

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B. RADHAKRISHNAN
&
THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN**

FRIDAY, THE 3RD DAY OF AUGUST 2012/12TH SRAVANA 1934

ITA.No. 34 of 2012 ()

ITA.299/COCH/2010 OF INCOME TAX APPELLATE TRIBUNAL,COCHIN BENCH, COCHIN

APPELLANT / RESPONDENT :

**M/S.SOUTHERN CASHEW EXPORTERS,
CHANDANATHOPE, KOLLAM**

**BY ADVS.SRI.ANIL D. NAIR
SRI.J.R.PREM NAVAZ
SMT.NIVEDITA A.KAMATH**

RESPONDENT / APPELLANT :

**THE DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE I, KOLLAM - 691 001**

**BY ADV. SRI.P.K.R.MENON (SR), SC, GOI (TAXES)
BY ADV. SRI.JOSE JOSEPH, SC, INCOME TAX**

**THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON 03-08-2012,
ALONG WITH ITA NO. 45/2012, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

Mn

...2/-

ITA.No. 34 of 2012 ()

APPENDIX

PETITIONER'S EXHIBITS :

**ANNEXURE A : COPY OF THE ORDER OF ASSESSMENT FOR THE YEAR 2002-03
ISSUED TO THE APPELLANT.**

**ANNEXURE B : COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX FOR
THE YEAR 2002-03 ISSUED TO THE APPELLANT.**

**ANNEXURE C : COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL,
COCHIN BENCH DT. 20.12.2011.**

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.S. TO JUDGE

Mn

**THOTTATHIL B. RADHAKRISHNAN
&
K.VINOD CHANDRAN, JJ.**

I.T.A.Nos.34 & 45 of 2012

Dated this the 3rd day of August, 2012

JUDGMENT

Vinod Chandran, J.

The assessee is in appeal before us against the orders of the Tribunal for the assessment years 2002-'03 and 2003-'04. The appellant/assessee is an exporter of cashew kernels and the assessments for the respective years were completed by accepting the returns under Section 143(1) of the Income Tax Act, 1961 (hereinafter called the Act). Subsequently noticing that the income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act, notice was issued under Section 148. The issue that arose was regarding the deduction claimed while computing the deduction under Section 80 HHC more specifically the deduction claimed with respect to the profit on sale of Duty Entitlement Pass Book (DEPB) (hereinafter referred to as DEPB). The assessing authority found that pursuant to the amendment brought in, in the year 2005 every assessee having turnover exceeding Rs.10 crores, for claiming entitlement of profits on sale of DEPB under Section 80 HHC; has to satisfy two conditions regarding availability of an option to choose either duty drawback or DEPB scheme and also that the duty drawback credit was higher than that available under

DEPB. Exporters of cashew having no such option and the assessee having failed to produce any evidence, the claim made by the assessee was disallowed.

2. Before the first appellate authority the assessee raised three specific grounds with respect to the disallowance of the claim under Section 80HHC. The first ground was on the reopening of the assessment under Section 147 alleging there was no material to invoke the provision. The next ground was regarding the reopening of the assessment on the ground of retrospective amendment of Section 80 HHC, since according to the assessee no retrospective amendment could have been made to withdraw the exemption or concessions already granted. The last ground was that the assessing officer was wrong in excluding the entire sale value of the DEPB licence for computing the deduction under Section 80 HHC. The assessee relied on a decision of the Special Bench of the ITA Tribunal, Mumbai in **Topman Exports Vs. The Income Tax Officer** (OSD) 14(2) Mumbai, ITA No.5769/MUM/2006 dt. 11.8.2009 to advance his contentions. The first ground was rejected by the first appellate authority holding that the reopening under Section 147 was done based on the retrospective amendment and was within the prescribed time limit and hence is valid. The 1st appellate authority, in any event could not have considered the validity of the retrospective

amendment. The ground regarding the inclusion of the entire sale value was considered on facts and it was held that the income from DEPB is accounted by the appellant only at the time of actual sale of DEPB licence.

3. The assessee was then before the Income Tax Appellate Tribunal and the appeal was rejected by a short order produced as Annexure-C. We find from the order that the issue raised by the assessee and considered by the Tribunal was only with respect to the reopening of the assessment under Section 147. Whether the assessing officer was entitled to withdraw the deduction in respect of DEPB incentive on the basis of the subsequent amendment. The Tribunal held that since in a similar situation the jurisdictional High Court has upheld the order of the assessing officer under Section 154; there is no infirmity in the action taken under Section 147. The assessee does not challenge the said finding in the instant appeal.

4. The present appeal has been filed raising the following question of law:-

“In the facts and circumstances of the case, ought not the Tribunal have allowed the Appeal filed by the assessee more showing the view of the judgment of the Supreme Court in Civil Appeal No.1700/2012 dated 8th February 2012 ?”

We are afraid that this question does not at all arise from the order of the Tribunal since the Tribunal considered only one issue as stated by us above.

5. The Supreme Court decision referred to by the assessee is reported in ***M/s. Topman Exports Vs. Commissioner of Income Tax, Mumbai*** [(342 ITR 49 (SC)]; and affirms the Special Bench decision cited supra. The issue that arose in the said case was whether on sale of DEPB the entire sale value could be treated as profit arising on transfer of DEPB for the purpose of clause (iiid) of Section 28. The argument before the Supreme Court was that in such circumstance there will be double taxation on the assessee since under clause (iiib) of Section 28 the cash assistance, equivalent to the face value of the DEPB would be taxed and the same again subjected to tax for a second time as profit on transfer of DEPB under clause (iiid) of Section 28. What is to be taken for the purpose of clause (iiid) of Section 28, according to the assessee before the Supreme Court, was the difference between the sale proceeds and the face value of DEPB. The Special Bench of the Tribunal at Mumbai held that the cost of acquiring DEPB is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against export has a cost element attached to it. The Supreme Court affirmed this view. When DEPB is sold by a

person, hence, his profit on transfer of DEPB would be the sale value of the DEPB, less the face value. In addition to the fact that the question of law framed by the assessee does not arise from the order of the Tribunal, we notice that the first appellate authority has clearly held in its order that the assessee has not accounted the income from the DEPB in any previous year and the same is accounted only at the time of actual sale of the DEPB licence. The issue based on the Supreme Court decision would be the bifurcation of face value of DEPB and the profits derived from sale of DEPB under sub section (iiib) & (iiid) of Section 28 of the Act. This issue was not raised before the Tribunal or considered by the Tribunal in the order which is appealed herein.

6. The learned counsel for the assessee then would contend that the retrospective amendment made by the Finance Act 2005 classifying exporters into those having turnover less than Rs.10 crores and above Rs.10 crores and also imposing conditions for claim of deduction under Section 80 HHC on the latter; more specifically on the profit derived by sale of DEPB; has been struck down by the High Court of Gujarat at Ahmedabad.

7. The validity of a provision cannot be considered or adjudicated upon by the Tribunal constituted under the Act. Section

260A provides for an appeal from every order passed by the Appellate Tribunal; if it involves a substantial question of law. Such question of law should arise from the order of the Tribunal. If the Tribunal cannot consider the validity of a retrospective amendment, no doubt such question does not arise from its order and the jurisdiction conferred on the High Court under Section 260A cannot also enable the High Court to consider such validity or otherwise.

8. The issue of the scope of Section 67 in the Income Tax Act, 1922 arose in **K.S.Venkataraman & Co. Vs. State of Madras (1966) 2 SCR 229**. Section 67 was a bar to the maintainability of a suit against assessments made under the Act. Whether the restriction applied in the event of the assessing officer giving effect to an *ultra vires* provision; was the question dealt with. After noticing the provisions empowering the Income Tax officers to make assessments and the two tier appeal respectively before the Assistant Appellate Commissioner and ITAT, the Supreme Court held:

“Up to this stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the ground that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them. Their jurisdiction is confined to the assessment of the income and the tax under the provisions of the Act. Whether the provisions are good or

bad is not their concern. But, it is said that s.66 of the Act makes all the difference. Section 66 is in two parts. Under s.66(1), within the prescribed time, on an application made by an assessee or the Commissioner, the Appellate Tribunal shall refer to the High Court any question of law arising out of such order; if the Appellate Tribunal refuses to state a case, on an application filed by either of them, the High Court may require the Appellate Tribunal to state the case and to refer the same to it accordingly. On a reference made by the Appellate Tribunal to the High Court, the High Court shall decide the questions of law raised thereby and pass its judgment thereon and thereafter the Appellate Tribunal may pass such orders as are necessary to dispose of the case conformably to such judgment. It has been held by this Court that the jurisdiction conferred upon the High Court by s.66 of the Income-tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is *ultra vires* of the Legislature arises out of the Tribunal's order? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of *ultra vires* is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the *ultra vires* of a

provision. At the most the only question that it may be called upon to decide is whether the Tribunal has jurisdiction to decide the said question. On the express provisions of the Act it can only hold that it has no such jurisdiction. The appeal under s.66A(2) to the Supreme Court does not enlarge the scope of the said jurisdiction. This Court can only do what the High Court can.”

Though the provisions for reference to the High Court, by the Tribunal, of questions of law arising from the order is no longer in existence; the jurisdiction going by the words employed in Section 260A, of the Income Tax Act, 1961, remains the same.

9. By following or dissenting from the judgment of the High Court of Gujarat, we would be determining the constitutional validity of the amendment of 2005. We would then be stepping out of and beyond the scope of the jurisdiction under Section 260A. The assessee too has not raised such a question in the appeal.

For the reasons stated above we reject the appeals filed by the assessee.

**THOTTATHIL B. RADHAKRISHNAN,
JUDGE.**

**K.VINOD CHANDRAN,
JUDGE.**

okb.