

CASE NO.:
Appeal (civil) 7307 of 2005

PETITIONER:
Income Tax Officer, Bangalore

RESPONDENT:
Induflex Products (P) Ltd.

DATE OF JUDGMENT: 08/12/2005

BENCH:
S.B. Sinha & R.V. Raveendran

JUDGMENT:
JUDGMENT

S.B. SINHA, J.

Leave granted.

The Respondent is an assessee of Income Tax. It is engaged in the business of export. It claimed benefit of Section 80HHC of the Income Tax Act, 1961 (Act). A declaration was made by it that its profits out of export of trading goods were 'negative' i.e. it incurred loss. The said benefit having been allowed by the assessing officer while making assessment under Section 143(3) of the Act, the Commissioner of Income Tax in exercise of his power conferred upon him under Section 263 thereof issued a notice to the assessee on the premise that the said order of assessment was erroneous and prejudicial to revenue. Upon hearing the assessee, by an order dated 3.3.1999, a direction was issued to the assessing officer to withdraw the said relief. The Respondent preferred an appeal thereagainst before the Income Tax Appellate Tribunal, Bangalore. By an order dated 19.8.2002, the said appeal was allowed following a decision of Cochin Bench of the Tribunal in the case of A.M. Mossa v. CIT, in ITA No. 498/Coch/1995. The appeal was preferred by the Appellant herein before the High Court in terms of Section 260A of the Act. The substantial question of law raised in the said appeal was as under:

“Whether, under the facts and circumstances of the case the Tribunal was justified in allowing the deduction under Section 80HHC of the Act to the assessee Company in spite of not fulfilling the pre-condition which is mandatory in order to obtain such deduction?”

The Appeal was dismissed in limine by the High Court. The Appellant is, thus, in appeal before us.

Sub-section (1) and sub-section (3) of Section 80HHC reads as under:

“(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 to the extent of profits, referred to in sub-section (1B), 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.''

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“(3) For the purposes of sub-section (1),

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,-

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods:

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iii-a) (not being profit on sale of a licence acquired from any other person), and clauses (iii-b) and (iii-c) of Section 28, the same proportion as the export turnover bears to the total turnover of business carried on by the assessee.

Explanation. For the purposes of this sub-section,

(a) ‘adjusted export turnover’ means the export turnover as reduced by the export turnover in respect of trading goods;

(b) ‘adjusted profits of the business’ means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3);

(c) ‘adjusted total turnover’ means the total turnover of the business as reduced by the export turnover in respect of trading goods;

(d) ‘direct costs’ means costs directly attributable to the trading goods exported out of India including the purchase price of such goods;

(e) ‘indirect costs’ means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover;

(f) ‘trading goods’ means goods which are not manufactured or processed by the assessee.''

The aforementioned provision was brought in the statute book for the purpose of providing incentive to export houses but the same would not mean that even if the assessee incurs a loss instead of profit, he would be entitled to the benefit thereof.

From a perusal of the aforementioned provision, it is evident that the profits derived from the export of goods which would be subject-matter of exemption thereunder must be the profits out of the business carried on by the assessee. The expression "profits" used in the aforementioned provision connotes positive profit. It is a profit earned from the said business alone which can be the subject-matter of exemption. A fortiori if a profit is not earned, the question of claiming exemption would not arise.

The question came up recently before this Court in IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai., [2004] 12 SCC 742. In that case, the taxable income before the deductions under Chapter VI-A came to Rs. 4.39 crores. The Appellants therein, however, claimed various deductions in terms of Section 80HHC to the extent of Rs. 3.78 crores. It was found that the sum of Rs. 3.78 crores claimed for deduction was the profit for exports of self-manufactured goods. It was further found that from the exports of trading goods there was a loss of Rs. 6.86 crores. The question which arose for consideration was as to whether the Appellants was entitled to deduction under Section 80HHC in respect of the sum of Rs. 3.78 crores ignoring the loss of Rs. 6.86 crores. This Court repelled the contention that even when the profits are to be reduced by the losses in cases where an export house has disclaimed its turnover in favour of a supporting manufacturer, the turnover of the exporter gets reduced to the extent disclaimed opining that in computing total income the entire turnover is taken into account even though there is a disclaimer. The Court further negated the submission of the assessee that even loss in negative profit.

IPCA Laboratory (supra) is an authority for the proposition that adjusted profit of business would be a profit as reduced by the profit derived from business of exports out of India of trading goods. It is no doubt true that the term 'profit' implies positive profit which has to be arrived at after taking into consideration the profit earned from export of both self-manufactured goods and the trading goods and the profits and losses in both the trades have, thus, to be taken into consideration. In the event, if it is found that a loss has occurred, sub-section (3) of Section 8-HHC will have no application.

However, it does not appear from the records as to whether such an exercise was undertaken or not. The Appellants themselves in the list of dates averred that for the assessment year 1994-95, the Respondent had earned profit in its export business.

Yet again in the order dated 03.03.1999 passed under Section 263 of the Income Tax Act by the Commissioner of Income Tax, the contention of the assessee was noticed in the following terms:

"The learned Counsel for the assessee who appeared on the appointed day, contended that, though the assessee earned export profit, it resulted in the negative figure owing to the provisions in Sec. 80 HHC(3); that, in such a situation, the profit should be taken at Nil and relief should be allowed having regard to the export incentives (viz. advance licences); that as section 80 HHC is benefit giving section it should be liberally construed; that the Appellate Tribunal in the case of A.M. Mossa v. CIT ITAT Cochin Bench ITA No.498/Coch/1995, support this view, and that the assessment order is not erroneous."

It may, therefore, be necessary, in our opinion, to consider this aspect of the matter as to whether the Appellant had shown any positive profit or not as such clear finding does not appear to have been arrived at by the High Court.

We are, therefore, of the opinion that the matter should be considered from this angle by the High Court. This appeal is, therefore, allowed and the matter is remitted to the High Court for consideration of the matter afresh in the light of the observations made hereinbefore.

JUDIS