
(1990) 09 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 3584 of 1987

K.M.A. International Ltd.

APPELLANT

Vs

Central Board of Direct Taxes

RESPONDENT

Date of Decision : 19-09-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 80HHB, 80HHB(1), 80HHB(1)(a), 800

Citation : (1993) 66 TAXMAN 114

Hon'ble Judges : T.D. Sugla, J

Bench : Single Bench

Advocate : Soli Dastur, M.S. Sanklecha and P.L. Buchani, for the Appellant; Mrs. Manjula Singh and G.S. Jetley, for the Respondent

Judgement

T.D. Sugla, J.—By this petition under article 226 of the Constitution, the petitioner- company has challenged the legality and validity of the impugned order dated 18-3-1987, passed by the CBDT, New Delhi refusing to approve the petitioner's agreement dated 12-9-1981, read with the memorandum of understanding dated 27-6-1983, with a Saudi Arabian concern: Mohammed Bin-Ladin, Organisation "the said concern". The petitioner entered into an agreement dated 12-9-1981, with the said concern. The petitioner and the said concern were to form a limited company by the name "Bin-Ladin K.M.A. Industrial Ltd." (hereinafter referred to as the "joint venture company") for production, marketing, galvanizing, processing and fabrication of steel structures, sections and allied products. The share capital of the joint venture company was to be of 3, 125 paid-up equity shares of Saudi Riyals 1,000 each, out of which the petitioner was to hold 781 shares. The rest of the shares were to be held by the said concern.

2. Thereafter, the petitioner entered into an agreement with the joint venture company. In terms of the latter agreement, the petitioner was to make available to the joint venture company the technical know-how and technical services to

enable the Joint venture company to set up a galvanizing project in Saudi Arabia. In consideration of making available the technical know-how, technical information, drawings, designs and also recommending appropriate production process and appropriate plant, machinery and equipment, etc., the joint venture company was to pay to the petitioner-company fees amounting to Saudi Riyals 6, 25,000 which amount was to be adjusted against the purchase of shares by the petitioner in the joint venture company. Permission of the RBI to set up a joint venture company in Saudi Arabia was obtained on 15/17-3-1982. That was subject to the conditions laid down by the Ministry of Commerce, Government of India, in its letter dated 8-2-1982. On or about 27-6-1983, a memorandum of understanding was reached between the petitioner and the said concern by which the obligations to be discharged by the petitioner and the said concern in respect of the joint venture company were reiterated.

3. The petitioner made an application to the Board u/s 80-O of the income tax Act, 1961 ("the Act") for the approval of the agreement. The application was dated 16-4-1986, and was for the previous year ending 30-6-1985. By letter dated 26-12-1986, the Board raised some queries including a query about the applicability of section 80HHB to the case. The petitioner filed its explanation in response thereto by letter dated 14-1-1987. By the impugned letter/order dated 18-3-1987, the Board refused to approve the agreement u/s 80-O. The ground given is that the agreement was squarely covered by the provisions of section 80HHB and as such, fell outside the scope of section 80-O in view of the overriding provisions of sub-section (5) of section 80HHB.

4. It is pointed out by Shri Dastur, the learned counsel for the petitioner, that the respondent-department has not filed any affidavit-in-reply and, therefore, the averments made by the petitioner in the petition remain uncontroverted and have to be taken as correct. It is fairly admitted that, in view of sub-section (5) of section 80HHB, no part of the consideration or of the income comprised in the consideration payable to the petitioner for the execution of a foreign project referred to in clause (a) of sub section (1) or of any work referred to in clause (b) of that sub-section shall qualify for deduction for any assessment year under any such other provision, under the heading C of Chapter VI-A of the Act. But, in the present case, no part of the income or consideration under the agreement was payable for the execution of a foreign project u/s 80HHB(1) clauses (a) and (b). Alternatively, it was contended that the power to approve an agreement u/s 80-O vested in the Board, whereas the power to consider whether any income or consideration arising out of an agreement fell u/s 80HHB(1)(a) or (1)(b) vested in the Assessing Officer. If an Assessing Officer commits a mistake, the assessee could challenge his decision by way of first appeal, second appeal or also in this Court by way of reference. The decision of the Board u/s 80-O, on the other hand, was not appealable and could be challenged only under article 226 of the Constitution before this Court. The jurisdiction of this Court under article 226 was limited. By considering the provisions of section 80HHB about which the Board was not competent, the Board, he argued, was depriving the assessee of its

legitimate rights to challenge the decision u/s 80HHB against the assessee by way of appeal, etc.

5. Mrs. Singh, the learned counsel for the department, on the other hand, stated that the provisions of sub-section (5) were overriding provisions and, therefore, while considering the question of approval of an agreement u/s 80-O, the Board was obliged to take into account the overriding provisions of sub-section (5) of section 80HHB. That is what the Board has done.

6. In my view, the Board has a statutory duty to approve an agreement u/s 80-O provided the conditions laid down in that section are satisfied. The Board's order under that section is final in the sense that the Act does not provide for any appeal or revision against such an order. That is why the petitioner has to come to this Court under article 226 to challenge the legality and validity of such an order.

7. Admittedly, the jurisdiction of this Court under article 226 is limited. It is certainly not a substitute for appeal. The Court does not substitute its own judgment for the judgment of the Board which is vested with the statutory duty. In case the Board is found to have failed to perform its statutory duty or is influenced by extraneous considerations or has not performed the duties in good faith, etc., mandamus can and should be issued to compel the Board to perform the statutory duty as required under the law. There again, this Court would avoid as far as possible, asking the authority to perform its duty in a particular manner.

8. In the circumstances, it is necessary in the first instance to ascertain what precisely is the duty of the Board u/s 80-O and to consider thereafter whether and to what extent the Board has failed to discharge its duty and/or performed it in the manner required under the section. Relevant portions of sections 80HHB and 80-O read as under:

80HHB. Deduction in respect of profits and gains from projects outside India. -
(1) Where the gross total income of an assessee being an Indian company or a person (other than a company) who is resident in India includes any profits and gains derived from the business of--

(a) the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him, or

(b) the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person,

with the Government of a foreign State or any statutory or other public authority or agency in a foreign State, or a foreign enterprise, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty-five per cent, thereof:

Provided that the consideration for the execution of such project or, as the case may be of such work is payable in convertible foreign exchange.--

(2) to (4) *****

(5) Notwithstanding anything contained in any other provision of this Chapter under the heading "C. -- Deductions in respect of certain incomes", no part of the consideration or of the income comprised in the consideration payable to the assessee for the execution of a foreign project referred to in clause (a) of sub-section (1) or of any work referred to in clause (b) of that sub-section shall qualify for deduction for any assessment year under any such other provision.

80-O. Deduction in respect of royalties, etc., from certain foreign enterprises. -- Where the gross total income of an assessee being an Indian company includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, under an agreement approved by the Board in this behalf, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of an amount equal to fifty per cent of the income so received in, or brought into, India, in computing the total income of the assessee:

Provided that the application for the approval of the agreement referred to in this section is made to the Board before the 1st day of October of the assessment year in relation to which the approval is first sought:

9. Section 80HHB was brought into the Act by the Finance Act, 1982, with effect from 1-4-1983. The Finance Bill, 1982, was introduced in the Lok Sabha on 27-2-1982. As per clause 18 of the Bill, section 80HHB had four sub-sections. Sub-section (5) was introduced subsequently. The relevant portion of the notes on clauses as regards insertion of section 80HHB reads as under:

Clause 18 seeks to insert a new section 80HHB in the income tax Act relating to deduction in respect of profits and gains from projects outside India.

Sub-section (1) of new section 80HHB provides that an Indian company or a non-corporate assessee resident in India will be entitled to a deduction, in the computation of the taxable income, of 25 per cent of the profits and gains

derived from the business of the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him or the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person.

The provisions of this sub-section will apply only where the consideration for the execution of the project or such work is payable in foreign currency." Commissioner of Income Tax Vs. Plastica Moulders (P.) Ltd., .

10. Clause 48 of the memo explaining the provisions in the Finance Bill, 1982, reads as under:

48. Deduction in respect of profits and gains from projects outside India.--With a view to encouraging contractors to undertake construction and engineering contracts outside India, it is proposed to provide a tax relief on the profits derived by them from foreign contracts. For this purpose, it is proposed to insert a new section 80HHB in the income tax Act to provide that where an Indian company or a non-corporate taxpayer resident in India derives any profits and gains from the business of execution of a project under a contract entered into by him with the Government of a foreign State or any statutory or other public authority or agency in a foreign State or with a foreign enterprise, he will be entitled to a deduction, in the computation of his taxable income, of 25 per cent of such profits and gains, subject to certain conditions. This concession will also be available where the assessee undertakes the execution of any work in connection with any foreign project undertaken by any other person." - 134 ITR (St.) 140

11. From the notes on clauses and the memo explaining the provisions, it is evident that the provisions of section 80HHB were inserted with a view to encourage certain persons to undertake construction and engineering contracts outside India. Contractors falling u/s 80HHB were, perhaps, not entitled to any relief before the introduction of section 80HHB. The provision was introduced to give relief to such contractors also in respect of their foreign earnings. When the Bill finally became an Act, however, sub-section (5) was added to it. There is no indication available as to why sub-section (5) which was not there in the original Bill was eventually inserted. With the addition of sub-section (5), it cannot be disputed that the object for which section 80HHB was originally destined is, to some extent, diluted as an assessee entitled to larger relief u/s 80-O or some other section will be entitled to lesser relief available u/s 80HHB, provided a part or the whole of the income under the agreement also falls u/s 80HHB.

12. However, the Legislature has given jurisdiction to administer and apply section 80HHB to the Assessing Officer, whereas the jurisdiction to approve the agreements u/s 80-O vests in the Board. If the Board exercises jurisdiction u/s 80-O by considering the provisions of section 80HHB, the applicant will have no right to challenge the order of the Board by way of appeal or reference. The applicant will be placed in an unenviable position. On the other hand, if the Board

considers the application for approval from the point of view of the conditions laid down in section 80-O and leaves it to the Assessing Officer whether or not a part or whole of the income under the agreement also falls u/s 80HHB so as to deprive him of the benefit u/s 80-O, the assessee will not be prejudiced inasmuch as he, then, will have a right of appeal, reference, etc.

13. In the above view of the matter, in any judgment, it is only appropriate that the Board continues to consider the agreements in question purely from the point of view of section 80-O and grant or refuse approval on that basis. The Board may, if so advised, qualify the approval by making it clear that it will be open to the Assessing Officer to examine whether the whole or part of the income under the agreement falls u/s 80HHB(1), so as to disentitle such income from the benefit u/s 80-O. Because, if the Board refuses to approve the agreement, no Assessing Officer will grant relief u/s 80-O.

14. Admittedly, the Board in the present case refused to approve the agreement not for the reason that any condition laid down in section 80-O is not satisfied. It has refused to approve the agreement on the ground that a part or the whole of the income/consideration receivable under the agreement was covered u/s 80HHB(1)(a) or (1)(b). For reasons stated earlier, this, the Board could not legally do. In my judgment, the Board was, thus, influenced by extraneous circumstances in refusing to approve the agreement. Accordingly, the impugned order requires to be and is hereby quashed. The Board is directed to consider the question of approval of the agreement afresh in the light of observations made hereinabove.

15. Rule is made absolute in terms of prayer clause (a). No order as to costs.