
(2006) 05 P&H CK 0141
In the Punjab And Haryana At Chandigarh
Case No : IT Appeal No. 293 of 2005

Commissioner of Income Tax

APPELLANT

Vs

Vardhman Polytex Ltd.

RESPONDENT

Date of Decision : 22-05-2006

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 143(3), 28, 288(2), 80HHC

Citation : (2006) 203 CTR 397 : (2008) 296 ITR 382

Hon'ble Judges : Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Advocate : N.L. Sharda, for the Appellant; Akshay Bhan, for the Respondent

Judgement

1. This is an appeal by the Revenue, arising out of order dt. 16th Nov., 2004, passed by the Income Tax Appellate Tribunal Chandigarh Bench "B", Chandigarh (for short the Tribunal") in ITA No. 458/Chd/2000, for the asst. yr. 1995-96, raising the following substantial question of law:

1. Whether, on the facts and circumstances of case, the Hon"ble Tribunal was justified in law in excluding the amount of sales-tax and excise duty from the total turnover for the purpose of the computation of deduction u/s 80HHC of IT Act, by ignoring that sales-tax and excise duty are part of the billing amount for which the sales have been effected ?

2. Briefly the facts of the case are that the assessee filed its return of income for the assessment year in question on 28th Nov., 1995 declaring total income of Rs. 3,81,53,620, which was processed u/s 143(1)(a) of the IT Act, 1961 (for short "the Act") on 8th Feb., 1996. Regular assessment u/s 143(3) of the Act was completed vide order dt. 16th March, 1998 and the income of the assessee was determined at Rs. 3,95,42,740. At the time of passing of order u/s 143(3) of the Act, the deduction claimed by the assessee u/s 80HHC of the Act was recomputed by including sales-tax and excise duty in the total turnover. Aggrieved against this action of the AO, the assessee went in appeal before the

Commissioner of Income Tax (Appeals) [for short "the CIT(A)], who relying upon the order passed in appeal filed by the assessee for the asst. yr. 1994-95 decided the issue in favour of the assessee. The Revenue, not accepting the order of CIT(A), further challenged the same before the Tribunal. The Tribunal relying upon a Special Bench decision of the Tribunal, Calcutta, in the case of (2002) 83 ITD 96 rejected the appeal filed by the Revenue. The relevant part of the impugned order of the Tribunal is extracted below:

8. At the very outset, learned Counsel for the assessee submitted that the issue is covered in favour of the assessee and against the Revenue by the decision of Tribunal, Calcutta Special Bench, in the case of (2002) 83 ITD 96 .

9. The aforesaid contention of the learned Counsel for the assessee was not controverted by the learned Departmental Representative for the Revenue. It is noticed that the Special Bench while defining total turnover in the case of IFB Agro Industries Ltd. v. Dy. CIT (supra) held as under:

The two terms, namely, "export turnover" and "total turnover" should unless a contra-intention appears, be given their natural and general meaning as understood in commercial law as interpreted by the judicial decisions and not the restricted meaning.

Though "total turnover" may include the receipts of excise duty and sales-tax, etc. in its general parlance and under specific statute, because of its wider coverage in the definitions given thereunder, it has to be given a restrictive meaning while, computing the "export profit" for the purpose of Section 80HHC, namely only that part of the receipt for sale consideration is to be taken as part of the total turnover which has an element of profit therein and, accordingly the receipt of excise duty and sales-tax which do not include an element of profit should be excluded from "total turnover". In the result, the AO was directly to compute the deduction u/s 80HHC on export profits and arrived at on the basis of the export turnover and total turnover exclusive of the receipts of excise duty and sales-tax.

So by respectfully following the order of the Tribunal (Special Bench) in the aforesaid referred to case, we are of the opinion that learned CIT(A) was fully justified in holding that sales-tax and excise duty should not be included in the "total turnover" for calculating deduction u/s 80HHC. We, therefore, do not see any merit in this ground of the Departmental appeal.

3. We have heard Dr. N.L. Sharda, advocate, counsel for the Revenue and Shri Akshay Bhan, advocate, counsel for the respondent and perused the record carefully.

4. Dr. N.L. Sharda, learned Counsel appearing for the Revenue contended that the removal of the excise duty and sales-tax element from the total turnover would increase the percentage of the export profit vis-a-vis total profits. He further contended that for the purpose of calculation of the deduction u/s 80HHC

of the Act, total turnover is to be taken into account and even from the point of view of sales-tax laws, total turnover would include excise duty and sales-tax paid on the goods. He further contended that the excise duty and sales-tax are certainly a trading receipt being part of the sale proceeds of the goods and merely because it is not levied on the goods, which are exported, does not mean that it should not be taken into account for the purpose of calculating total turnover of the assessee.

5. Mr. Akshay Bhan, learned Counsel appearing for the assessee contended that the language employed in the very provision explicitly makes it clear that the statutory outgoings cannot be included in the total turnover so as to inflate the same. While the intention of the legislature is giving benefit to assesseees, who are exporting the goods and earning foreign exchange, the authorities erred in reducing the export profit proportion by inflating the total turnover by adding excise duty and sales-tax element in it. He placed reliance on the judgments of Bombay, Calcutta and Kerala, Madras, Karnataka and Madhya Pradesh High Courts, taking a view that the excise duty and the sales-tax paid on the goods would not form part of the total turnover, while calculating the deduction under the above provision. The judgments being Commissioner of Income Tax Vs. Sudarshan Chemicals Industries Ltd., Rathi Engineering Works and Klockner Windsor (I) Ltd., ; Subikash Roy Vs. Smt. Leena Chatterjee, ; Commissioner of Income Tax Vs. K. Rajendranathan Nair, K. Raveendranathan Nair and Smt. T.C. Usha, ; The Commissioner of Income Tax Vs. Sundaram Fasteners Ltd., ; Commissioner of Income Tax and Another Vs. Bharat Earth Movers Ltd., ; The Commissioner of Income Tax, Tamilnadu-I, Madras Vs. Wheels India Limited, ; D.P. Agrawal Vs. Commissioner of Income Tax, and The Commissioner of Income Tax Vs. Sundaram Clayton Ltd., .

6. Relevant provisions of Section 80HHC of. the Act reads as follows:

80HHC. Deduction in respect of profits retained for export business.-(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....

(3) For the purpose of Sub-section (1),-

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of business carried on by the assessee;

(b) xxxxxx

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,-

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods:

Provided that the profits computed under cl. (a) or cl. (b) or cl. (c) of this subsection shall be further increased by the amount which bears to ninety per cent of any sum referred to in cl. (iiia) (not being profits on sale of a licence acquired from any other person), and cls. (iiib) and (iiic) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.-....

(4) The deduction under Sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form along with the return of income, the report of an accountant, as defined in the Explanation below Sub-section (2) of Section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(b) "export turnover" means the sale proceeds received in, or brought into India by the assessee in convertible foreign exchange in accordance with cl. (a) of Sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962);

(ba) "total turnover shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962):

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in cls. (iiia), (iiib) and (iiic) of Section 28;

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession as reduced by-

(1) ninety per cent of any sum referred to in els. (iiia), (iiib) and (iiic) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;

7. From the above extract, it is clear that subject to and in accordance with the provision of the section, an assessee engaged in the business of export is entitled to claim deduction of the profits derived by it from export, while computing its total income under Sub-section (1) of Section 80HHC of the Act. Sub-section (3)(a) of Section 80HHC of the Act provides how "profits derived from export" should be arrived at. It provides that profits derived from export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee.

8. "Export turnover", "total turnover" and "profits of business" have been defined in Explns. (b), (ba) and (baa) to Section 80HHC of the Act. "Total turnover" is not to include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined under the Customs Act, 1962. The proviso thereto provides in relation to any assessment year commencing on or after 1st day of April, 1991, that the expression "total turnover" shall have effect as if it also excluded any sum referred to in cls. (iiia), (iiib) and (iiic) of Section 28. While "total turnover" is defined by an "excluding" definition, the term "export turnover" is defined in cl. (b) of Explanation by an extensive definition as meaning the sales proceeds received in, or brought into, India by the assessee in convertible foreign exchange, of any goods or merchandise to which Section 80HHC of the Act applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station. There is no dispute as to how the "profits of business" or the "export turnover" is to be arrived at. But the dispute falls in a very narrow compass, i.e., as to how the "total turnover" of the business of the assessee should be arrived at, for calculating the profit of export.

The said provision is given effect by adopting the following formula:

Profit of export = Profits of business x Export turnover/Total turnover

9. As regards the contention of the learned Counsel for the Revenue that even under the sales-tax laws, the turnover has been held to include amount of sales-tax as well as excise duty, we are afraid that it will not be the right course to adopt interpretation given to a term under a different statute enacted for a different object. The principles relating to interpretation of words used in a statute and application thereof in a different statute are well settled. Hon'ble the Supreme Court of India in the Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, has observed as under:

...decisions rendered with reference to construction of one Act cannot apply with reference to the provisions of another Act, unless the two Acts are in *pari materia*.

In *S. Mohan Lal Vs. R. Kondiah*, it is held as under:

3...It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act; more so if the two Acts in which the same word is used are not cognate Acts. Neither the meaning, nor the definition of the term in one statute affords a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally. On the other hand it is a sound, and, indeed, a well-known principle of construction that meaning of words and expressions used in an Act must take their colour from the context in which they appear...

10. Keeping in view the above principles for interpretation of statutes the term "total turnover" used in Section 80HHC of the Act needs to be interpreted vis-a-vis the definition of "export turnover" with reference to other definitions as given in various clauses of Section 80HHC of the Act. The interpretation under the IT law need to be contextual and should not be with reference to the interpretation given to it under the sales-tax law.

11. It is submitted by the counsel for the assessee that the profits derived from such exports should be the amount, which has profit element in it. As already stated, while interpreting the word "total turnover", u/s 80HHC of the Act, different High Courts have taken a view in favour of the assessee.

12. While dealing with the issue in *Wheels India Ltd.*'s case (supra), Madras High Court held as under:

11. The word "turnover", when it is not specifically defined in the Act, would actually assume the meaning that the consideration received must be for the sale of goods and it must be available with the assessee for being turned over or in other words it must come to the assessee's till as the money belonging to him. In order that an amount can be included in the total turnover it must either be the purchase or the sale price or something incidental to the transfer of the goods dealt with by the assessee. In other words the turnover must relate to the purchase or the sale of the goods made by the assessee. The incidental expenses such as freight and insurance have been specifically excluded.

12. When the definition of total turnover excludes incidental expenses such as freight and insurance, which amount has to be borne by the assessee for safe transportation of his goods from and out of his pocket, it is highly impossible to accept the contention that the term "turnover" would include itself the excise duty and sales-tax components which are all indirect taxes and the assessee has to collect and pay it over to the Government and such statutory dues will not have any element of profit of business.

13. The definition "export turnover" read along with "total turnover" would show that they include anything which has nexus with the sale proceeds. On the other

hand they would not encompass with them anything which has no connection whatsoever to the sale proceeds. Section 80HHC of the Act is a code by itself and in order to remove difficulties the legislature thought it fit to explain and give meaning to various expressions employed in that section for the purpose of its working. The object of Section 80HHC of the Act is required to be kept in mind while considering that section. The language employed in the above said section is for profit derived from export. The profits derived from export shall be the amount which bears with the profits of the business, the same proportion as the export turnover in respect of such goods bears with the total turnover of the goods. Therefore, the turnover should be restricted to such receipts which have an element of profit in them. It is only the actual sale price, which is relevant. The element of sales-tax and excise duty cannot be included to inflate the total turnover artificially in order to reduce the benefit which an assessee is otherwise entitled to.

13. In Sudarshan Chemicals Industries Ltd. case (supra), it is held as under:

...Under cl. (b) of the Explanation to Section 80HHC, export turnover is defined to mean sale proceeds received in India by the assessee in foreign exchange. Under the said definition, export turnover is defined to mean the sale proceeds of any goods which are exported out of India but which will not include freight or insurance. Clause (ba) defines total turnover to exclude freight or insurance. This cl. (ba) explains the turnover in a negative manner so as to exclude freight or insurance. Therefore, a combined reading of the above two clauses shows that they include anything which has nexus with the sale proceeds. Correspondingly, they show that they exclude everything which has no nexus with the sale proceeds. Further, the meaning of export turnover in cl. (b) of the Explanation to Section 80HHC, therefore, clearly shows that export turnover did not include excise duty and sales-tax. The export turnover is the numerator in the above formula whereas the total turnover is the denominator. The above formula has been prescribed to arrive at the profits from exports. In the circumstances, the above two items, namely, sales-tax and excise duty, cannot form part of the total turnover. In fact, if the denominator was to include the above two items and if the numerator excluded the above two items then the formula would become unworkable. In the circumstances, we are of the view that in order to ascertain the export profits, the above two items cannot be introduced to inflate the total turnover artificially in order to reduce the benefit which an assessee is entitled to. Ultimately, the object of Section 80HHC is required to be kept in mind in order to encourage export. The legislature has applied the above formula in order to find out the profits derived from the exports. In this connection, Section 80HHC(1) may also be noticed. u/s 80HHC(1), it is, inter alia, provided that where an assessee is engaged in the business of exports of any goods, there shall 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. In other words, in computing the total income of such an assessee, profits derived by the assessee from the export are deductible. The above expression, namely, "profits

derived from exports" also finds place in Section 80HHC(3)(a). It says that where the export is of goods, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business. In fact, the earlier Section 80HHC(3) consisted of two parts, namely, whether the assessee carried on a business as 100 per cent, exporter and secondly whether the assessee carried on a composite business. In the latter case it was provided that the profits derived from exports shall be the amount which bears to the profits of the business as computed under the head "Profits and gains of business", the same proportion as the export turnover to the total turnover. The emphasis is on the words "profits derived from the exports". Therefore, weightage must be given to such profits. Such profits cannot be reduced artificially by including statutory levies in the denominator, namely, total turnover. Therefore, the turnover should be restricted to such receipts which have an element of profit in it. It is only the actual sale price which is relevant. Anything charged by the assessee by way of excise duty and sales-tax cannot be taken into account as they do not have any element of profit. Even according to the accounting principles, such levies do not form part of the P&L a/c. In fact, they are shown as liability in the balance sheet. In the circumstances, the above two items cannot be included in the total turnover. We prefer this interpretation as it advances the object sought to be achieved by the legislature.

Other High Courts have also taken similar view.

14. Counsel for the Revenue could not cite any judgment taking a view contrary to what has been taken in the judgments referred above.

15. What should be the approach of the different Courts dealing with an all India statute is well settled by various judgments. The latest being CIT v. S.A.E. Head Office Monthly Paid Employees Welfare Trust (2004) 192 CTR (Del) 70 : (2004) 271 ITR 159 wherein Delhi High Court dealing with the issue held as under:

When in the tax matters which are governed by all India statute, there is a decision of another High Court on the interpretation of a statutory provision, it would be a wise judicial policy and practice not to take a different view barring, of course, certain exceptions, like where the decision is sub silentio, per incuriam, obiter dicta or based on a concession or takes a view which it is impossible to arrive at or there is another view in the field or there is a subsequent amendment of the statute or reversal or implied overruling of the decision by a higher Court or some such or similar infirmity is manifestly perceivable in the decision.

It must be remembered that it is a general policy in Income Tax matters that whatever the view of the Bench at the time of hearing may be the Bench should follow the view taken by another High Court on the interpretation of the section. In the case of Commissioner of Income Tax, Gujarat-I Vs. Sarabhai Sons Ltd., , the Gujarat High Court observed that "Even though we may be persuaded to

take a different view, we are not inclined to do so in view of the settled practice referred to in the decision of the Madras High Court and the decisions of the Bombay High Court and the Madhya Pradesh High Court adverted to above.

16. Further in *Steel Authority of India v. Collector of Customs, Bombay* 2000 (115) ELT 42 (SC), Hon''ble the Supreme Court of India deprecated the Revenue in taking different stands in the different High Courts. The observations in the above judgment are extracted below:

3. learned Counsel for the Revenue submitted that this trade notice had been issued only by the Bombay Customs House. It is hardly to be supposed that the Customs authorities can take one stand in one State and another stand in another State. The trade notice issued by one Customs House must bind all Customs authorities and, if it is erroneous, it should be withdrawn or amended, which in the instant case, admittedly has not been done.

17. Keeping in view the fact that the interpretation involved in the present case is of a statute, having application throughout the country, we do not find any good reason to differ from the views taken by six different High Courts on the issue.

18. Accordingly, the substantial question of law raised in the appeal is answered against the Revenue and in favour of the assessee.