

(2012) 07 MAD CK 0099

In the Madras High Court

Case No : Tax Case (Appeal) No. 492 of 2006

Galaxy Granites (P.) Ltd.

APPELLANT

Vs

CIT

RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Customs Act, 1962 — Section 28

Citation : (2012) 07 MAD CK 0099

Hon'ble Judges : K. Ravichandra Baabu, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : T.N. Seetharaman, for the Appellant; K. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Chitra Venkataraman, J.—The assessee is on appeal as against the order of the Tribunal relating to the assessment year 1996-97, raising the following substantial question of law:

Whether the Tribunal is right in law in holding that unrealised export turnover should be included in the total turnover while it is not treated as export turnover for the purposes of computing the allowable deduction u/s 80HHC?

The assessee company claimed relief u/s 80HHC in the return filed for the above said year. It pointed out that a sum of Rs. 22,45,433 which is rupee equivalent to the foreign exchange earned had not been realised before 31-3-1996, but extension of time was granted by the CIT till 31-12-1997. While so, out of the above-said sum, a sum of Rs. 15,74,033 was realised. It further pointed out that a sum of Rs. 9,26,324 was not realised on account of the foreign buyer refusing to pay for the exported goods. Consequently, the assessee sought for deduction of 9,26,324 from the export turnover while calculating the relief u/s 80HHC in calculating the relief u/s 80HHC. The AO pointed out that apart from the non-receipt of Rs. 9,26,324 foreign exchange was not realised by 31-12-1997 for a

sum of Rs. 6,47,709. Thus, the income deductible u/s 80HHC was worked out on the total turnover of Rs. 1,01,20,167 including the export turnover of Rs. 75,46,769 and business profit of Rs. 14,16,993. Thus the deduction allowable u/s 80HHC was arrived at Rs. 10,56,674. Aggrieved by the same, the assessee went on appeal before the CIT(A) who confirmed the AOs method for granting the relief. However, he pointed out that the communications received by the assessee from the Indian Embassy in Paris dated 7-4-1997 and 20-3-1998 categorically stated that it would not be worthwhile to pursue the matter regarding realisation of sale proceeds of Rs. 9,26,324 from the foreign buyer and that the financial condition of the foreign company was not good and hence moving the Court against the foreign buyer would not be encouraging and such a litigation might add up to further loss to the assessee's company. In the circumstances, the assessee made the plea that the AO should have considered the sale proceeds not realised to the tune of Rs. 9,26,324 for the purposes of working out the relief u/s 80HHC.

2. As far as the sum of Rs. 6,47,709 is concerned the assessee contended that the said amount would be entitled for consideration in the calculation of 80HHC relief. The first appellate authority pointed out that considering the letter from the Indian Embassy, the AO should consider the assessee's claim for allowance of bad debt/business loss accordingly. As far as the sum of Rs. 6,47,709 was concerned, the AO was directed to include the said sum for the purpose of exemption u/s 80HHC in view of the communication dated 15-3-1999 from the CIT(A). Aggrieved by the said order, the assessee went on appeal before the Tribunal, which once again confirmed the reasoning of the CIT (A).

3. The Tribunal pointed out that due to certain objections raised by the foreign buyer the assessee could not realise the sale proceeds of Rs. 9,26,324, however, that would not in any manner interfere with the working of export turnover and total turnover. The Tribunal pointed out that even if the unrealised sale proceeds are deducted as proportionate to the business profit and the total turnover the result would be the same when deduction u/s 80HHC is computed by reducing the export turnover by unrealised portion of export turnover. The Tribunal pointed out that the contention of the assessee that unrealised portion should be deducted from the total turnover as well as from the export turnover would be contrary to the provisions of the Act. Consequently, the Tribunal confirmed the order of the CIT(A).

4. As regards the unrealised sale proceeds of Rs. 9,26,324 as business loss was concerned, it confirmed the order of the CIT(A) directing the AO to consider the assessee's plea for allowance of claim for bad debt/business loss, in the light of the letter written by the Indian Embassy in Paris. Thus, the Tribunal confirmed the order of the CIT(A). Aggrieved by the same, the present appeal is filed by the assessee.

5. Learned counsel appearing for the assessee pointed out that the Department had not disputed the fact that the sum of Rs. 9,26,324 represented unrealised

foreign exchange on account of the objection raised by the foreign buyer. Hence the said amount of unrealised export turnover cannot be included in the total turnover for the purpose of computing deduction u/s 80HHC. Placing reliance on the decision of the Kerala High Court in *Commissioner of Income Tax Vs. ABAD Fisheries*, as well as the decision of the Bombay High Court in *Commissioner of Income Tax Vs. Polycott Corporation*, , learned counsel submitted that the authorities committed a serious error in including the unrealised amount as export turnover for the purpose of working out relief u/s 80HHC. He also referred to the decision of the Apex Court (sic-Madras High Court) in (2002) 257 ITR 60 to contend that unrealised foreign exchange has to be necessarily excluded from the export turnover.

6. In the decision *CIT v. Madras Motors Ltd.* (supra) this Court considered the meaning of the term "total turnover" as used in sub-s. (3) of s. 80HHC. Explanation (b) defines the term "export turnover" as follows:

(b) export turnover means the sale proceeds received in or brought into India by the assessee in convertible foreign exchange in accordance with clause (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).

7. In the decision in *CIT v. Madras Motors Ltd.* (supra) this Court pointed out that the language of sub-section shows that the export turnover becomes numerator while total turnover becomes denominator. As far as the denominator is concerned, the total turnover of the business would be the total turnover of the business of the goods to which the section applies. This Court pointed out that the sub-section has been created only to see the ratio of the income out of the export to the total income out of the business in respect of those goods to which the section applies. Thus, on a reading of subsection (1) of section 80HHC, clause (a) of sub-section (2), and clause (a) and (b) of sub-section (3), this Court held that there remains no doubt that the total turnover of the business would contemplate only the business regarding such goods part of which are exported and the others are not so exported. There is just no scope to include the turnover of the business of the goods which are not contemplated by the section. Thus the words "total turnover of the business" would then be controlled by and have to be read in the colour of the opening clause and the business contemplated in the section is restricted to only the goods to which the section applies and therefore by necessary implication even the total turnover of the business would be the total turnover of the business of the goods to which the section applies.

8. A reading of the definition "export turnover" shows that it relates to the sale proceeds "received" in contrast to "receivable" which was prevailing till its substitution under the Finance Act, 1990 w.e.f. 1-4-1991. We are concerned with the assessment year 1996-97. Consequently for the purpose of this case "export turnover" is restricted to the sale proceeds received in or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (2) (a). Considering the restriction spoken to in "export turnover" as to the actual sale proceeds received in respect of the goods or merchandise to which this section applies and which are exported out of India, the total turnover defined in cl. (ba) has no such restriction as referable to sale proceeds received alone that the total turnover has to be necessarily restricted to that end. All that cl. (ba) speaks about total turnover is that it shall not include freight of insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act. The proviso to the said definition excludes only those sums referred to in clause (iiia), (iiib), (iiic),(iiid) and (iiie) of section 28.

9. When we apply this decision to the case on hand, it is evident that the assessee had total turnover of Rs. 1,01,20,167. Going by the definition of the "export turnover" meaning thereby the sale proceeds received in or brought into India by the assessee, necessarily the same has to be the assessee's actual receipt of sale proceeds i.e. export turnover of Rs. 91,20,802. Taking the actual foreign exchange received excluding a sum of Rs. 9,26,324 alone would represent the export turnover of the assessee. Going by the reasoning of this Court and the definition of "export turnover" we have no hesitation in confirming the order of the Tribunal.

10. Learned counsel for the assessee placed reliance on the decision of the Kerala High Court in CIT v. Abad Fisheries (supra), particularly to the last para of the judgment. We do not think that the said decision would be of any assistance to the assessee. The assessee therein claimed deduction on the export profits which could not be brought into India in convertible foreign exchange. The Kerala High Court pointed out that for the purpose of denominator of the "total turnover" the amount which had not been received in foreign exchange could not form part of the total turnover. Confirming the view of the Tribunal, the Kerala High Court held that since the amount could not be included in the profit the same cannot also be included in the total turnover.

11. As far as this view is concerned, as already pointed out going by the decision of this Court in CIT v. Madras Motors Ltd. (supra) the said line of reasoning by the Kerala High Court does not persuade us to hold that the sale proceeds has not been received in convertible foreign exchange and hence it could not be included in the profit and it cannot form part of the turnover also. Consequently, we hold that the computation of profits of the business is one thing and the computation of export turnover as defined in section 80HHC Explanation (b), has to be in respect of sale proceeds received or brought in India in convertible

foreign exchange and in contrast to this the total turnover as observed by this Court has to be in respect of the goods which are exported out of India. In the light of the said discussion, we have no hesitation in confirming the order of the Tribunal.

12. As far as the claim of the assessee of a sum of Rs. 9,26,324 is concerned the assessee took the plea before the CIT(A) that the AO should have considered the sale proceeds not realised, for the purpose of deduction as bad debt/business loss since the foreign buyer refused to remit the sale proceeds for the exported goods and the Indian Embassy in Paris also informed the difficulties in realising the same. As far as this aspect is concerned, the Tribunal confirmed the order of the CIT(A). It is not as though the issue had not been gone into the consideration of the Tribunal. Having regard to the order of the Tribunal confirming the order of the CIT(A) and directing the AO to consider the assessee's plea for allowance of the claim for bad debt, we do not think that that calls for any interference by this Court. Consequently we direct the AO to consider the claim in the light of the letter written by the Indian Embassy in connection with the said claim. In the result, the tax case (appeal) is dismissed. No costs.