
(2014) 11 GUJ CK 0013
In the Gujarat High Court
Case No : Tax Appeal Nos. 29 and 316 of 2001

K. Khodidas Patel Specific Family Trust	APPELLANT
Vs	
A.C.I.T.	RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 215, 28, 30, 31

Citation : (2014) 11 GUJ CK 0013

Hon'ble Judges : Kaushal Jayendra Thaker, J;K.S. Jhaveri, J

Bench : Division Bench

Advocate : S.N. Soparkar, Sr. Advocate and Swati Soparkar, Advocate for the Appellant; Nitin Mehta, Advocate for the Respondent

Judgement

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K.S. Jhaveri, J.—While admitting Tax Appeal No. 316/2001 on 11.12.2001, the following question of law was formulated for determination;

"Whether the Appellate Tribunal is right in law and on facts in having held that the appellant was not entitled to claim deductions under Section 80HH and 80I of the I.T. Act in respect of the interest income of Rs. 33,91,668/- earned by the appellant and in not permitting adjustment of interest debited to Profit and Loss Account amounting to Rs. 44,72,227/-?"

Whereas, in Tax Appeal No. 29/2001, the following question of law was formulated while admitting the appeal on 20.06.2001;

"Whether the Appellate Tribunal is right in law and on facts in holding that though the interest income from bank, fixed deposits and interest from IDBI cannot attract deduction under section 80I, directing to adjust the same in interest expenses?"

2. Briefly stated, the facts are that the assessee is a private Trust carrying on business of manufacturing washing powder in the name of "K.K. Patel

Industries". The assessee filed the return of income on 29.06.1988 declaring total income of Rs. 1,44,97,320/-. Subsequently, a revised return was filed on 21.05.1990, in which the total income was shown as Rs. 1,45,49,650/-. It was the case of the assessee that the return of income was revised to rectify the mistake in taking net profit of "K.K. Patel Industries". However, the A.O made assessment u/s. 143(3) at Rs. 78,30,254/- and also charged interest u/s. 215 of the Act. On appeal being filed, the CIT held that charging of interest u/s. 215 was consequential in nature and that it will be automatically reduced while giving appeal effect and accordingly, the appeal was partly allowed. Cross-appeals were filed before the Appellate Tribunal against the order of the CIT(A). The said group of appeals were disposed of vide order dated 11.05.2001 whereby, the appeal of the Revenue was partly allowed whereas, the cross objection filed by the assessee was disposed of as not pressed. Being aggrieved by the same, the assessee has preferred the present appeal.

3. We have heard learned counsel for both the sides. The question of law raised in T.A. No. 316/2001 can be bifurcated into two parts, viz. (i) Whether the appellant was not entitled to claim deductions u/s. 80HH and 80I of the Act in respect of the interest income; and (ii) Whether the Appellate Tribunal was right in law and on facts in not permitting adjustment of interest debited to the Profit and Loss Account amounting to Rs. 44,72,227/-.

4. Insofar as the first part of the question of law is concerned, the same is already concluded by a decision rendered by the coordinate Bench of this Court in Tax Appeal No. 810/2013 decided on 27.01.2014. For ready reference, the findings in the said decision is reproduced hereunder;

"Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal (the Tribunal for short) dated 28.2.2013 raising following questions for our consideration:

1. Whether the Appellate Tribunal is right in law and on facts in deleting the disallowance of discount of Rs. 29,02,192/- and transport income of Rs. 6,22,409/- made by AO for the purpose of calculation of deduction under Sections 80I & 80HH of the IT Act and confirmed by CIT(A) while relying upon its own decisions which have not reached finality and without considering the fact that such expenses incurred from the business income only and not for earning income liable to be excluded?

2. Whether the Appellate Tribunal is right in law and on facts in restoring the issue back to AO to decide for granting benefits of the netting aspect and further directing the AO to allow expenses after verifying nexus between interest income, rent income, discount, insurance, warehousing charges tank rent for netting purpose which are held to be not derived from industrial undertaking, without considering the facts that such expenses were incurred from the business income only and not for earning incomes and hence liable to be excluded?

3. Whether the Appellate Tribunal is right in law and on facts in restoring the issue back to AO to decide for granting benefits of the netting to the Assessee and further directing the AO to allow expenses after verifying nexus with various income such as misc. income of Rs. 81,681/- warehousing income of Rs. 2,000/-, tank rent of Rs. 3,000/- and Rent Income of Rs. 48,280/- and further directing 90% of such net income should be excluded from business profit only for the purpose of allowing deductions under section 80HHC of the Act for netting purpose without considering the facts that such expenses were incurred from the business income only and not for earning incomes and hence liable to be excluded?

Insofar as question No. 1 is concerned, the same has two elements. First part pertains to disallowance of discount of Rs. 29.02 lacs (rounded off) for the purpose of calculation of deduction under section 80-I and 80HH of the Income Tax Act, 1961 (the Act for short). Second part has reference to transport income of Rs. 6.22 lacs (rounded off) for similar benefits.

From the record it emerges that during the previous year relevant to assessment year 1997-98, the assessee received additional income of Rs. 29.02 lacs towards discount of the sales of raw materials which the assessee purchased. The assessee, therefore, claimed such amount as part of deduction under section 80IA/ 80HH of the Act. The Tribunal ultimately upheld the assessee's contention. We see no reason to take a different view. If on the basis of the discounts given by the sellers, the total profit of the assessee from the activity which was otherwise eligible for deduction 80I/80HH of the Act was to that extent increased, there is no reason why such larger sum should qualify for deduction.

Coming to the question of transport income, counsel for the assessee conceded that the same would not qualify for deduction under 80-I/80HH of the Act but argued that what should be excluded is net income and net gross received thereof. This argument of the counsel for the assessee would have bearing also on question Nos. 2 and 3 which have the identical element in the context of slightly different fact situation. We may, therefore, examine the entire question of netting of the income for the exclusion from deduction provision, be it under section 80HH or 80-I of the Act.

The question is when certain income of the assessee is excluded from the claim of deduction under section 80I or 80HH of the Act, should the gross income be excluded or should it be only net, that is, total receipt minus the expenditure incurred by the assessee for earning such income which should be so excluded.

Such a question in the context of deduction under section 80HHC came up for consideration before the Supreme Court in the case of ACG Associated Capsules Pvt. Ltd. (Formerly Associated Capsules Pvt. Ltd.) Vs. The Commissioner of Income Tax, Central-IV, Mumbai, . The Supreme Court held that for the purpose section 80HHC of the Act, it is not the entire amount received by the assessee on sale of DEPB credit, but the sale value of less the face value of the DEPB that will

represent profit on transfer of DEPB credit by the assessee. Heavy reliance was placed in the case of *Topman Exports Vs. Commissioner of Income Tax, Mumbai*, . Extending such logic, it was further held that even other amounts, such as, interest or rent when are to be excluded for the purpose of explanation (baa) to section 80HHC of the Act. Ninety per cent of not the gross rent or gross interest, but the net thereof shall have be excluded. It was observed as under:

If we now apply Explanation (baa) as interpreted by us in this judgment to the facts of the case before us, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under section 28 of the Act, and if any quantum of the rent or interest of the assessee is allowable as expense in accordance with sections 30 to 44D of the Act and is not to be included in the profits of the business of the assessee as computed under the head Profits and gains of business or profession, ninety per cent of such quantum of the receipt of rent or interest will not be deducted under clause (1) of Explanation (baa) to section 80HHC. In other words, ninety per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the assessee as computed under the head Profits and gains of business or profession, is to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining the profits of the business.

In view of such decision, question No. 3 raised by the Revenue gets automatically answered since the amounts referred to in the said question are to be excluded for the purpose of deduction under section 80HHC of the Act.

Learned counsel for the Revenue vehemently contended that the ratio of the decision in the case of *ACG Associated Capsules Pvt. Ltd.* (supra) cannot be applied to a situation where the exclusion from the claim of deduction relates to section 80HH or section 80-I of the Act. He strenuously urged that the language used in both the sets of provisions are different. Section 80HHC is also vitally different and that therefore the concept of netting may not be automatically applied to deduction under section 80HH and 80-I of the Act. He submitted that number of tax appeals have been admitted by this Court on this issue and this appeal may also be likewise admitted. He drew our attention to the order dated 6.5.2013 passed by this Court in the case of *Bloom Decor Ltd.* in Tax Appeal No. 447 of 2013 where at the instance of the assessee, similar question was not considered.

On the other hand, learned counsel Shri Soparkar for the assessee, in addition to relying on the decision in the case of *ACT Associated Capsules Pvt. Ltd.* (supra), also placed heavy reliance on an order dated 30.11.2013 in Tax Appeal No. 213 of 2006 in the case of *Rajoo Engineers Ltd.* in which the Revenues appeal raising such a question came to be dismissed relying on the decision in the case of *ACG Associated Capsules Pvt. Ltd.* (supra). The counsel also relied on a decision of the Delhi High Court in the case of *Essel Shyam Communication Ltd. Vs. Commissioner of Income Tax*, , in which in detailed consideration, relying on the decision of the Supreme Court in the case of *ACG Associated Capsules Pvt. Ltd.*

(supra), exclusion was approved for deduction under section 80-IA of the Act.

Having heard the learned counsel for the parties, we see no reason to entertain this tax appeal. The Supreme Court in the case of ACG Associated Capsules Pvt. Ltd. (supra) has already laid down the foundation for the logic for excluding the net profit and not the gross profit from the claim of deduction when it is found that the source of income does not qualify for such deduction under section 80HHC of the Act. It is true that section 80HHC represents vastly different scheme of deduction and also provides for complex formula for deriving for the eligible profit for deduction under different situations depending on whether the exporter is also engaged in the local business or not.

However, this distinction would not be material insofar as central question of exclusion of certain profit from the activity which is not eligible for deduction under section 80HH and 80-I are concerned. The logic being when the profit is being excluded from the claim of deduction, not the gross profit but the net thereof, that is the gross profit minus the expenditure incurred for earning such profit should be excluded. That is precisely how this Court in the case of Rajoo Engineers (supra) viewed the situation. That is how the Delhi High Court in the case of Essel Shyam Communication (supra) held referring to the decision in the case of ACG Associated Capsules Pvt. Ltd. (supra).

It is true that in the case of Bloom Decor Ltd., a question was suggested by the assessee which may have some bearing on the controversy on hand. However, the entire focus of the order of the Court was regarding applicability of the decision of the Supreme Court in the case of Topman Exports (supra) and not on the question of netting. In any case, therein, the decision in the case of ACG Associated Capsules Pvt. Ltd. was not noticed.

In the result, Tax Appeal is dismissed with a clarification that as far as transport income is concerned, in view of our findings, it is clarified that it would be the net and not the gross income which would be excluded. The question is decided in favour of the Revenue. To that extent, decision of the Tribunal is reversed."

5. In view of the above, the (i) part of the question of law is answered against the assessee and in favour of the Revenue and the (ii) part of the question of law is answered in favour of the assessee and against the Revenue. Insofar as Tax Appeal No. 29/2001 is concerned, the same is answered against the assessee and in favour of the Revenue.

6. Both the appeals stand disposed of accordingly.