ORDER SHEET

ITA 767 OF 2008
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIOENR OF INCOME TAX, KOLKATA-III
Versus
M/S. ITC LIMITED, KOLKATA

BEFORE:
The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ASHA ARORA
Date : 22nd June, 2016.

For Appellant/Petitioner : Mr.P.K.Bhowmik,Advocate

For Assessee : Mr.J.P.Khaitan,Sr.Advocate
Ms.Nilanjana Banerjee (Pal),Advocate

The Court : The appeal is directed against a judgement and order dated 7th March, 2008 passed by the learned Income Tax Appellate Tribunal "E" Bench, Kolkata in ITA No.1527 (Kol) of 2007 pertaining to the assessment year 2004-05 by which an appeal preferred by the Revenue was dismissed. Aggrieved revenue has once again come up in appeal which was admitted on 20th November, 2008 and the following question of law as suggested by the revenue was admitted by the court :

"Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal, "E" Bench Kolkata erred in law in allowing the assessee's appeal and directing to the Assessing Officer to exclude foreign exchange receipts taken into account for the purpose of deduction under

section 80HHD of the Income Tax Act, 1961 from the total turnover for the purpose of calculation of deduction under section 80HHC of the Income Tax Act, 1961 ?"

Mr.Bhowmik, learned advocate appearing for the appellant/revenue submitted, at the very outset, that there is an inadvertent error in the question formulated, in that, the learned Tribunal by the impugned judgement had dismissed an appeal preferred by the revenue. Therefore, the question should be reformulated as below :

"*Whether, under the facts and circumstances of the case, the Income Tax Appellate Tribunal erred in upholding the views of the CIT(Appeal) who had directed the assessing officer to exclude Foreign Exchange receipts taken into account for the purpose of deduction under section 80HHD of the Income Tax Act, 1961 from the total turn over for the purpose of calculation of deduction under section 80HHC of the Income Tax Act, 1961 ?"*

The CIT (A) had held in favour of the assessee on the basis of an earlier order of the Tribunal passed on 25th February, 2005 in ITA Nos. 888 and 889 (Kol)/2004. When the matter came up before the learned Tribunal, the learned Tribunal also upheld the order of the CIT for the same reasons assigned by the learned Tribunal in its judgement and order dated 25th February, 2005 which to be precise are as follows :

"*We have heard the parties and considered their rival submissions. We have also carefully perused the orders of the lower authorities on this issue. The* *principle of keeping the numerator and the denominator in the same proportion is discussed at length by the Hon'ble Bombay High Court in the case of C.I.T. vs. Sudarshan Chemicals Ltd. (245 ITR 769) and by the Hon'ble Calcutta High Court in the case of CIT vs. Chloride Industries Ltd. (supra). According to the said judgement of Hon'ble High Courts, deduction eligible u/s. 80HHC would be in the following manner :-*

Profits arising of the business (export of goods) X Export turnover (export of goods)

Total turnover of the business

On reading of Sec.80HHC, it would be evident that neither the profits contain profits of hotel business nor the export turnover contains the receipts from hotel business. In that event, if the total turnover includes the receipts from hotel business, the entire claim will be wayward and the basic intention of proportionate deduction would be redundant. As per the said judicial pronouncements, the turnover should be restricted to such receipts which have an element of profit derived from export of goods. Therefore, respectfully following the principle laid down by the Hon'ble Courts, referred to above, the total turnover has to be reduced by the amount of gross receipts from such hotel business in order to keep the parity between the numerator and the denominator. In this view of the matter, we uphold the order of the Ld.C.I.T.(A) on this issue and direct the A.O. to recalculate the allowable deduction u/s.80HHC as per guidelines mentioned hereinabove."

Mr. Bhowmik appearing for the appellant-revenue drew our attention to sub-section 7 of section 80HHD, which provides as follows:-

"(7) Where a deduction under sub-section (1) is claimed and allowed in respect of profits derived from the business of a hotel, such part of profits shall not qualify to that extent for deduction for any assessment year under any other provisions of this Chapter under the heading "C.-Deductions in respect of certain incomes", and shall in no case exceed the profits and gains of such hotel.

Explanation.-For the purposes of this section,-

(a) "travel agent" means a travel agent or other person (not being an airline or a shipping company) who holds a valid licence granted by the Reserve Bank of India under section 32 of [the Foreign Exchange Management Act, 1999 (42 of 1999)];

(b) "convertible foreign exchange" shall have the meaning assigned to it in clause (a) of the Explanation to section 80HHC;

(c) "services provided to foreign tourists" shall not include services by way of sale in any shop owned or managed by the person who carries on the business of a hotel or of a tour operator or of a travel agent;

(d) "authorised dealer", "foreign exchange" and "Indian currency" shall have the meanings respectively assigned to them in clauses (b), (h) and (k) of section 2 of [the Foreign Exchange Management Act, 1999 (42 of 1999)];

(e) "eligible issue of capital" means an issue made by a public company formed and registered in India and the entire proceeds of the issue is utilised wholly and exclusively for the purpose of carrying on the business of-

(i) setting up and running of new hotels approved by the prescribed authority; or

(ii) providing such new facility for the growth of tourism in India, as the Central Government may, by notification in the Official Gazette, specify."

He submitted that deduction availed by an assessee under section 80HHD cannot be the subject matter of any deduction under the heading 'C' of Chapter VIA of the Income Tax Act. He contended that section 80HHC is also a part of Chapter VIA under the heading 'C'. It is because of this reason that the profit earned by the assessee from the hotel business was not taken into account but the turnover of the hotel business was taken into account for the purpose of working out the deduction admissible under section 80HHC.

We have not been impressed by this submission. Section 80HHC provides for deduction in respect of profits retained for export business whereas section 80HHD provides for deduction in respect of earnings in convertible foreign exchange when the assessee is engaged in the business of a hotel or of a tour operator in India. It is a fortuitous circumstance that the assessee before us is engaged both in the business of hotel and in the business of export. The assessee has income in convertible foreign exchange arising from hotel business in India.

It also has income from export business. The assessee is, therefore, entitled to deductions both under section 80HHC and under section 80HHD. The deduction under section 80HHD has duly been allowed to him. The question arose with respect to the quantum of deduction available to the assessee. The assessing officer was of the opinion that in arriving at the income earned by the assessee from export business the turnover of the hotel business has to be taken into account. In that case the percentage of his profit shall go down. It was not the intention of the legislature that the benefit under section 80HHC is to be regulated by the turnover of the hotel business to which section 80HHD is applicable. 80HHC and 80HHD are two different channels. They provide for benefit of two different characters. The benefit receivable under section 80HHC is not regulated by the benefit received or receivable by the assessee under section 80HHD. Similarly, the benefit received or receivable under section 80HHD by the assessee is not regulated by the benefit received or receivable under section 80HHC. Appropriate reasons in that regard were also advanced by the learned Tribunal in its judgment and order dated 25th February, 2005 passed in ITA Nos.888 and 889(Kol)/2004 with which we are in agreement. The department had accepted the judgment of the learned Tribunal. The department subsequently, however, by a second thought made a half-hearted attempt by presenting an appeal with an application for condonation of appeal of 900 days, which was dismissed in limine by an order dated 12th May, 2008 which reads as follows:-

"We have perused the application for condonation of delay. We do not find any sufficient cause or ground in the application to condone the delay of 900 days. Further, we have perused the order passed by the Tribunal. We have found that the Tribunal has extensively dealt with the matter including the facts, materials and evidence placed before the Tribunal for adjudication. We do not find any reason to interfere with the order so passed by the learned Tribunal nor the order so passed by the learned Tribunal suffers from any legal infirmity nor we find that any substantial question of law is involved in this appeal.

Hence, we dismiss the application and the appeal without any order as to costs."

For the aforesaid reasons, the question reformulated by us is answered in the negative and against the revenue.

The appeal is thus dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)

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