IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.94 of 2014
Date of decision: 06.04.2015

M/s Maken Cement Industries, Kathua ….Appellant

Vs.

Commissioner of Income Tax, Amritsar and another ….Respondents

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE GURMEET SINGH SANDHAWALIA

Present: Ms. Radhika Suri, Senior Advocate with
Ms. Rajni Paul, Advocate for the appellant.

Mr. Dinesh Goyal, Advocate for the respondents.

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G.S.SANDHAWALIA, J.

The present appeal has been filed by the assessee under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the order dated 8.11.2012 (Annexure A/4) passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") in ITA No.70 (Asr)/2011 for the assessment year 2002-03.

The appellant sought to raise the following substantial question of law for the consideration of this Court:-

> "i) Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal has fallen in error in holding that the transport subsidy amounting to Rs.16,11,477/- which was never received by the assessee and for which merely a claim was lodged with the Jammu & Kashmir Government could be treated as income accrued and taxed in the hand of the assessee?"

Learned senior counsel for the appellant has vehemently argued that the above said amount was never received by the assessee

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and therefore it could not be treated as income in the hands of the assessee and placed reliance upon the Transport Subsidy Scheme, 1971 (hereinafter referred to as "the Scheme") circulated by the Jammu & Kashmir Development Finance Corporation Limited (hereinafter referred to as "the Corporation") to submit that freight charges for movement was to be determined on the basis of transport rates fixed by the authorities from time to time or the actual freight paid, whichever is less. Relevant Clause of the Scheme reads as under:-

> "6. Details of the Scheme -(i) A transport subsidy will be given to the industrial units located in the selected areas in respect of law materials which are brought into and finished goods which are taken out of such areas.
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> (ii) xxx xxx xxx
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> (iii) xxx xxx xxx
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> (iv) xxx xxx xxx
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> (v) xxx xxx xxx
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> (vi) xxx xxx xxx
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> (vii) + Freight charges for movement by road/sea will be determined on the basis of transport/transshipment rates fixed by the Central Government/State Government/Union Territory Administration concerned from time to time or the actual freight paid, whichever is less."

Accordingly, it was contended that once only a sum of ₹ 5,17,123/- had been received out of ₹ 21,18,637/-, balance of ₹ 16,11,477/- could not be added to the income of the assessee. Reliance has been placed upon the judgment of the Apex Court in **Commissioner of Income-Tax, Bombay City Vs. Messrs. Shoorji Vallabhdas and Co. (1962) 46 ITR 144 (SC)** to submit that once there was neither accrual nor receipt of income though entry had been made in the books, it was only hypothetical income and had not materialised. Therefore, the order of the Tribunal was not justified in upholding the assessment order and allowing

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the appeal of the revenue.

Counsel for the revenue on the other hand has submitted that this was neither the case of the assessee before the Tribunal as such nor before the assessing authority rather the benefit of Section 80-IB of the Act had been sought. Nil return had been filed and on re-opening after recording reasons by the assessing authority, the assessment order had been passed on 4.12.2009(Annexure A/2) and it had been noticed that the assessee had been adopting mercantile system of accounting and had credited subsidy receivable account with a sum of ₹ 21,28,603/- on 31.3.2002. Keeping in view the provisions of Section 80-IB the assessment officer held that subsidy received was an income incidental to industrial undertaking and had no direct nexus with it, and would not be eligible for deduction and the amount had been added as income. Accordingly, it was contended that it was never the case before the assessing authority as now contended that the amount had never been received.

A perusal of the paper-book would go on to show that no certificate as such was obtained from the General Manager, District Industries Centre, Kathua for the year in question i.e. 2002-03. The return had been filed on 30.10.2002 and had been duly processed under Section 143(1) of the Act on 27.1.2003. It was noticed that transport subsidy had been received by the assessee from the Corporation which had not been declared as income and the case was re-opened on 16.7.2008. Thereafter, the assessment was framed on 4.12.2009 by noticing that transport subsidy had been received from the State Government and had no direct nexus with the industrial undertaking and a sum of ₹ 21,28,603/- was liable to tax and added to the returned income.

The assessee filed an appeal before the Commissioner of Income Tax (Appeals), Amritsar (hereinafter referred to as “the CIT”) which

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was partly allowed by upholding the reasoning given by the Assessing Authority on the issue of Section 80-IB that the assessee was not eligible for deduction since the receipt of transport subsidy did not fall in the category of direct source of profit but was any other profit. However, the CIT granted the benefit of a sum of ₹ 16,11,480/- on account of the fact that it had not been received by the assessee and therefore, need not be taxed at the hands of the assessee.

Two appeals were filed before the Tribunal by both the parties. On the basis of consensus arrived at, that benefit of rebate under Section 80-IB of the Act could not be granted, on the transport subsidy received in view of the judgment of the Apex Court in **CIT Vs. Sterling Foods (1999) 237 ITR 579 (SC)** and **CIT Vs. Pandian Chemicals Ltd. 262 ITR 278 (SC),** the appeal of the assessee was dismissed. However, the Tribunal allowed the appeal of the revenue whereby the CIT had given the benefit of ₹ 16,11,480/- on account of the fact that the assessee had not filed any documentary evidence supporting its claim for the concerned assessment year and had adopted the mercantile system of accounting. It had credited subsidy receivable on 21.3.2002 and therefore, it was considered to be received on the said date. Accordingly, the appeal of the revenue was allowed.

Thus, it would be apparent that the assessee apart from adopting mercantile system of accounting had chosen to take benefit of Section 80-IB of the Act and sought exemption. It had never taken the plea before the authorities below which is now sought to be raised that it was only liable to be assessed to the tune of ₹ 5,17,123/- which was actually received in the year concerned. As noticed neither was the certificate filed from the concerned General Manager, District Industries Centre when the return was filed on 31.3.2002. The certificate was only obtained for the

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subsequent period and therefore, it was never only the case of the assessee from day one that it could take benefit of Clause 6 (vii) of the Scheme which has been reproduced above on the ground that actual freight paid would be the income.

Once that was not the specific case before the assessing authority and neither the same material had been placed before the Tribunal, we are of the view that the substantial question of law which is now sought to be raised on the strength of aforesaid clause of the Scheme is not permissible. It is settled principle that the substantial question of law would only be on the strength of documents which have been brought before the authorities below and also which was subject matter of consideration before the Tribunal. Once the stand was contrary before the Assessing Authority at the initial stage, the argument which is now sought to be raised cannot be addressed before this Court. Resultantly, the judgment in **Messrs. Shoorji Vallabhdas's case** (supra) relied upon by the assessee will be of no avail since in that case it was the specific case of the assessee as to what would be the rate of commission as per agreement which had been entered into and what had actually been received.

Thus, keeping in view of the above facts and circumstances, this Court is of the opinion that no substantial question of law as contended arises. Accordingly, the present appeal is dismissed.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

(G.S.SANDHAWALIA)
JUDGE

06.04.2015
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