IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

ITA No. 253 of 2007(O&M)
Date of decision :19.10.2016

The Commissioner of Income Tax-III, Ludhiana

.....Appellant

Versus

M/s Nahar Export Ltd.

.....Respondent

CORAM : HON'BLE MR. JUSTICE S.J.VAZIFDAR,CHIEF JUSTICE
HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. Rajesh Katoch, Advocate
for the appellant.

Mr.Sanjay Bansal, Sr. Advocate
with Mr. Amit Parsad, Advocate
and Mr. B.S.Monga, Advocate
for the respondent.

****

S.J. VAZIFDAR, CHIEF JUSTICE.

This is an appeal against the order of the Income Tax Appellate Tribunal (hereinafter referred to as "Tribunal") pertaining to the Assessment Year 1998-99.

2. The tribunal remanded the issue pertaining to the respondent-assessee's claim for deduction under Section 80 IA of the Income Tax Act, 1961 (for short "Act") with a direction to the Assessing Officer (for short 'A.O') to recalculate the same by applying the same method which had been followed in respect of the trading loss while allowing the deduction under Section 80

HHC.

3. The appellant contended that four substantial questions of law arise in the case. By an order dated 12.11.2009, a Division Bench of this Court admitted the appeal only as regards question No. 2, which reads as under:-

> "2. Whether on the fact and circumstances of the case, the Hon'ble ITAT was right in law in directing the Assessing Officer to compute the deduction u/s 80 IA by following the method in section 80 HHC (3) for working out profit/loss from trading goods?"

4. Mr. Sanjay Bansal, the learned Senior counsel appearing on behalf of the respondent raised a preliminary objection as to the maintainability of this appeal. He contended that the tax effect is less than ₹ 20 lacs and therefore, the appeal is not maintainable in view of circular No. 21/2015 dated 10.12.2015 issued by the Central Board Direct Taxes under Section 119 of the Act.

5. It is admitted by the parties that the aggregate tax effect of all the questions raised in this appeal is more than ₹ 20 lacs. It is also agreed that the tax effect in respect of question No. 2 itself is less than ₹ 20 lacs. The question that falls for consideration is whether the tax effect for the purpose of the said circular is to be determined on the basis of the aggregate tax effect in the appeal or only on the basis of the value of the tax effect of the question on which the appeal is admitted.

6. In support of his contention that the tax effect of only the question on which the appeal is admitted and not the tax

effect of the entire appeal is to be considered, Mr. Bansal, relied upon the following provisions of the circular:-

> "4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.
>
> 5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately.
>
> 6. In a case where appeal before a Tribunal or a Court is

> not filed only on account of the tax effect being less than the monetary limit prescribed above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits."

7. Mr. Rajesh Katoch's contention on behalf of the appellant-revenue that the tax effect must be determined on the basis of the entire appeal and not merely on the basis of the individual questions of law and issues raised therein is well founded. This is clear from the plain language of the circular. Paragraph 4 states that the "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which the appeal is intended to be filed. Therefore, the value depends upon the issues against which the appeal is intended to be filed by the Revenue. The sustainability of the Revenue's case is not relevant at that stage. What is relevant is the tax effect in respect of the issues that the Revenue intends carrying in appeal. Moreover, paragraph 4 refers to the tax on the total income assessed and not the tax on those issues on which the Revenue succeeds or is even likely to succeed. When

the Revenue decides to file an appeal, it is reasonable to presume that it expects to succeed in the appeal. It is axiomatic then that the tax effect must be determined with reference to the appeal as a whole and not to any particular issue in the appeal.

8. Paragraph 5 of the circular also supports Mr. Katoch's submissions. It provides that the AO shall calculate the tax effect separately "for every assessment year in respect of the disputed issues". The tax effect therefore is to be computed in respect of the assessment year and not in respect of any particular claim or item in the assessment proceedings pertaining to the relevant year. The second sentence in paragraph 5 also supports the contentions on behalf of the Revenue. It provides that where the disputed issues arise in more than one assessment year an appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limits specified in paragraph-3. The monetary limit, therefore, is qua the disputed issues taken together and not qua any particular disputed issue. The fourth sentence in paragraph 5 further supports this contention as it provides that appeals can be filed only with reference "to the tax effect in the relevant assessment year". It does not refer to the tax effect qua each independent issue in respect whereof the appeal is filed.

9. In the result, the monetary limit stipulated in paragraph 3 of the circular must be determined on the basis of

the appeal considered as the whole and not in respect of any individual issue or question raised in the appeal.

10. The appeal is therefore maintainable as the aggregate tax effect therein exceed the limit of ₹ 20 lakhs stipulated in the circular. We therefore proceed to deal with the question-2 set out above in respect of which alone the appeal has been admitted.

11. The assessee admittedly carries on trading as well as manufacturing and export activities. Admittedly, the manufacturing activity is an eligible activity under Section 80 IA. The assessee is, therefore, entitled to the benefit of deduction under Section 80 IA.

12. The AO, however came to the conclusion that the sale price is not verifiable. In view thereof, he observed that the assessee's claim that it had incurred a loss qua its trading activities was not acceptable. He came to the conclusion that the profit earned by the assessee's eligible unit was not only on account of its manufacturing activities but also from its trading activities. It is difficult to understand the basis on which this observation is made for while computing the assessee's claim under Section 80 HHC in Annexure B to the assessment year, it is expressly stated that the profit from the export of trading activity was Rs.(-)1,54,18,954/-. While applying the formula under Section 80 HHC, this is reiterated. In other words, the finding is that there was a loss to the extent of Rs.

1,54,18,954/- in respect of the assessee's trading activities. The AO then proceeds to observe that the assessee had not maintained separate books of accounts for these two activities and that the ratio of turnover is also not known. It is therefore, observed that the only way out is to split the profit on the basis of the ratio of expenses on purchases and direct expenses of the two activities. The AO found that the total cost of material and other direct expenses was about Rs. 142.46 crores as against which the total cost of traded goods was Rs. 22.47 crores. He, therefore, directed that while computing the deduction under Section 80 IA, 1/ 7th of the profits would be excluded from the total profit.

13. The CIT (A) on the other hand noted that the computation of the loss in respect of the trading activities was filed by the assessee by its letter dated 20.10.2000. The CIT(A) accepted the assessee's contention that the AO had ignored the amount of loss computed by the company without any basis or evidence and reduced the same from the profits of the industrial undertaking. The CIT(A) also accepted the contention that the AO had estimated the profits on mere guess work and that there would be no justification for applying a different yardstick and method for computing the results of the trading activities while dealing with claims under Sections 80 IA and 80 HHC. In other words the finding of the CIT(A) is that the AO having accepted, on the basis of the assessee's books of account, that there was a

loss in respect of the trading activities while dealing with the case under Section 80 HHC could not come to a contrary conclusion while dealing with the claim under Section 80 IA. The loss in the trading activities is still a loss.

14. We are unable to hold that this finding which is essentially one of fact is perverse or absurd. To say the least, it is a possible view. Question-2 therefore, raises essentially a question of fact or an analysis of the facts on record and does not raise a substantial question of law. Nor are we able to say, as suggested on behalf of the respondent, that the analysis of the facts is perverse.

15. The Tribunal has upheld the findings of the CIT(A) on the same basis. Having done so, the Tribunal rightly remanded the issue to the AO to recalculate the deductions under Section 80 IA.

16. In the result, the appeal though held to be maintainable, is dismissed on merits.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DARSHAN SINGH)
JUDGE

October 19, 2016
s.khan

Whether speaking/reasoned : Yes

Whether Reportable : Yes