

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1553 of 2007

With

TAX APPEAL NO. 2639 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

Sd/-

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

DEVRAJ R AGARWAL.....Appellant(s)

Versus

THE ASSISTANT CIT CIRCLE 10....Opponent(s)

Appearance :

In Tax Appeal No.1553/2007 :

MR BS SOPARKAR with MRS SWATI SOPARKAR, ADVOCATES for the Appellant(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

In Tax Appeal No.2639/2010 :

MR BHARGAV KARIA for MR RK PATEL, ADVOCATE for the Appellant(s)

No.1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 28/07/2016

COMMON ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of these Appeals, the common Appellant - assessee has challenged the orders dated 30.04.2007 and 17.09.2010 of the Income Tax Appellate Tribunal, Ahmedabad 'A' Bench, Ahmedabad in ITA No.918/Ahd./2005 for the Assessment Year : 2000-2001 and in ITA No.1484/Ahd./2005 for the Assessment Year : 2001-2002 respectively.

2. While admitting Tax Appeal No.1553/2007 on 04.12.2007 and Tax Appeal No.2639/2010 on 09.11.2001, the following common substantial question of law was framed by the Court for consideration :-

“Whether, on the facts and in the circumstances of the case, the ITAT

was right in holding that for calculating u/s. 80HHC of the Act turnover of all independent businesses is to be clubbed and thereby rejecting the Assessee's contention that turnover of only export business is required to be taken into consideration?"

3. Learned Counsel for the appellant - assessee has taken us to the order of the Assessing Officer, the Tribunal and CIT (Appeals) and has contended that view taken by CIT (Appeals) is just and proper. It is submitted that the Tribunal has erred in not appreciating the facts of the case in the proper perspective and thereby upholding the order passed by the respondent rejecting the claim of the appellant for deduction u/s. 80HHC on the basis of the combined turnover and also that the Tribunal erred while passing the order by relying on the order passed by the Special bench of the Tribunal and not the judgment of the High Court. Reliance is placed on the Assessment order of the Assessing Officer, the relevant part which reads

as follows :-

"So it is quite clear that meaning of profit of the business cannot be restricted to profit from exporting unit only. In fact profit of the business would be equal to the profit calculated under the head profits and gains of the business. Assessee has number of prop. concerns but the profits of all the concerns fall under the single head i.e. profits and gains of the business. Similar is the case with adjusted export turnover and adjusted total turnover of the business. Here it should be noted that sub clause 1 of clause C of sub section 3 talks about adjusted total turnover of the business (not the unit or concern). Therefore total turnover has to be calculated after taking into consideration the turnover of all the businesses of the assessee."

3.1. Learned Counsel for the appellant has drawn the attention of this Court to the decision in the case of **Commissioner of Income-tax v. Padmini Technologies Ltd.** reported in **[2011] 245 CTR 611 (Delhi)** and relevant paragraphs of the said decision reads as under :-

"8. In our view, the contention is completely mis-conceived. The issue involved in the present case is: where an assessee runs and manages two separate units, one of which, is engaged fully or partially in earning income through exports then, in the calculation of proportionate deductible profits, would the expression „total turnover of the business“ would include only the turnover of the export business or also that of the domestic business.

9. Before we proceed further it may be relevant to note even though provisions of Section 80 HHC have been amended from time, the expression „total turnover of the business“ has not undergone a change. The expression finds mention in sub-Section (3)(1)(C) of Section 80 HHC.

10. It is pertinent to note that the revenue has not assailed before us the finding of fact returned by the Tribunal that in so far as the two businesses were concerned, they were carried on in two separate undertakings. It was also not disputed that in respect of the said undertakings, the assessee maintained separate books of accounts and also prepared separate profit and loss accounts and balance sheets. In the judgment of Madras Motors Ltd. (supra), the rationale given is that the word „business“ which follows the expression „total

turnover" would have to be confined to only those goods to which the section applies. Therefore, by necessary implication, the total turnover of business would only mean total turnover of business of goods to which the section applies. Inclusion of turnover of goods to which the section does not apply, would be doing violence to the language of sub-section (3)(b). Sub-section (3) is inserted only to determine the deductible profits out of the total profits of business which can be attributed to the export business. We are in respectful agreement with the rationale adopted by the Madras High Court in Madras Motors Ltd. (supra). As a matter of fact, there could be a circumstance where one unit is completely engaged in export and not partially as was the case in Madras Motors Ltd. (supra). In those circumstances, there would be no occasion for disallowing a portion of the export earnings by adopting formula provided in section 80 HHC of the IT Act. This view was taken by the Madras High Court not only in Rathore Brothers (supra) but also in M.Gani & Co.(supra) which in turn followed yet another judgment of the Madras High Court in the case of CIT Vs. Suresh B. Mehta (2007) 291 ITR 462.

11. Ms. Aggarwal's submission that the judgment of the Supreme Court in

IPCA Laboratory Ltd. (supra) and Simco Industries Ltd. (supra) would apply is according to us completely untenable. This is demonstrable from the facts obtaining in the two judgments cited before us. In IPCA Laboratory Ltd. (supra), the assessee was running an export house. For the assessment year 1996-1997, the assessee had filed a return of income declaring „nil“ income. The assessee's income before claiming deductions under Chapter VIA of the IT Act was Rs.4.39 crores. Against this income, the assessee had claimed various deductions including a deduction under section 80 HHC amounting to Rs.3.78 Crores. During the course of the assessment proceedings, it was found that the assessee was exporting goods which were manufactured by it but also those which were produced by supporting manufacturers. The assessment proceedings revealed that the profit of Rs.3.78 Crores which the assessee had claimed was earned by the assessee from exports of goods manufactured by the assessee. In so far as exports made by the assessee in respect of goods manufactured by the supporting manufacturers was concerned, the assessee had recorded a loss of Rs.6.86 Crores. It was also found that the assessee had issued certificates of disclaimer in favour of supporting manufacturers in respect of goods supplied by them

for the purposes of export. It is in these circumstances that the Assessing Officer came to the conclusion that no deduction was available to the assessee on export of goods as it had as a matter of fact recorded a net loss. Therefore, the question which came up for consideration before the Supreme Court was whether the assessee was entitled to a deduction in respect of the sum of Rs.3.78 Crores without taking into account the loss of Rs.6.86 Crores recorded by the assessee in respect of the exports carried out by it qua the goods of supporting manufacturers. The Supreme Court after a detailed consideration of the matter came to the conclusion that the expression „profits from such exports“ appearing in section 80 HHC (3)(c) could only mean profits of self manufactured goods plus profit of exports of trading goods (i.e., those supplied by supporting manufacturers). The court concluded that profits had to be calculated by taking into account both exports, and that deduction was permissible under section 80 HHC (3)(1) only if there was positive profit in the export of both self manufactured goods as well as trading goods. The Supreme Court in repelling the contention of the assessee, in addition, took recourse to the provisions of section 80 AB and section 80B(5). As is evident, the

facts of the case are quite different from those obtaining in the instant appeal before us."

3.2. It is contended that so far as the decision of the Delhi High Court is concerned, it was held that insofar as the two businesses were concerned, they were carried on in two separate undertakings and the assessee maintained separate books of account and also prepared separate profit and loss account and balance sheets. Further, the total turnover of business would only mean total turnover of business of goods to which the section applies and therefore, the impugned order of the Tribunal was upheld. In the present case for every activity of the individual, there are different companies like Agrawal Overseas Corporation, Devraj Agrawal Share Trading, Agrawal Lignite Corporation, Agrawal Investment and Finance Corporation and Agrawal Warehousing Corporation. It is further submitted that the above referred decision of the Delhi High Court was followed earlier in the case of

Commissioner of Income-tax v. Rathore Bros. reported in [2002] 254 ITR 656, wherein a similar view is taken.

3.3. Learned Counsel for the appellant – assessee has further relied on the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income-tax v. Canara Workshops (P.) Ltd.** reported in [1986] 161 ITR 320(SC) wherein the facts were that the assessee-company was engaged in the manufacture of automobile spares. The products manufactured by it were covered by the list in the Fifth Schedule to the act. During the previous year relevant to the assessment year 1966-67, the assessee commenced another activity, the manufacture of alloy steels, which was an industry included in the Fifth Schedule. During the relevant assessment years while the assessee had profits from industry of automobile ancillaries, it had loss from alloy steel industry. The ITO held that the assessee would be entitled to deduction under section 80E on the

profits from the manufacture of automobile parts only after setting off the loss in alloy steel manufacture. The Tribunal however, accepted the contention of the assessee that a deduction was permissible on the entire profits of the automobile parts industry included in the total income without deducting therefrom the losses in the alloy steel manufacture. The High Court then confirmed the Tribunal's order.

4. Learned Counsel for the respondent - Department has taken this Court to sub-clause 3 of Section 80HHC and the Explanation immediately after sub-section 4 and contended that in view of the explanation where for the purpose of this section, the Legislature has provided the definition of all the terms which are used in the sub-sections namely export turnover, total turnover and profit of the business.

4.1. Reliance is also placed on the decision of the Hon'ble Supreme Court in

the case of **Commissioner of Income-tax v. K. Ravindranathan Nair** reported in [2007] 295 ITR 228 and of the Kerala High Court in the case of **Commissioner of Income-tax v. Jose Thomas** reported in [2002] 253 ITR 553.

5. We have learned Counsel appearing for the respective parties and perused the records of the case. On going through the judgment of the Delhi High Court as referred hereinabove, it seems to be very descriptive and acceptable to the facts of the case, but on detailed examination of the Section, the issue has to be read in light of the following Explanations of the above Section :-

“(b) “export turnover” means the sale proceeds [received in, or brought into, India] by the assessee in convertible foreign exchange [in accordance with clause (a) of sub-section (2)] of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs

station as defined in the Customs Act, 1962 (52 of 1962)];

(ba) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962):

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (iiia), (iiib), [(iiic), (iiid) and (iiie)] of section 28;]

[(baa) "profits of the business" means the profits of the business as computed under the head 'Profits and gains of business or profession' as reduced by -

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib) [(iiic), (iiid) and (iiie)] of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature included in such profits; and

(2) the profits of an branch, office, warehouse or any other establishment of the assessee situate outside India;]"

5.1. We are of the that in view of the above referred decisions of the Hon'ble Supreme Court and explanation to the above sections, the interpretation put forward by the Tribunal is required to be accepted. Consequently, the issue raised in this Appeal is answered in favour of the Department and against the assessee. The Tax Appeals stand disposed of in the aforesaid terms.

Sd/-
(K.S. JHAVERI, J.)

Sd/-
(G.R. UDHWANI, J.)

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THE HIGH COURT
OF GUJARAT

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