

(2003) 03 KL CK 0113

High Court Of Kerala

Case No: IT Ref. No"s. 149 and 162 of 1999

Commissioner of Income Tax

APPELLANT

Vs

Hintannia Plastics (P) Ltd.

RESPONDENT

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**Date of Decision:** March 24, 2003**Acts Referred:**

- Income Tax Act, 1961 - Section 80HHA
- Industries (Development and Regulation) Act, 1951 - Section 11B

**Citation:** (2003) 183 CTR 385 : (2004) 267 ITR 114**Hon'ble Judges:** J.M. James, J; G. Sivarajan, J**Bench:** Division Bench**Advocate:** P.K.R. Menon and George K. George, for the Appellant; Balachandran, for the Respondent

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**Judgement**

G. Sivarajan, J.

The following questions of law are referred by the Income Tax Appellate Tribunal, for short "the Tribunal", u/s 256(1) of the IT Act, 1961, for short "the Act", for the decision of this Court at the instance of the Revenue :

"1. Whether, on the facts and in the circumstances of the case, "the cost of generator sets was not to be included while considering the investment in plant and machinery for the purpose of Section 80HHA of the IT Act ?

2. Whether, on the facts and in the circumstances of the case, the assessee is entitled to the benefit of Section 80HHA of the IT Act ?"

2. The brief facts necessary for the purpose of this case is as follows :

The respondent-assessee in both these cases are one and the same. It is a private limited company engaged in the manufacture and sale of PVC pipes. The assessment years concerned are 1992-93 and 1991-92, respectively. In the assessment for the aforesaid years the assessee claimed the status of a small-scale

industrial unit for availing the benefit of deduction u/s 80HHA. The AO rejected the said claim holding that since the investment in plant and machinery exceeded the limit provided in the said section the assessee cannot be treated as a small-scale industrial unit for the purpose of Section 80HHA. The deduction claimed was accordingly denied. The assessee took up the matter in appeals before the CIT(A), Cochin, who by separate orders dismissed the appeals and confirmed the assessments. In further appeals by the assessee, the Tribunal by separate orders, allowed the claim made u/s 80HHA of the Act relying on a press note issued by the industries department under which cost of generating sets, extra transformer installed at the direction of the State Electricity Board would be excluded. It is against the said orders of the Tribunal that the question set out in the opening paragraph has been referred to this Court.

3. Today, when the matter came up for hearing the learned counsel appearing for the parties submitted that the provisions of Section 80HHA has been amended by modifying the Expln. (b) to the said section by Finance Act of 1999 with, retrospective effect from 1st April, 1978 (from the asst. yr. 1978-79 onwards) as per which an industrial undertaking shall be deemed to be a small-scale industrial undertaking which is, on the last date of the previous year, regarded as a small-scale industrial unit u/s 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951). The counsel on the basis of the said retrospective amendment submits that the basis of the determination of the status of the assessee as a small-scale industrial undertaking has been changed from the method provided earlier under Sub-section (2) of Section 80HHA and neither the AO nor the two appellate authorities had occasion to consider the question in the light of the amendment provisions.

4. We have considered the aforesaid submission, Under Sub-section 1 of Section 80HHA, where the gross total income of an assessee includes any profits and gains derived from a small-scale industrial undertaking to which this section applies, a deduction from such profits and gains of an amount equal to twenty per cent thereof was provided in accordance with the subject to the provisions of the said section. Sub-section (2) thereof provides that this section applies to any small-scale industrial undertaking which fulfils all the following conditions :

"(i) it begins to manufacture or produce articles after the 30th day of September, 1977 (but before the 1st day of April, 1990), in any rural area;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any small-scale industrial undertaking which is formed as a result of the reestablishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in Section 33B, in the circumstances and within the period specified in

that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers" in a manufacturing process carried on without the aid of power.

Explanation : Where in the case of a small-scale industrial undertaking, any machinery or plant or any part thereof previously .used for any purpose is transferred to a new business and the total value of the machinery or plant so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of Clause (iii) of this Sub-section, the condition specified therein shall be deemed to have been fulfilled."

Explanation (b) to Section 80HHA inserted by Finance Act, 1999, which is relevant for the purposes of this case reads :

"an industrial undertaking shall be deemed to be a small-scale industrial undertaking which is, on the last day of the previous year, regarded as a small-scale industrial undertaking u/s 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951)."

Here it must be noted that the AO and the two appellate authorities had considered the question as to whether the cost of generator will form part of the plant and machinery of the said unit since the Expln. (b) to Section 80HHA was not in the statute. Under the then existing provisions if the value of the plant and machinery exceeded a particular limit the unit will not be treated as a small-scale industrial undertaking. However, by the new Expln. (b) inserted by the Finance Act, 1999, with retrospective effect from 1st April, 1978, an industrial undertaking shall be deemed to be a small-scale industrial undertaking which is, on the last date of the previous year regarded as a small-scale industrial unit u/s 11B of the Industries (Development and Regulation) Act, 1951. Thus, the very base for determining the status of the assessee as a small-scale industrial undertaking is changed. Consequently, it is a matter for consideration by the AO as to whether the assessee satisfies the provisions of Clause (b) of the Explanation to Section 80HHA added by the Finance Act, 1999, with retrospective effect from 1st April, 1978, This is also a matter for evidence to be produced by the assessee. Since this question has not been considered by the AO and by the two appellate authorities, we set aside the orders passed by the two appellate authorities and direct the AO to decide this question afresh in the light of Expln. (b) to Section 80HHA inserted by the Finance Act, 1999, with retrospective effect from 1st April, 1978, and to pass a fresh assessment order in accordance with law. It is open to the assessee to adduce evidence for satisfying the requirement of Clause (b) of the Explanation. In these circumstances we decline to answer the questions referred to this Court.

These IT references are disposed of as above.