(2005) 04 AHC CK 0245

Allahabad High Court

Case No: Income-tax Reference No. 12 of 1996

Commissioner of Income Tax		APPELLANT
	Vs	
Eastern Novelties Corporation		RESPONDENT

Date of Decision: April 15, 2005

Acts Referred:

- Income Tax Act, 1922 - Section 10(2)
- Income Tax Act, 1961 - Section 256(1), 80HHC

Citation: (2006) 284 ITR 579 : (2006) 155 TAXMAN 138

Hon'ble Judges: Rajes Kumar, J; R.K. Agrawal, J

Bench: Division Bench

Advocate: R.K. Upadhyaya, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

1. The Income Tax Appellate Tribunal, Allahabad, has referred the following two questions of law u/s 256(1) of the Income Tax Act, 1961, hereinafter referred to as "the Act", for the opinion of this Court :

Whether, on the facts and circumstances of the case, the Tribunal was correct in law in confirming the order of the Commissioner of Income Tax (Appeals) directing the Assessing Officer to allow deduction u/s 80HHC of the Income Tax Act, subject to various conditions being duly complied with ?

2. The assessment year involved is 1986-87.

3. The brief facts of the case are as follows :

4. The opposite party/assessee (hereinafter referred to as "the assessee") was a registered partnership firm and claimed deduction u/s 80HHC of the Act in the year under consideration. The assessing authority has rejected the claim of deduction u/s 80HHC of the Act on the ground that the required reserve had not been credited in

the balance-sheet filed along with the return of income. The assessee contended before the Assessing Officer that the reserve had been duly created in the books of account, but due to inadvertence the correct balance-sheet has not been filed. However, noted that the total profit of Rs. 1,20,540 had been credited to the accounts of the partners and no reserve had been created at the time of finalisation of the accounts. The separate calculations, according to the Income Tax Officer were an afterthought and on the aforesaid facts he rejected the claim. The assessee preferred appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) allowed the appeal and held that the assessee had created a valid reserve which was duly verified by the assessing authority from the books of account and on the assumption that such a reserve had not been created he could create the same during the course of the assessment proceedings. In support of the aforesaid reasoning reliance was placed on the decision of this Court in the case of Commissioner of Income Tax, Central Vs. Modi Spinning and Weaving Mills Co. Ltd., . The aforesaid order of the Commissioner of Income Tax (Appeals) has been affirmed by the Tribunal in the appeal filed by the Revenue.

5. Heard Sri R.K. Upadhyaya, learned standing counsel for the Revenue. No one appears on behalf of the assessee.

6. Learned standing counsel for the Revenue very fairly conceded that the issue involved in the present reference is covered by the decision of this Court in the case of Commissioner of Income Tax, Central Vs. Modi Spinning and Weaving Mills Co. Ltd., and by a subsequent decision of the apex court in the case of Karimjee P. Ltd. Vs. Deputy Commissioner of Income Tax and Another, . At the relevant time, Section 80HHC of the Act read as follows :

(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction equal to the aggregate of--

(a) four per cent, of the net foreign exchange realisation; and

(b) fifty per cent, of so much of the profits derived by the assessee from the export of such goods or merchandise as exceeds the amount referred to in Clause (a) :

Provided that the deduction under this Sub-section shall not exceed the profits derived by the assessee from the export of such goods or merchandise :

Provided further that an amount equal to the amount of the deduction claimed under this Sub-section is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee.

7. A similar provision in Section 10(2)(vib) of the Indian Income Tax Act, 1922, came up for consideration before a Division Bench of this Court in the case of Commissioner of Income Tax, Central Vs. Modi Spinning and Weaving Mills Co. Ltd., . This court held as follows (page 310) :

Now, as to the period during which the entries required by proviso (b) to Section 10(2) (vib) must be made, no statutory provision prescribing such period has been placed before us. All that the law requires is that a development reserve be created in compliance with proviso (b), and there is nothing in the object for which the reserve is created from which a definite period for such compliance can be inferred. In our opinion a company may make the necessary entries for the purpose of complying with proviso (b) to Section 10(2) (vib) at any time before the return of income is filed under the Income Tax Act. Even if the entries are made thereafter, during the pendency of the assessment proceedings, the Income Tax Officer may take them into consideration.

8. The second proviso to Section 80HHC of the Act came up for consideration before the apex court in the case of Karimjee P. Ltd. Vs. Deputy Commissioner of Income Tax and Another, the apex court even allowed to comply with the requirement of the said proviso at its stage. The relevant part of the apex court decision is as follows (page 565) :

The only reason for declining the relief to the assessee was the failure of compliance of the second proviso to Section 80HHC of the Income Tax Act, 1961. In respect of other requirements, there is no dispute that the assessee has complied with the same.

While the matter was being argued, we permitted learned Counsel for the assessee to comply with the requirements of the said proviso and it is now represented that an amount equal to the amount of deduction claimed under the Sub-section has been debited from the profit and loss account of the previous year relevant to the assessment year 1987-88 in respect of which the deduction was to be allowed and that the same was credited to a reserve account to be utilised for the purpose of the business of the assessee.

In view of the compliance of the said proviso, the order under challenge is set aside and the assessee is held entitled to deduction u/s 80HHC in the accounting year 1986-87.

The civil appeal is, accordingly, allowed.

9. In the present case, the Commissioner of Income Tax (Appeals) has recorded the finding that the assessee has created a valid reserve which was also verified by the Assessing Officer from the books of account, even if the reserve is not created at the time of submission of the return, but it could be created during the course of the assessment proceedings and such creation of reserve subsequently, is held to be a

proper compliance with the proviso to Section 80HHC of the Act.

10. We do not find any infirmity in the order of the Commissioner of Income Tax (Appeals), which has been confirmed by the Tribunal which are in conformity with the decisions of this Court and the apex court, referred to hereinabove.

11. In the circumstances, the question referred to above is answered in the affirmative, i.e., in favour of the assessee and against the Revenue.