

(2011) 08 CAL CK 0066
In the Calcutta High Court
Case No : Income Tax A. No. 775 of 2004

Duncans Industries Limited	Vs	APPELLANT
Commissioner of Income Tax		RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Finance Act, 1990 — Section 80HHC(3)
Income Tax Act, 1961 — Section 260A, 80AB, 80B(5), 80HHC, 80HHC(1)

Citation : (2011) 245 CTR 77 : (2011) 202 TAXMAN 677

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Debi Pal, J.P. Khaitan, Somok Bose and A.K. Dey, for the Appellant;
Dipak Kumar Shome and Ranjan Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 260A of the income tax Act, 1961 is at the instance of an Assessee and is directed against an order dated 23rd June, 2004, passed by the income tax Appellate Tribunal, "C" Bench, Kolkata in income tax Appeal bearing ITA No. 1220 (Kol) of 1997 for the Assessment Year 1991-92 and thereby dismissing the appeal filed by the Assessee.

2. Being dissatisfied, the Assessee has come up with the present appeal.

3. The facts giving rise to filing of the appeal may be summed up thus:

a) The Assessee is a public limited liability company within the meaning of the Companies Act, 1956 and the present appeal arises out of the assessment made under the income tax Act, for the Assessment Year 1991-92 for which the relevant previous year was the financial year ended on March 31, 1991. The Assessee was amalgamated with M/s. Chand Chhap Fertilizers and Chemicals Limited with effect from January 01, 1994 pursuant to an order dated September 13, 1994 passed by this Court. The amalgamated company was renamed as Duncans Industries Limited with effect from November 01, 1994.

b) The Assessee carried on the business of inter alias, growing and manufacturing tea in its own tea estates (hereinafter referred to as the "garden tea business"). Such tea was sold by the Assessee not only in the domestic market but also by way of export outside India.

c) Apart from the said garden tea business, the Assessee carried on a separate business of exporting tea purchased by it (hereinafter referred to as the "purchased tea business"). In respect of the said separately purchased tea business, the Assessee maintained separate books of account.

d) During the previous year ended on March 31, 1991, the Assessee earned a profit of Rs. 6,14,65,671/- in the purchased tea business which was separately disclosed in its accounts.

e) In respect of the profit derived by the Assessee from the exports of the aforesaid garden tea business and purchased tea business respectively, according to the Assessee, it is entitled to deduction u/s 80HHC of the Act and as the two business were separate and distinct, the Assessee claimed that the amount of deduction u/s 80HHC was required to be separately computed in respect of each of such businesses.

f) The total turnover of the purchased tea business amounted to Rs. 37,36,62,392/- and according to the Assessee, it was entitled to deduction u/s 80HHC in respect of the entire profit of the purchased tea business which after making disallowance under the provisions of the Act amounted to Rs. 6,22,61,946/-.

g) According to the Assessee, the total turnover of the garden tea business was Rs. 66,35,11,666/- of which the export turnover was Rs. 2,91,07,747/-. The profit of the garden tea business amounted to Rs. 6,05,64,776/- and accordingly, the Assessee claimed deduction u/s 80HHC in respect of the garden tea business computed in the following manner:

$6,05,764,776 \times 2,91,07,747 / 66,35,11,666 = \text{Rs. } 26,56,930/-$.

h) The Chartered Accounts, while issuing the report in Form No. 10CCCAC u/s 80HHC(4), took note of the fact that the purchased tea business and garden tea business were two distinct and separate businesses and accordingly, were separately computed and certified the quantum of deduction for each of the said business at Rs. 6,22,61,946/- for purchased tea business and Rs. 26,56,930/- in respect of the garden tea business. The Assessee in its return of income for the Assessment Year 1991-92 accordingly claimed deduction u/s 80HHC in respect of the aforesaid two amounts aggregating to Rs. 6,49,18,876/-.

i) The Assessing Officer by order dated March 18, 1994 accepted that the purchased tea business was a separate one and computed the profits thereof at Rs. 6,25,02,070/- as against Rs. 6,22,61,946/- returned by the Assessee. However, instead of computing the deduction u/s 80HHC separately in respect of the purchased tea business and garden tea business with reference to the

respective turnover of the said two business, the Assessing Officer aggregated the profits of all the business of the Assessee, the export turnover of the two business and also aggregated the turnover of all the business of the Assessee and he worked out the quantum of deduction u/s 80HHC at Rs. 4,73,57,023/- by applying the provisions of Sub-section (3) of Section 80HHC to the aggregate figures so arrived at by him.

j) Being dissatisfied, the Assessee preferred an appeal before the Commissioner of income tax (Appeal), who, however, by an order dated February 27, 1997 following his order dated February 24, 1997 for the Assessment Year 1990-91, declined to grant relief to the Appellant.

k) Against the identical issue involved in the Assessor's case for the Assessment Year 1990-91, the Appellant preferred separate appeals before the income tax Appellate Tribunal against the order of the Commissioner of income tax (Appeals) for the Assessment year 1990-91 and 1991-92.

l) The Tribunal by an order dated June 23, 2004 allowed the Assessor's appeal for the Assessment Year 1990-91 but the appeal for the Assessment Year 1991-92 was dismissed. The Tribunal accepted that the purchased tea business and garden tea business were two separate and distinct businesses and that the Assessing Officer had separately computed the profits in respect of each of the two businesses. The Tribunal also took note of the fact that the distinct and separate nature of the two businesses was also accepted by the Assessing Officer for the Assessment Year 1994-95. After arriving at such findings, the Tribunal by the order impugned held that the purchased tea business was required to be considered on its own for the purpose of computing the deduction u/s 80HHC having regard to the provisions of Sub-section (3) as in force during that year and in view of the amendment in Sub-section (3) of the 80HHC by the Finance Act, 1990 with effect from April 1, 1991, the Tribunal declined to grant relief to the Assessee for the Assessment year 1991-92.

4. Being dissatisfied, the Assessee has come up with the present appeal.

5. A Division Bench of this Court formulated the following substantial questions of law for decision in this appeal:

i) Whether on a true and proper interpretation of Section 80HHC of the Income Tax Act, 1961 and in view of the undisputed position that the garden tea business and purchased tea which separate accounts are maintained and profits are separately computed, the Tribunal was justified in law in holding that the deduction under the said Section was required to be computed by aggregating the profits, export, turn over and total turn over of all the businesses and not separately with reference to the profits, export turnover and total turnover of each business?

ii) Whether the Tribunal was justified in law in upholding the determination of the deduction u/s 80HHC at Rs. 4,73,57,023/- as made by the Assessing Officer as

against the Appellant's claim of Rs. 6,22,61,946/- in respect of the purchased tea business and Rs. 26,56,930/- in respect of the garden tea business?

6. Therefore, the only question that falls for determination in this appeal is whether in view of the amended provision of Sub-section (3) of Section 80HHC of the Act, the Appellant is entitled to the benefit of calculation on the basis of separate computation as was accepted in respect of earlier year under the pre amended provision of Sub-section (3).

7. In order to appreciate the question involved herein, the provision contained in Section 80HHC(1) and both the pre-amended and the post amended provisions of 80HHC (3) are quoted below:

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, then shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the Assessee, the deduction of the profits derived by the Assessee from the export of such goods or merchandise:

Provided that if the Assessee, being a holder of an Export House Certificate or a Trading House Certificate, (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in Clause (b) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this Sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the Assessee shall be reduced by such amount which bears to the total profits of the export business of the Assessee the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the Assessee

Prior to substitution of the language of Sub-section (3) of Section 80HHC by the Finance Act, 1990 w.e.f. 1.4.1991 (for the assessment year 1990-91). After the substitution of the language of Sub-section (3) of Section 80HHC by the Finance Act, 1990 w.e.f. 1.4.1991 for the assessment year 1991-92.

(3) for the purpose of sub-section (1), profits derived from the export of the goods or merchandise out of India shall be - a) in a case where the business carried on by the assessor consists exclusively of the export out of India of the goods or merchandise to which this section applies, the profits of the business as computed under the head "profits and gains of business or profession". b) In a case where the business carried on by the assessed does not consists exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head "profits and gains of business or profession") the same proportion as the export turnover bears to the total turnover of the business carried on by the assessed.

(3) for the purpose 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 "profits and gains of business or profession), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessor.

8. Dr. Pal, the learned Senior Counsel appearing on behalf of the Appellant, assiduously contended before us that after the amendment of Sub-section (3) of Section 80HHC, in fact, there has been no material change but the previous two Sub-sections, namely, (a) & (b) have been amalgamated. Dr. Pal contends that it would appear from the Sub-section (3), as it stood prior to amendment, by invoking the principle of Sub-section (b) thereof, the same result could be achieved also in respect of cases coming under the purview of Sub-section (a) and for the above reason, the legislature made the amendment by making an amalgamated provision by virtually maintaining Sub-section (b) of an pre-amended provision. Dr. Pal contends that there is no substantial change in giving effect to the provisions after the amendment with effect from 1st April, 1991 from the one that it stood prior to the amendment.

9. Dr. Pal contends that after the amendment, the Sub-section (3) as it stands, clearly indicates that each of the separate business of the Assessee should be computed separately for the purpose of calculating the benefit of deduction u/s 80HHC as would appear from the fact that the phrase "the business" has been has been employed therein. Dr. Pal, therefore, prays for setting aside the order passed by the Tribunal and for giving the same benefit has been given to his client in respect of earlier assessment year by separately calculating the profit of the two businesses. In support of his contention, Dr. Pal relies upon the following decisions:

- 1) Commissioner of Income Tax Vs. Rathore Brothers,
- 2) Commissioner of Income Tax Vs. Jindal Fine Industries,
- 3) The Commissioner of Income Tax Vs. M. Gani and Co.,
- 4) Commissioner of income tax v. Suresh B. Mehta, reported in (2007) 291 ITE 462;

10. Mr. Shome, the learned Senior Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Dr. Pal and has contended that after the amendment of Sub-section (3), at present, there is no scope of separate computation in respect of different business of the Assessee. Mr. Shome, therefore, prays for dismissal of the appeal. In support of his contention, Mr. Shome relies upon the decisions of Kerala High Court in the case of Indian Spices Co. Vs. Commissioner of Income Tax, .

11. Therefore, the question that arises for determination in this appeal is whether for the purpose of computation in terms of Sub-section (3) of Section 80HHC after the amendment, each of the businesses of the Assessee should be

separately computed or it should be computed on the basis of profit arising out of all the businesses of the Assessee.

12. After hearing the learned Counsel for the parties and after going through the provisions contained in Sub-section (3) of Section 80HHC, as it stands after the amendment as quoted above, we find that that the said Sub-section speaks of two factors to be the guiding ones for computation of the deduction, i.e. first, the profits of "the business" (as computed under the head "profits and gains of business or profession) arising out of export turnover and secondly, the total turnover of "the business" carried on by the Assessee.

13. As held by the Supreme Court in the case of IPCA Laboratory Ltd. v. Deputy Commissioner of income tax, Mumbai reported in AIR 2004 SC 3046, 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 and the word "profit" has the same meaning in Section 80HHC (1) and (3). The following observations of the Supreme Court in the above-mentioned case are relevant are quoted below:

13. u/s 80HHC(1) the deduction is to be given in computing the total income of the Assessee. In computing the total income of the Assessee both profits as well as losses will have to be taken into consideration. Section 80AB is relevant. It reads as follows

80AB. Where any deduction is required to be made or allowed under any section 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.

Section 80B(5) is also relevant. Section 80B(5) provides that "gross total income" means total income computed in accordance with the provisions of the income tax Act.

14. Section 80AB is also in Chapter VI-A. It starts with the words "where any deduction is required to be made or allowed under any section of this Chapter." This would include Section 80HHC. Section 80AB further provides that "notwithstanding anything contained in that section." Thus Section 80AB has been given an overriding effect over all other sections in Chapter VIA. Section 80HHC does not provide that its provisions are to prevail over Section 80AB or over any other provision of the Act. Section 80HHC would thus be governed by Section 80AB. Decisions of the Bombay High Court and the Kerala High Court to the contrary cannot be said to be the correct law. Section 80AB makes it clear

that the computation of income has to be in accordance with the provisions of the Act. If the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration.

15. Another reason why the argument of Mr. Dastur cannot be accepted is that even u/s 80HHC(3)(c)(i) the profit is to be adjusted profit of business. The adjusted profit of the business means a profit as reduced by the profit derived from business of exports out of India of trading goods. Thus in calculating the profits, u/s (3)(c)(i), one necessarily has to reduce by profits u/s (3)(c)(ii). As seen above the term "profit" means positive profit. Thus if there is loss then those losses in export of trading goods have to be adjusted. They cannot be ignored. We, therefore, hold that a plain reading of Section 80HHC makes it clear that in arriving at profits earned from export of both self-manufactured goods and trading goods, the profits and losses in both the trades have to be taken into consideration. If after such adjustments there is a positive profit the Assessee would be entitled to deduction u/s 80HHC(i). If there is a loss he will not be entitled to any deduction.

16. Mr. Dastur submitted that the word "profit" in Section 80HHC must have the same meaning in the entire section. He submitted that as the word "profit" in Section 80HHC(1) means only positive profit, it will have the same meaning in Section 80HHC(3)(c). He submitted that thus the word "profit" in Section 80HHC(3)(c) would not include losses and if there are any losses they are to be ignored. We are unable to accept this submission for more than one reason. Firstly it is not necessary that the word "profit" must have the same meaning. The meaning that the word "profit" will depend on the context in which it is used. In Section 80HHC(1) it is admittedly used to indicate positive "profit" because the deduction will only be of a positive profit. Section 80HHC(3) is the Sub-section which provides how profits are to be worked out in computing total income. For purposes of such computation both profit and losses have to be taken into account. Thus the word "profit" in Section 80HHC(3) will mean profits after taking into account losses, if any. 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).

(Emphasis supplied by us).

14. The principles mentioned above have been all along followed by the Supreme Court in the subsequent cases of Income Tax Officer, Bangalore Vs. Induflex Products (P) Ltd., and Commissioner of Income Tax, Pune v. Shirke Construction Equipment Ltd., AIR 2007 SC 2089 .

15. In our opinion, in view of the aforesaid principles laid down by the Apex Court there is no scope of advancing any argument that the different business of the Assessee are required to be considered separately for the purpose of calculating the deductions u/s 80HHC of the Act.

16. We now propose to deal with the decisions cited by Dr. Pal.

17. Dr. Pal has mainly relied upon the decision of the Madras High Court in the case of Commissioner of income tax v. Rathore Brothers (supra), which was decided prior to the passing of the decision of the Supreme Court in the case of IPCA Laboratory Ltd. v. Deputy Commissioner of income tax, Mumbai (supra) and in the other three decisions of different High Courts, the above case of Rathore Brothers has been followed. In none of the other cases, the High Court took note of the above Supreme Court decision and thus, those are no longer good law.

18. We, thus, find no substance in the only submission of Dr. Pal.

19. We, consequently, dismiss the appeal by answering both the questions formulated by the Division Bench in the affirmative and against the Assessee.

20. In the facts and circumstances, there will be, however, no order as to costs.