

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**INCOME TAX REFERENCE No. 17 of 1998****For Approval and Signature:****HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-****HONOURABLE MR.JUSTICE Z.K.SAIYED Sd/-**

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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, 1950 or any order made thereunder ? NO
 - 5 Whether it is to be circulated to the civil judge ? NO

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HIMSON FADIS MACHINERY PVT LTD - Applicant(s)
Versus
COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :

MR RK PATEL for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MR.JUSTICE Z.K.SAIYED
Date : 15/04/2008
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following two questions

under section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of assessee-applicant :

"1. Whether on the facts and circumstances of the case the Tribunal was right in confirming the orders of the C.I.T. made u/s. 263 holding that the assessee company was not entitled to deduction u/s.80-I for lack of satisfaction of the condition laid down in clause (ii) of sub-section (2) of Sec.80-I of the I.T.Act.

2. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that the CIT (A) rightly refused to entertain the appeal against the order of the A.O.giving effet to the order of the C.I.T. U/s. 263 for the A.Y.1987-88?"

2 The Assessment Years in question are Assessment Years 1987-88 and 1988-89 and the relevant accounting periods are calendar years ended on 31.12.1986 and 31.12.1987. The assessee, a Private Limited Company, came into existence during the accounting year ended on 31.12.1986. The assessee company took on lease machineries from one other Private Limited Company viz. Himson Engineering Private Ltd. For Assessment

Year 1987-88 hire charges to the tune of Rs.80,000/- were paid, and similarly Rs.1,20,000/- as hire charges were paid for Assessment Year 1988-89. The machineries, so taken on lease, were used by the assessee for manufacturing machine parts and also used for job work. Such manufacturing activity commenced from April, 1986. For the two years under consideration the assessee claimed deduction u/s.80I of the Act at Rs.27,840/- and Rs.61,440/- respectively. The said claim was allowed by the Assessing Officer.

3 The Commissioner of Income Tax (CIT) initiated proceedings u/s. 263 of the Act and issued notice on the following ground :

"Since the manufacturing work was done by you on the machineries hired by you and you have not got your own machineries you are not entitled for deduction u/s.80-I of the Act. The deduction was therefore wrongly allowed to you u/s.80-I of the Act".

The reply furnished by the assessee was not found to be satisfactory by the CIT and he came to

the conclusion that the conditions laid down in sub-section (2) of section 80I of the Act were not fulfilled and therefore the assessee was not entitled to relief u/s.80I of the Act. The CIT accordingly directed the Assessing Officer to withdraw the relief granted u/s.80I of the Act for Assessment Year 1987-88, while assessment for Assessment Year 1988-89 was set aside to make a fresh assessment considering the claim of the assessee on merits after making inquiries about the admissibility of the claim u/s.80I of the Act.

4 In relation to Assessment Year 1987-88, the Assessing Officer withdrew deduction u/s.80-I of the Act against which the assessee preferred appeal before Commissioner (Appeals). The First Appellate Authority did not entertain the Appeal against the order giving effect to the order of CIT as according to Commissioner (Appeals) he had no jurisdiction to admit the Appeal against an order made by CIT u/s. 263 of the Act. The said order was challenged by the assessee before the Tribunal.

5 In so far as the orders made by CIT u/s. 263 of the Act are concerned the assessee challenged the same before the Tribunal but did not succeed. The assessee had also preferred an Appeal before the Tribunal against the order of Commissioner (Appeals) refusing to entertain the Appeal but the said Appeal was dismissed by the Tribunal as the Tribunal had upheld the orders made by CIT for two years.

6 The learned Advocate for the applicant-assessee assailed the impugned order of the Tribunal by submitting that both CIT and the Tribunal had proceeded on an erroneous footing by reading the requirement of ownership of the machineries as being a pre-requisite for allowing relief u/s.80I of the Act. It was further submitted that even if the word "*transfer*" would include transfer by lease the other condition had also to be considered and the object of the provision borne-in-mind before making the disallowance. That in fact the impugned order of Tribunal did not correctly record the facts and hence order dated 31.12.1996 was sought to be rectified by filing Misc. Application u/s. 254(2) of the Act. It

was further submitted that in subsequent Assessment Years viz. Assessment Years 1990-91 to 1993-94 and the set aside assessment for Assessment Year 1988-89, the assessee had produced necessary evidence before Commissioner (Appeals) and had succeeded. Referring to the consolidated order dated 16.07.1994 of Commissioner (Appeals) it was submitted that despite the said details having been produced before the Assessing Officer the same were not considered by the Assessing Officer but considered favourably by Commissioner (Appeals) who held that the claim of the assessee that new machineries were given on hire was correct.

7 On behalf of the respondent revenue reliance was placed on the findings recorded by the Tribunal to submit that no interference was warranted.

8 In order dated 31.12.1996 the Tribunal has recorded thus :

"There is, however, no material available on record to show as to when the said industrial unit was set up by Himson Engineering Pvt. Ltd. and for how

long the said company carried on the business of manufacturing of machinery parts in the said industrial unit was neither set up by the assessee company nor it was new on its taking over on lease. Having regard to these facts, we find that condition at Sr.No.(ii) Above is not satisfied in the hands of Assessee Company as this condition provides that the industrial undertaking is not formed transfer to a new business of machinery of plant previously used for any purpose. The machinery and plant installed in the unit were earlier used by Himson Engineering Pvt. Ltd. and its taking on lease amongst to transfer from Himson Engineering Pvt. Ltd. to the Assessee Company".

The Misc. Application filed by the assessee seeking suitable modification in the order of the Tribunal came to be rejected by the Tribunal vide order dated 28.10.1997 refusing to modify the earlier order dated 31.12.1996. The reliance on the proceedings of subsequent years by the assessee also cannot carry the case of the assessee any further for the simple reason that against the order made by Commissioner (Appeals), the Revenue had carried the matter in Appeals before the Tribunal and the

Tribunal has vide order dated 3.7.2002 recorded :

"It is not disputed that the facts for the assessment years under appeal before us are exactly identical".

9 The position in law is therefore that the Tribunal has in the first instance held that there is no material available on record to show as to when the machineries belonging to Himson Engineering Private Ltd., which were leased out to the assessee company, were used by the said lessor company; that there was no material to show that the machineries hired by the assessee company was a new industrial unit set up by the assessee company, nor was there any material to show that such leased out machineries were new at the time of taking on lease. The Tribunal has therefore found that condition No. [ii] under sub-section (2) of section 80I of the Act was not satisfied. In fact the Tribunal has categorically recorded that the machineries and plant installed in the unit of the assessee had earlier been used by Himson Engineering Private Ltd. the lessor company, and the lease of the said machineries by Himson Engineering Private Ltd., amounts to

transfer from Himson Engineering Private Ltd. to the assessee company.

10 Though Commissioner (Appeals) in his order for subsequent years has recorded that as per list furnished by the assessee the machineries and plant were new in departmental appeals the Tribunal has recorded that it is not disputed that the facts for the Assessment Years under Appeal are exactly identical to the facts recorded for Assessment Years 1987-88 and 1988-89. The Tribunal has therefore refused to reconsider the earlier decision of the Tribunal on the same set of facts.

11 In this state of affairs and the findings recorded by the Tribunal even if, for the sake of argument one accepts the contention that the ownership of an industrial undertaking may not be necessary for claiming relief u/s.80I of the Act, when factually it is found by the Tribunal that the machineries and plant used by the assessee were not new there is no question of going behind the said finding. Hence, it is not necessary to enter into the

larger controversy as regards whether ownership of plant and machineries is, or is not, a necessary requisite for claiming relief u/s. 80I of the Act.

12 In light of the findings recorded by the Tribunal, it is not possible to record any other finding contrary to findings recorded by the Tribunal. The Tribunal was right in confirming the order made by CIT u/s. 263 of the Act holding that the assessee company was not entitled to relief u/s.80I of the Act. Accordingly question No.1 is answered in the affirmative i.e. in favour of the revenue and against the assessee.

13 In light of the answer to question No.1 it is not necessary to record any answer so far as question No.2 is concerned.

14 The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
(D.A.Mehta, J.)

Sd/-
(Z.K.Saiyed, J.)

M.M.BHATT

