(2012) 12 P&H CK 0203

High Court Of Punjab And Haryana At Chandigarh

Case No: IT Appeal No. 312 of 2011

Commissioner of Income Tax	APPELLANT
Vs	
Abhishek Industries Ltd.	RESPONDENT

Date of Decision: Dec. 20, 2012

Acts Referred:

- Income Tax Act, 1961 - Section 143(3), 260A, 263, 263(1), 80HHC

Citation: (2013) 255 CTR 504

Hon'ble Judges: Surya Kant, J; R.P. Nagrath, J

Bench: Division Bench

Advocate: Rajesh Katoch, for the Appellant; Akshay Bhan, for the Respondent

Judgement

R.P. Nagrath, J.

This appeal filed by CIT-I, Ludhiana under s. 260A of the IT Act, 1961 (for brevity ''IT Act'') challenges the order dt. 29th April, 2011 passed by the Tribunal, Bench ''A'', Chandigarh. The facts of the case in brief are that Jt. CIT, Range-I, Ludhiana, the AO passed the assessment order dt. 28th Dec, 2006 under s. 143(3) of the IT Act in respect of the respondent-assessee for the asst. yr. 2004-05. The CIT exercising his revisional powers under s. 263 of IT Act, found the assessment order to be prima facie erroneous and prejudicial to the interest of Revenue as the relief granted under s. 80IA, was not deducted from the profits and gains of the business before computing relief under s. 80HHC of the IT Act. The respondent-assessee was, thus, served with a show-cause notice dt. 18th/20th Feb., 2009 under s. 263 of IT Act.

2. After hearing the respondent-assessee by the revisional authority in its order dt. 18th March, 2009 (Annex. A2) observed as under:

3.1.1. For the sake of coherence second argument put forth by the assessee company is discussed at first place. Sub-s. (9) of s. 80IA is reproduced as under:

(9) Where any amount of profits and gains of an undertaking or of an enterprise in the case of an assessee is claimed and allowed under this section for any assessment year, deduction to the extent of such profits and gains shall not be allowed 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 eligible business of undertaking or enterprise, as the case may be.

3.1.2. Very plain reading of sub-section makes it amply clear that where any amount of profits and gains in the case of an assessee is claimed and allowed under s. 80IA, deduction to the extent of such profits and gains shall not be allowed under this chapter i.e. Chapter VI-A. Sec. 80HHC also falls in Chapter VI-A, therefore, deduction under s. 80HHC is not to be computed on profits and gains of an industrial undertaking on which deduction under s. 80IA has been allowed.

3. It was also found that due to non-application of correct law, deduction under s. 80HHC has been allowed in excess, which has resulted into lesser taxable income and thus the order is prejudicial to the interest of Revenue. To this extent the order of AO was set aside and it was directed to compute the deduction under s. 80HHC after giving due opportunity of being heard to the assessee.

4. The Tribunal allowed appeal of the assessee-respondent thus concluding that:

17. The issue raised in the present appeal is identical to the issue raised before the Hon''ble Delhi High Court i Commissioner of Income Tax Vs. Honda Siel Power Products Ltd., In the facts of the present case before us and elaborated by us in the paras hereinabove, the AO had allowed the deduction under ss. 80IA and 80HHC of the Act without resorting to the provisions of s. 80IA(9) of the Act. Merely because the issue does not find mention in the assessment order, there is no presumption that no enquiry was made by AO, especially in view of the various aspects of deductions allowable under ss. 80IA and 80HHC of the Act which were elaborately considered and decided by AO, as referred to by us in paras hereinabove. Further, the issue was covered in favour of the assessee by the orders of Tribunal at the relevant time and the AO having taken such a view, cannot be said to be incorrect application of law. In the totality of facts and circumstances and following the ratio laid by the Hon''ble Delhi High Court in the case of CIT vs. Honda Siel Power Products Ltd. (supra), we find no merit in the order of CIT as the view taken by the AO was one of the views and accordingly the same could not be held to be erroneous and prejudicial to the interest of justice. Accordingly, we cancel the order passed by the CIT under s. 263 of the Act. The ground of appeal raised by the assessee is thus allowed.

5. In this appeal filed by CIT against the above order of the Tribunal, following substantial question of law has been proposed:

Whether, on the facts and circumstances of the case, the Hon''ble Tribunal has erred in law in cancelling the order dt. 18th March, 2009 of CIT-I, Ludhiana passed under s. 263 by holding that it does not contain any firm decision that the order of the AO passed under s. 143(3) of the Act was erroneous in the eyes of law when the CIT in his order under s. 263 has clearly brought out that plain reading of the sub-s. (9) of s. 80IA of the IT Act makes it amply clear that where any amount of profits and gains in the case of an assessee is claimed and allowed under s. 80IA, deduction to the extent of such profits and gains shall not be allowed under this chapter i.e., Chapter VI-A. Sec. 80HHC also falls in Chapter VI-A, therefore, deduction under s. 80HHC is not be computed on profits and gains of an industrial undertaking on which deduction under s. 80IA has been allowed?

It is stated that the tax effect involved in this case is Rs. 96,92,017.

6. We have heard learned counsel for the parties and have given our thoughtful consideration to the proposition involved.

7. The counsel for appellant submits that this Court has settled the position of law while interpreting s. 80IA(9) of the IT Act in three recent judgments. The first judgment is Friends Castings (P) Ltd. Vs. Commissioner of Income Tax, . The Tribunal in that case had held that the issue was squarely covered by the decision of Tribunal, Special Bench ''C'', New Delhi in favour of the Revenue and against the assessee in the case of Asstt. CIT vs. Hindustan Mint & Agro Products (P) Ltd., passed in ITA Nos. 1537, 1538 and 1539/Del/2007 for the asst. yrs. 2001-02, 2003-04, 2004-05 dt. 23rd June, 2009 [reported at (2009) 119 ITD 107 . This Court agreed with the view of the Tribunal and dismissed the appeal of assessee. The aforesaid view was followed by this Court in Asian Exim International vs. CIT, IT Appeal No. 469 of 2010, decided on 18th April, 2011 and CIT vs. Davinder Exports, IT Appeal No. 371 of 2007, decided on 21st April, 2011.

8. The respondent''s counsel on the other hand vehemently contended that there was a consistent contrary view of different Benches of the Tribunals and also the High Courts and since the view taken by AO was one of the possible views, the revisional powers could not be invoked by CIT. To support his contention, reliance is placed upon the judgment of Hon''ble Delhi High Court in Commissioner of Income Tax Vs. Honda Siel Power Products Ltd., which is directly relating to the issue in hand. In that case also the CIT took up the case in exercise of his powers under s. 263 of IT Act on the application of the provisions of ss. 80HHC, 80IB(13) r/w s. 80IA(9) of IT Act. The Delhi High Court held as under:

18. From the aforesaid discussion, it is apparent that the expression ''prejudicial to the interest of Revenue'' appearing in s. 263 has to be read in conjunction with the expression ''erroneous'' and that every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the Interest of the Revenue. In cases where the AO adopts one of the courses permissible in law or where two views are

possible and the ITO has taken one view, the CIT cannot exercise his powers under s. 263 to differ with the view of the AO even if there has been a loss of revenue. Of course, if the AO takes a view which is patently unsustainable in law, the CIT can exercise his powers under s. 263 where a loss of revenue results as a consequence of the view adopted by the AO. It is also clear that while passing an order under s. 263, the CIT has to examine not only the assessment order, but the entire record of the profits. Since the assessee has no control over the way an assessment order is drafted and since, generally, the issues which are accepted by the AO do not find mention in the assessment order and only those points are taken note of on which the assesee''s explanations are rejected and additions/disallowances are made, the mere absence of the discussion of the provisions of s. 80IB(13) r/w s. 80IA(9) would not mean that the AO had not applied his mind to the said provisions. As pointed out in Kalvinator of India''s case (supra), when a regular assessment is made under s. 143(3), a presumption can be raised that the order has been passed upon an application of mind. No doubt, this presumption is rebuttable, but there must be some material to indicate that the AO had not applied his mind.

23.....Consequently, we are of the view that the decisions cited by the learned counsel for the Revenue, wherein assessment orders were found to be erroneous for want of an enquiry or proper enquiry, would have ''no application to the present appeals. It is also true that the validity of an order under s. 263 has to be tested with regard to the position of law as it exists on the date en which such an order is made by the CIT. From the narration of facts in the Tribunal''s order, it is clear that on the date when the CIT passed his orders under s. 263, the view taken by the AO was in consonance with the views taken by several Benches of the Tribunals. Therefore, the conclusion of the Tribunal that the CIT could not have invoked his jurisdiction under s. 263 of the said Act was correct. As a result, we answer the question against the Revenue and in favour of the assessee by holding that the Tribunal was correct in law in cancelling the order passed by the CIT under s. 263 and in restoring the order of the AO by holding that the AO had taken a possible view at the relevant point of time. The appeals are accordingly dismissed.....

9. The Department filed special leave to appeal against the above judgment of Delhi High Court, which was dismissed by the Hon''ble Supreme Court.

10. In the case in hand also, there was no specific discussion in the order passed by AO as to whether for granting relief under s. 80HHC, the profits and gains of the business for which relief was granted under s. 80IA, were required to be reduced or not, but separate deductions have been allowed under both these provisions in the assessment order. It is, thus, submitted that the present case is fully covered by the decision of the Delhi High Court and thus, the instant appeal deserves to be dismissed.

11. It, thus, emerges that for exercising revisional powers by the CIT under s. 263 of the IT Act, the position of law on the subject as prevalent on the date when the

order is passed has to be applied. In Honda Siel Power Products Ltd.''s case (supra), the assessment under s. 143(3) of the IT Act was completed by AO on 18th March, 2004. CIT passed order in that case under s. 263 of IT Act on 20th Feb., 2006. There might be a conflict of view on the interpretation of relevant provisions by various Benches of Tribunal at the relevant time but the present is a case in which the assessment order is dt. 28th Dec., 2006 and CIT passed the order on 18th March, 2009, when the proposition of law had been well settled by the Special Bench (Chennai) of the Tribunal on 27th April, 2007 in the case of (2007) 108 ITD 49 as also noticed by the Delhi High Court in Honda Siel Power Products Ltd.''s (supra). The Special Bench (Chennai) in Rogini Garments'' case (supra) held as under:

42.....Sec. 80HHC is part of Chapter VI-A. Hon''ble jurisdictional High Court in the case of CIT vs. Sharon Vaneers (P) Ltd., Tax Case (Appeal) No. 62 of 2004, dt. 26th Feb., 2007 [reported at Commissioner of Income Tax-III Vs. Sharon Vaneers P. Ltd., has made it clear that it is not correct to say that s. 80HHC of the Act is a self-contained provision. The deduction cannot be allowed ignoring the restrictive clause contained in s. 80IA(9). The restrictive clause in s. 80IA makes it abundantly clear that wherever deduction under any other section of Chapter VI-A(C) is claimed, the computation will be subject to the restrictions laid down in s. 80IA(9). It precludes pro tanto, all the deductions of such profits and gains claimed under Chapter VI-A(C). Sec. 80HHC is part of Chapter VI-A(C). It is not a self-contained provision. There is absolutely no ambiguity on this aspect. We are therefore of the opinion that relief under s. 80IA should be deducted from the profits and gains of the business before computing relief under s. 80HHC of the Act.

12. We are, further, of the firm view that nothing should be left at the whims and fancies of the AO while making assessment of income tax on the questions purely of law. Otherwise, it will bring ridicule to the system of assessment and end up with dangerous results. If for example one AO takes a particular viewpoint, out of the two possible views while interpreting the provisions and the AO of another area takes the other possible view, that would lead to anomalous situations. The Tribunal has held in this case that the AO adopted one of the two possible views and therefore, there was nothing wrong. What restrained the Tribunal to discuss and determine the scope of plain meaning of the provisions of s. 80IA(9) ? The decision of Tribunal was always subject to challenge either by the Department or the assessee before the higher forums.

13. In Commissioner of Income Tax Vs. Max India Ltd., it was observed that on the date when CIT passed the revisional order under s. 263 of the IT Act on 5th March, 1997, there were two views on the word ''profits'' in s. 80HHC(3). The Hon''ble Supreme Court held that problem with s. 80HHC of the IT Act is that it has been amended 11 times. Different views existed on the day when CIT passed the above order. Moreover, the mechanics of the section having become so complicated over the years that two views were inherently possible. Therefore, subsequent

amendment in 2005 inserting the word ''loss'' in the new proviso even though retrospective, will not attract the provision of s. 263 particularly when the CIT passed the order dt. 5th March, 1997, in purported exercise of his powers under s. 263 of the IT Act. Therefore, the above case will not provide any help to the respondent-assessee as the amendment in the provision was clearly made to remove an ambiguity which had arisen on account of interpretation of the said provision. That case, however, did not involve the interpretation of sub-s. (9) of s. 80IA of the Act.

14. Should we not adopt a uniform interpretation to the plain meaning of the section instead of leaving it to the absolute and arbitrary discretion of AO to accept one of the two possible views in preference to the other ?

15. The respondent-assessee, in the present case, had in its return of income tax, claimed deduction under s. 80IA at Rs. 12.01 crores and s. 80HHC of the IT Act at Rs. 5.75 crores and declared the total income of Rs. 82.47 lacs. The AO allowed the deduction under s. 80IA to the tune of Rs. 14.04 crores and deduction under s. 80HHC to the tune of Rs. 2.42 crores. The CIT on perusal of the assessment order found the assessment order to be both erroneous and prejudicial to the interest of Revenue and rightly so as deduction under s. 80HHC was allowed on eligible profits of business without reducing the profits of business on which deduction under s. 80IA had been allowed. There was, thus, contravention of s. 80IA(9), which clearly Indicates the extent of restriction to which the deduction under other provision of Chapter VI-A of IT Act can be allowed in cases where relief has been given on the profits and gains under s. 80IA of IT Act.

16. In MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, it was held as under:

An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.....

The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the ITO, the Revenue Is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

The phrase prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the AO.

On the facts of that case, the matter was decided by Hon''ble Supreme Court in favour of the Revenue observing as under:

The CIT noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his

mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the AO. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts, the conclusion that the order of the ITO was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the CIT under s. 263(1) was justified.

17. The respondent also relied upon the judgment reported as Commissioner of Income Tax Vs. Deepak Mittal, . That judgment did not deal with any conflict on the interpretation of ss. 80IA and 80IB on the one hand and s. 80HHC of the IT Act on the other. This Court in that case found that exercise of revisional jurisdiction on the ground of change in opinion by reappraisal of evidence was wholly without any justification, being not within the parameters of revisional jurisdiction of the CIT, That case would, thus, not help the respondent. In view of the above discussion, we allow this appeal, set aside the order dt. 29th April, 2011 of Tribunal, Chandigarh Bench ''A, Chandigarh and restore that of CIT-I, Ludhiana dt. 18th March, 2009 (Annex. A2).