(2010) 05 IPAB CK 0002

In the Intellectual Property Appellate Board

Case No : I.T.A. Nos. 1606, 1607/Mds/2008

Dy. Cit — APPELLANT

Vs

Spic Gel Engineering Construction Co. Ltd. — RESPONDENT

Date of Decision : 26-05-2010

Acts Referred:
Income Tax Act, 1961 — Section 36(2), 36(1)(vii), 80HHB, 80O

Citation : (2010) 5 ITR(Trib) 293

Hon'ble Judges : N. Barathvaja Sankar, J;Hari Om Maratha, J.M., J

Bench : Division Bench

Judgement

N. Barathvaja Sankar, J

1. As these two appeals are preferred by the revenue fn the case of one and the same Assessee, M/s. Spic Gel Engineering Construction Co. Ltd.,

for the assessment years 2002-03 and 2004-05, against the different orders dated 3-1-2008 of the Commissioner of Income-tax (Appeals)-V, Chennai,

they were clubbed together, heard together and are being disposed of by this common and consolidated order, for the sake of brevity and convenience.

2. Let us first take up I.T.A. No. 1606/Mds/2008 (for the assessment year 2 2002-03). The revenue has brought the following two issues for

adjudication by us :

(i) Whether the learned Commissioner (Appeals) erred in holding that the Assessees claim for deduction under Section 80HHB of the Act is in order.

(ii) Whether the learned Commissioner (Appeals) erred in holding that disallowance of deduction under Section 80-O of the Income Tax Act made by

the assessing officer, in respect of the project executed by M/s. Jurong Engineering Ltd. (JEL) at Queensland, Australia, is not in order.

3. The brief facts of the case are that the Assessee is engaged in the business of executing power projects in India and abroad and also carrying on

the business of conversion of steel for various projects. The Assessee-company is assessed to tax for the past several years admitting earnings in

foreign currency and claiming deduction under Sections 80-O, 80HHC and 80HHB on export business over the years. During the assessment

proceedings, the assessing officer found that the Assessee had claimed deduction under Section 80HHB in respect of a project undertaken at Abu

Dhabi during the assessment year under consideration. He also found that similar claim was made by the Assessee during the assessment year 2001-

02 also in respect of projects at Sharjah, Curaco, Abu Dhabi and Singapore. From the records, the assessing officer found that the Assessee executed

a repairs and maintenance project which was not a foreign project within the meaning of Section 80HHB. After going through the copies of invoices,

working, etc., furnished by the Assessee in support of its claim of deduction under Section 80HHB and further clarification made by the Assessee, the

assessing officer was of the view that the project at Abu Dhabi was for consultancy and not a project for installation of the machinery as envisaged in

Section 80HHB and the invoices and the receipts clearly showed that it was on account of manpower supply/arrangement at Abu Dhabi, Kuwait.

Hence, the assessing officer disallowed the claim of the Assessee to the extent of Rs. 3,59,81,740. Aggrieved, the Assessee moved the matter in

appeal before the first appellate authority.

4. During the appellate proceedings, the Commissioner of Income-tax (Appeals) observed that the Assessee had undertaken the following projects :

(i) Thermit, welding, stacker and reclaimer rail work at Sharjah Cement Factory M/s. Gulf SPIC Engineering.

(ii) Erection and installation of steam turbine, mechanical erection works for M/s. Curaco Juroijig Engineering, Netherlands.

(iii) Fabrication and erection work for refinery shut down and fertil shut down from M/s. Kuwait National Petroleum Company.

5. The Commissioner (Appeals) also observed that the assessing officer took note of invoices, billing made and the correspondence and concluded that

all these were mainly on account of supply of manpower. The Commissioner (Appeals) was of the view that Section 80HHB provides for deduction in respect of profits and gains from execution of any work undertaken by the Assessee forming part of a foreign project undertaken by any other person

in pursuance of a contract entered into by such person. He viewed that none of the receipts and invoices took away the fact that the work performed

by the Assessee-company was execution of a foreign project. Hence, he allowed the Assessees claim for deduction under Section 80HHB.

Aggrieved, the revenue is in appeal before us with the following effective grounds :

2.1 The learned Commissioner (Appeals) erred in holding that the Assessees claim; for deduction under Section 80HHB of the Actis in order.

2.2 The learned Commissioner (Appeals) failed to appreciate that supply of man power to a foreign company cannot amount to execution of a foreign

project and that the term ""execution of a foreign project"" used in Section 80HHB cannot be extrapolated to bring into its realm, supply of manpower.

2.3 It is submitted that the Hon'ble jurisdictional Income Tax Appellate Tribunal in the Assessees own case vide its order in I.T.A No. 1777/ Mds/06

dated 30-11-2007 has held that shut down of refinery will not qualify as foreign project for the purpose of deduction under Section 80HHB.

6. Before us, the learned departmental representative relied on the assessment order and the grounds of appeal filed before us and reiterated the

contents of the same as his submission. He also pointed out that in the Assessees own case in I.T.A No. 1777/Mds/06 dated November 30, 2007, the

Income Tax Appellate Tribunal has held that shut down of refinery will not qualify as foreign project for the purpose of deduction under Section

80HHB.

7. Per contra, learned Counsel for the Assessee relied on the order of the Commissioner of Income-tax (Appeals) and reiterated the contents therein

as his submission before us. He submitted that the earlier years case is factually different from the appeal of this year. He specifically referred to

paragraph 9 of the order of the Tribunal (supra) wherein the Tribunal has observed that the term ""assembling"" or ""installation"" of any machinery or

plant cannot be extrapolated to dismantling. Alternatively, he submitted that direction may be given to the assessing officer to revise the computation in

case the Tribunal felt that the supply of manpower is not eligible for deduction under Section 80HHB.

8. In his rejoinder, the learned departmental representative submitted that whether assembling or disassembling, there will be an element of manpower.

9. We have heard the rival submissions and considered the facts and materials on record. From the Commissioner (Appeals)s order, it is clear that the

following projects were undertaken by the Assessee :

(i) Thermit, welding, stacker and reclaimer rail work at Sharjah Cement Factory M/s. Gulf SPIC Engineering.

(ii) Erection and installation of steam turbine, mechanical erection works for M/s. Curaco Jurong Engineering, Netherlands.

(iii) Fabrication and erection work for refinery shut down and fertil shut down from M/s. Kuwait National Petroleum Company.

10. From the above it is seen that out of the three works, only one work involved refinery shut down and fertil shut down, which is from Kuwait

National Petroleum Company. The other two works seem to be erection and installation. Even the Tribunal in the Assessees own case for the earlier

year has only held that the work in connection with shut down of refinery will not qualify as foreign project as defined in Sub-section (2)(b)(ii)--the

assembly or installation of any machinery or plant outside India--of Section 80HHB. Thus, in this case, the earlier order of this Tribunal would be

applicable for the following work :

(i) Fabrication and erection work for refinery shut down and fertil shut down from M/s. Kuwait National Petroleum Company.

11. In respect of the other two works undertaken by the Assessee, it appears that they are for assembling and installation. Hence, we direct the

assessing officer to look into the details of the works and disallow the amount in connection with manpower relating to shut down of any project. Thus,

this issue is restored to the file of the assessing officer with the above direction.

12. As regards the next issue relating to deduction under Section 80-O is concerned, the assessing officer observed from the records that the

Assessee claimed deduction for rendering professional services to Tarong Power plant and providing technical manpower to M/s. Jurong Engineering

Ltd. 0EL) and not for supply of arty design, patent, invention or registered trade mark as envisaged in section! 80-O. He was of the view that Section

80-O is amended with effect from April 1, 1998 and consideration received from providing technical and professional services is not eligible for deduction. Hence, he disallowed the claim of the Assessee under Section 80-O to the extent of Rs. 41,87,295. Aggrieved, the Assessee moved the

matter in appeal before the first appellate authority.

13. In the first appeal, the Commissioner (Appeals) observed that it was drawings and documents that were prepared by the Assessee-company for

M/s. JEL, specific to the contract undertaken by M/s. JEL, and consideration was received! for preparation of such drawings and documents. He was

of the view that Section 80-O deduction cannot be said to be restricted to the consideration for a right to use drawings pre-existing with the Assessee.

Further, he was of the view that even drawings made for a specific project would be entitled to deduction in terms of Section 80-O as long as the

consideration in convertible foreign exchange was received for supply of such drawings. Accordingly, he directed the assessing officer to allow the

claim of the Assessee under Section 80-O. Aggrieved, the revenue is in appeal before us with the following effective grounds of appeal :

3.1 The learned Commissioner (Appeals) erred in holding that disallowance of deduction under Section 80-O of the Income-tax Act made by the

assessing officer, in respect of the project executed by M/s. Jurong Engineering Ltd. (JEL) at Queensland, Australia, is not in order.

3.2 The learned Commissioner (Appeals) failed to appreciate that the assesses had executed the job work pertaining to design of piping support,

material order list, etc., to the requirement and satisfaction of JEL, for payment of fees.

3.3 The learned Commissioner (Appeals) ought to have seen that the Assessee was never the owner of the design and JEL had the right to use or do

anything with the design and that the income received by the Assessee is not for allowing the use of patent, invention or design or trade mark.

3.4 The learned Commissioner (Appeals) ought to have noted that an Assessee becomes eligible for deduction under Section 80-O only on allowing a

foreign State or foreign enterprise to use outside India of any patent, invention, design, etc., which is not so, in the instant case.

14. At the time of hearing, the learned departmental representative reiterated the contents of the grounds of appeal as his submission and strongly

relied on the order of the; assessing officer.

15. On the contrary, learned Counsel for the Assessee relied on the order of the

Commissioner (Appeals).

16. We have heard the rival submissions and considered the facts and materials on record. We find that the Commissioner (Appeals) has allowed this

claim of the Assessee for the reason recorded in the appellate order at paragraph 10 which has been extracted elsewhere in this order and, as such,

we do not find any infirmity in the order of the Commissioner (Appeals) and we uphold the same by rejecting this ground of appeal of the revenue.

17. Thus, the Appeal No. 16G6/Mds/08 is partly allowed for statistical purpose.

18. Now, let us take up the next appeal of the revenue in I.T.A No. 1607/Mds/08 (for the assessment year 2004-05).

19. The only issue raised in this appeal by the revenue is regarding dis-allowance made towards bad debts from Rs. 20,10,862 to Rs. 3,47,419. The

grounds of appeal filed in this regard are as under :

2.1 The learned Commissioner (Appeals) erred in restricting the disallowance made towards bad debts from Rs. 20,10,862 to Rs. 3,47,419.

2.2 The learned Commissioner (Appeals) failed to appreciate that the Assessee has not furnished any evidence before the assessing officer on the

bad debt claim.

2.3 In the absence of any finding by the learned Commissioner (Appeals), as regards, the write off of bad debts in the books of the Assessee-

company, the learned Commissioner (Appeals) ought to have upheld the action of the assessing officer.

20. The brief facts of the case are that the Assessee is a limited company 20 engaged in the erection work mainly of power projects in India and

abroad as well as design work for the execution of the various projects outside India and manufacture of various items of steel under the fabrication

division, which is used for the erection work at various sites. The Assessee-company filed a return of income for the assessment year under

consideration on October 29, 2004 showing a loss of Rs. 38,02,820 under the normal computation and a book profit of Rs. 52,22,890. The Assessee

claimed bad debts of Rs. 10,95,090 under the head ""Administrative expenses"" and also bad debts under the head ""Project cost"" amounting to Rs.

9,15,772. Before the assessing officer, the Assessee explained that these bad debts arose on account of additional claims raised by the Assessee-

company on its clients but not accepted or paid by such clients. The assessing officer required the Assessee to establish with demonstrative evidence

that the concerned debt had become bad, but the Assessee had not established with details that such debts had gone bad, then the assessing officer

disallowed an amount of Rs. 9,15,772 towards bad debts. Aggrieved, the Assessee moved the matter in appeal before the first appellate authority.

21. In the appellate proceedings, the Commissioner (Appeals) observed that the justification for bad debt demanded by the assessing officer was

beyond the scope of Section 36(2). For this, he relied on the decision of the Hon'ble Gujarat High Court in the case of Kamla Cotton Co. v. CIT

(1997) 226 ITR 605. Thus, the Commissioner (Appeals) was of the view that in principle, the claim of bad debts made by the Assessee was

allowable. However, he found that in the case of Thiru Arooran Sugar, Kollumangudi, the Assessee had claimed bad debts of Rs. 5,13,212.95 and,

from the ledger account of this party, as appearing in the books of the Assessee-company for the period from 1-4-2003 to 31-3-2004 the closing debit

balance was only Rs. 1,65,794. Hence, he was of the view that this amount of bad debt alone could be written off and the bad debt claim of the

Assessee on account of this debtor would be restricted to that extent. Accordingly, he held that bad debt claimed to the extent of Rs. 16,63,443 would

be allowable on the facts of the Assessees case. He also held that disallowance of bad debts to the extent of excess bad debts claimed with reference

to Thiru Arooran Sugar amounting to Rs. 3,47,419 made by the assessing officer was in order and thus, the Commissioner of Income-tax (Appeals)

partly allowed the claim of the Assessee. Aggrieved by this decision of the Commissioner (Appeals), the revenue is in appeal before us.

22. Before us, the learned departmental representative reiterated the contents of the grounds of appeal (extracted elsewhere in this order) and the

order of the assessing officer which was relied upon by him.

23. Per contra, learned Counsel for the Assessee relied upon the order of the Commissioner (Appeals).

24. We have heard the rival submissions and considered the facts and materials on record. Even the apex court in the latest decision in the case of

T.R.F. Ltd. v. CIT (2010) 328 ITR 397 has held that after the amendment of Section 36(1)(vii) of the Income Tax Act, 1961, with effect from 1-4-

1989, in order to obtain a deduction in relation to bad debts, it is not necessary for the Assessee to establish that the debt, in fact, has become

irrecoverable ; it is enough if the bad debt is written off as irrecoverable in the accounts of the Assessee. following the above said decision of the apex

court, we do not find any\ infirmity in the order of the Commissioner of Income-tax (Appeals) and as such, we uphold the same by rejecting this

ground of the revenue.

25. In the result, Appeal No. 1606/Mds/08 is partly allowed for statistical purpose and Appeal No. 1607/Mds/08 is dismissed.

26. The order was pronounced in the court on 26-5-2010.