CASE NO.:
Appeal (civil) 877 of 2006

PETITIONER:
P.R. Prabhakar

RESPONDENT:
Commissioner of Income Tax, Coimbatore

DATE OF JUDGMENT: 18/07/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
JUDGMENT

S.B. Sinha, J.

The Appellant carries on business of export of its ownn products as also procuring export contracts for other exporters on commission. In the Assessment year 1990-1991, he derived an income of Rs. 56,69321/- by way of comission, whereas as an exporter of goods incurred a loss of Rs. 6,372/-. The value of the total exported goods outside India by the Appellant during the said assessment year was Rs.3,67,600/-. He claimed a deduction in respect of aforementioned income in terms of Section 80HHC of the Income Tax Act, 1961 (for short "the Act"). Exemption claimed under the aforementioned provision was disallowed by the Assessing Officer on the premise that they having incurred loss in respect of export business were not entitled thereto. An appeal preferred thereagainst was rejected by the Commissioner of Income Tax (Appeal). The Income Tax Appellate Tribunal, however, on further appeal preferred by the Appellant opined that the commissioner received by the Appellant from the other exporters is to be taken into consideration for the said purpose.

The Respondent aggrieved by and dissatisfied with the said decision field an application for reference to the High Court and by an order dated 13.9.1996 the following questions were referred by the Tribunal:

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee is entitled to deduction under Section 80HHC of the Income-Tax Act even though the export business resulted in a loss of Rs. 6,372/-?

2. Whether on the facts and in the circumstances of the case the Tribunal is right in law in holding that commission and brokerage for procuring export contracts for other exporters is exempt under section 80HHC of the Act on the ground that the same is export profits?"

By reason of the impugned judgment the High Court opined that income derived by the Appellant towards commission/borkerage for procuring orders of export for others is not eligible to exemption from tax under Section 80HHC of the Act. Referring to the circulars issued by the Central Board of Direct Taxes (CBDI), the High Court held that although the said provision was amended with effect from 1.4.1992 by inserting an explanation whereby and whereunder the profit derived out of such commission/brokerage was confined to 10% of the income, the same, being clarificatory in nature, would have retropective effect. On the said findings, answers to both the questions were rendered in the negative and in favour of the Revenue.

Mr. C.A. Sundaram, learned senior counsel appearing on behalf of the Appellant principally raised two contentions before us:

(i) The CBDT circular clarified that the amendment would have a

prospective application with effect from 1.4.1992 the High Court committed a serious error in holding that the same would operate retrospectively being clarificatory in nature.

(ii) Earing of commission being a part of the export business, the income derived therefrom should be calculated for the purpose of computing profit or loss in regard to the applicability of Section 80HHC of the Act.

Mr. Rajiv Dutta, learned senior counsel appearing on behalf of the Respondents, on the other hand, would submit that on a plain reading of the said provision it would be evident that income from commission/brokerage could not have been given any exemption for the purpose of invoking the provision of Section 80HC of the Act as it received statutory recognition only by reason of the said amendment which came into force with effect ffrom 1.4.1992.

Sub-sections (1) and (3) of Section 80HHC of the Income Tax Act read as under:

"(1) Where an assessee, being an Indiann 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 sectiion 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 amountt 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 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 dervied 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 attirbutable 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 dervied 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 the total turnover;

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

On a plain reading of the said provisions, it is evident that it applies to the assessee engaged in the business of export out of India including trading of goods. The expression 'business of export' must be given its due meaning. It not only speaks of 'export out of India, but also includes, trading of goods'.

Indisputably, the CBDT issued a circular bearing No. 621 dated 19th December, 1991 by way of explanatory notes to the said provision. Paragraph 32 of the said circular provides for modification of provisions relating to exemption of income from exports. The amendment by inserting sub-section (3) in the said provision was carried out so as to compensate the exporter from the comparative disadvantages faced by him in the international market. The formula, as was existing prior to 1991 as stated in the circular often used to provide a distorted figure of export profits when receipts like interest, commission, etc. which did not have an element of turnover were included in the profit and loss account and, thus, it was clarified that "profits of the business" for the said provision would not include receipt by way of brokerage, commission, interest or any other receipt of a similar nature. It was, however, categorically stated:

"...As some expenditure might be incurred in earning incomes, which in the generality of cases is part of common expenses, ad hoc 10 per cent, deduction from such incomes is provided to account for these expenses."

The amendments in no uncertain terms were to take effect from 1st April, 1992, i.e. for the assessment year 1992-93 and subsequent assessment years. Where however, the provisions were to operate with retrospective effect the same had been categorically stated as, for example, in paragraph 32.17 thereof, which is as under:

"This amendment takes effect retrospectively from 1st April, 1986, the day on which the substituted section 80HHC took effect. It will, accordingly. apply in relation to assessment year 1986-87 and susbequent years."

The aforementioned circular dated 19th December, 1991 issued by the CBDT is binding on the Department. [See Mercantile Bank Ltd. Bombay v. The Commissioner of Income Tax, Bombay City-III, (2006) 5 SCALE 244 and Union of India Anr. v. Azadi Bachao Andolan and Anr., [2004] 10 SCC 1.]

Once it is held that the amendment carried out in 1991 by reason of Finance Act (No. 2), Act, 1991 was prospective in nature, ex facie the High Court committed a serious error in opining that the same being clarificatory in character would apply to the assessment year in question. By reason of the purported clarification issued by the CBDT in term of the said circular, the area of exemption had not been widened. It has, in effect and substance as would appear from paragraph 32.11, been curtailed.

By reason of such amendment, the Parliament did not intend that the income dervied by way of brokerage/commission by the assessee should not be reckoned for the purpose of computing profit or loss earned by a person engaged in the business of export but by reason thereof the deduction to the extent of 10% held to be allowable thereby. We, therefore, cannot accept the submission of Mr. Dutta that the income dervied by way of commission and/or brokerage by an assessee carrying on business of export became exigible to exemption to the extent of 10% for the first time with effect from 1.4.1992.

The purport and reason for enacting Section 80HHC of the Income Tax Act indisputably was to provide incentive to export houses. It is now a well-settled principle of law that although the exemption provisions are to be construed strictly as regards the applicability thereof to the case of the assessee but once it is found that the same is applicable, the same are required to be interpreted liberally. [See Tata Iron & Steel Co. Ltd. v. State of Jharkhand and Ors., [2005] 4 SCC 272, Government of India and Ors. v. Indian Tobacco Association, [2005] 7 SCC 396 and Commr. of Central Excise, Raipur v. Hira Cement, JT, (2006) 2 SC 369.]

It is also trite law that an exemption is to be granted unless it is expressly taken away. [See Adityapur Industril Area Development Authority v. Union of India and Ors., (2006) 5 SCALE 321]

The expression "income arising out of business of export" brings within its sweep not only the export of any goods or merchandise manufactured or processed by the assessee but also of trading goods. The Parliament, therefore, intended to provide incentive when a positive profit is earned by an exporter. [See IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai, [2004] 12 SCC 742.]

The question again came up for consideration before a Division Bench of this Court in Income Tax Officer, Bangalore v. M/s. Induflex Products (P) Ltd., (2005) 10 SCALE 132, wherein: it was opined.

"...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..."

Indeed the question as to whether earning of income by way of commission/brokerage would attract Section 80HHC of the Act or not precisely came up for consideration before a Special Bench of the Income Tax Appellate Tribunal, Delhi Bench in International Research Park Laboraties Ltd. v. Assistant Commissioner of Income-Tax, 212 ITR wherein interpreting the CBDT circular, it was stated:

"Now, we come to whether the commission received could form part of export profits. Here again, we are unable to see it differently. It is no doubt true that this commission is not turnover but it is a profit relatable to exports. Coming back to section 80HHC(1), if the assessee is an exclusive exporter without having any local sales, then the profit on commission is admittedly includible as profit of the business computed under the head "Profits and gains of business or profession" and the whole of it would be eligible for exemption under clause (a) of sub-section (3) of section 80HHC. When such commission could be regarded as profit dervided from export for the purpose of clause (a), how can the same be excluded for the purpose of clause (b) unless it amounted to discrimination. The interpretation of clauses (a) and (b) must be harmoinous and not discriminatory, cutting against each other. What is sauce for the goose is also sauce for the gander. Secondly, we have just mentioned that this profit is profit derived from export and export is the basis or the foundation of the nexus. The argument of Shri B.B. Ahuja and all his effort to show to us that it has no reference to the export is, therefore, unacceptable to us. In our opinion, the argument advanced by Shri Ahuja overlooks the fact that the commission would not have come to the assessee had he not engaged in the export business. He sought to justify his argument by referring to subsequent amendments made from April 1, 1992, whereunder as we have pointed out above by adding clause (baa) to the Explanation at the end of sub-section (4A) with effect from April 1, 1992, 90 per cent of this commission etc. is not to be regarded as profits derived from export business and this amendment as explained in the Memorandum of Bill was only to clarify the position."

It is stated at the Bar that the Revenue did not prefer any appeal thereagainst. We, for the reasons stated hereinbefore, agree with the law laid down by the Tribunal.

For the views, we have taken, the judgment of the High Court cannot be sustained. It is set aside accordingly. The appeal is, accordingly, allowed. The parties shall, however, pay and bear their own costs.