Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEALS NO.62/2014 & 13/2015

Commissioner of Income Tax
"Aaykar Bhavan",
Patto, Panaji, Goa. ….. Appellant.

Versus

M/s. Borkar Packaging Private Limited,
Lake Plaza, Opp, Nehru Stadium,
Fatorda, Margao, Goa.
PAN NO.AAACB 7618N …… Respondent.

Ms. Suzan Linhares, Standing Counsel for the Appellant.

Mr. S. R. Rivankar, Senior Advocate with Mr. Rama Rivankar, Advocate for the Respondent.

Coram : M.S. Sonak &
Dama Seshadri Naidu, JJ.

Date : 29th September, 2020

ORAL JUDGMENT : (Per M.S. SONAK, J.)

Heard Ms. Linhares, the learned Standing Counsel for the Revenue and Mr. S.R. Rivonkar, the learned Senior Advocate for the Assessee.

2. In so far as Tax Appeal 13/2015 is concerned, the Appeal Memo makes reference to Assessment Year 2006-07. In fact, Tax Appeal No.62/2014 pertains to the Assessment Year 2006-07. Even the Memo of Appeal in Tax Appeal No.13/2015 is identical to the

Memo of Appeal in Tax Appeal No.62/2014.

3. Ms. Linhares, however, pointed out that there may be a mistake in stating the correct assessment year in the Memo of Appeal in Tax Appeal No.13/2015. She submits that the relevant assessment year, in so far as the said appeal, would be 2007-08. She, therefore, orally applied for leave to amend the Memo of Appeal.

4. We were inclined to grant the leave to amend the Memo of Appeal and we even indicated as such. However, later on Mr. S. R. Rivankar, the learned Senior Advocate appearing for the Respondent pointed out that vide Judgment and Order dated 13th January, 2015, this Court disposed of Tax Appeal No.64/2014 which pertained to the Assessment Year 2007-08.

5. Upon the aforesaid being pointed out, Ms. Linhares did not press for leave to amend the Memo of Appeal in Tax Appeal No.13/2015. It appears that by mistake two appeals have been filed in respect of Assessment Year 2006-07. Since, we propose to consider Tax Appeal No.62/2014, which was instituted prior in point of time, it is not necessary to consider Tax Appeal No. 13/2015. Tax Appeal No.13/2015 is, accordingly, disposed of as infructuous or, in any case, on the ground that the same was filed inadvertently and, therefore, requires no consideration.

6. We now proceed to consider Tax Appeal No.62/2014 which pertains to the Assessment Year 2006-07.

7. Tax Appeal No.62/2014 was admitted by order dated 1st October, 2014 on the following substantial questions of law :

> *(A) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, is right in allowing deduction under Section 80IB and under Section 80IC ignoring the fact that the assessee has not furnished properly filled Form No.10CCB report. The statute requires such obligation and it is seen from the 10CCB report that such obligation has not been properly complied with.*
>
> *(B) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, is right in allowing deduction under Section 80IC amounting to Rs.2,95,50,892/- ignoring the fact that the Assessing Officer has disallowed deduction under Section 80IC of the IT Act, for Nalagarh Unit on basis of alleged disparity in ratio between consumption of electricity and sales in different assessment years in appellant different Unit ?*
>
> *(C) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, is right in admitting the new evidences such as details of expenditures incurred by the assessee along with the copy of accounts and necessary evidences in the shape of the bills, vouchers and other documents which were not produced earlier before the AO without giving any opportunity to the AO ?*

8. Tax Appeal No.13/2015 was admitted by order dated 9th April, 2015 on the same substantial questions of law.

9. Accordingly, the learned Counsel for the parties agree that both these Appeals can be disposed of by a common Judgment and Order.

10. In this case, the Assessing Officer, in respect of both the assessment years, declined the Assessee deduction under Section 80IB of the Income Tax Act, 1961, mainly on the ground that the Assessee had not properly filled in Form 10CCB. This form, *inter alia*, relates to the details of number of workers working in various units of the Assessee.

11. The AO disallowed the Assessee deduction under Section 80IC by reasoning that there was a serious disparity in the rate of consumption of electricity and the sales as between Nalagarh Unit of the Assessee and the other Units of the Assessee at Daman and Goa.

12. The Assessee appealed to the Commissioner of Income Tax (Appeals) and such appeals were allowed and deductions under Section 80IB and Section 80IC of the Income Tax Act were directed to be granted to the Assessee.

13. The Revenue then appealed to the Income Tax Appellate Tribunal (ITAT) and by the impugned orders, the ITAT dismissed the appeals. Hence, these Appeals which came to be admitted on the aforesaid substantial questions of law.

14. At the outset, we note that nothing was pointed out to us to suggest that the ITAT in these matters admitted any new evidences. In the absence of the ITAT admitting any new evidences, the substantial question of law 'C', as framed, really will not even arise.

15. In so far as the substantial question of law 'A' is concerned, the only reason why the AO denied the Assessee deduction under Section 80IB was, because, the Assessee in Form No.10CCB failed to provide the details of number of workmen working in each of the Units of the Assessee. Now, although it is true that there was this omission on the part of the Assessee whilst filling in the Form 10CCB, it is not as if this omission was not rectifiable. In fact, the AO should have granted the Assessee an opportunity for rectifying this omission.

16. Ultimately, the Assessee even prior to the assessment, produced material before the AO, which evidences that each of the Units of the Assessee employed more than 10 workers. This means that there was material before the AO to conclude that the Assessee fulfilled the conditions required for claiming deduction under Section 80IB. In these circumstances, both, the Commissioner (Appeals), as well as the ITAT, were quite justified in directing grant of deduction under Section 80IB to the Assessee.

17. In the case of *Hindustan Steel Limited vs. State of Orissa*[1] the Hon'ble Supreme Court has held that mere furnishing of deduction form 10CCB could, at the most, be a default of technical and venial nature. Such omission cannot be held to be so fatal as to merit the penalty of disallowance of deduction under consideration. The view taken by the Commissioner (Appeals) and the ITAT is in consonance with the law laid down by the Hon'ble Apex Court in *Hindustan Steel Limited* (supra). Accordingly, the substantial question of law 'A' is required to be decided against the Revenue and in favour of the Assessee.

18. In so far as substantial question 'B' is concerned, the AO has compared the consumption of electricity in various Units of the Assessee and on such basis, concluded that the profits in respect of the newly established Unit at Nalagarh appeared to be unreasonably high. The AO has held that the profits are not matching with the consumption of the electricity at the said Unit. On this basis, the AO denied the Assessee deduction under Section 80IC of the Income Tax Act.

19. The record indicates that the Assessee, in this case, had offered detailed explanation as to why the production and consequently profits at the Nalagarh Unit is higher than the production and profits at the Units in Goa and Daman. The

[1] 83 ITR 26 (SC)

explanation is summarized in paragraph 6.2 of the AO's order, which reads as follows :

> *"6.2 The reasons for such peak performance in one unit selectivey were brought to the notice of the assessee's representative. The assessee in its letter dated 09-11-2011 has submitted that the comparison of the sales of Nalagarh Unit with the sales of the other units with regard to electricity expenses is for the following reasons:*
>
> *a) The machineries at Goa Units are 20 years old whereas the machineries at Daman are 10 years old, and machineries at Nalagarh Unit are less than 1 year old.*
>
> *b)) The Goa Unit is manufacturing only two colour printing, whereas the Daman Unit is manufacturing six colour printing and Nalagarh Unit is manufacturing in multiple colours.*
>
> *c) All the machineries are of different technologies.*
>
> *d) The machineries at Nalagarh are fully automatic and technically advanced with much higher output i.e. more than 10 times higher than machineries at Goa and Daman.*
>
> *e) The requirements of the customers of Nalagarh Unit is entirely different from the units of Goa & Daman.*
>
> *f) The sale value and contribution of Nalagarh Unit is much higher due to quality of printing as compared to other units.*
>
> *g) The products manufactured at Goa & Daman are excisable products whereas Himachal Pradesh Unit is operating under Excise Exemption for 10 years. Hence, no sales can be diverted from Goa & Daman to Nalagarh.*
>
> *h) Distance of Nalagarh Unit is 2300 km. from Goa and 1750 km from Daman.*
>
> *i) The customers of Nalagarh Unit are located in*

Himachal Pradesh due tax advantages.
j) The electricity power rates at Goa and Daman are different the power rates at Himachal Pradesh. "

20. The AO rejected the aforesaid explanation by observing that the consumption of electricity is increased only by 1497%, but the sales have increased by 7102%.

21. Now, both the Commissioner (Appeals) as well as the ITAT, have quite correctly held that the alleged mismatch between the production and the profits at the various Units as determined by consumption of electricity at such units, cannot be the sole ground for concluding that there has been some unreasonable inflation of profits. The two authorities have held that several factors can contribute to the increased profits and upon consideration of such several factors which were not only pleaded, but made good by the Assessee to conclude that there was no good ground to deny the Assessee deduction under Section 80IC of the Income Tax Act. According to us, the two authorities, having recorded the concurrent findings on this issue, the substantial question 'B' does not deserve to be answered in favour of the Revenue.

22. There is no perversity pointed out in the appreciation of the material on record by the Commissioner (Appeals) and the ITAT. In fact, these two authorities have applied the correct principles and the correct tests for determining whether there is indeed any inflation in

the production figures or in the consequent profits. These two authorities have held that it is not proper to focus on the singular aspect of the alleged disparity in the electricity consumption and the production figures.

23. The reasoning of the ITAT on this issue is to be found in paragraph 11.3 of the impugned order and the same reads as follows :

> *"11.3 We have heard the rival contention of both the parties, looking to the facts of the circumstances of the case, we find that the Assessing Officer has verified the electricity consumed and sales in different unit situated at different far way places. The Assessing Officer has verified the disparity of electricity consumption of Nalagarh Unit and income of sales of Nalagrah Unit in comparison to other units were higher. The main contention of the AO that in comparison to electricity consumed the sales of Nalagarh Unit has shown very high sales. We find that the assessee has explained before us that the machineries at Goa Units are 20 years old whereas the various machineries at Daman are 10 years old, and machineries at Nalagarh Unit are less than 1 year old. All the machineries are of different technologies. The Goa Unit is manufacturing only two colour printing, whereas the Daman Unit is manufacturing six colour printing and Nalagarh Unit is manufacturing in multiple colours. The machineries at Nalagarh are fully automatic and technically advanced with much higher output i.e. more than 10 times higher than machineries at Goa and Daman which are capable of achieving this production more efficiently with less than consumption of electricity. The requirements of customers at Goa Unit are different from those of Daman Unit. The quality of printing, sale value and contribution of Nalagarh Unit is much higher as compared to other units. The products*

manufactured at Goa & Daman are excisable products whereas Nalagarh Unit is excise exempt for 10 years. Moreover the electricity power rate at Goa, Daman are different from the power rates at Himachal Pradesh. We find that the Commissioner of Income Tax was of the view that the AO should bring out the reason of more sales at Nalagarh Unit. We find that AO has not carried out any excise. We find that in the instant case, the AC has not rejected the books of account. We find that there are many reasons for higher electricity consumption, therefore, on this simple disparity the AO cannot disallow the deduction U/s 80IC. We find that the CIT(A) has dealt this issue in detail. Therefore, our interference is not required"

24. Again, we find that the view taken by both, the Commissioner (Appeals) as well as the ITAT, is a reasonable view. The findings arrived at by both the authorities are substantially turned out from the material on record. Accordingly, it cannot be said that there is any perversity involved either in recording of the findings, or in the approach adopted by the Commissioner (Appeals) and the ITAT. It will not be possible to answer the substantial question 'B' in favour of the Revenue and against the Assessee.

25. Since Ms. Linhares was unable to point out any documents which were said to have been admitted by the ITAT as new evidences, the substantial question 'C' does not arise and the same is not required to be answered. The subtantial questions of law at 'A' and 'B', in the facts and circumstances of the present case, are answered against the Revenue and in favour of the Assessee.

26. The Appeals are, accordingly, disposed of in the aforesaid terms.

27. There shall, however, be no order as to costs.

Dama Seshadri Naidu, J. ***M.S. Sonak, J.***