

A.F.R.

Court No. - 39

Case :- INCOME TAX APPEAL No. - 248 of 2015

Appellant :- Pr. Commissioner Of Income Tax Kanpur

Respondent :- M/S Surya Merchants Ltd.

Counsel for Appellant :- Ashok Kumar,Ashish Agrawal,Jr.S.C.

Counsel for Respondent :- Rahul Agarwal

Hon'ble Dilip Gupta,J.

Hon'ble Ravindra Nath Kakkar,J.

This appeal has been filed by the Principal Commissioner of Income Tax (Central), Kanpur under Section 260-A of the Income Tax Act, 1961¹ against the order dated 18 February 2015 of the Income Tax Appellate Tribunal 'G' New Delhi² relating to the assessment year 2005-06.

The questions of law that have been framed in the appeal are as follows:-

1. Whether Hon'ble ITAT was justified in dismissing Revenue's appeal by observing that the assessee's claim of deduction under Section 80IP is allowable on undisclosed income that was declared in consequence of search.
2. Whether Hon'ble ITAT was justified in dismissing Revenue's appeal by observing that the assessee's claim of deduction under Section 80IB is allowable in respect of disallowance under Section 40A(3) made on undisclosed income that was declared in consequence of search.
3. Whether Hon'ble ITAT was justified in dismissing Revenue's appeal by observing that the assessee's claim of deduction under Section is allowable in terms of Section 80IB (13) on subsequent enhancement of income.

1 the Act

2 the Tribunal

The relevant facts are that the assessee had furnished a return of income on 18 January 2006 for the assessment year 2005-06 declaring income of Rs. 34,89,935/- after claiming deduction of Rs. 41,83,813/- under Section 80IB of the Act. This claim was allowed by the Assessing Officer by order dated 10 July 2007 under 143 (B) of the Act. However, a search was carried out on the premises of the Company on 6 February 2009 and certain incriminating documents were seized. The revenue found from the seized documents that there was an undisclosed income of Rs. 5,68,80,271/-.

Accordingly, the Assessing Officer issued a notice under Section 153-A of the Act on 22 February 2010 pursuant to which the assessee furnished a return declaring income of Rs.94,91,330/- after claiming a total deduction which included expenses of Rs.3,99,61,041/- and Rs.60,27,367/- under Section 80IB of the Act. The Assessing Officer noted that in the return filed by the assessee under Section 153A an enhanced amount of Rs.18,43,552/- was claimed under Section 80IB of the Act and, therefore, directed the assessee to explain why in the absence of an audit report the said claim should not be disallowed. A reply was filed but the Assessing Officer disallowed the claim as the assessee failed to satisfy the condition set out in sub-section (7) of Section 80IA of the Act since the audit report was not submitted with the return which was filed. The Assessing Officer also made a disallowance of Rs. 54,52,697/- on the ground that assessee had

made cash payment of Rs.2,72,63,485/- contrary to the provisions of Section 40A(3) of the Act.

The assessee filed an appeal before the Commissioner of Income Tax (Appeal) Meerut³. In so far as the deduction under Section 80IB of the Act is concerned, the CIT Appeals found that filing of the audit report was a directory requirement and as the audit report had been furnished prior to the completion of the assessment proceedings, the provisions of sub-section (7) of Section 80IB stood complied. In regard to the disallowance of the deduction under Section 40A(3) of the Act, the CIT Appeals observed that the Assessing Officer was justified in not allowing the deduction but observed that since such amount would become the income of the eligible project, there was no reason why the assessee should be denied deduction under Section 80IB of the Act. The Assessing Officer was, therefore, directed to recompute the eligible deduction under Section 80IB of the Act.

The revenue filed an appeal before the Tribunal. The Tribunal noted that it was an admitted position that the assessee was eligible to claim deduction under Section 80IB of the Act as the claimed deduction of Rs. 41,83,113/- was earlier allowed by the Assessing Officer in the original assessment. However, the return filed in response to the notice issued under Section 153 of the Act, the said claim was enhanced to Rs. 18,43,552/- on account of the additional income declared in the return. The Tribunal noted

3 CIT Appeals

that the claim of the assessee under Section 80IB was not a new claim but was a claim based on enhanced income declared under the return relating to the eligible project as a result of the search. It, accordingly, did not agree with the finding recorded by the Assessing Officer that the claim cannot be allowed as the audit report was not furnished with the return. The Tribunal also found that it was an undisputed position that the audit report for the enhanced claim had been furnished during the course of the assessment proceedings together with the profit and loss account and balance sheet duly verified by the Accountant. In holding that the requirement of filing the audit report was merely directory in nature, the Tribunal relied upon various decisions of High Courts to which reference shall be made. In regard to the disallowance under Section 40A(3), the Tribunal observed that since the disallowance was directly relatable to the profit, benefit of deduction under Section 80IB of the Act was required to be provided.

Sri Ashok Kumar learned counsel appearing for the appellant has submitted that the requirement of sub-section (7) of Section 80IA of requiring the assessee to furnish the report of audit in the prescribed form duly signed and verified with return of income is a mandatory requirement and since in the present case admittedly the assessee did not furnish the audit report with the return of income, the CIT Appeal and the Tribunal committed an illegality in allowing the deductions claimed by the assessee under

Section 80IB of the Act. It is his submission that the language of sub-section (7) of Section 80A is very clear and does not admit of any doubt that the deductions can be allowed only when the audit report is furnished with the return of income. Learned counsel also submitted that the finding by the CIT Appeal and the Tribunal committed an illegality in regard to the deduction claimed by the assessee under Section 40(3)A of the Act

Sri S.D. Singh learned Senior Counsel appearing for the assessee assisted by Sri Rahul Agarwal has, however, submitted that the requirement of sub-section (7) of Section 80IA of the Act is merely a directory requirement as has been repeatedly held by various High Courts across the country. His submission is that the assessee had furnished the audit report prior to the conclusion of the assessment proceedings initiated under Section 153 A of the Act and, therefore, the requirement of sub-section (7) of Section 80IA stood satisfied. Learned Senior Counsel also submitted that the CIT Appeals and the Tribunal committed no illegality in holding that even if the deduction claimed under Section 40A(3) of the Act was disallowed, the same was required to be added to the deduction claimed under Section 80IA of the Act for the reason that it was linked to the profit of the eligible project.

We have considered the submissions advanced by the learned counsel for the parties.

Section 80IB of the Act deals with the deduction in respect of profits and gains from certain industrial undertakings

other than infrastructure development undertakings. Sub-section (13) of Section 80IB provides that the provisions contained in sub-section (5) and sub-sections (7) to (12) of Section 80IA shall, so far as may be, applied to the eligible business under this section.

The provision of Section 80IB(1) and sub-section (7) of Section 80IA of the Act are reproduced below :-

“80IB(1) - Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), 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 such percentage and for such number of assessment years as specified in this section.

80IA(7)-The deduction under sub Section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub Section (2) of Section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.”

Sub-section (7) of Section 80IA provides that the deduction made from the profits and gains derived from undertaking shall not be admissible unless the accounts of the undertaking for the previous year have been audited by an

accountant and the assessee furnishes along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

The dispute in the present appeal is as to whether furnishing of the audit report along with the return of income is a mandatory requirement or is a directory requirement. It is not in dispute that the petitioner had complied with the requirement of sub-section (7) of Section 80IA at the time of furnishing the original return of income. The dispute is about the furnishing of the audit report with the return of income filed under Section 153 A of the Act by the assessee after the search was carried out. It is, however, not in dispute that the assessee had furnished the audit report during the assessment proceedings under Section 153 of the Act. The return under Section 153 A of the Act was filed by the assessee on 8 April 2010 while the audit report was filed during the course of the proceedings on 19 July 2011.

The Assessing Officer has disallowed the deductions under Section 80IB merely for the reason that the assessee had not furnished the audit report along with the return of income. The CIT Appeals and the Tribunal have not accepted the view taken by the Assessing Officer and have allowed the deductions for the reason that the said requirement was merely directory which stood satisfied when the assessee furnished the audit report during the course of the assessment proceedings.

The requirement of sub-section (7) of Section 80IA of

the Act has been held to be directory by various High Courts. The High Courts have decided this issue while examining the provisions of Section 80IB of the Act as also the provisions of Section 80J(6A) and Section 184 of the Act.

The decisions directly dealing with the provisions of Section 80IB shall be discussed first. The Karnataka High Court in **Commissioner of Income Tax and Another v. ACE Multitaxes Systems Private Limited**⁴ specifically examined whether the filing of the audit report for getting the benefit of deductions under Section 80IB was directory or mandatory. After placing reliance on the earlier decisions of the Punjab and Haryana High Court in **Commissioner of Income Tax v. Shahzedanand Charity Trust**⁵ and the Calcutta High Court in **Murali Export House And Others v. Commissioner Of Income-Tax**⁶ it was observed that sub-section (7) of Section 80IA of the Act does not cast any obligation on the assessee to furnish the audit report with the return of income. The Delhi High Court in **Commissioner of Income Tax v. Contimeters Electricals Private Limited**⁷ also in conclusion with the requirement of sub-section (7) of Section 80IA of the Act, examined decisions of various High Courts and observed that the filing of audit report with the return of income is not a mandatory requirement but a directory requirement and that the requirement would stand satisfied if the audit report is filed before the framing of the assessment. Similar view has been expressed by the Madhya

4 [2009] 317 ITR 207 (Kar)

5 [1997] 228 ITR 292

6 [1999] 238 ITR 257

7 [2009] 317 ITR 249 (Del)

Pradesh High Court in **Commissioner of Income Tax v. Medicaps Limited**⁸.

It would be appropriate to now refer decisions of the High Courts dealing with similar provisions. A Divisions Bench of this Court in **Additional Commissioner of Income Tax v. Murlidhar Mathura Prasad**⁹ considered whether the requirement contained in sub-section (7) of Section 184 of the Act requiring the firm to furnish with its return of income, a declaration in the prescribed form and verified in the prescribed manner was a mandatory requirement or a directory requirement. Section 184 of the Act deals with registration as also with registration having effect for subsequent years. Sub-section (7) of Section 184 provides that where the registration is granted to any firm for any assessment year, it shall have effect for every subsequent year and the proviso, amongst other, stipulates that the firm furnished, along with its return of income for the assessment year concerned, a declaration to that effect in the prescribed form and verified in the prescribed manner. Dealing with this issue the Division Bench observed that the requirement of filing the declaration with the return is directory. The observations are:-

“The essence of section 184 (7) is that once registration has been granted to a firm, it is to have effect for every subsequent year, in case there has been no change in the constitution of the firm or in the shares of its partners. The other requirements are merely to evidence this fact. The requirement that the firm shall

8 [2010] 323 ITR 554 (MP)

9 [1979] 118 ITR 392 (All)

furnish a declaration in Form No. 12 is merely to prove the facts in a particular way. The requirement that the declaration shall be filed along with the return of income is not of the substance or the essence. It is a procedural requirement.

The legislative intent appears to be that while dealing with the assessment of a firm the ITO should have clear-cut evidence that the essential fact that there has been no change in the constitution of the firm or in the shares of the partners has been proved satisfactorily in the required manner. The procedural requirements hence are to be treated as directory. If there is some defect in the declaration form, the assessee is to be given an opportunity for rectifying it [See Section 185(2)]. It cannot be ignored or rejected straightaway. Similarly, the requirement that the declaration should be filed along with the return of income is directory, because the ITO is enabled to assess the firm provided, the return is filed up to the time he makes the assessment.”

This decision has been followed by the **Gujrat High Court in Commissioner of Income Tax v. Gujarat Oil and Allied Industries¹⁰**, while interpreting the provisions of Section 80J-6(A) of the Act, which is as follows:-

"80J-6(A) - Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, and the assessee furnishes, along with his

10 [1993] 201 ITR 325 (Guj)

return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."

Similar views have been expressed by the Gujrat High Court in **Zenith Processing Mills v. Commissioner of Income Tax**¹¹, the Madras High Court in **Commissioner of Income Tax v. A.N. Arunachalam**¹², the Bombay High Court in **Commissioner of Income Tax v. Shivanand Electronics**¹³ and the Punjab and Haryana High Court in **Commissioner of Income Tax v. Mahalaxmi Rice Factory**¹⁴.

In **Commissioner of Income Tax v. Web Commerce (India) Private Limited**¹⁵ the Delhi High Court examined the provisions of sub-section 10B(5) of the Act, which is similar to the provisions of sub-section 80IA(7) and Section 80J(6A) of the Act and observed, after placing reliance upon its earlier decisions in **Contimeters Electricals Private Limited** (supra), that the provisions are directory and the requirement of the report of the accountant to be filed with the return of the income would stand satisfied if it is submitted before the assessment order is passed.

The aforesaid decisions leave no manner of doubt that the requirement of sub-section (7) of Section 80IA of the Act, which is made applicable to section 80IB of the Act in view of the provisions of sub-section (13) of Section 80IB of the Act, that the audit report should be furnished along with the return of income is

11 [1996] 219 ITR 721 (Guj)

12 [1994] 208 ITR 481 (Mad)

13 [1994] 209 ITR 63 (Bom)

14 [2007] 294 ITR 631 (P&H)

15 [2009] 318 ITR 135 (Del)

a directory requirement and would stand satisfied if the audit report is furnished during the course of the assessment proceedings.

In the present case, the return of income under Section 153-A of the Act was filed on 8 April 2010 and the audit report was filed on 19 July 2011 before passing of the assessment order. The requirement, therefore, stood satisfied and the benefit of Section 80IB of the Act could not have been denied to the assessee merely for the reason that the audit report was not furnished with the return of income. It needs to be remembered that the audit report had been submitted earlier by the assessee with the return of income submitted on 18 January 2006 for the assessment year 2005-06 and only the additional benefit of Rs. 18,45,552/- under section 80IB was subsequently claimed in the return filed on 8 April 2010 as the income had increased.

The next submission of the learned counsel for the appellant is that the CIT Appeals committed an illegality in reversing the finding of Assessment Officer that the assessee was not entitled to deductions under Section 40 A(3) of the Act. Section 40A (3) of the Act is as follows:-

“Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.”

The CIT Appeals and the Tribunal had maintained the finding of the Assessing Officer that the assessee was not entitled to deductions under sub-section (3) of Section 40A of the Act but observed that even if this deduction is not allowed, then too as the amount relates to the profits of the undertaking, it would be entitled to the benefit under Section 80IB of the Act. It is for this reason that the Assessing Officer was directed to recompute the deductions under Section 80IB of the Act.

We find no infirmity in the view taken by the CIT Appeals and the Tribunal nor illegality any has been pointed out by learned Counsel for the appellant. If deductions under sub-section (3) of Section 40A of the Act is not allowed then the same would have adjusted to the profits of the undertaking as a result of which it will be entitled to seek deductions under Section 80IB of the Act.

Thus for all the reasons stated above the questions of law framed by the appellant are answered against the revenue and in favour of the assessee.

The appeal is, accordingly, dismissed.

Order Date :- 3.5.2016
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(Dilip Gupta,J.)

(Ravindra Nath Kakkar,J.)