

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 61 OF 2000

M/s. Tata Unisys Limited	]	
216-A, Dr. A. B. Road, Worli,	]	
Mumbai 400 025.	]	.. Applicant.
v/s.		
Commissioner of Income Tax	]	
Bombay City-IIIMumbai.	]	.. Respondent.

Mr. Sunil Lala with Ms. Nikita Panhalkar and Ms. Rajshree Lala, for the Applicant.

None for the Respondent.

**CORAM: M.S.SANKLECHA, &
S.C.GUPTE, JJ.**

**RESERVED ON : 30th SEPTEMBER, 2016.
PRONOUNCED ON : 13th OCTOBER, 2016.**

JUDGMENT (Per M.S. Sanklecha, J.):

None appears on behalf of the Revenue. The Applicant has filed an affidavit of service, indicating completion of service upon the Revenue on 6th April, 2000.

2 This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) by the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following question of law:-

“ Whether on the facts and in the circumstances of the case, the Tribunal was right in coming to the conclusion that deduction under Section 80-O was not allowed on the gross receipts, but only on that part of receipts which form part of the total income of the assessee?”.

3 This Reference relates to Assessment Year 1985-86.

Brief facts:-

4 The controversy giving rise to the above question as set out in the statement of case reads as under:-

“2 The Tribunal, in para 6 of its order, had summarized the entire controversy, which is reproduced below for the sake of convenience:

“6 The rival submissions in regard to the above have been very carefully considered. The Tribunal in the case of the assessee for the assessment year 1982-83 considered the claim of quantum of deduction under section 80-O i.e. gross or in the manner laid down under Section 80-AB of the Act by referring to the Supreme Court decision in *Distributors (Baroda) P. Ltd.* (supra) where the provisions of section 80-AB were considered specifically. Despite the fact that the provisions of Section 80-AB were not in the statute book during the previous year relevant to the assessment year that was before the Supreme Court, the Supreme Court had upheld the applicability on a principle. The Tribunal would have referred to the provisions of section 155(12) of the Act and observed that these provisions were intended to give relief to the assessee on the basis of amounts received in foreign currency. They held that the intention of the legislature was not to allow relief to the assessee with reference to the gross income. In so far as the apportionment of expenses of the corporate office with reference to which deduction under Section 80-O has to be granted, the Tribunal observed that most of these expenses were debited to revenue account and could not be liable to be allocated in pro-rata manner against the income exempted under section 80-O and 80-AB of the Act and that the adjustment of expenses or losses should be limited to the items that have nexus to the earning of the income. Since the assessing officer had not carried out that exercise the matter was remanded back to the file of the assessing officer to carry out such exercise. The decision of the Tribunal in *J. B. Boda & Co. Pvt. Ltd.* of June 1994 refers to the decision of the Supreme Court in *Coninental Construction Ltd.*, (supra), but does not refer to the provisions of section 80-AB. It referred to the earlier decision in the case of *Boda & Co.*, the decision of the Supreme Court in *Distributors (Baroda) Pvt.Ltd.* (supra) and to the decision of the Tribunal in *Expo Machinery Ltd. vs. I.A.C.* (1989) 31 I.T.D. 41, which was concerned with the deduction

under section 80-HHA and 80-HHB and held the section 80-AB was in applicable for calculating deduction under section 80-HHA and 80 HHB. Section 80-O states – where the gross total income of an assessee being an India company... includes an income by way of royalty, commission, fees or any similar payment received by the assessee..... and such income is received in convertible foreign exchange in India, there shall be allowed in accordance with and subject to the provisions of this section a deduction of an amount equal to 50 per cent of the income so received in India in computing the total income of the assessee. Section 80-HHB states – where the gross total income of an assessee being an Indian Company includes any profits and gains derived from the business of execution of foreign projects 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 from such profits and gains of an amount equal to 50 per cent thereof. Sub-section (3) of section 80-HHB talks of the conditions for allowability of the deduction, i.e. the assessee maintains separate accounts in respect of profits and gains derived from the business of execution, etc. etc. and such accounts have been audited by an accountant, etc. etc. and the assessee furnishes a certificate from the auditor in the prescribed Form 50 per cent of the profits and gains so referred earlier is debited to the profit and loss account of the previous year etc. etc. and the proviso to this section states that where the amount credited by the assessee to the Foreign Project Reserve Account in pursuance of clause (ii) or the amount brought in to India by the assessee in pursuance of clause (iii) or each of the said amounts is less than 50 per cent of the profits and gains referred to in sub-section (1), the deduction under that sub-section shall be limited to the amount so credited in pursuance of clause (ii) or the amount so brought into India in pursuance of clause (iii), whichever is less. The reading of section 80-O suggests that the gross total income of the assessee should include income for which deduction is allowable under section 80-O. The said income must be received in convertible foreign exchange in India and the amount of deduction is to the extent of 50 per cent of the income received in India. This indicates that the term 'Income' is with reference to the income that is included in the gross total income and not necessarily the quantum of convertible foreign exchange though the quantum of income included in the gross total income must be represented by

amount received in convertible foreign exchange. Whatever be the quantum of deduction to be arrived at under section 80-O the quantum of deduction to be allowed has been further restricted by the provisions contained in section 80-AB of the Act which states specifically that notwithstanding anything contained in the section which talks of deduction under Chapter VIA, the amount of the deduction has to be with reference to the amount of income of that nature computed in accordance with the provisions of this Act alone would be deemed to be the amount of income of that nature which is derived or received by the assessee and included in the gross total income. Therefore, there is no way of superseding the provisions of section 80-AB which has been considered by the Tribunal in the case of the assessee for the assessment year 1982-83. In addition, as observed by the Madras High Court in *S. Devraj* (supra) the principle of stare decisis would come into operation and therefore, in view of the opinion of the High Court having been sought, it would be only proper to maintain consistency in the conclusion. We accordingly hold that the assessee would be entitled to deduction after deducting corporate expenses, which would have to be taken into account in computing the income according to the provisions of this Act, which would be necessary to comply with the provisions of section 80-AB of the Act.”

3. For the assessment year 1982-83 in R.A. No.1866/Bom/1993 the assessee had sought identical question for reference along with one other question and the same was referred for the valued opinion of the Hon'ble High Court vide Statement of the Case dated 31.10.1994. In the light of the above, the questions above is referred to the Hon'ble High Court of Judicature at Mumbai for its valued opinion.”

(emphasis supplied)

5 The Reference made by the Tribunal in relation to Assessment Year 1982-83 being Income Tax Reference No.5 of 2000 on an identical question by the Tribunal, was returned un-answered on 30th April, 2015. This was for the reason that none appeared on behalf of the Applicant-Assessee. Mr. Lala, learned Counsel for the Applicant-Assessee states that in view of small tax effect, the Applicant-Assessee is not taking

out any application for restoration of Income Tax Appeal No.5 of 2000. However, the above order dated 30th April, 2015 itself clarified that the questions raised therein are left open for consideration in an appropriate case, if not already decided. Therefore, the question raised in this Reference is being independently considered.

6 From the statement of case as set out hereinabove, the controversy revolves around the extent of availability of deduction under Section 80-O of the Act, viz. whether the deduction under Section 80-O of the Act is to be allowed on gross or on net basis. The contention of the Applicant-Assessee as evidenced from the statement of case was that the deduction should be allowed on gross basis i.e. *de-hors* the provisions of Section 80-AB of the Act. However, Tribunal in its order rendered for the earlier Assessment Year had held that there is no way of superseding the provisions of Section 80-AB of the Act while computing the deduction allowable under Section 80-O of the Act. In fact, the question as framed has been referred to us by the Tribunal for the subject Assessment Year only for the reason that in the earlier Assessment Year it had referred the question to us for our opinion. This is particularly so, because at the time when this Reference was made on 26th August, 1996 for the Assessment Year 1985-86, the issue whether deduction under Section 80-O of the Act is to be allowed on gross or net basis (on an application of Section 80-AB of the Act) was an issue on which there were conflicting interpretations of the Tribunal.

7 The fact that there were conflicting views on the availability of Section 80-O of the Act on gross or net basis at the relevant time, is recorded by the Apex Court in *Kvaverner John Brown Engg (India)P. Ltd. v/s. Assistant Commissioner of Income Tax 305 ITR 103* (decided on 29th April, 2008). The Apex Court was considering the issue of

payment of additional taxes due to restricting the benefit of Section 80-O of the Act while doing adjustment under Section 143 (1)(a) of the Act. The Assessing Officer, while making adjustment, sought to restrict the benefit of Section 80-O of the Act only to net receipts, i.e. after reducing the expenses incurred to earn that (Section 80-O) income. The Apex Court held that at the relevant time, i.e. during the Assessment Years 1996-97 and 1997-98, in view of conflicting interpretation in respect of section 80-O of the Act, *prima facie*, adjustment to restrict a claim under Section 80-O of the Act, resulting in demand of additional tax, was not permissible.

8 In fact, this controversy was first resolved by this Court in the context of Section 80-O of the Act only in ***CIT v/s. Asian Cable Corporation Ltd., (No.2) 262 ITR 537***. The Court in the above case held that income earned in foreign exchange for services rendered, has to be allowed on net basis, inter alia, on application of Section 80-AB of the Act.

9 It may be pointed out that the Apex Court in ***A. M. Moosa v/s. CIT 294 ITR 1*** has held that Section 80-AB of the Act has an overriding effect over all Sections of Chapter VI-A of the Act. Undisputedly, Section 80-O of the Act is part of Chapter VI-A of the Act and, therefore, would be governed by Section 80-AB of the Act.

10 Therefore, we were of the view that issue stands concluded in favour of the Respondent-Revenue by virtue of the decision of this Court in Asian Cable Corporation ltd., (supra).

11 However, Mr. Lala, learned Counsel appearing for the Applicant-Assessee contends that the issue here is not gross or net income which is allowable for deduction under Section 80-O of the Act, but the issue is whether the income could be reduced by expenditure determined on pro-rata method on notional basis to restrict the claim for deduction.

In support, learned Counsel invites our attention to the statement of case which records the fact that the Tribunal upheld the deduction under Section 80-O of the Act, after deducting corporate expenses in terms of Section 80-AB of the Act. Mr. Lala, submits that the question as framed is not properly worded and, therefore, the Court must take note of the dispute as recorded in the orders of the Authorities under the Act.

12 In a Reference under Section 256(1) of the Act, our jurisdiction is Advisory. We are required to answer the question as referred to us in the context of the facts set out in the statement of case for our opinion. Therefore, on reading the statement of case, it is noted that it records that for the earlier Assessment Year, i.e. A. Y. 1982-83, adjustment of expenses should be limited only to the items that have nexus to the earning of the income and restored the issue to the Assessing Officer to determine the same. Notwithstanding the above findings/directions, the Applicant-Assessee filed a Reference being Reference No.5 of 2000. This on the basis that Section 80-AB of the Act would not be applicable for the purpose of computing deduction under Section 80-O of the Act. In the subject Assessment Year, the statement of case does not state that expenses were allocated in a pro-rata manner without any nexus. This for the reason that according to the Applicant, it is entitled to deduction on gross basis without being governed by Section 80-AB of the Act. (Please see the emphasized portion of statement of case). In any case, the present Reference has been made in view of the Reference made for the Assessment Year 1982-83 and only with a view to maintain consistency. The attempt on the part of the Applicant-Assessee is to enlarge the scope of the question which has been referred to us for our opinion by the Tribunal. The issue which has been referred to us for our opinion, is not with regard to allocation of expenditure on a pro-rata basis

but the issue is whether deduction has to be allowed on the basis of the gross receipts or on that part of the receipts which form part of total income of the Applicant-Assessee, i.e. on application of Section 80-AB of the Act.

13 As held by the Apex Court in *CIT v/s. Ansuya Devi* 68 ITR 750, in a Reference, the High Court may only answer the question which is referred to it. New question cannot be raised by the Court. At the very highest, we can in a reference, re-frame the question so as to clear some ambiguity or bring out the real dispute. No such occasion to re-frame the question arises in this case.

14 In the above view, the question as raised at the instance of the Applicant-Assessee by the Tribunal is answered in the affirmative i.e. against the Applicant-Assessee and in favour of the Respondent-Revenue. This in view of the decision of this Court in Asian Cable Corporation (supra).

15 **Reference disposed of** in the above terms. No order as to costs.

(S.C.GUPTE,J.)

(M.S.SANKLECHA,J.)