

ITA 666 of 2008
WITH
GA No. 3269 of 2014
ITAT 159 of 2014
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-IV
Versus

HINDUSTAN GUM AND CHEMICALS LTD

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 30th June, 2016.

For the assessee :
Mr. R.N.Bajoria, Sr. Advocate
Mr. Akhilesh Gupta, Advocate
Mr. Sanjay Bhowmik, Advocate

For the revenue :
Mr. P. Dudhuria, Advocate in ITA
No. 666 of 2008 & Mrs.
A.G.Gutgutia, Advocate in GA
No. 3269 of 2014

The Court : - The subject matter of challenge in the appeal is a judgment and order dated 28th December, 2007 passed by the Income Tax Appellate Tribunal, 'E' Bench, Kolkata in ITA No. 150 (Kol) of 2007 and ITA No. 277 (Kol) of 2007) both pertaining to the assessment year 2003-04. The former appeal was an

appeal by the assessee and the latter appeal was an appeal by the revenue. By the impugned order, the appeal preferred by the assessee was allowed and the appeal preferred by the revenue was dismissed. The revenue has, as such, come up in appeal. The following questions of law were formulated on 18th November, 2008 when the appeal was admitted :

“(a) Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal erred in law in directing the Assessing Officer to treat the interest income of Rs. 28,74,473/- as part of the profits of business of the 100% E.O.U. eligible for deduction under Section 10B of the Income Tax Act, 1961 and compute deduction accordingly without appreciating the fact that the said interest income was not profit from the business but accrued on fixed deposit kept by the assessee in bank ?

(b) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal erred in law in setting aside the order of revenue and directing the Assessing Officer to work out deduction under Section 80HHC of the Income Tax Act, 1961 by excluding 90% of net interest ?

(c) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal erred in law in allowing fresh evidence to be placed before the Income Tax Appellate Tribunal without appreciating the Rule 46A of the Income Tax Rules, 1962 ?”

There is a consensus at the Bar between the learned Advocates appearing for the parties that the question no. 2 has already been answered against the revenue by a judgment of the Apex Court in the case of Liberty Footwear Co. vs. CIT reported in [2016] 383 ITR 195 (SC). In that view of the matter, no further discussion in regard thereto is required. The question no. 2 is answered in the negative and in favour of the assessee. In so far as the question no. 3 is concerned, Mr. Dudhoria, learned Advocate appearing for the revenue submitted that he is not pressing the same. Therefore, we are only concerned with the question no. 1. In order to answer the question, we have to consider subsection (1) and subsection (4) of Section 10B of the IT Act, 1961, in so far as the same is material for our purpose, which provide as follows :

“10B. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee.”

“10B. (4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles

or things or computer software bears to the total turnover of the business carried on by the undertaking.”

A bare reading of sub-section (1) suggests that 100 % export oriented undertakings are entitled to a deduction of profits and gains derived from the export of articles for a period of 10 years. The aforesaid entitlement is, however, subject to the provisions of Section 10B. In other words, subject to the provisions contained in the other parts of the Section 10B, the benefit is available to an assessee. It was not disputed that the only relevant provision to be taken into account is subsection (4) which we already have quoted. Sub-section (4) provides the quantum of deduction which can be availed by an assessee. The quantum of deduction is dependent upon the total turnover of the business of the undertaking and the export turnover of the undertaking. Once these two figures are available, one has to divide the total turnover by the export turnover in order to work out the percentage of the export turn over, vis-à-vis the total turn over. Suppose total turn over is Rs. 100/- and total export turn over is for Rs 10/-, then the export turn over is 10 % of the total turnover. Then one has to find out the total profit of the business of the undertaking. Suppose the total profit of the business of the undertaking is Rs. 100, in that case, deduction available to the assessee under Section 10 sub-section (1) of Section 10B shall be 10% of Rs. 100, i.e. to say Rs. 10/-. This is the formula which has been provided by subsection (4) for the purpose of working out the benefit or deduction under subsection (1). Total turnover shall naturally include receipt on account of

interest. The legislature does not appear to have provided for excluding the amount of interest from the total turn over as has been done in the case of 80HHC by explanation (baa) of sub-section (4C) thereof. In that case, 90% of the income arising out of interest has to be excluded from the profits of the business for the purpose of arriving at deduction available under Section 80HHC. But an identical provision is not there. Therefore, that provision cannot be imported by implication. The submission that the amount earned from interest was not intended to be taken into account for the purpose of giving benefit under subsection (1) of Section 10B may be correct. But the amount of deduction available to a 100% export oriented undertaking is necessarily dependent upon the formula provided in subsection (4). There is, as such, no scope for any controversy that part of the money was earned from interest and not from export. This question came up before the Karnataka High Court and was answered in the case of CIT vs. Motorola India Electronics (P.) Ltd. reported in [2014] 46 Taxmann.com 167 (Karnataka) as follows :

“In the instant case, the assessee is a 100% EOU, which has exported software and earned the income. A portion of that income is included in EEFC account. Yet another portion of the amount is invested within the country by way of fixed deposits, another portion of the amount is invested by way of loan to sister concern which is deriving interest or the consideration received from sale of the import entitlement, which is permissible in law. Now the question is whether the interest

received and the consideration received by sale of import entitlement is to be construed as income of the business of the undertaking. There is a direct nexus between this income and the income of the business of the undertaking. Though it does not partake the character of a profits and gains from the sale of an article, it is the income which is derived from the consideration realized by export of articles. In view of the definition of income from Profits and Gains incorporated in Sub-section (4), the assessee is entitled to the benefit of exemption of the said amount as contemplated under Section 10B of the Act. Therefore, the Tribunal was justified in extending the benefit to the aforesaid amounts also. We do not find any merit in these appeals. Therefore, the first substantial question of law raised in ITA No. 428/2007 is answered in favour of the revenue and against the assessee and the first substantial question of law in ITA No. 447/2007 is answered in favour of the assessee and against the revenue.

In the light of the aforesaid findings, the second question of law in both the appeals do not arise for consideration.”

Mr. Dudhoria, learned Advocate appearing for the revenue drew our attention to a judgment of the Madras High Court in the case of International

Components India Ltd. vs. Assistant Commissioner of Income Tax reported in 2015 - (372) – ITR- 0190 - Madras wherein the following view was taken :

“In the light of the above said decision, we are of the firm view that the interest earned from deposits with Corporation Bank, Electricity Board and on staff advances does not have direct or immediate nexus with the business of the assessee’s undertaking and, consequently, they are not eligible for grant of deduction under Section 10B of the Act, which is akin to Section 80HH of the Act dealt with in the decision referred supra.”

Mr. R.N.Bajoria, Learned senior advocate rightly pointed out that the judgment of the Madras High Court is of no relevance for the simple reason that sub-section (4) of Section 10B was not taken into account by the Hon’ble Madras High Court. Therefore, this judgment is of no assistance in deciding the issue. The learned Tribunal has passed the following order :

“There is no requirement for the purposes of section 10B to establish direct nexus between the income and the undertaking. The entire business income of the 100% EOU will be the “profits of the business of the undertaking”. It has been held above that the interest earned on temporarily surplus business funds of the 100% EOU deposited with banks for short periods is business income and has in fact been so assessed. It is not in dispute that the surplus funds were of the 100% EOU. As such, the interest earned thereon has to be regarded as part of the “profit of the business of the undertaking”. We

further find that the Tribunal in the case of Cheviot Co. Ltd. for assessment years 2003-04 and 2004-05, relied upon by the assessee, has dealt with similar issue. In those cases, the difference between the provisions of sections 10B and 80HH was noted and after considering the judgments of the Hon'ble Supreme Court in Sterling Foods (supra) and in P.R.Prabhakar versus CIT (284 ITR 548 (SC)) approving the Special Bench decision of the Tribunal in International Research Park Laboratories Limited versus Assistant C.I.T. (212 ITR (AT) 1 (SB)), it was held that the profits of the business of the undertaking would include its entire business income. Keeping in view the above decision and the decision of the Tribunal, we are of the considered opinion that the assessee has to succeed. The Assessing Officer is directed to treat the interest of Rs. 28,74,473/- as part of the profits of the business of the 100% EOU eligible for deduction under section 10B and compute the deduction accordingly. The Assessing Officer should deduct the sum of Rs. 8,01,30,294/- (Rs. 7,72,54,821/- + Rs. 28,74,473/-) and not only Rs. 7,72,54,821/- from the profit as per profit and loss account for the purpose of separate consideration under section 10B Ground Nos. 3,4 and 5 of the assessee's appeal are thus allowed."

We are of the opinion that the Tribunal was right in the view they took for the reasons discussed by us. In that view of the matter, the question no. 1 is

answered in the negative and in favour of the assessee. The appeal is, therefore, dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)