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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 05.01.2015

\+ **ITA 38/2000**

COMMISSIONER OF INCOME TAX DEL-III ..... Appellant

Through: Mr.Balbir Singh, Sr.Standing Counsel

versus

UNIPATCH RUBBER LTD. ..... Respondent

Through: Mr.Prakash Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The question of law framed in this case by order dated 22.09.2000 is as follows:-

> *"Whether assessee is entitled to deduction/benefit under Section 80-I on the gross income without excluding/reducing deduction allowed under Section 80-HH?"*

2. The facts necessary for deciding this appeal under Section 260-A of the Income Tax Act, 1961 are that for the period 01-01-1988 to 31-03-1989, relevant for the assessment year 1989-90, the return of income was filed by the respondent-assessee declaring Rs.53,93,390/- as income. The assessee manufactured and sold rubber patches for tyre, tubes, uniseals etc. By order dated 13-03-1992 the Assessing Officer *inter alia* held that deduction under Section 80-I could be allowed on the balance amount of income after it

suffers a deduction under Section 80-HH. This view was affirmed by the Commissioner of Income Tax (Appeals) who was of the opinion that both Sections i.e., Sections 80-HH and 80-I were independent provisions and consequently, the assessee was entitled to deduction under Section 80-I on the total amount without it having suffered any deduction under Section 80-HH. The Revenue unsuccessfully appealed to the ITAT and consequently has approached this Court.

3. It is argued on behalf of the Revenue that the ITAT as well as the Commissioner (Appeals) completely overlooked Section 80-HH (9) which is in imperative terms and stipulates expressly that before the benefit of Section 80-I could be claimed, or some other benefit – under Section 80-J, could be claimed – the total profits had to be deducted in the manner provided in the Section i.e. in terms of Section 80-HH (I). The submission of the Revenue in this regard may be noticed by its contention in the grounds of appeal to the following effect:-

> *"The language of Section 80-HH(9) is clear and specifically stipulates that where the assessee is entitled to deduction u/s 80-HH and 80-I, the assessee is first entitled to deduction u/s 80-HH and thereafter deduction will be allowed u/s 80-I."*

4. The CIT(A) reasoned that the deduction under Section 80-I and 80-HH had to be with reference to gross total income independent to one another, relying on the language with reference to Section 80-I. The ITAT apparently endorsed this opinion in the following terms:-

> *"The next grievance is against the direction of the Ld.CIT(A) to allow deduction u/s 80I on the same income on which deduction u/s 80HH has been allowed i.e. on the gross income. The*

assessee claimed deductions u/s 80HH & 80I on the gross income. The issue is covered by the order dated 5.11.96 of Delhi Bench 'B' in ITA No.5730/Del/91 in assessee's own case. Reliance on the orders of the Karnataka High Court and Allahabad High Court reported in 203 ITR 811 and 140 ITR 745 have been placed. The ITAT had held in asstt. Year 1988-89 in this very case that the deduction u/s 80I must be allowed without taking into account other deductions permissible under Chapter 6 of the Act. Thus the relief under sec. 80HH and 80I were admissible on gross income. Following the order of the ITAT we dismiss the revenue's ground."

5. The relevant provisions are as follows:-

*"**Section 80-HH(1)** – Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, to which this section applies, 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 twenty per cent thereof.*

xxxx xxxxxx xxxxx

***Section 80 HH(9)** – In a case where the assessee is entitled also to the deduction under [section 80-I or] section 80J in relation to the profits and gains of an industrial undertaking or the business of a hotel to which this section applies, effect shall first be given to the provisions of this section.*

[Deduction in respect of profits and gains from industrial undertakings after a certain date, etc.

***80-I.** (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel [or the business of repairs to ocean-going vessels or other powered craft], to which this section applies, 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 twenty per cent thereof :

Provided *that in the case of an assessee, being a company, the provisions of this sub-section shall have effect [in relation to profits and gains derived from an industrial undertaking or a ship or the business of a hotel] as if for the words "twenty per cent", the words "twenty-five per cent" had been substituted.*

[(1A) Notwithstanding anything contained in sub-section (1), in relation to any profits and gains derived by an assessee from—

(i) an industrial undertaking which begins to manufacture or produce articles or things or to operate its cold storage plant or plants; or

(ii) a ship which is first brought into use; or

(iii) the business of a hotel which starts functioning,

on or after the 1st day of April, 1990, [but before the 1st day of April, 1991], 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 twenty-five per cent thereof :

Provided *that in the case of an assessee, being a company, the provisions of this sub-section shall have effect in relation to profits and gains derived from an industrial undertaking or a ship or the business of a hotel as if for the words "twenty-five per cent", the words "thirty per cent" had been substituted.]*

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely :—

(i) it is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India, and begins to manufacture or produce articles or things or to operate such plant or plants, at any time within the period of [ten] years next following the 31st day of March, 1981, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power :

Provided *that the condition in clause (i) shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section :*

Provided further *that the condition in clause (iii) shall, in relation to a small-scale industrial undertaking, apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.*

Explanation 1.—For the purposes of clause (ii) of this sub-section, any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machi-nery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.—Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

Explanation 3.—For the purposes of this sub-section, "small-scale industrial undertaking" shall have the same meaning as in clause (b) of the Explanation below sub-section (8) of section 80HHA.

(3) This section applies to any ship, where all the following conditions are fulfilled, namely :—

(i) it is owned by an Indian company and is wholly used for the purposes of the business carried on by it;

(ii) it was not, previous to the date of its acquisition by the Indian company, owned or used in Indian territorial waters by a person resident in India; and

(iii) it is brought into use by the Indian company at any time within the period of [ten] years next following the 1st day of April, 1981.

(4) This section applies to the business of any hotel, where all the following conditions are fulfilled, namely :—

(i) the business of the hotel is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of a building previously used as a hotel or of any machinery or plant previously used for any purpose;

(ii) the business of the hotel is owned and carried on by a company registered in India with a paid-up capital of not less than five hundred thousand rupees;

(iii) the hotel is for the time being approved for the purposes of this sub-section by the Central Government;

(iv) the business of the hotel starts functioning after the 31st day of March, 1981, but before the 1st day of April [1991].

[(4A) This section applies to the business of repairs to ocean-going vessels or other powered craft which fulfils all the following conditions, namely :—

(i) the business is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it is carried on by an Indian company and the work by way of repairs to ocean-going vessels or other powered craft has been commenced by such company after the 31st day of March, 1983, but before the 1st day of April, 1988; and

(iv) it is for the time being approved for the purposes of this sub-section by the Central Government.]

(5) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts

functioning [or the company commences work by way of repairs to ocean-going vessels or other powered craft] (such assessment year being hereafter in this section referred to as the initial assessment year) and each of the seven assessment years immediately succeeding the initial assessment year :

Provided *that in the case of an assessee, being a co-operative society, the provisions of this sub-section shall have effect as if for the words "seven assessment years", the words "nine assessment years" had been substituted :*

*[**Provided further** that in the case of an assessee carrying on the business of repairs to ocean-going vessels or other powered craft, the provisions of this sub-section shall have effect as if for the words "seven assessment years", the words "four assessment years" had been substituted:]*

*[**Provided also** that in the case of—*

(i) an industrial undertaking which begins to manufacture or produce articles or things or to operate its cold storage plant or plants; or

(ii) a ship which is first brought into use; or

(iii) the business of a hotel which starts functioning,

on or after the 1st day of April, 1990 [but before the 1st day of April, 1991], provisions of this sub-section shall have effect as if for the words "seven assessment years", the words "nine assessment years" had been substituted :

Provided also *that in the case of an assessee, being a co-operative society, deriving profits and gains from an industrial undertaking or a ship or a hotel referred to in the third proviso, the provisions of that proviso shall have effect as if for the words "nine assessment years", the words "eleven assessment years" had been substituted.]*

(6) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an industrial undertaking or a ship or the business of a hotel [or the business of repairs to ocean-going vessels or other powered craft] to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under sub-section (1) for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such industrial undertaking or ship or the business of the hotel [or the business of repairs to ocean-going vessels or other powered craft] were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

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

(8) Where any goods held for the purposes of the business of the industrial undertaking or the hotel or the operation of the ship [or the business of repairs to ocean-going vessels or other powered craft] are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel or the operation of the ship [or the business of repairs to ocean-going

vessels or other powered craft] and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the business of the industrial undertaking or the hotel or the operation of the ship [or the business of repairs to ocean-going vessels or other powered craft] does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship [or the business of repairs to ocean-going vessels or other powered craft] shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date :

Provided *that where, in the opinion of the [Assessing] Officer, the computation of the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship [or the business of repairs to ocean-going vessels or other powered craft] in the manner hereinbefore specified presents exceptional difficulties, the [Assessing] Officer may compute such profits and gains on such reasonable basis as he may deem fit.*

Explanation.—In this sub-section, "market value", in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market.

(9) Where it appears to the [Assessing] Officer that, owing to the close connection between the assessee carrying on the business of the industrial undertaking or the hotel or the operation of the ship [or the business of repairs to ocean-going vessels or other powered craft] to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in the business of the industrial undertaking or the hotel or the

operation of the ship [or the business of repairs to ocean-going vessels or other powered craft], the [Assessing] Officer shall, in computing the profits and gains of the industrial undertaking or the hotel or the ship [or the business of repairs to ocean-going vessels or other powered craft] for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(10) The Central Government may, after making such inquiry as it may think fit, direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to any class of industrial undertakings with effect from such date as it may specify in the notification.]

6. This Court notices that the question of law framed has now been answered in a series of decisions. In the first case i.e. ***J.P.Tobacco Products Pvt. Ltd vs Commissioner of Income Tax; (1998)229 ITR 123***, the Madhya Pradesh High Court, after noticing that sub-Section 9 of Section 80-HH was amended by Act No.30 of 1981, nevertheless, in relation to assessment year 1985-86, proceeded to hold that the benefits under Section 80-HH and Section 80-I were independent and consequently, there was no question of giving effect to Section 80-HH(9) and thereafter proceeding to bring the balance amount for the purposes of tax or benefit under Section 80-I.

7. The view in ***J.P. Tobacco*** *(supra)* was followed by several other High Courts i.e., Gujarat High Court, Allahabad High Court, Rajasthan High Court, the Punjab and Haryana High Court and even by a Division Bench of this Court [in ***CIT vs S.A. Engineering Pvt. Ltd. (2006) 285 ITR 423 (Del)***]. Ultimately this view was affirmed by the Supreme Court in ***Joint Commissioner of Income Tax vs. Mandideep Engineering and Packaging***

Ind. Pvt. Ltd. (2007) 292 ITR (1) SC. The relevant part of the discussion by the Supreme Court is as follows:-

> *"2. The Madhya Pradesh High Court in J.P.Tobacco Products P. Ltd. v. CIT reported in [1998] 229 ITR 123 took the view that both the sections are independent and, therefore, the deductions could be claimed both under sections 80HH and 80I on the gross total income. Against this judgment a special leave petition was filed in this court which was dismissed on the ground of delay on July 21, 2000 (see[2000] 245 ITR (St.) 71). The decision in J.P.Tobacco Products P. Ltd. [1998] 229 ITR 123 (MP) was followed by the same High Court in the case of CIT v. Alpine Solvex P. Ltd. in I.T.A. No. 92 of 1999 decided on May 2, 2000. Special leave petition against this decision was dismissed by this court on January 12, 2001, (see [2001] 247 ITR (St.) 36). This view has been followed repeatedly by different High Courts in a number of cases against which no special leave petitions were filed meaning thereby that the Department has accepted the view taken in these judgments. See CIT v. Nima Specific Family Trust reported in [2001] 248 ITR 29 (Bom); CIT v. Chokshi Contacts P. Ltd. [2001] 251 ITR 587 (Raj); CIT v. Amod Stamping [2005] 274 ITR 176 (Guj.); CIT v. Mittal Appliances P. Ltd. [2004] 270 ITR 65 (MP); CIT v. Rochiram and Sons [2004] 271 ITR 444 (Raj.); CIT v. Prakash Chandra Basant Kumar [2005] 276 ITR 664 (MP); CIT v. S. B. Oil Industries P. Ltd. [2005] 274 ITR 495 (P&H); CIT v. SKG Engineering P. Ltd. [2005] 119 DLT 673 and CIT v. Lucky Laboratories Ltd. [2006] 200 CTR 305 (All).*
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> *Since the special leave petitions filed against the judgment of the Madhya Pradesh High Court have been dismissed and the Department has not filed the special leave petitions against the judgments of different High Courts following the view taken by the Madhya Pradesh High Court, we do not find any merit in this appeal. The Department having accepted the view taken in those judgments cannot be permitted to take a contrary view in the present case involving the same point. Accordingly, the civil appeal is dismissed. No costs."*

8. In view of the above position in law, the question of law framed in this appeal is answered in terms of the law declared by the Supreme Court in ***Mandideep Engineering and Packaging Ind. Pvt. Ltd.*** *(supra)* and against the Revenue. The appeal is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 05, 2015
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