

(1998) 09 CAL CK 0010
In the Calcutta High Court
Case No : Writ Petition No. 1232 of 1997

Warren Tea Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Income Tax Act, 1961 — Section 80HHC
Income Tax Rules, 1962 — Rule 8

Citation : (2000) 158 CTR 327 : (1999) 108 ELT 628 : (1999) 236 ITR 492 :
(1999) 102 TAXMAN 501

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : Debi Prosad Pal, P.K. Pal and C. Mukherjee, for the Appellant; Addl. Solicitor-General and S.K. Kapur, for the Respondent

Judgement

Satyabrata Sinha, J.—Interpretation of section 80HHC of the Income Tax Act, 1961 (hereinafter referred to as "the said Act"), vis-a-vis a circular letter bearing No. 600 (see Commissioner of Income Tax Vs. Industrial Credit and Investment Corporation of India Ltd., dated 23rd May, 1991, issued by the Central Board of Direct Taxes is in question in this writ application.

2. The facts shortly stated are as follows :

The petitioner being a company incorporated and registered under the Companies Act, 1956, admittedly is engaged in growing, manufacturing and selling black tea. It also exports tea out of India.

3. A question arose as to the stage of grant of deduction required to be given in assessment of computation of income of such an assessee in view of various representations regarding problems faced by tea exporters. By reason of the impugned Circular No. 600 (see Commissioner of Income Tax Vs. Industrial Credit and Investment Corporation of India Ltd., dated 23rd May, 1991, the Board has laid down the following formula.

Abbreviated profit and loss account

Rs. Rs.

Expenses 1,200 Domestic sales 1,000

Profits 300

Exports (FOB) 500

1,500

1,500

Profits from tea business 300

Allocation under rule 8 :

Income chargeable under I. T. Act, 40 per cent. 120

Agricultural income 180

Income chargeable to income tax 120

Less : Deduction u/s 80HHC

Rs. 120 X 500

1,500 40

80

4. According to the petitioner, the interpretation of the aforesaid provision by the Central Board of Direct Taxes (hereinafter referred to as "the said Board") is not in consonance with the provisions of Section 80HHC read with Rule 8.

5. Dr. Pal, learned senior counsel appearing on behalf of the petitioner, submits that in terms of Rule 8 framed under the said Act legal fiction has been created in terms whereof the agricultural income and the non-agricultural income is to be treated as a composite income out of which 60 per cent, thereof would be treated as an agricultural income and 40 per cent, thereof would be treated as non-agricultural income and, in that view of the matter, the proper stage for grant of such deduction would be when the allocation chargeable under the said Act in terms of Rule 8 is being made.

6. The learned Additional Solicitor General, appearing on behalf of the Revenue, on the other hand, submitted that the aforementioned circular letter is merely clarificatory in nature which the Board was entitled to issue in terms of Section 295(2)(b) and hardly there exists any difference in the matter of computation of profits so far as that part of business of the petitioner relating to sale of tea leaves within or outside India is concerned and the difference, if any, would be only in respect of computation of agricultural income. According to learned counsel Section 80HHC has to be considered in the light of the provisions of

Section 2(1A), Section 10(1), Section 28, Section 29 and Sections 30 to 43D of the said Act. In support of the aforementioned contentions strong reliance has been placed upon a recent Division Bench decision of the Gauhati High Court in Assam Company Ltd. and Another Vs. State of Assam and Others,

7. It is beyond any cavil of doubt that Parliament occupies the legislative field in respect of imposition of taxes arising out of non-agricultural income in terms of item No. 82, List I of the Seventh Schedule to the Constitution of India whereas the legislative field in relation to agricultural income falls within the ambit of the State Legislature in terms of item No. 42 of List II thereof.

8. The Constitution of India itself defines agricultural income in article 366(1) to mean agricultural income as defined for the purposes of enactments relating to Indian Income Tax.

9. Section 2(1A) of the said Act defines agricultural income.

10. Section 10 provides for such income which would not be included in total income and agricultural income is one of such items.

11. Section 2(45) defines total income which means the total amount of income referred to in Section 5, computed in the manner laid down in the Act.

12. Section 5 provides for the scope of total income which in the case of a resident includes all income from whatever source derived, viz., (a) which is received or is deemed to be received in India in such year by or on behalf of such person ; or (b) accrues or arises or is deemed to accrue or arise in India during such year or (c) accrues or arises outside India during such year.

13. Section 14 provides for heads of income and Clause D thereof refers to profits and gains of business or profession.

14. Section 28 deals with profits and gains of business or profession. Section 29 states that the income referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43D.

15. In the aforementioned context, the provision of Section 80HHC has to be construed which reads thus ;

"(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 :

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be), issues a certificate referred to in Clause (b) of Sub-section (4A) that in respect of the amount of the export

turnover specified therein, the deduction under this Sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods."

16. Sub-section (3A) of the said provision which is also relevant for the purpose of this case reads thus :

"(3A) For the purposes of Sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,--

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business ;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee."

17. The Central Government in exercise of power conferred upon it u/s 295 of the Income Tax Act, 1961, and Rule 15 of Part A, Rule 11 of Part B, and Rule 9 of Part C of the Fourth Schedule thereto made rules known as the Income Tax Rules, 1962. Rule 8 which is relevant for the purpose of this case reads thus :

"8. Income from the manufacture of tea--(1) Income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business, and forty per cent, of such income shall be deemed to be income liable to tax.

(2) In computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or become permanently useless in an area already planted, if such area has not previously been abandoned, and for the purpose of determining such cost, no deduction shall be made in respect of the amount of any subsidy which, under the provisions of Clause (30) of Section 10, is not includible in the total income."

18. The scheme of the Act and the rules in relation to income from cultivation and manufacture of tea as noticed from the aforementioned provisions would clearly show that Parliament, keeping in view the inconsistencies and anomalies which may arise, considered it necessary to create a legal fiction so as to make the income derived from sale of tea grown and manufactured by the seller in India to be computed as if it were income derived from business. It does not rest there and also specifies the extent of income that is 40 per cent, thereof as to be the income which would be deemed to be income liable to tax.

19. Before proceeding with the matter it may be noticed that in Commissioner of Agricultural Income Tax and Another Vs. Periakaramalai Tea and Produce Co. Ltd. and Others, , Veeraswami C. J., speaking for a Division Bench of the Madras High Court, while considering the question of interpretation of Rule 8 in the light of the Agricultural Income Tax Act enacted by the Legislature of Madras held as follows (page 644) :

"The forty per cent, contemplated by the rule is the chargeable income and that means, before applying the forty per cent, rule, the income should have been computed in accordance with the provisions of the Act, that is to say, after allowing the deductions including those under Chapter VI-A of the Income Tax Act. If that has not been done, and the Income Tax Officer, for the purpose of the Income Tax Act, has, before applying Section 80-1 determined the forty per cent, of the income from which he deducted the eight per cent, u/s 80-1, the balance of the income could not be taken to be 60 per cent, of the income for the purposes of agricultural Income Tax. The Agricultural Income Tax Officer, in order to ascertain 60 per cent, of the income for the purpose of levy under the Agricultural Income Tax Act, should have to deduct eight per cent, u/s 80-1 in order to ascertain the true income."

20. This question came up again for consideration before the apex court in Tata Tea Ltd. and Another Vs. State of West Bengal and Others, . The apex court while considering the question as to whether the State has any legislative power to determine the agricultural income despite the aforementioned provisions contained in Rule 8 of the Income Tax Rules, 1962, held that it does not have any such power. The apex court in view of the interpretations made by it in relation to the said rule did not consider it necessary to go into the larger question of vires of the amendment carried out in 1980 to the Bengal Agricultural Income Tax Act on the ground that the same was given retrospective operation and held as follows (page 33) :

"A perusal of the aforesaid Rule 8(1) makes it clear that under the said rule, income from the sale of tea grown and manufactured by a seller in India has to be computed as if it were income derived from business which would imply that the deductions allowable under the Act of 1961 in respect of income derived from business would be allowable in the case of income derived from the sale of tea grown and manufactured by a seller and further allowance would be granted as set out in Rule 8(2) and 40 per cent, of the income so computed would be deemed to be income liable to the levy of Income Tax and the balance of the income would be liable to tax as agricultural income subject to such further deduction as the law pertaining to the levy of agricultural Income Tax might allow. The question is whether Rule 24 of the Income Tax Rules, 1922, Rule 8 of the Income Tax Rules, 1962, can be said to form part of the definition of the term "agricultural income" under the Act of 1922 and the Act of 1961, respectively."

21. In the context of the aforementioned decisions, the Division Bench judgment

of the Gauhati High Court reported in Assam Company Ltd. and Another Vs. State of Assam and Others, has to be considered.

22. Although Chapter IV of the Income Tax Act, and in particular the provisions contained in Section 30 to Section 43D refer to the manner in which profits and gains of business, or profession has to be computed, the same, in the opinion of this court cannot be said to be exhaustive. The deductions from income for the purpose of computation of taxability of income have to be made not only keeping in view the provisions of Section 30 to Section 43D but also upon taking into consideration the other deductions which are permissible u/s 80HHC falling under Chapter VI-A of the Act.

23. For the purpose of granting deductions in terms of the aforementioned provisions it is not necessary that the assessee must carry on business only of export or only of sale of tea leaves within India as also outside India but it may have several other businesses. It also applies to a case of the present nature where apart from sale of tea leaves, and the assessee is engaged in growing tea.

24. Section 80HHC and in particular the words "total income" has to be considered from that angle.

25. As indicated hereinbefore, Rule 8 creates a legal fiction. But for creation of such legal fiction, it would not have been possible for an Income Tax Officer appointed under the provisions of the Income Tax Act, to assess an assessee, who not only carries on business in selling tea but also grows the same. With a view to give a go-by to the anomalies, a legal fiction was created in Rule 8. Asquith J., in East End Dwellings Co. Ltd. v. Finsbury Borough Council [1951] 2 All ER 587, stated the law in the following terms (page 599) :

"If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

26. However, it is a well settled principle of law that despite the fact that a legal fiction created by Parliament has to be given its full effect, it cannot be permitted to extend the purpose for which the same was created.

27. After computing the total income, the same has to be bifurcated in terms of Rule 8 as agricultural income (which would be 60 per cent, of such income) and non-agricultural income (which would be 40 per cent, of such income) which would mean net income and not gross income. Before the charging section is given effect, the taxable event must occur and thus, while computing the net income all expenditure as also other deductions and allowances must be taken into consideration before the net income can be computed.

28. In Assam Company Ltd. and Another Vs. State of Assam and Others, the Division Bench of the Gauhati High Court has not considered the matter from that angle. It interpreted the provisions of Section 80HHC only with reference to

Sections 30 to 43D and it appears that the learned judges were remiss in not taking into consideration the effect of the provision of Chapter VI-A of the Act although it itself held as follows (page 73) :

"In the case of Tata Tea Ltd. and Another Vs. State of West Bengal and Others, , the Kerala Agricultural Income Tax (Amendment) Act, 1980, and the Bengal Agricultural Income Tax (Amendment) Act, 1980, were under challenge before the Supreme Court under article 32 of the Constitution. The Explanation to Section 2(a)(2) of the Kerala Agricultural Income Tax Act, 1950, stated that the agricultural income derived from land used for agricultural purposes by the cultivation of tea leaves meant that portion of the income derived from the cultivation, manufacture and sale of tea as defined to be agricultural income for the purposes of the enactments relating to the Indian Income Tax and the said Explanation was sought to be deleted by the Kerala Agricultural Income Tax (Amendment) Act, 1980. Similarly, in subsection (2) of Section 8 of the Bengal Agricultural Income Tax Act, 1944, it was provided that notwithstanding anything contained in that Act in the case of tea grown in West Bengal and sold by the grower himself or his agents after manufacturing, the agricultural income derived therefrom shall be deemed to be that portion of the income computed under the Indian Income Tax Act, 1922, on which Income Tax was not payable under the said Act of 1922. In 1979, Sub-section (2A) was inserted in Section 8 of the said Bengal Agricultural Income Tax Act, 1944, providing for assessment in cases where assessments under the Income Tax Act had not been completed or had been annulled or set aside."

29. The Division Bench noticed Tata Tea Ltd. and Another Vs. State of West Bengal and Others, and upon doing so it held thus (page 84) :

"Thus, deductions under the Income Tax Act which were in the nature of expenses incurred for the purpose of earning income derived from sale of tea grown and manufactured by the seller were only to be allowed in the computation of such income before application of Rule 8 of the Income Tax Rules, 1962, and allowances which were not really in the nature of expenses were not to be deducted from the computation of such income before application of Rule 8. This view is further reinforced by the provision of Section 29 of the Income Tax Act to the effect that income from profits and gains of business shall be computed in accordance with Sections 30 to 43D of the Income Tax Act."

30. As regards interpretation of the provisions of Section 80HHC the learned judges observed as follows (page 84) :

"A bare reading of Section 80HHC quoted above shows that it is not an item of expense incurred for earning profits from the sale of tea grown and manufactured by a seller but is a deduction of profits derived by the assessee from export of goods or merchandise from India. In our view, the allowance u/s 80HHC cannot be allowed as deduction for computing income derived from the sale of tea grown and manufactured by the seller before application of Rule 8 of

the Income Tax Rules, 1962, and that out of the income computed without deducting the allowance under the said Section 80HHC of the Income Tax Act, 40 per cent, is to be treated as income derived from profits and gains of business and the allowance u/s 80HHC can be allowed only out of such profits and gains of business constituting the 40 per cent, of the income. The balance 60 per cent, of the income is to be deemed as agricultural income and out of such agricultural income only such allowances as are permissible under the Agricultural Income Tax Act can be made. This is because the said 60 per cent, of the income deemed as agricultural income falls within the domain of the State Legislature out of which no further allowances not of the nature of expenses can be allowed except those which are permissible under the Agricultural Income Tax Act."

31. With utmost respect to the learned judges, it appears that the question as to how the computation of total income has to be made and particularly the intention of Parliament behind the law had not been taken into consideration in the said decision. It appears that prior to 1989, the assessee was entitled to a deduction of the whole of the income but by reason of the Direct Tax Laws (Amendment) Act, 1989, the said words were substituted by the word of "profits".

32. The very fact that at one point of time Parliament had allowed deduction of the whole of the income in computing the total income of the assessee goes to show that such a provision was made with a view to boost up exports which is necessary for the purpose of earning foreign exchange. Section 80HHC has two parts: (i) the assessee is engaged in the business of export out of India ; and (ii) in computing the total income deduction of the profit derived from export has to be made with a view to give full effect to the aforementioned provision. Keeping in view the intention of the law maker I am of the opinion that the stage at which such deduction has to be given is when the net profit is to be calculated and not at a later stage as was directed by the Board of Direct Taxes in its impugned circular.

33. For the purpose of interpretation of such a provision, the interpretation which is beneficial to the assessee has to be taken recourse to.

34. According to the petitioner, keeping in view the illustrations of the Board of Direct Taxes itself, the computation of income should be done in the following manner :

Rs. Rs.

Expenses 1,200 Domestic sales 1,000

Profit 300

Export sales 500

1,500 1,500

Deduction u/s 80HHC of the Act :

300 x 500

1,500 = Rs. 100

Profit 300

Less : Deduction u/s 80HHC 100

200

Non-agricultural income being 40 per cent. of Rs. 200 80

Agricultural income being 60 per cent. of Rs. 200 120

35. Thus, the deduction for the purpose of Sub-section (1) of Section 80HHC in terms of the provisions of Sub-section (3A) thereof should be given by way of benefit of export before apportioning the income and not thereafter. The learned Additional Solicitor-General, however, has placed before this court another chart to show that even if the contentions of the writ petitioners are accepted the same does not make any difference now which is as follows :

Example :

Abbreviated profit and loss account :

Rs. Rs.

Expenses 1,200 Domestic sales 1,000

Profit 300

Export sales (FOB) 500

1,500

1,500

36. In the above example taxable income as per Circular No. 600 (see Commissioner of Income Tax Vs. Industrial Credit and Investment Corporation of India Ltd., and as per the prayer made in the writ petition would be as under :

As per Circular No. 600

As per petitioner's prayer

Rs. Rs.

1. Profit of business 300 Profit of business 300

2. Income chargeable under Income Tax Act, being 40 per cent. of the above 120
Less : 80HHC

300 x 500

1,500 100

200

3. Agricultural income 180 40 per cent. of above being chargeable to income tax
80

4. Taxable income under Income Tax Act 120 Agricultural income 120

Less : Deduction u/s 80HHC Total income under Income Tax Act 80

120 x 500

1,500 40

Taxable income 80

37. The learned Additional-Solicitor General would urge that from the aforementioned example it would appear that income chargeable to Central Income Tax is Rs. 80 in both the cases. However, as per the circular the agricultural income would be Rs. 120 whereas as per the writ petitioners, the agricultural income would be Rs. 180. The said contention does not appear to be correct. The said submission is of no moment in the matter of interpretation of the provision of the Act and the Rules framed thereunder.

38. This court is also of the view that the matter has to be considered from another angle.

39. In *Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad*, the apex court has clearly held that Section 72(1) which occurs in Chapter VI has a direct impact upon the computation under the head "Profits and gains of business or profession". Thus, it would not be correct as has been done in *Assam Company Ltd. and Another Vs. State of Assam and Others*, that for the purpose of computation under the head "Profits and gains of business or profession", only those provisions which are contained in Chapter IV of the Act can only be taken into consideration. Even, otherwise, Chapter IV itself does not contain provisions relating to expenditures made by the assessee. It, inter alia, contains depreciation, development rebate, investment in certain companies, etc. By way of example, it may be noticed that Section 33 refers to development rebate. Section 33A refers to development allowance in respect of planting of tea bushes on any land in India owned by an assessee who carries on business of growing and manufacturing of tea. Section 33AB also provides for tea development account.

40. For the reasons aforementioned, this court is of the view that the stage for grant of rebate in terms of Section 80HHC as computed in terms of subsection (3) thereof would be at the time before computing the net income and not after apportionment is made between agricultural income and non-agricultural income.

41. For the reasons aforementioned with utmost respect, I am unable to follow the ratio of the Division Bench of the Gauhati High Court in *Assam Company Ltd. and Another Vs. State of Assam and Others*, particularly in view of the decision

of the Madras High Court in Commissioner of Agricultural Income Tax and Another Vs. Periakaramalai Tea and Produce Co. Ltd. and Others, and that of the apex court in Tata Tea Ltd. and Another Vs. State of West Bengal and Others, . Before parting with this case, it may be noticed that the learned Additional Solicitor-General, submitted that the doctrine of contemporanea exposito would be applicable in interpreting the impugned circular letter. In my considered opinion, the said doctrine has no application in the instant case as Section 80HHC of the Act was inserted in the year 1983 whereas the impugned circular letter had been issued in the year 1991. It is, therefore, not a case where weight has to be given to the interpretation put upon a document at the time of its enactment. Furthermore, Parliament as also the rule-making authority would be presumed to be aware of the legal position as has been enunciated by the court. Rules framed under the 1922 Act was in pari materia with Rule 8 of the 1962 Rules. Had Parliament felt any difficulty, Section 80HHC or Rule 8 could have been couched in a different language and in any event Rule 8 could have been amended. The same having not been done, the court should be inclined to put such construction upon a similar provision which had been existing for a long time.

42. For the reasons aforementioned, this application is allowed and it is declared that the aforementioned Circular bearing No. 600 (see Commissioner of Income Tax Vs. Industrial Credit and Investment Corporation of India Ltd., dated May 23, 1991, is not attracted and the interpretation of the Board in construing the provision of Section 80HHC and Rule 8 as has been sought to be done by reasons of the circular bearing No. 600, (see Commissioner of Income Tax Vs. Industrial Credit and Investment Corporation of India Ltd., dated May 23, 1991, is not correct.

43. But in the facts and circumstances of this case, there will be no order as to costs.