

(2006) 11 GUJ CK 0017
In the Gujarat High Court

Case No : Income Tax Reference No. 68 of 1998

Dhall Enterprised and Engineers P. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-11-2006

Acts Referred:

Income Tax Act, 1961 — Section 28, 36, 36(1), 80HH, 80HHC(1)

Citation : (2007) 207 CTR 729 : (2007) 295 ITR 481

Hon'ble Judges : Y.R. Meena, Acting C.J.; Anant S. Dave, J

Bench : Division Bench

Advocate : R.K. Patel, for the Appellant; Manish R. Bhatt, for Respondent 1, for the Respondent

Judgement

Y.R. Meena, Act.C.J.

1. Following questions are referred for the opinion of this Court by the Tribunal:

1. Whether on the facts and in the circumstances of the case the Tribunal was justified in upholding the order of the lower authorities disallowing the bad debts in case of (1) M/s. Neo Mar Ltd. Of Rs. 81,529/- and (2) M/s. Modern Woolen Mills Ltd. Of Rs. 21,463/- in spite of the fact that under provisions of Section 36 of the I.T. Act, 1961 there is no requirement for determining the basis for which the payment have not been made by the debtors to the assessee?

2. Whether on the facts and in the circumstances of the case the Tribunal was justified in law in holding that the sum of Rs. 1005105/- being the sale consideration of spare parts supplied to party in Poland could not be considered as export turnover within the meaning of Section 80HHC of the I.T. Act, 1961?

The main issue raised by the learned counsel for the applicant in the first question is that "once the assessee debited the account with a particular amount of debt which has become bad, that amount should be allowed as bad debt". The other issue raised in the second question is `whether the assessee is entitled for deduction u/s 80HHC of the Income Tax Act, admittedly, when the goods are not

exported from India.

This issue has been considered by the Tribunal as under:

3.5 We have heard both the sides. It appears that the first appellate authority by the impugned order considered the materials in support of the claim made by the assessee. The assessee had claimed bad debts with regard to 9 parties out of which in relation 7 parties the bad debts were allowed by the first appellate authority. With regard to M/s. Neo Mar Ltd., the assessee had produced a letter before the Assessing Officer issued by M/s. Neomar Ltd. which shows that the party was interested to settle the claim. Similar is the position with M/s. Modern Wollen Mills who withheld the payment for the pending jobs and supply of spares to be rendered by the assessee. Therefore, there are materials on record to show that the payments were not made by those two parties due to the internal differences between the assessee and those two parties. It is true that by virtue of the amendment brought in Section 36(1)(vii) the earlier provision by which the assessee was constrained to establish by strict proof that a debt has become bad is no more in existence but at the same time it is also correct that for the purpose of claiming deduction on account of bad debt all debts cannot be termed as bad debts. Irrespective of their possibility of recovery it was not the object of the statute that all debts are allowable as bad debts. The decision of the Tribunal, *supra* relied upon by the departmental representative supports the same view. Further, we find that with regard to the two debts, the debtors did not clear their dues due to certain differences with regard to the transactions between the parties. Hence, in our opinion, the finding recorded by the first appellate authority is correct.

2. Heard learned counsel for the parties. Clause (vii) of Sub-section (1) of Section 36 of the Income Tax Act, 1961, provides as under:

Other deductions. 36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in Section 28(i) to (vi) x x x x x (vii) subject to the provisions of Sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:

Provided that in the case of a bank to which Clause (vii) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that Clause; (viii) to (x) x x x x x

3. Even if we go by the plain reading of Clause (vii), the requirement for allowing deduction on account of bad debt is that the bad debt should be written off as irrecoverable. Mere debiting the amount is not sufficient. The requirement is that the assessee should also prove that the debt has become bad in that particular year. As pointed out rightly by the Tribunal, there was correspondence regarding

the amount in question that due to some differences the amount was not paid in that particular year. But, when correspondence was there to the effect that the assessee was insisting for payment for recovery of the debt, it cannot be said that the debt has become bad in the relevant assessment year. We, therefore, see no infirmity in the order of the Tribunal and we answer the first question against the assessee.

4. However, we make it clear that if the bad debt is not allowed in that particular year and if the assessee shows that the amount of debt has become bad in some other subsequent year, he can approach the concerned authority for deduction on account of bad debt of the amount claimed here.

5. The next issue which has been considered by the Tribunal is "whether the assessee is entitled for deduction u/s 80HHC in respect of the goods which were purchased from some country and exported from that country to some other country". Can it be said that it amounts to export and the assessee is entitled for deduction u/s 80 HHC of the Act?

6. This issue has been considered by the Tribunal as under:

7.5 We have heard both the sides and perused the materials available on record. The present assessment year is 1989-90. The provision of Section 80HHC has been changed during the present assessment year. u/s 80 HHC the basis for calculating the deduction has been changed from net foreign exchange realisation to "export turnover". The definition of net foreign exchange realisation has also been abolished since it is unnecessary. Export turnover has been defined in Section 80HHC(4A) Explanation (b).

The export turnover is the sale proceeds received in India by the assessee in convertible foreign exchange in accordance with Clause (a) of Sub-section (2). Clause (a) of Sub-section (2) provides as follows:

(2)(a) This section applies to all goods or merchandise, other than those specified in Clause (b), if the sale proceeds of such goods or merchandise exported out of India are (received in, or brought into, India) by the assessee (other than the supporting manufacturer) in convertible foreign exchange within a period of six months from the end of the previous year or, where the Chief Commissioner or Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is, for reasons beyond his control, unable to do so within the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf.

7. Therefore, if we consider the aforesaid two provisions together, it would be clear be clear that the sale proceeds of such goods or merchandise exported out of India by the assessee in convertible foreign exchange is to be termed as export turnover. The opening word of Section 80HHC reads as follows:

Deduction in respect of profits retained for export business.

80 HHC. (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.

8. On considering the different provisions of Section 80HHC, we find that the first requirement is that the assessee has to export some goods or merchandise from India and thereafter, the assessee has to receive the price in convertible foreign exchange. In the departmental Circular which has been relied upon by the assessee, it has been clarified that some sale proceeds received in non-convertible rupees from bilateral account countries in India rupees under Government credit is to be regarded as convertible foreign exchange, but that is not the issue here. From the details of export sales furnished on behalf of the assessee at pg. 218 of the compilation, the assessee has maintained the accounts of direct supply to the tune of Rs. 10,05,105/- separately, therefore, the factual position which remains uncontroverted is that the assessee did not produce or manufacture any goods in India for supplying to Poland. The assessee has not brought in India any goods from Germany for supplying to Poland. On the other hand, the assessee has made some direct supply from Germany to Poland for its conveyance but, in our opinion, those sales cannot be termed as export turnover for the purpose of availing relief u/s 80HHC because the assessee has not exported any goods or merchandise from India which is sine qua non for the purpose of availing relief u/s 80 HHC. Accordingly this ground of appeal is rejected. Sub-section (1) and Sub-section (3) of Section 80HHC makes it clear that deduction under Sub-section (1) will be available only in case of export of the goods or merchandise out of India, meaning thereby that the export should be from India and not from any other country. We, therefore, see no infirmity in the order of the Tribunal and we answer the second question also against the assessee.

The Reference stands disposed of accordingly.