

(2005) 09 DEL CK 0060
In the Delhi High Court
Case No : ITA 156 of 2003

S.R. Grover

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 12-09-2005

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 143(2), 80AB, 80O

Citation : (2006) 200 CTR 183 : (2005) 124 DLT 397 : (2005) 84 DRJ 523 :
(2006) 280 ITR 580 : (2005) 149 TAXMAN 379

Hon'ble Judges : T.S. Thakur, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Rajiv Tyagi, for the Appellant; R.D. Jolly and Rashmi Chopra, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The assessed, a lawyer by profession, filed his return of income on 31.10.1995 in respect of assessment year 1995-96. He declared a total income of Rs.2,05,326/- after claiming a deduction of Rs.17,05,760/- u/s 80-O being 50% of the gross professional fees received in foreign exchange to the extent of Rs.34,11,529/-. In the profit and loss account, the assessed had shown gross professional fees amounting to Rs.41,46,203/- (including the said gross professional fees received in foreign exchange) and gross interest receipt of Rs.42,804/-. The assessed claimed various expenses like salary, traveling expenditure, conveyance and other official expenses and after deducting the same from the gross receipts, the net profit has been shown as Rs.17,68,707/-. The Assessing Officer processed the return u/s 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as the "said Act") and by intimation dated 27.01.1997 the total income was computed at Rs.10,26,740/-. The Assessing Officer had allowed a deduction of only Rs.8,83,946/- u/s 80-O as against the claim of Rs.17,05,360/- by the assessed. The assessed had claimed the deduction u/s 80-O in respect of the gross income by way of fees in convertible foreign exchange, whereas the Assessing Officer had made the adjustment allowing the deduction against the net income received in convertible foreign

exchange.

2. Being aggrieved by this action on the part of the Assessing Officer, the assessed had filed an appeal before the Commissioner of Income Tax (Appeals) challenging the adjustment made by the Assessing Officer as aforesaid. The Commissioner of Income Tax (Appeals) allowed the appeal of the assessed and cancelled the adjustments holding that:-

"Whether or not deduction u/s 80-O is admissible with reference to the gross foreign exchange brought into India or the profit included in the gross total income is a debatable question of law on which contrary opinions are conceivable. Adjustment of the returned income on account of the claim of deduction u/s 80-O is, Therefore, outside the scope of Section 143(1)(a). The returned income is Therefore directed to be accepted without the impugned adjustment relating to the claim of deduction u/s 80-O of the Act."

3. Against this order, the revenue filed an appeal before the Income Tax Appellate Tribunal and the main issue urged before the Tribunal was whether such an adjustment could be made under the provisions of Section 143(1)(a) of the Income Tax Act. It was argued on behalf of the revenue that this court had, in the case of CIT v. Marketing Research Corporation, held that deduction u/s 80-O was to be computed on the net income and not on the gross receipt of the assessed. It was also submitted that this decision was based on the decision of the Supreme Court in the case of Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, and that the decision in CIT v. Marketing Research (supra) was fully approved and endorsed by a Full Bench of this Court in the case of Commissioner of Income Tax Vs. Chemical and Metallurgical Design Co. Ltd.,

4. On the other hand, it was argued on behalf of the assessed that when the assessed filed the return on 31.10.1995, the question of deduction being claimed on the basis of gross receipts of foreign exchange or on a net basis was still in the realm of uncertainty and, Therefore, no adjustment could be done u/s 143(1) (a) of the said Act. It was argued that in a decision of the Calcutta Bench of the Tribunal in the case of M.N. Dastur & Co. Ltd v. Deputy Commissioner of Income Tax (1992) 40 ITD 521 (Cal.), it had been held that deduction u/s 80-O was to be computed on gross receipts of foreign exchange. Though this decision had been subsequently reversed by the Calcutta High Court, yet, the issue, according to the assessed, was debatable in the year 1995 when the assessed had filed his return.

5. The Tribunal considered these rival submissions and held that since this court in the case of CIT v. Marketing Research Corporation (supra) had held that deduction u/s 80-O was to be computed on the basis of net income and not on gross receipts and that this decision had been rendered in 1987, much before the filing of the return by the assessed for the assessment year 1995-96, there was no doubt or debate with regard to this issue insofar as the Assessing Officer in Delhi was concerned and that merely because a Bench of the Tribunal in Calcutta

had taken a different view, did not detract from the position that the Assessing Officer was bound by the decision of the jurisdictional High Court (Delhi) and insofar as he was concerned, the debate had been settled. Therefore, while he was processing the return in 1995, the matter was clear and well-settled that the deduction was to be allowed on net income and not on the gross income. Accordingly, he was entitled to make the adjustments u/s 143(1)(a). For these reasons, the Tribunal reversed the order of the CIT (Appeals) and upheld the adjustment made by the Assessing Officer for computation of deduction u/s 80-O with respect to net foreign income.

6. In this appeal, the assessed seeks to raise the following questions as substantial questions of law:-

"I. Whether the deduction u/s 80-O is allowable on the gross amount of fees for technical services received by the assessed particularly when the deduction is allowable with reference to the convertible foreign exchange received in India ?

II) Whether in the facts and circumstances of the case the Tribunal failed to follow the law laid down by the Supreme Court in Commissioner of Income Tax Vs. Hindustan Electro Graphites Ltd.,

III Can the Assessing Officer make the adjustment adding the income without any enquiry and without any notice to the Appellant, particularly when the following judgments have held that the exemption is on "gross" and not "net":

1. M.N. Dastur & Co. Ltd. v. CIT (1992) 40 ITD 521 cal

2. Manchur Industries v. CIT 19 ITD 468

3. CIT v. Asian Cables Ltd. (Bombay)

4. Additional Commissioner of Income Tax, Madras-I Vs. Isthmian India Maritime Private Ltd.,

7. The position in law is as follows.

In CIT v. Marketing Research Corporation (supra), the question that was posed was:-

"Whether on the facts and circumstances of the case, the Tribunal was justified in law in holding that the assessed company was entitled to relief u/s 80-O of the IT Act on the gross receipt of Rs.57,320/- ?"

A Division Bench of this Court following the decision of the Supreme Court in the case of Distributors (Baroda) Pvt Ltd (supra) held as under:-

"The Supreme Court has held that for the purposes of section 80-O, the deduction has to be computed not on the basis of gross income but on the basis of net income. In view of the Supreme Court decision the question referred to us is answered in favor of the applicant and against the assessed. The question is answered accordingly."

8. While this was the position in law as prevailing in Delhi, the assessed filed his return for the assessment year 1995-96 on 31.10.1995 claiming deduction u/s 80-O on the basis of gross income and not net income. This was clearly contrary to the decision of this court in CIT v. Marketing Corporation (supra). On 27.01.1997 when the Assessing Officer processed the return u/s 143(1)(a) and issued the intimation, the position was not debatable and it was quite well-settled and, Therefore, he could make the adjustment. It is another matter that subsequently in the year 2000, to be precise on 14.03.2000, another Division Bench of this court made a reference to a larger Bench in the case of CIT v. Chemical and Metallurgical Design Co. Ltd doubting the ratio in CIT v. Marketing Research Corporation (supra). However, the Full Bench, after examining the matter [Commissioner of Income Tax Vs. Chemical and Metallurgical Design Co. Ltd., in detail, came to the conclusion that Section 80-AB applied to the provisions of Section 80-O of the Act and that the mode of computation as indicated in Section 80-AB had to be applied while working out the deductions u/s 80-O of the Act. It answered the reference accordingly. This clearly implied that the deductions were to be calculated on the basis of net income and not gross receipts. It is thereafter that the impugned decision of the Tribunal was rendered on 12.10.2002. Therefore, from the above discussion, it is clear that the deduction u/s 80-O has to be made in terms of Section 80-AB and, Therefore, the deduction has to be on the basis of net income and not on the basis of gross receipts.

9. Clearly, this takes care of all the questions sought to be raised by the assessed in this appeal. However, the assessed submitted that even though on merits the deduction has to be given on the basis of net income, yet adjustments could not be made by the Assessing Officer u/s 143(1)(a) inasmuch as in view of the proviso to Section 143(1)(a), the only adjustments that could be made in the income or declared in the return, in the context of the facts of the present case, could be in respect of a deduction which was prima facie inadmissible. According to the learned counsel for the assessed, the expression prima facie, denotes that the issue should not be debatable. He relied upon a decision of this court in the case of Samtel Color Limited Vs. Union of India (UOI) and Others, wherein this court, while considering this very provision, held that:-

"We are, Therefore, of the considered opinion that u/s 143(1)(a) of the Act it is not open to the Assessing Officer to make any adjustment in the returned income by disallowing any claim for deduction, allowance or relief, unless he is satisfied on the basis of information available in the return, documents, and the accounts accompanying it that such a claim is inadmissible on the face of it and there is no possibility of any debate thereon on such claim etc. If anything more is read into the power of the Assessing Officer to make unilateral adjustments, it would render the provision wholly arbitrary and unreasonable because: (a) a disallowance is made without giving an opportunity to the assessed to explain his view point in support of the deduction or allowance and (b) additional tax on the increased amount is charged from him arbitrarily. This would not only be in total

violation of the principles of natural justice, it will also be not in consonance with the spirit of the provision to cause minimum inconvenience to the assessed and at the same time put the assessed on guard against claiming inadmissible deduction and allowances. On the contrary, the above interpretation of Section 143(1)(a) of the Act will not cause any prejudice to the Revenue. In a given case where the Assessing Officer has any doubt about the allowability of deduction or claim made by the assessed, it is open to him to issue a notice under Sub-section (2) of Section 143 and have the evidence in support thereof. Similar views have been expressed on the subject by the Bombay High Court in *Khatau Junkar Ltd. and Anr v. K.S. Pathania and Anr.* (1992) 196 2nd 55, Calcutta High Court in *Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others*, *GOD GRANITES Vs. CENTRAL BOARD OF DIRECT TAXES and Others*, and some other High Courts as well."

As a principle of law there cannot be any exception to what was observed by the Division Bench in that case. However, the question remains whether that principle is applicable to the facts of the present case. It is clear that if the issue was debatable, then the adjustment could not be made u/s 143(1)(a), but the fact of the matter is that the issue was not debatable in 1995 or in 1997 when the return was filed and when the intimation u/s 143(1)(a) was issued respectively. The position, insofar as Delhi was concerned, was settled by the decision of this court in the case of *CIT v. Marketing Research Corporation* (supra) as far back as in 1987.

10. The learned counsel for the petitioner also urged that although the Full Bench decision in the case of *CIT v. Metallurgical Design* (supra), settled the issue but that decision had come in 2000 and the relevant point of time for consideration was when the return was filed. For this, he again relied upon the decision in *Samtel Colour Ltd* (supra) and in particular to the finding in para 24 thereof which reads as under:-

"24. We have, Therefore, no hesitation in holding that the question of prima facie adjustment u/s 143(1)(a) of the Act has to be considered with reference to the date on which the return of income is filled and not with reference to the events subsequent thereto."

Once again, there cannot be any dispute with this principle. However, it is to be seen in the context of the facts of the present case. In 1995 when the return was filed, the position was well-settled and clear in view of the decision in the case of *CIT v. Marketing Research Corporation* (supra). Deduction u/s 80-O were available only on the net income and not on gross receipts of fees in convertible foreign exchange. In these circumstances, the position of law being clear, the assessing officer cannot be faulted for making the adjustment that he did while processing the return u/s 143(1)(a).

11. The learned counsel for the petitioner also relied upon the decision of the High Court of Bombay in the case of *Commissioner of Income Tax Vs. Asian*

Cables Corporation Ltd., as also the decision of the Madras High Court in the case of Additional Commissioner of Income Tax, Madras-I Vs. Isthmian India Maritime Private Ltd., wherein it was held that the deduction u/s 80-O should be calculated on the gross fees receipt and not on net income. These decisions are of the Bombay and Madras High Courts. They are decisions which would be binding within the jurisdictions of these High Courts. Insofar as the Assessing Officer in Delhi was concerned, he was bound by the decision of this court in the case of CIT v. Marketing Research Corporation (supra) and as such, there was no scope for any debate. Therefore, the adjustments could be made by the Assessing Officer u/s 143(1)(a).

12. Accordingly, we feel that no substantial question of law arises for our consideration and the appeal is dismissed.