IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 57 of 2001

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
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

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INCOME TAX OFFICER....Appellant(s)

Versus

MAITRY EXPORTS....Opponent(s)

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Appearance:

MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1

MR B S SOPARKAR, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 26/04/2016

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. This appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) at the instance of the revenue is directed against the order dated 24.7.2000 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench ‘B’, (hereinafter referred to as “the Tribunal”) in ITA No.1227/Ahd/1999.

2. While admitting the appeal, this court by an order dated 5.3.2001 had formulated the following substantial question of law :-

> *“Whether on the facts and in the circumstances of the case, the Appellate Tribunal has substantially erred in remanding the matter to the Assessing Officer for determination of question as to whether benefit or privilege in the form of advanced licence allotted to the assessee is taxable or not ?”*

3. The respondent assessee, an exporter of synthetics cloth, claimed deduction under section 80HHC of the Act at Rs.1,12,79,533/- but restricted the same to income returned at Rs.80,75,780/- Thus, the assessee disclosed income at ‘nil’ after claiming deduction under section 80HHC of the Act. During the course of assessment proceedings, the assessee was asked to submit the working of export incentive credited

to the profit and loss account. The assessee submitted the working of duty benefit, excise duty refund and duty drawback. The assessee explained that the duty benefit was receivable by it to the extent of Rs.1,10,56,774/. The duty benefit had been worked out by the assessee on the basis of exports made by it. Considering the explanation of the assessee, the Assessing Officer was of the view that the duty benefit did not fall under clauses (iiia) (iiib) and (iiic) of section 28 of the Act and, accordingly, issued notice to the assessee. In response thereto, the assessee contended that the duty benefit had been worked out by it on the basis of advance licence available on export of goods which is in the nature of cash assistance (by whatever name called) received or receivable against the export under the scheme of the Government of India. It was contended that the duty benefit falls under section 28(iiia) of the Act.

4. Before the Tribunal, the learned counsel for the assessee admitted that the plea raised by the assessee before the Assessing Officer that Rs.1,10,56,774/- was cash incentive was factually incorrect and that even if it is held that the assessee received licence under the export scheme, the licence was a capital receipt and could be taxed only under section 28(iiia) of the Act when the licence is sold. No licence was sold in the year under consideration and profit from licence was duly shown in the next year. The plea that a sum of Rs.1,10,56,774/- was not taxable income was sought to be raised as an additional ground of appeal as no such plea was taken in the memorandum of appeal. The learned counsel for the assessee, accordingly, did not contend that the assessee was entitled to deduction under section 80HHC on the sum of

Rs.1,10,56,774/- as alleged export incentive.

5. It was the case of the revenue that the income of Rs.1,10,56,774/- was computed by the assessee on accrual basis under the mercantile system of accounting followed by it and was credited to the profit and loss account. This was taken as cost and was carried to the closing stock and adjusted against the sale proceeds of goods and licences sold in the next year. According to the revenue, the licence given in the year under consideration was a valuable asset and its value was fixed by the assessee at Rs.1,10,56,774/- and that the assessee cannot now be permitted to turn around and claim that this was not taxable. It was the case of the revenue that the assessee in the return showed that the above benefit had a value and fixed the same at Rs.1,10,56,774/- and returned the same as income, therefore, there was now no question of deducting the said amount from the total income assessed in the hands of the assessee. The Tribunal, after considering the submissions advanced by the learned counsel for the respective parties, held thus:

> *"6.2 It is thus clear that provision relating to credit of Rs.1,10,56,774/- as duty benefit was duly put before the AO although at some other place the assessee had wrongly claimed that duty benefit was cash compensatory allowance. This stand was modified and AO was fully aware of the nature of entries made by the assessee in its books of accounts. All the facts relating to the export made by the assessee and the scheme under which the duty exemption entitlements were allowed to the assessee in the shape of licence, were known to the AO. It is, therefore, not a case where the Revenue would be taken by surprise if the assesses is permitted to raise the ground that sum in question has been wrongly subjected to tax. It is no doubt true that assessee showed this amount as taxable receipt*

and further claimed deduction u/s.80HHC on this amount and is now seeking to raise altogether different claim by saying that amount is not a revenue receipt at all. On account of above circumstances. The assessee cannot be debarred from raising the claim. There is no estoppel against the statute and income is to be taxed as per statutory provisions and not on the basis of impression or views which the assessee is supposed to have taken of the matter. It is further settled law that entries made by the assessee in the books of accounts are not conclusive on the question of taxability at a receipt. The question has to be determined in accordance with law. Therefore, the mere fact assessee showed this amount of Rs.1,10,56,774/- as taxable receipt is not material. The issue has to be examined as per the statutory provisions. In the above circumstances and for advancing cause of justice, we permit the assessee to raise the ground that sum of Rs.1,10,56,774/- or a lesser amount shown as import incentive is not a taxable receipt."

6. The Tribunal, for the detailed reasons recorded in paragraphs 6.3, 6.6 and 6.7 of the impugned order, thought it appropriate to ask the Assessing Officer to re-examine the claim of the assessee under section 80HHC of the Act in case there is a positive total income and allow relief in accordance with law.

7. Mr. Sudhir Mehta, learned senior standing counsel for the appellant assailed the impugned order by submitting that the Assessing Officer was wholly justified in holding that the duty benefit derived by the assessee on the duty free import falls within the ambit of section 28(iiib) of the Act under the head "cash assistance" as business receipts and as such, the Tribunal was not justified in not upholding the order passed by the Assessing Officer and remitting the matter to the Assessing Officer to examine the taxability of the value of the advance licence. It was submitted that in the case of M/s. Pratibha

Synthetics Ltd., the Tribunal itself has held that duty benefit derived by the assessee on duty free imports falls within the ambit of section 28(iiib) of the Act under the head “cash assistance” as business receipts and hence, the Tribunal was not justified in not deciding the matter on merits and remitting the matter to the Assessing Officer.

8. On the other hand, Mr. B.S. Soparkar, learned advocate for the respondent assessee submitted that in the present case what the assessee had done was to take up the value of export duty which it was likely to save on export of yarn and dyes and had accordingly, credited such amount in the profit and loss account. Reliance was placed upon the decision of the Karnataka High Court in ***J.K. Industries Ltd. v. Joint Commissioner of Income Tax***, *[2013] 351 ITR 454 (Karn)*, for the proposition that notional duty benefit derived by the assessee did not amount to cash assistance under section 28(iiib) of the Act. Reference was also made to the decision of the Delhi High Court in ***Commissioner of Income-tax v. Nagesh Knitwears P. Ltd.,*** *[2012] 345 ITR 135 (Delhi)*. Referring to the impugned order it was submitted that the Tribunal, having regard to the facts of the case, has merely sent back the matter to the Assessing Officer to decide whether the benefit of privilege in the form of advance licence allotted to the assessee is taxable or not. Therefore, the impugned order of the Tribunal does not give rise to any question of law so as to warrant interference. Reliance was placed upon the decision of 345 ITR 135 and 351 ITR 454 (Karn).

9. As can be seen from the impugned order, the Tribunal

after recording that the plea raised before it was also raised before the Assessing Officer, has observed that the assessee had shown the amount of Rs.1,10,56,774/- as taxable receipt and further claimed deduction under section 80HHC on such amount and was now seeking to raise an altogether different claim by saying that the amount was not revenue receipt at all. The Tribunal was of the view that the assessee cannot be debarred from raising such a claim and that there is no estoppel against the statute and income has to be taxed as per the statutory provisions and not on the basis of impression or views which the assessee is supposed to have taken in the matter. The Tribunal observed that it is settled law that entries made by the assessee in the books of account are not conclusive on the question of taxability of a receipt and that such question has to be determined in accordance with law. Therefore, the mere fact that the assessee showed the amount of Rs.1,10,56,774/- as taxable receipt is not material and that such issue has to be examined as per the statutory provisions. The Tribunal, accordingly, permitted the assessee to raise the ground that the sum of Rs.1,10,56,774/- or a lesser amount shown as import incentive is not a taxable receipt. Before the Tribunal, it was contended on behalf of the revenue that the assessee was given a licence to import dyes and that licence was freely transferrable and it had a commercial value which was fixed by the assessee at Rs.1,10,56,774/-. The amount was also shown as income and this had been the stand of the assessee throughout. The Tribunal noted that it was true that the assessee did show Rs.1,10,56,774/- as its income but having regard to its working which the Assessing Officer examined in detail, the credited amount cannot be treated as the assessee’s income. The Tribunal noted that the Assessing

Officer did not record a finding that on export the assessee was given licences which had commercial value of Rs.1,10,56,774/- and, therefore, the amount was taxable receipt although the question was specifically raised before him. The Assessing Officer referred to assessee's entitlement as "advance licence" and specifically held that income would accrue to the assessee only on sale of licence under section 28(iiia) of the Act and failed to examine the alternative claim of the assessee that the amount of Rs.1,10,56,774/- was not a revenue receipt if it does not fall under the three clauses of section 28 of the Act. The Tribunal, therefore, did not think it fit to accept the submission made on behalf of the revenue that Rs.1,10,56,774/- should be assessed as taxable receipt representing the value of licence allotted to the assessee on export. According to the Tribunal, the question raised was required to be examined from all angles.

10. On behalf of the assessee, it was contended that the licence allotted to the assessee as per settled law is a capital asset and not a taxable receipt and, therefore, the above amount should be excluded from the total income. The Tribunal noted that the assessee showed the amount as taxable receipt in its books of account as also in its return. The Assessing Officer held that it was not export incentive falling under any clause of section 28 and, therefore, refused to grant deduction on this amount under section 80 HHC of the Act. The receipt was charged to tax as shown in the return. The assessee did not object to the taxability of the receipt before the Commissioner (Appeals) and, therefore, no finding was recorded on the issue. In the above background, the Tribunal was of the view that the assessee was responsible for

preventing the revenue authorities from examining in detail the question of taxability of the amount. The Tribunal observed that it had held that the working of export incentive as given by the assessee and examined by the Assessing Officer is not taxable, but hastened to add that it was not its finding that no benefit or privilege accrued to the assessee when licence was allotted to it on export. The licence given to the assessee has a commercial value and whether the benefit or privilege in the shape of licence is taxable or not has not been examined. The Tribunal was, accordingly, of the view that the question was required to be examined and that for that purpose the matter was required to be restored to the file of the Assessing Officer to let him determine as to whether on the allotment of licence any taxable income accrued to the assessee or not in accordance with law.

11. Thus, the assessee had initially not raised any contention to the effect that the amount of Rs.1,10,56,774/- was not taxable. However, before the Tribunal a plea was raised in that regard. The Tribunal noted that such plea was also raised before the Assessing Officer but had not been examined and for the reasons referred to hereinabove, the Tribunal remitted the matter to the Assessing Officer to examine the issue in accordance with law.

12. From the facts as emerging from the record, the assessee had been allotted advance licence under the export scheme in the year under consideration the value whereof as stated by the assessee was Rs.1,10,56,774/-. While before the Assessing Officer as well as the Commissioner (Appeals), the assessee claimed deduction under section 80HHC with reference to the

above amount, claiming that the same was a duty benefit falling within clauses (iiia), (iiib) and (iiic) of section 28 of the Act, subsequently, before the Tribunal the assessee stated that the plea that the sum of Rs.1,10,56,774/- was cash incentive was factually incorrect. It was, however, claimed that even if it is held that the assessee received the licence under the export scheme, the said licence was a capital receipt and could be taxed only under section 28(iiia) of the Act when the licence is sold. That no licence was sold in the year under consideration and profit from licence was duly shown in the next year. The Tribunal, after discussing the contentions advanced on behalf of the respective parties was of the view that income is to be taxed in accordance with the statutory provisions and not on the basis of the impression or the views which the assessee is supposed to have taken in the matter. On facts the Tribunal found that the assessee had advanced such a plea before the Assessing Officer also and was further of the view that the mere fact that the assessee had shown such amount as taxable receipt is not material and that the issue has to be examined as per the statutory provisions. Accordingly, it has remitted the matter to the Assessing Officer to reexamine the claim of the assessee under section 80HHC of the Act. In the opinion of this court, the approach adopted by the Tribunal in sending the matter back to the Assessing Officer for determination of the question as to whether benefit or privilege in the form of advance licence allotted to the assessee is taxable or not is a practical approach having regard to the facts and circumstances of the case. In these circumstances, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to warrant interference.

13. For the foregoing reasons, it is held that on the facts and in the circumstances of the case, the Appellate Tribunal has not erred in remanding the matter to the Assessing Officer for determination of the question as to whether the benefit or privilege in the form of advanced licence allotted to the assessee is taxable or not. The question stands answered accordingly, that is, in favour of the assessee and against the revenue. The appeal, therefore, fails and is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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