
(2012) 07 KL CK 0020

In the High Court Of Kerala

Case No : IT Appeal No's. 128, 151, 175, 177 and 207 of 2000

Parry Agro Industries Ltd.

APPELLANT

Vs

Jt. CIT

RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Income Tax Act, 1961 — Section 143(2), 32, 32(1), 32AB, 37

Citation : (2012) 07 KL CK 0020

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : E.K. Nandakumar, A.K. Jayasankar Nambiar and Anil D. Nair, for the Appellant; P.K.R. Menon and Jose Joseph, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.—The above appeals relate to the assessment years 1989-90, 1990-91 and 1991-92. Since common issues are considered by the Tribunal for all the three years, we deem it appropriate that the matters are disposed of together, though they were heard separately, however, on the same day. IT Appeal Nos. 151 of 2000 and 177 of 2000 are with respect to the assessment year 1989-90, IT Appeal Nos. 128 of 2000 and 175 of 2000 arise from the year 1990-91 and IT Appeal No. 207 of 2000 for the year 1991-92. Essentially these appeals deal with (i) computation of profits derived from the export of goods or merchandise out of India as contemplated under s. 80HHC of the IT Act, 1961 (hereinafter referred to as "the Act"), (ii) the inclusion of interest received from fixed deposits as "business income" entitled to be deducted u/s 32AB and (iii) the disallowance u/s 37(3) of the income claimed as expenditure to accommodate touring employees of the company. One solitary question also arises for the year 1989-90, which we shall refer to shortly.

2. The assessee is a company, mainly engaged in manufacture and sale of tea. It owns tea estates at Anamalai, South India and Deckiajuli in the State of Assam. The assessee has been assessed for income of the business carried on at both

these places by the respondent. For the year 1989-90 while completing the assessment u/s 143(2), the AO made some disallowances. We are concerned only with the disallowances referred to above u/s 80HHC, section 32AB and section 37(3) of the Act. The major disallowance was with respect to the claim u/s 80HHC.

3. Section 80HHC provides for a deduction of the profits derived on export by an assessee, being an Indian company or person resident in India engaged in the business of export out of India of any goods or merchandise. In computing the said profits, taking into account that, there might be cases where the assessee's business consists exclusively of the export out of India and otherwise, subsection (3) was provided specifically with the intention to provide guidance on such computation. Sub-section (3) provided that when the business of an assessee was exclusively of the export out of India of the goods or merchandise then what was available for deduction as profits is the profits of the business as computed under the head "profits and gains of business or profession", by sub-section (3) (a). When the assessee was not involved in such exclusive business of export, then the profits entitled to deduction were to be the amount which bears to the profits of the business, as computed under the head "profits and gains of business or profession", the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, by sub-section (3)(b).

4. The simple formula, hence, was $\text{Export Turnover} / \text{Total Turnover} \times \text{Business Turnover (sic--profits)} = \text{Available Deduction}$. The assessee claimed that the total turnover, i.e., the denominator in the above formula, should be that of the Assam unit alone, since only the tea obtained from the estate at Assam were exported. The AO, however, took the stand that the denominator should be the total turnover of the assessee consisting of the business at Assam as also in South India. The AO, hence, rejected the contentions of the assessee and computed the deduction u/s 80HHC as proposed.

5. One other solitary issue arising for the year 1989-90 was as to whether while computing deduction u/s 32AB, deduction of depreciation amount should be for a period of 12 months or 21 months. The assessment year 1989-90 being a transitional period and the previous year being comprised of 21 months, the AO allowed deduction of depreciation amount of Rs. 3,38,86,360, being the depreciation computed for 21 months, to arrive at the eligible profits in accordance with the provisions of section 32(1) of the Act.

6. Interest income along with some other sundry receipts were disallowed as being not business income and hence excluded from deduction u/s 32AB. The amounts claimed as business expenditure for expenses incurred at Iyerpadi and Coonor for meeting the expenses of the employees and others on tour, in providing them food and accommodation was disallowed as an expenditure clearly coming within the purview of section 37(3) of the Act.

7. On appeal by the assessee, the first appellate authority allowed the

expenditure incurred for accommodation of touring employees having found the same to be not an expenditure covered u/s 37(3). The finding of the first appellate authority was to the effect that the expenditure claimed by the assessee was not an expenditure incurred on guest house, but a reimbursement of expenses which was incurred by the estate manager to accommodate visiting employees in the house provided for the estate manager. With respect to the issue of section 32AB, interest having been found to be business income, was directed to be allowed as a deduction u/s 32AB. The computation of profits entitled to deduction u/s 80HHC as done by the AO was confirmed, as was the deduction of depreciation for 21 months.

8. The assessee was in appeal before the Tribunal against the computation of export profits u/s 80HHC as also the deduction of depreciation for 21 months. The Revenue was in appeal before the Tribunal against treating interest as a deduction allowable u/s 32AB and the expenditure incurred for accommodation of touring employees being allowed as not being covered u/s 37(3). The Revenues appeals with respect to the above issues were allowed. In the assessee's appeal, the issue of deduction of depreciation for 21 months while was upheld, the computation of section 80HHC was remanded to the AO to consider whether the same would come under clause (a) of sub-section (3) or clause (b) thereof. The assessee, hence, has raised the following questions of law for the assessment year 1989-90, by the two appeals:

(1) Whether on the facts and circumstances of the case was the Tribunal justified in holding that the appellant is entitled to deduction of export profit u/s 80HHC of the IT Act on the export profit calculated with reference to the export turnover and total turnover of Deckiajuli alone only if business of the Deckiajuli Estate is exclusively of export of tea?

(2) Whether on the facts and circumstances of the case, was the Tribunal justified in considering the claim u/s 80HHC(3)(a) of the IT Act when the appellants claim was under clause (3)(b) of section 80HHC but with reference to the export turnover, total turnover and total profit of Deckiajuli Estate alone?

(3) In view of the separate, distinct and independent business with separate accounts and including profit and loss accounts available for Deckiajuli Estate in Assam and in view of the fact that the appellant has exported tea produced only in that estate should not the Tribunal have granted the claim under clause (3)(b) of section 80HHC with reference to the export turnover, total turnover and profit of Deckiajuli Estate alone as claimed by the appellant?

(4) Whether on the facts and circumstances of the case, was the Tribunal justified in excluding interest income and tea subsidy in the computation of profit of the eligible business for granting relief u/s 32AB of the IT Act?

(5) Whether on the facts and circumstances of the case was the Tribunal justified in holding that depreciation on guest house is liable to be disallowed u/s 37(4) of the IT Act ?

(6) Should not the Tribunal have held that depreciation being an eligible deduction u/s 32 cannot be disallowed u/s 37(4) of the IT Act even if such a depreciation is on the guest house?

(7) Whether on the facts and circumstances of the case was the Tribunal justified in deducting depreciation for 21 months in the computation of profit of the eligible business u/s 32AB of the FT Act instead of deducting depreciation for 12 months for the said purpose as done by the appellant?

9. For the year 1990-91 also, the questions of law raised by the assessee in the two appeals for the said year, viz., IT Appeal Nos. 128 of 2000 and 175 of 2000 are the questions 1 to 6 raised above. Question No. 7 arises only for the assessment year 1989-90. For the year 1991-92, question Nos. 1 to 3 and 5 and 6 are raised in IT Appeal No. 207 of 2000. We proceed to deal with the questions of law rather than each of these appeals.

10. The first three questions raised by the assessee are with respect to the computation of export profit allowable for deduction u/s 80HHC. As noticed above, the claim of the assessee is that the denominator in the formula being $\text{Export Turnover} / \text{Total Turnover} \times \text{Business Profits} = \text{Available Deduction}$; is the turnover for the Assam estate alone. Hence the contention is that in calculating the deduction u/s 80HHC and specifically in computation of the export profits entitled to deduction, the Assam unit should be taken as a separate unit and the proportion of export turnover of that unit to the total turnover of that unit should be applied to the total business profits of the assessee; being that disclosed under the head "Profits and gains of business or profession". The assessee urges for that proportion of its entire profits to be granted deduction as equivalent to the proportion of export turnover in the Assam unit alone. We deem it appropriate to extract the provisions coming up for interpretation in the said case as they stood in the relevant years. We say so because the present appeals deal with three years and there had been changes introduced by the subsequent Finance Act of 1990. We, however, notice that this was not, specifically taken note of by the Tribunal. We find that the clause extracted in the Tribunal's order for the year 1989-90 was introduced only subsequently, w.e.f. 1-4-1991. However, the discussion in the order of the Tribunal is on the relevant clause, which is extracted hereunder:

Section 80HHC(1):

80HHC. Deduction in respect of profits retained for export business.--(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, 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 of the profits derived by the assessee from the export of such goods or merchandise.

Section 80HHC(3)--as it Stood in assessment years 1989-90 and 1990-91:

(3) For the purposes of sub-section (1), profits derived from the export of goods or merchandise out of India shall be,--

(a) in a case where the business carried on by the assessee consists exclusively for the export out of India and of the goods or merchandise to which this section applies, the profits of the business as computed under the head Profits and gains of business or profession;

(b) in a case where the business carried on by the assessee does not consist exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head Profits and gains of business or profession) the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Section 80HHC(3), as substituted by Finance Act, 1990, which came into effect from 1-4-1991:

(3) For the purposes of sub-section (1), profits derived from the export of goods or merchandise out of India shall be the amount which bears to the profits of the business (as computed under the head Profits and gains of business or profession), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

11. The counsel for the assessee would strenuously urge before us that the estate at Assam was independently carried out without any connection with the other operations of the company and that it would even be possible to continue the business operations in the Assam estate if the other operations of the company were closed. Separate books of accounts were maintained for the Assam estate and its income was also computed separately as it was subject to agricultural income tax of that State. The tea produced in the South Indian estates were not subject to exports and what was subject to exports was the tea manufactured from the Assam estate alone. True, the tea manufactured at the Assam estate was also involved in local sales and hence the proportion of the export turnover with respect to the total turnover of the Assam unit has to be arrived at for computing the allowable deductions u/s 80HHC. The said proportion, it is contended, has to be applied to the business profits derived by the assessee from its entire business, i.e., the tea produced at Assam as also at South India. According to the counsel, this interpretation would serve best the benefit conferred by the provision and the Courts are bound to make such a beneficial interpretation when construing provisions conferring benefits to the assessee. The learned counsel would canvass the above position drawing support from a decision of the Madras High Court in Commissioner of Income Tax Vs. The Madras Motors Ltd., and the Delhi High Court in The Commissioner of Income Tax (Central) Vs. Padmini Technologies Ltd., .

12. In the Madras Motors Ltd. case (supra), the assessee was engaged in the business of forgings, which also involved export of forgings and had other

sources of business, being the business of selling of motorcycles, spare parts thereof and television sets. In computing the deduction u/s 80HHC, the denominator taken by the AO was the total turnover with respect to the business of the assessee in forgings, motorcycles, spare parts and television sets. The assessee contended before the High Court that this would substantially reduce their deduction, the denominator being more. The denominator which ought to have been adopted was the business in forgings alone, contended the assessee. The proportion to be applied for arriving at the allowed deduction, according to the assessee, was the proportion of the export of the forgings to the actual turnover of forgings alone, i.e., export and local sales, of the forgings. The Madras High Court accepted the contention of the assessee on an analysis of section 80HHC. The learned Judges held that a look at sub-section (2) of section 80HHC would indicate that the section 80HHC applies only to the goods which are not only exported out of India, but the sale proceeds of which are receivable by the assessee in convertible foreign exchange. Clause (a) of sub-section (3) would apply only when the assessee's business is exclusively of export sales. In the facts of the said case, since the business in forgings of the assessee extended to both export and local sales, in computing the profits; it was held that subsection (3)(b) of section 80HHC would be applicable. However, giving the plain meaning to the word "business" employed in the section, it was held that it can only be:

business relating to the goods to which the section applies and the thrust is on the word exclusively. The sub-section considers a situation where the assessee's business is of exports and the assessee's business is not that of export alone. However, one thing is certain that the business has to be only in respect of the goods or merchandise to which the section applies.

Hence, with special emphasis on the exemption being available to the goods or merchandise; it was held that:

The business contemplated in the section would be 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 goods to which the section applies.

In such circumstances, the contention of a lower denominator being applied to the formula was accepted by the Madras High Court, thus excluding the turnover of the business from other sources in computing the total turnover.

13. We are unable to understand how the said decision would be applicable to the facts of the instant case. The appellant herein, being engaged in the business of tea, is not involved in the business of any other goods. The tea produced by the assessee is subjected to export as also local sale. The "goods" which would assume significance by the words employed in section 80HHC is "tea" and "tea" alone. In arriving at the allowable deduction u/s 80HHC, the export turnover to be taken is of tea. The total turnover is also of tea; since the goods, subject to

export, is exclusively tea. The distinction or division now attempted by the assessee with respect to the estates in Assam and South India is artificial and not permissible under the provision.

14. We have also examined the decision of the High Court of Delhi in Padmini Technologies case (supra). The facts relevant to the case is also similar to the Madras case (supra). Padmini Technologies Ltd. managed two units, one of which was engaged in the business of multimedia and the other in PET jars. The business of multimedia had carried out exports as well. The issue was whether in calculating the allowable deduction under s. 80HHC, the total turnover, i.e., the denominator, should include business of PET jars. The learned counsel for the assessee lays stress on para 8:

In our view, the contention is completely misconceived. The issue involved in the present case is: where an assessee runs and manages two separate units, one of which is engaged fully or partially in earning income through exports then, in the calculation of proportionate deductible profits, would the expression total turnover of the business include only the turnover of the export business or also that of the domestic business.

The contention of the learned counsel is that here the question of two units was considered and held in favour of the assessee and the findings would be equally applicable in the case of the assessee. We are afraid, the said contention is totally misconceived. True, in the facts of the said case there were two undertakings exclusively dealing with multimedia and PET jars. But what weighed with the Court and prompted the Court to follow the Madras decision was the rationale that the word "business" which follows the expression "total turnover" would have to be confined only to those goods which are exported and to which the section applies. We are of the firm opinion that the decision cited by the learned counsel does not at all apply to the facts of the instant case as noticed above.

15. In this context, the learned standing counsel for the Department pointed out that for the very same assessment year 1989-90 against the very same order of the Tribunal the Revenue was before this Court and the said appeal, numbered as Appeal No. 103 of 1999, was disposed of answering the question raised by the Revenue in favour of the Revenue and against the assessee by the decision in Commissioner of Income Tax Vs. Parry Agro Industries Ltd. (formerly CWS (India) Ltd.), . In the said decision, we notice the provisions under sub-section (3) relevant for the assessment year was correctly noticed and cl. (a) related to exclusive business in export and clause (b) related to business not exclusively of export.

16. The counsel for the assessee would draw a distinction insofar as the assessee's contention in that appeal filed by the Revenue was that there was no requirement for going into sub-section (3) and the deduction of the assessee u/s 80HHC can be decided by virtue of the provisions under subsection (1) itself. In

so far as the present appeal filed by the assessee is concerned, the learned counsel would contend that the assessee's contention now is that the computation u/s 80HHC, in the facts of the assessee's case, would be sub-cl. (a) of sub-section (3) and not sub-clause (b) thereof. We notice that a Division Bench of this Court had expressly rejected the contention of the assessee with respect to there being no need to have recourse to sub-section (3) and the assessee's case could be decided under sub-section (1) alone. The Division Bench noticed the words employed in sub-section (3) "for the purpose of sub-section (1), profits derived from the export of goods or merchandise out of India shall be " and held that it clearly shows that the said sub-section wholly and completely applies to sub-section (1). The Division Bench after answering the question in the following manner, issued the following directions:

We notice from sub-section (3)(b) that the formula for ascertainment would be that "the entire business including profits of the entire business multiplied by export turnover divided by entire business turnover including export and non-export.

This is the formula utilised for the assessment to be made. If this be so, the order of the Tribunal requires to be modified and fresh assessment order has to be made by the AO employing the above formula. The order is accordingly modified.

The rather valiant distinction attempted by the learned counsel for the assessee, according to us, is non-existent. The Division Bench has clearly held what is applicable would be sub-section (3)(b) and that too the total turnover will be entire business turnover. In the circumstances, there cannot be any option for the lower denominator being the total turnover of the Assam unit alone. The proportion of business profits to be computed for arriving at the allowable deduction has to be made on the proportion of export turnover of tea to the total turnover of tea. There can be no distinction between tea produced in two different units. It is not so contemplated in the provision; nor does it fall for such an interpretation from the two decisions cited by the learned counsel. Hence, we respectfully follow the Division Bench decision of this Court and answer the question against the assessee and in favour of the Revenue.

17. We are conscious that the provision as interpreted by the Division Bench was applicable for the assessment years 1989-90 and 1990-91. The order of remand of the Tribunal, in our opinion, was not correct since it directs the AO to verify whether the assessee is entitled under sub-clause (a) or (b). Factually, on assessee's admission, even the Assam unit is not exclusively export-oriented and there is no question of assessee being covered under sub-clause (a). For the assessment years 1989-90 and 1990-91, sub-clause (b) of sub-section (3) of section 80HHC will be applicable to the assessee, as held in the assessee's own case. For the year 1991-92 the provision is as substituted by Finance Act, 1990 w.e.f. 1-4-1991. The earlier distinction of exclusive export and business consisting other than that of export in clause (a) and clause (b) was substituted.

The legislature might have noticed that sub-cl. (a) of sub-section (3) was redundant insofar as it states the obvious. The substituted provision distinguished between manufactured or processed goods and trading goods. Then for the assessment year 1991-92 what would be applicable is sub-clause (a) of sub-section (3) which also refers to the proportion in respect of export of goods based on the total turnover of the business carried on by the assessee. The position of law on the facts of the case of the assessee does not change with the substitution. Ordinarily we would have followed the Division Bench decision reported in Commissioner of Income Tax Vs. Parry Agro Industries Ltd. (formerly CWS (India) Ltd.), , in the case of the assessee itself, with respect to the assessment year 1989-90 and answered the question in favour of the Revenue. But we have independently considered the issue as we are conscious of the position that each assessment year gives rise to a fresh cause of action and also considering the fact that the provision for all the assessment years were not the same; though substantially similar. Hence, the questions of law Nos. 1 to 3 are answered in favour of the Revenue and against the assessee.

18. The next question is with respect to the justification of the Tribunals finding that interest income cannot be treated as "profit" for the purpose of computation of relief u/s 32AB. The issue is squarely covered by the decision of a Full Bench of this Court in the assessee's own case, reported as Parry Agro Industries Ltd. Vs. Commissioner of Income Tax, . Respectfully following the above decision, we hold that the assessee was not entitled to include interest income as profits of eligible business or profession for computing the deduction u/s 32AB of the Act. Hence, the fourth question also is answered in favour of the Revenue and against the assessee.

19. We would now consider question No. 7, which arises only in the assessment year 1989-90, being the deduction of depreciation for 21 months while computing deduction u/s 32AB. It is noticed by both the appellate authorities that the previous year relevant to the assessment year 1989-90 was a transitional period, comprising of 21 months. It was hence that the AO computed depreciation for a period of 21 months and took into account the entire depreciation for the 21 months for computation of deduction u/s 32AB. The assessee's contention is that only the depreciation for the 12 months should have been taken into account for computation. u/s 32AB, eligible profits are arrived at after deducting depreciation computed in accordance with the provisions of section 32(1). Sub-section (3) of section 32AB is clear that eligible profit would be arrived at after deducting an amount equal to depreciation computed in accordance with the provision of sub-section (1) of section 32. The amount that had been computed u/s 32(1) of the Act for the relevant assessment year with respect to the previous year comprising of 21 months is the depreciation for a period of 21 months. In such circumstance, the depreciation for the purpose of section 32AB cannot be limited to 12 months. The assessee's contention is that depreciation allowable u/s 32(1) is to be to the depreciation determined for 21 months. However, in computation of section 32AB, the same shall be limited to

12 months. The contention is only to be rejected. Hence, question No. 7 raised for the assessment year 1989-90 is also answered in favour of the Revenue and against the assessee. Question Nos. 5 and 6 arising for all the years is the disallowance with respect to the expenditure incurred to accommodate touring employees. The facts with respect to the three years are not similar. In the years 1989-90 and 1990-91 the assessee claimed that they were not maintaining a separate guest house, but had been accommodating such touring employees in the house of the estate manager itself. The expenses were claimed as being expenditure not covered u/s 37(3) on the premise that these were amounts reimbursed to the estate manager for the expenditure incurred by him in accommodating touring employees. The said contention cannot be countenanced, since section 37(3) as it existed in the relevant assessment years refers to "any expenditure incurred by an assessee after the 31-3-1964, on advertisement or on maintenance of any residential accommodation including any accommodation in the nature of a guest-house or in connection with travelling by an employee or any other person (including hotel expenses or allowances paid in connection with such travelling)". The assessee cannot take up a contention that reimbursement of expenses to the estate manager would not be for providing accommodation to touring employees and, hence, would not come within the ambit of sub-section (3) of section 37, Sub-section (3) refers specifically to "any residential accommodation"... "in the nature of a guest-house"... in connection with travelling by an employee or any other person". It also includes hotel expenses or allowance paid in connection with such travelling. The AOs finding in this respect, as affirmed by the Tribunal, is perfectly in order and in accordance with the provisions of the Act. However, for the year 1991-92, this question does not arise at all, since the facts would clearly show that in the said year the assessee had maintained two guest houses, named as "Rochdale House" and "Mounmion House". It was in such circumstance that expenditure was disallowed as it has been covered u/s 37(3). Hence, while we answer question Nos. 6 and 7 against the assessee in favour of the Revenue for the years 1989-90 and 1990-91, for the year 1991-92 we refuse to answer the question. The said issue was decided on the facts pertinent to the relevant year and there cannot be any question of law arising from the same. Question Nos. 5 and 6 are accordingly answered in favour of the Revenue and against the assessee.

In the result, all the questions of law raised for the subject assessment years are answered in favour of the Revenue and against the assessee. The income tax appeals are hence dismissed.