1st May, 1976. On account of death of one of the

partners, a fresh partnership firm was constituted which continued upto the asst. yr. 1979-80. The assessee claimed relief under s. 80J of the IT

Act. The ITO held that the assessee was not entitled to claim the relief under s. 80J of the Act, for the reasons that A. Viswanathan and A.

Subramaniam, the partners of the assessee firm were previously partners of another firm M/s Srinivasa & Co. for a number of years and that firm

was dissolved on 30th April, 1976 and by a separate deed, the assets and liabilities of M/s Srinivasa & Co., were allotted and distributed amongst

two groups of partners, namely Shri Subramanian and Viswanathan on the one hand and the remaining partners on the other. The group consisting

of Subramanian and Viswanathan was allotted land, buildings, machinery and plant of gross value of Rs. 11,32,005. The firm Srinivasa & Co.

before dissolution were manufacturing E.I. tanned leather. The assessee-firm with the assets obtained on the dissolution of M/s Srinivasa & Co. set

up an industrial undertaking and started manufacturing fully finished leather products for export purposes. For this purpose, the sophisticated and

imported machinery which were mostly in Madras and which were allotted to the shares of the two partners A. Subramanian and A. Viswanathan

were transferred to Dindigul, where the industrial undertaking was set up. There is no dispute that the plant and machinery were set up in the new

undertaking and the assessee claimed relief under s. 80J of the Act in respect of that unit and the ITO held that the assessee was not entitled to

claim deduction under s. 80J of the Act, which was confirmed by the AAC. On further appeal before the Tribunal, it was conceded on behalf of

the assessee that for the purpose of considering the dispute that even assuming that 100 per cent plant and machinery used by the assessee was

previously used by M/s Srinivasa & Co., the assessee would still be eligible for the relief under s. 80J of the Act. The Tribunal based on the

decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat-IV Vs. Suessin Textile Bearing Ltd., , held that the

previous user contemplated under s. 80J(4) of the Act should be by the assessee and not by any other person and the assessee was entitled to the

relief under s. 80J of the Act. The assessee also claimed deduction under s. 80HH of the Act. The ITO as well as the AAC for the same reasons.

stated to deny the relief under s. 80J of the Act, denied the relief under s. 80HH of the Act: In so far as deduction under s. 80HH of the Act is

concerned, the Tribunal, following its earlier order granting deduction under s. 80J of the Act, held that the assessee would be entitled to the relief

under s. 80HH of the Act. The Tribunal also held that in any event, the plant and machinery previously used were not in any backward area, as it is

common ground that such plant and machinery were in Madras, which is not a backward area and therefore, the assessee was entitled to relief

under s. 80HH of the Act.

3. Mr. C-V. Rajan, learned counsel for the Revenue, submitted that the view of the Tribunal that the assessee is entitled to deduction under s. 80J

of the Act is erroneous in law. He submitted that s. 80J(4) of the Act provides that the industrial undertaking is not formed by the transfer to a new

business of machinery or plant previously used for any purpose. Learned counsel for the assessee, however, submitted that section has not placed

any restriction regarding the user and only condition was that it should not be previously used by the assessee for any purpose and the fact that any

third party had used the plant and machinery, is not a relevant consideration to deny the relief under s. 80J of the Act and that the assessee is

entitled to the relief under s. 80HH of the Act.

4. Sec. 80J(4) of the Act provides that the relief under s. 80J of the Act would be available to the industrial undertaking. Sec. 80J of the Act

provides that one such condition for the grant of deduction is that the industrial undertaking should not have been formed by the transfer to a new

business of machinery and plant previously used for any purpose. Sec. 80J(4) of the Act, therefore, postulates that the new unit is not formed by

the transfer to a new business of machinery and plant previously used for any purpose and in our opinion, the previous user is not confined to the

user by the assessee but extends to the user by third persons also. Sec. 80J of the Act places an embargo that the deduction will be denied if the

assets were used and if the restriction of prior user is confined to the assessee alone, the object behind the grant of deduction under s. 80J of the

Act for the establishment of a new industrial undertaking would be easily defeated. Therefore, even if a third party had used the machineries and

those machineries were used for the formation of a new industrial under-taking by transfer of those machineries, the industrial undertaking would be

ineligible to claim the relief under s. 80J of the Act. The decision of the Supreme

Court in the case of Bajaj Tempo Ltd., Bombay Vs.

Commissioner of Income Tax, Bombay City-II, Bombay, , is more apposite here and the apex Court while construing the expression, ""previously

used in any other business"" in s. 80J of the Act, held that it cannot be construed narrowly so as to confine it to the user by the assessee only. The

apex Court approved the decision of the Bombay High Court in the case of Capsulation Semces Pvt. Ltd. vs. CIT (1973) 91 NR 566 (Bom) ,

and held that the transfer of building or machinery to a new business would disentitle the undertaking to claim the relief and the words, ""previously

used in any other business"" in s. 80J of the Act could not be construed so narrowly as to be confined to the user of the building by the assessee

only. Therefore, it is clear that the assessee's claim that the machinery or plant was previously used by any third party and those machineries have

been transferred to the new industrial undertaking with which the undertaking was formed is not tenable and the assessee is not entitled for the

grant of the relief under s. 80J of the Act.

5. In so far as the deduction under s. 80HH of the Act is concerned, the position is different as the proviso to s. 80HH(2)(iii) of the Act prescribes

a condition that there should not be a transfer to a new business of machinery or plant previously used for any purpose in any backward area.

Therefore, the relief under s. 80HH of the Act would be denied in case of transfer of machinery previously used in any backward area. The finding

of the Tribunal is that the machinery or plant, though previously used for any purpose, was not used for any business set up in a backward area and

on the basis of the finding of fact rendered by the Tribunal, we are of the opinion that there is no infringement of the condition prescribed in s.

80HH of the Act and the assessee is eligible to get the deduction under s. 80HH of the Act and the Tribunal was correct in holding that the

assessee was entitled to claim the relief under s. 80HH of the Act, but it is not correct in holding that the assessee was entitled to the relief under s.

80J of the Act. Hence, we answer the common questions of law as under :

First Question - It is answered in the negative, against the assessee and in favour of the Revenue.

Second question .- It is answered in the affirmative, against the Revenue and in favour of the assessee.

In the circumstances of the case, there will be no order as to costs.

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