

(2013) 02 KAR CK 0097

In the Karnataka High Court

Case No : Income Tax Appeal No. 1105 of 2006

J.K. Industries Ltd.

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 19-02-2013

Acts Referred:

Income Tax Act, 1961 — Section 260A, 80AB, 80HHC

Citation : (2013) 260 CTR 348 : (2013) 351 ITR 434

Hon'ble Judges : D.V. Shylendra Kumar, J;B. Sreenivase Gowda, J

Bench : Division Bench

Advocate : A. Shankar, for the Appellant; E.R. Indrakumar, for E.I. Sanmathi, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—This appeal by the assessee u/s 260A of the income tax Act, 1961 (for short "the Act"), in respect of the assessment year 1997-98 seeking for determination of the following substantial questions of law as arising out of the order of the Tribunal.

1. Whether, on the facts of the case, the Tribunal was justified in law in holding that the benefit of deduction u/s 80HHC of the Act can be availed of by the assessee only on the total income as computed after setting off the unabsorbed depreciation of the earlier years ?
2. Whether the method of computation of deduction u/s 80HHC as approved by the Tribunal is valid in law on the facts of the present case?
3. Whether, on the facts and in the circumstances of the case, the benefit of section 80HHC of the Act can be claimed on the total income after deduction of unabsorbed losses and unabsorbed depreciation or otherwise ?

The assessee is a limited company and in so far as the present appeal is concerned, is aggrieved by the order of the Tribunal in taking the view that the Appellate Commissioner had committed an error in allowing the appeal of the assessee and to hold that the benefit of deduction claimed by the assessee u/s

80HHC of the Act could not have been allowed before setting off the accumulated unabsorbed depreciation of the earlier years.

2. The brief facts in so far as the question in issue is concerned is that the assessee had export business and, manufacturer of tyres and exports some part of its production. It is in respect of the export turnover, the assessee had put forth a claim for deduction from out of its assessable income under the provisions of section 80HHC of the Act.

3. The assessee had quantified the benefit available to the assessee u/s 80HHC of the Act for the accounting period relevant for the assessment year in a sum of Rs. 7,52,92,016 and this amount had been reduced from its total taxable income for the year in question which was at a sum of Rs. 11,80,40,798.

4. The Assessing Officer found that there was unabsorbed accumulated depreciation of the earlier years in a sum of Rs. 11,95,60,654, first set off the accumulated depreciation amount of the earlier years against the available total income offered by the assessee and found that the net result was there was no taxable income and, therefore, did not allow the benefit claimed by the assessee u/s 80HHC of the Act as per his order at annexure B.

5. In the appeal of the assessee on this aspect of the matter, the Appellate Commissioner was of the view that the Assessing Officer had committed an error in following the decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Gogineni Tobacco Limited, did not agree with the view taken by the Assessing Officer; held that the Assessing Officer had wrongly applied the provisions of section 80AB of the Act and purporting to follow the view taken by the Orissa High Court in the case of Commissioner of Income Tax Vs. Tarun Udyog, allowed the appeal and directed the Assessing Officer to re-compute the taxable income by first allowing the benefit u/s 80HHC of the Act before adjusting for unabsorbed carried forward depreciation of earlier years.

6. As against this order, the Revenue went up in appeal and met with success before the Tribunal and the Revenue noticing that the decision of the Andhra Pradesh High Court was no more good law in the wake of the decision of the Supreme Court in the case of IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax, Mumbai, and this decision had been followed by the Madhya Pradesh High Court in the case of Viprey Solvex Products Ltd. Vs. Commissioner of Income Tax, opined that the unabsorbed depreciation and the carried forward losses of the earlier year should be first factored in while arriving at the taxable income and as against the balance available, the benefit of deduction u/s 80HHC of the Act can be claimed.

7. It is aggrieved by this decision of the Tribunal, the assessee is in appeal and posing the questions as indicated earlier.

8. Mr. Shankar, learned counsel for the appellant-assessee, has mainly put forth

two contentions. It is firstly submitted that the judgment of the Supreme Court in the case of IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax, Mumbai, is inapplicable to the facts of the present case; that the judgment of the Supreme Court was rendered in IPCA's case (supra) in the context of the assessee having two activities of export and as to whether the assessee should set off the losses, if any, incurred in one of the activity before arriving at the profit attributable to exports for the purpose of deduction u/s 80HHC of the Act.

9. It is submitted that, in the present case, the assessee's activity is only one and the assessee has made profit from out of its export business and, therefore, the questions examined in IPCA's case (supra) really does not cover the case of the assessee.

10. Apart from this, Sri Shankar, learned counsel for the appellant-assessee, also submits with reference to the provisions of section 32 of the Act which provides for allowing depreciation allowance and also provides for carry forward of unabsorbed depreciation in any given year for want of commensurate profits to the assessee in that year and that the section had undergone a change, in the sense, by the Finance (No. 2) Act, 1996, with effect from April 1, 1997, it has come to be amended.

11. It is submitted that this legal position held the field till the sub-section was again amended by the Finance Act of 2000 with effect from April 1, 2001, and position ante was restored and as the assessment year in question in this appeal is the assessment year 1997-98, this statutory provision governs the questions of carrying forward depreciation, etc., and it is pointed out in this regard that on a perusal of section 32(2) of the Act as prevailed during the assessment year in question, there was no deeming provision which was available earlier and it has been brought back again after the year 2000 and, therefore, it makes a material difference.

12. The submission is that when once the carried forward or brought forward unabsorbed depreciation is not deemed to be depreciation of the current year, then the profit for the purposes of section 80HHC of the Act should be first assigned without factoring the carried forward or unabsorbed depreciation of the earlier years, but it should be otherwise determined independently and the benefit u/s 80HHC of the Act should be given if otherwise profits were available for the assessee should be of that year in view of the language of section 80HHC(1) of the Act and, therefore, submits that the view taken by the Appellate Commissioner is fully justified on this statutory legal position and the view taken by the Tribunal is not correct.

13. Mr. Shankar, learned counsel for the appellant-assessee, points out to the position in section 32(2) of the Act that for the assessment year relevant for the purpose of this appeal, there was a limit of eight years up to which unabsorbed depreciation can be taken forward to the subsequent years and it was called unabsorbed depreciation allowance of the earlier years whereas earlier by fiction,

it was being made depreciation allowance for the current year and that made all the difference.

14. With reference to section 80AB of the Act, Mr. Shankar, learned counsel for the appellant, would draw our attention to the language of this section and submits that there is no reference to the gross total income in this section vis-à-vis section 80HHC of the Act and, therefore, it is submitted that the computation of the amount quantifying for deduction u/s 80HHC of the Act should be computed independently and not in relationship to the gross total income of the assessee.

15. It is alternatively submitted that in the case of the assessee though gross total income is brought down to "nil" because of the brought forward unabsorbed depreciation of the, earlier years for arriving at this figure, profits attributable to exports having already been factored, there is profit from export activity and, therefore, the assessee is entitled for claiming deduction.

16. On the other hand, with reference to the judgment of the Supreme Court in the case of (2007) 14 SOT 263 particularly to paragraph 12, the submission is that the Supreme Court had rejected the plea that the word "profit" in section 80HHC(3)(c) of the Act would not include losses and if there are any losses, they are to be ignored. On such premise, it is submitted that the losses cannot be factored and on the same logic carried forward unabsorbed depreciation, but only profit is to be ascertained and given the benefit as per section 80HHC of the Act.

17. On the other hand, appearing on behalf of the Revenue, Sri E.R. Indra Kumar, learned senior counsel, would vehemently urge that the questions are not res integra; that the judgment of the Supreme Court in IPCA's case (supra) did cover the issue-; that the ratio of, the decision in IPCA's case (supra), did lay the law that before giving the benefit of deduction u/s 80HHC of the Act, the carried forward losses of the earlier years has to be adjusted or set off and the ratio equally holds good in respect of unabsorbed depreciation allowance of the earlier years.

18. It is pointed out that the ratio laid down in IPCA's case (supra) has been followed by the Supreme Court in the case of Commissioner of Income Tax, Pune Vs. Shirke Construction Equipment Ltd., as is obvious on reading of paragraph 9 that overriding effect of section 80AB of the Act is discussed and it does control even the provisions of section 80HHC of the Act and the contrary view taken by the Bombay High Court and the Kerala High Court has been disapproved and though this was the decision in the context of carrying forward unabsorbed business losses of the earlier years, the position is not any different in respect of unabsorbed depreciation of the earlier years for the simple reason that it has been categorically held in these two judgments of the Supreme Court that the benefit of section 80HHC of the Act can be claimed only as against positive profits earned by an exporter, in the sense, that there should be a positive offer of profit after computing the profits as otherwise is computed and if there is no

positive profit there cannot be a benefit claimed under Chapter VI-A in view of the provisions of section 80AB of the Act.

19. It is also submitted by Sri Indra Kumar, learned senior counsel appearing for the Revenue, that these two judgments of the Supreme Court has been followed by the Bench of the Madras High Court in the case of (2007) 14 SOT 263 : Commissioner of Income Tax-III Vs. Sharon Vaneers P. Ltd., and in this case, the Madras High Court had an occasion to refer to the provisions of section 32 of the Act also in the context of the amendment and did hold that section 80HHC of the Act cannot be considered as forming a code by itself, but is governed and controlled by section 80AB of the Act; that the provisions of section 80AB of the Act have a overriding effect on any other provisions in Chapter VIA of the Act and, therefore, section 80HHC of the Act is subject to the limitation imposed in section 80AB of the Act.

20. The Madras High Court expressly reversed the view taken by the Tribunal and as, in the present case, the Tribunal has taken the view taken by the Madras High Court, namely, to held that unabsorbed depreciation, unabsorbed business loss and unabsorbed investment allowance of the earlier years cannot be granted before deduction u/s 80HHC of the Act; that the provisions of section 80AB of Act cannot be applied while determining the business profits u/s 80HHC of the Act.

21. Sri Indra Kumar, learned senior counsel submits that the Madras High Court having expressly reversed the finding of the Tribunal in that case and the present view being no different and applying the judgment and the ratio of the Supreme Court in IPCA, Shirke and Moosa cases (supra), and as applied by the Madras High Court, the present appeal of the assessee should be dismissed.

22. However, Sri Shankar, learned counsel for the appellant-assessee, would point out that the decision of the Madras High Court related to the assessment year 1994-95, i.e., prior to the amendment by the Finance (No. 2) Act, 1996, and, therefore, that decision cannot be applied to the present case.

23. It is in this background and in the wake of the submissions made by the learned counsel for the assessee and the Revenue, we are required to examine the questions.

24. The questions though posed as many as three questions, in our view, the only question that arises for our consideration is as to whether the deduction claimed by the assessee u/s 80HHC of the Act should have been given first and then the adjustments of unabsorbed depreciation should have been taken place as is held by the Assessing Officer and the Tribunal, unabsorbed depreciation should be adjusted first and the benefit of deduction given to the assessee in terms of section 80HHC of the Act.

25. Though Mr. Shankar, learned counsel for the appellant-assessee, has tried to distinguish the judgment of the Supreme Court in IPCA's case (supra) and as we notice the fact which was not exactly as in the present case and that was a case

relating to inter se set off of losses between two sources of export business of the assessee, what is held there is that the profit of the export business for the purpose of section 80HHC of the Act has to be necessarily arrived at by setting off the losses under one source of export business against the profit earned from another source and it is only thereafter profit attributable to export can be arrived at.

26. In the present case, no doubt that there are no two sources of export, but there is only one export activity. More important aspect is that the Supreme Court observed in IPCA's case (supra) and traced the history of section 80HHC of the Act and examined the scope of the profit for the purpose of section 80HHC of the Act.

27. However, the Supreme Court specifically rejected the contention on behalf of the assessee in the context of understanding section 80HHC(3) of the Act and the ratio was that even in arriving at the amount for the purpose of section 80HHC of the Act, both the profits and losses will have to be taken into consideration and in this background, did discuss significance of section 80AB of the Act and did notice that the provisions of section 80AB of the Act does prevail and also made a reference to Board Circular which had indicated that only positive profit can be considered for the purpose of deduction and therefore rejected the contentions urged on behalf of the assessee and had dismissed the appeal of the assessee.

28. The concept of positive profit was reiterated in Shirke and Moosa's cases (supra). Though Mr. Shankar, learned counsel for the appellant, has taken us through the history of the provision of section 32 of the Act, i.e., providing for depreciation and that as to how a deeming provision was not available for the assessment year in question, we are of the view that this really cannot have any bearing on the question that we are considering for the simple reason that in arriving at the income, in the sense, whether total income, gross total income or taxable income, so long as the unabsorbed losses of the earlier years permitted to be carried forward and unabsorbed depreciation allowance of earlier years brought forward are permitted to be set off against the profits of the year in question, that is determinative of the question of availability or otherwise of the income against which the assessee can claim a deduction u/s 80HHC of the Act or for that matter, under any other section of Chapter VI-A of the Act.

29. Section 32 of the Act deals with the manner of allowing the depreciation allowance and also provides for taking forward unabsorbed depreciation allowance of any year. Whether such brought forward depreciation of earlier years is treated as depreciation of the current year by fiction of law and otherwise is also permitted by the language of section 32(2) of the Act as is the case in the present situation. The net result is that such amount is allowed as an allowance or reduction in arriving at the taxable income of the assessee. It is here the concept of "positive profit" has its role to play and if one should look at allowing depreciation allowance, it is allowance provided for the capital invested

in any business being worn out over the period of years and that capital reducing to "nil" which should be factored in arriving at the true profits of the business. If the depreciation is not allowed, then a part of the capital investment is also being taxed over a period of time and it is a provision made to bail out an assessee as otherwise income tax will be levied on par with the capital also every year which gets diminished over a period of time.

30. It is here that the concept of positive profit has significance as the positive profit is only after providing for such allowance and the losses as is enabled u/s 72 of the Act. In so far as the provisions of section 80HHC of the Act is concerned, it is no doubt true that it is a beneficial provision which provides for incentive benefit to an assessee who has export business and of the nature as is mentioned in the section. The only significance in so far as section 80HHC of the Act is concerned, as we notice, is that the said profits for computing the amount which qualifies for benefit u/s 80HHC of the Act. It is only for such exercise all the provisions of section 80HHC(1), (2) and (3) exist. On the basis of the judgment of the Supreme Court, referred to above, the provisions of section 32 has no direct bearing on the provisions of section 80HHC of the Act. The effect in claiming the benefit is felt when the assessee's claim is made u/s 80HHC(1) of the Act in the context of computing the total income of the assessee and even in the computation of the total income, the depreciation allowance whether for the current year or unabsorbed depreciation of earlier years necessarily is factored. It is only after making adjustments against these carried forward losses or unabsorbed depreciation allowance the true profits and positive profits can be arrived at.

31. The expression "total income" which occurs even in section 80HHC of the Act is the total income with reference to section 5 of the Act and as expressly defined in section 2(45) of the Act. In arriving at the total income even as per the provisions of the Act, depreciation is a factor which is always to be taken into consideration and is in no way regulated or controlled by the provisions of section 80HHC of the Act.

32. In the present situation, we find that the assessee did have unabsorbed allowance of the earlier three assessment years and the benefit of section 80HHC of the Act can be claimed only as against the total income of the assessee for the current year as determined after allowing for the absorption of unabsorbed depreciation allowance of the earlier years against the profits of the assessee for the year.

33. Though Sri Shankar, learned counsel for the appellant, points out to the language of section 80HHC(1) of the Act to submit that deduction is allowable in computing the total income, it cannot be said that section 80HHC(1) of the Act either control or regulate the computation of total income, but can be a factor for claiming the benefit u/s 80HHC of the Act from out of the total income and apart from this, the more important provision of section 80AB of the Act which had come in for examination by the Supreme Court in the abovereferred cases.

34. Though Sri Shankar, learned counsel for the appellant, has put forth the argument that the expression of such of that income has great significance, we find that reference is to the sections which occur under the heading "C" of Chapter VI-A of the Act, but more important factor is by the fiction for the purpose of deducting the benefit available under any of the sections under the heading "C" of Chapter VI-A, that amount is restricted before making any deduction under this Chapter and for example in the present situation, the deduction available under sub-section (1) of section 80HHC of the Act will be limited to the amount as determined under this section and not as otherwise could have been determined. But we having noticed the ratio of the Supreme Court in the, judgments referred to above, that the deduction can be claimed only against positive profits and positive profit necessarily implies the adjustments and set off of the depreciation allowance of earlier years and carried forward losses of earlier years and that judgment having the binding effect on this court, it has to be necessarily ruled that the benefit u/s 80HHC of the Act can be claimed only after the unabsorbed depreciation of the earlier years is adjusted against the profits of the current year and then only the benefit extended u/s 80HHC of the Act can be given effect to.

35. In this view of the matter, we opine that the Tribunal was correct in taking the view that the Appellate Commissioner was not justified in reversing the view taken by the Assessing Officer and the order of the Tribunal is proper, does not suffer from any error of law and, therefore, we answer the questions posed in the affirmative to hold that the Tribunal was correct in taking the view that the assessee was not entitled to claim the benefit of deduction even before adjusting unabsorbed depreciation of the earlier years. the result, the appeal is dismissed.