(2011) 09 MAD CK 0231

Madras High Court

Case No: Tax Case (Appeal) No''s. 62 of 2008 and 643 to 645 of 2007

The Commissioner of Income Tax, Chennai		APPELLANT
	Vs	
M/s. ATC Ltd (formerly M/s. Asia Tobacco Co. Ltd.) Chennai 600 018 (cause title substituted as per order dt. 29.9.2011 in M.P. Nos. 1 to 1 of 2011		RESPONDENT

Date of Decision: Sept. 29, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 28, 80, 80HHC, 88HHC

Hon'ble Judges: R. Subbiah, J; Elipe Dharma Rao, J

Bench: Division Bench

Advocate: K. Subramaniam, for the Appellant; R. Venkat Narayanan, for the Respondent

Final Decision: Allowed

Judgement

Elipe Dharma Rao, J.
The Revenue has come forward with these Appeals.

2. The facts in brief are as follows :-

The assessee is a company engaged in the manufacture of cigarette and export of finished leather goods. For the assessment years 1993-94 to 1996-97, the assessee claimed deduction u/s 80HHC of the Income Tax Act. The Assessing Officer, while computing the relief, held that the turnover pertaining to the entire business including the Cigarette Division has to be taken into account as total turnover and that 90% of the interest receipts should be deducted from the business profits and the loss suffered by the Cigarette Division should be taken into account to arrive at the business profit.

Against the orders passed by the Assessing Officer, the assessee filed appeals before the Commissioner of Income Tax, who, by four separate orders dated 19.7.2000, allowed the appeal in part by holding that job receipts included would very much form part of the total turnover, however, directed the Assessing Officer not to exclude the value of job receipts of the Cigarette Division from the total turnover and to recompute the relief u/s 80HHC. So far as the other issues are concerned, the appellate authority confirmed the Assessment Order of the Assessing Officer. Against the aforesaid orders, so far as the portion relating to exclude the value of job receipts of the Cigarette Division, the Revenue preferred I.T.A.Nos.1576 and 1577 (Mds)/2000 and the Assessee preferred I.T.A.Nos.1580 to 1583 (Mds)/2000 before the Income Tax Appellate Tribunal (in short "the Tribunal"), which, by a common order dated 30.11.2005, dismissed the appeals preferred by the Revenue holding that when the job receipt is linked to the operational activity of the assessee, Explanation (baa) to Section 80HHC would not be applicable. So far as the appeals preferred by the assessees are concerned, the Tribunal allowed the appeals in toto. Aggrieved by the aforesaid common order, the Revenue has come with the present appeals.

3. While these appeals came up for admission, this Court, with regard to the first substantial question of law raised by the Revenue to the effect that whether the Tribunal was right in holding that the turnover pertaining to cigarette division should not form part of the total turnover, since cigarettes are not exported, held that the issue had already been decided in (2002) 257 ITR 60 and admitted the appeals on the following other two substantial questions of law :-

1. Whether on the facts and circumstances of the case, the Tribunal was right in holding that only the net interest is to be taken into account for the purpose of 90% exclusion from business profits ?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the loss sustained by the Cigarette division is to be ignored while computing the business profits for the purpose of calculation of deduction u/s. 80HHC?

4. Coming to the issue whether only net interest has to be taken into account for the purpose of 90% exclusion from business profits, it is not disputed by both sides that the issue has already been decided by a Division Bench of this Court in Commissioner of Income Tax Vs. V. Chinnapandi, . In the aforesaid decision, this Court, by relying on the decision of this Court in K.S. Subbiah Pillai and Co. (India) Pvt. Ltd. Vs. Commissioner of Income Tax, and the decision of the Punjab and Haryana High Court in Rani Paliwal Vs. Commissioner of Income Tax, , observed in paragraph 10 and 11, as follows :-

10. The above two judgments support the case of the Revenue. The appellant in the present case had received interest of Rs. 2,65,019 and hence the receipt of interest is alone relevant and the same is to be taken into consideration for the purpose of deduction for the claim u/s 80HHC of the Act. No expenditure or any other deduction is permissible

from the receipt of interest income. Section 80HHC stipulates a deduction in respect of export profits. Instead of enjoining the Assessing Officer to compute such export profits from out of the consolidated amount of the assessee, which may involve income by way of interest, rent, commission etc., the Legislature has provided a simple procedure under which 90 per cent of the receipts such as interest, rent, commission, brokerage, etc., shall be excluded as profits not attributable to exports. The intention is, therefore, clear that there should be no attempt to deduct any expenditure from the receipts, however, related, such expenditure may be to the receipts. It is in this view of the matter that the expression "receipt by way of" has been used in the section and not "income" of that nature.

11. In view of the above, we are of the view that 90 per cent of the interest that is deductible for the claim u/s 80HHC of the Act is from the gross interest received by the assessee and that the amount of interest paid by the assessee should not be deducted therefrom and, hence, we answer the above question in favour of the Revenue and against the assessee and allow the tax case filed by the Revenue.

5. In view of the aforesaid decision, the substantial question of law raised in respect of net interest is answered against the assessee.

6. The only question left to be decided is whether the loss sustained by the Cigarette division has to be ignored or not while computing the business profits.

7. Learned Standing Counsel for the Revenue submitted that the Tribunal should not have ignored the loss arising from the Cigarette division as it would lead to anomalous results. He further submitted that since the Cigarette division is also part of the business of the assessee, it should be considered while calculating the deduction u/s 80HHC. In support of such contention, learned counsel has strongly placed reliance upon the decision of the Supreme Court reported in IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax, Mumbai, .

8. Learned counsel for the assessee submitted that the leather business and the cigarette business are two independent businesses and the loss suffered in one business should not be considered in the other business at the time of calculating deduction u/s 80HHC and he supported the order of the Tribunal.

9. It is the case of the assessee that it was exporting leather goods as well as it was carrying on cigarette manufacturing business. It is the assertion of the assessee that only the goods which are exported and sold in the domestic market or in any operation which is linked to the operation of the manufacturing activity of the export goods alone, have to be included in the total turnover. Since the manufacturing of cigarette is not in any way connected with the exporting business of leather, the turnover of such cigarette cannot be included in the total turnover and in the profit. According to him, once the turnover of the cigarette was not included in the total turnover, the loss suffered by the assessee in the cigarette division has nothing to do with profit of the leather goods exported and,

therefore, the loss suffered by the assessee or profit earned by it in cigarette manufacturing activity cannot form part of the profit for the purpose of deduction u/s 80HHC. The Tribunal by relying on the decision of this Court in (2002) 257 ITR 60 allowed the prayer sought for by the assessee.

10. We are unable to understand the reason given by the Tribunal for rejecting the case of the Revenue. It is no doubt true that the assessee was carrying on exporting business in leather finished goods and manufacturing of cigarette. In order to find out whether the assessee is entitled to claim deduction, one has to go through the relevant provision. The relevant provision of Section 88HHC is to the following effect :-

80-HHC. Deduction in respect of profits retained for export business.-(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 to the extent of profits, referred to in sub-section (1-B) derived by the assessee from the export of such goods or merchandise:

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an export house or a trading house, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4-A), that in respect of the amount of the export the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1-A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any export house or trading house in respect of which the export house or trading house has issued a certificate under the proviso to sub-section (1), 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 to the extent of profits, referred to in sub-section (1-B) derived by the assessee from the sale of goods or merchandise to the export house or trading house in respect of which the certificate has been issued by the Export House or Trading House.

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(3) For the purposes of sub-section (1),-

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,-

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods:

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iii-a) (not being profit on sale of a licence acquired from any other person), and clauses (iii-b) and (iii-c) of Section 28, the same proportion as the export turnover bears to the total turnover of business carried on by the assessee.

(a) to (e)....

(f) "trading goods" means goods which are not manufactured or processed by the assessee.

(3-A) For the purposes of sub-section (1-A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,-

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more export houses or trading houses, the profits of the business;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more export houses or trading houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective export house or trading house bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of Section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

11. A plain reading of the aforesaid Section, particularly sub-sections (1) and (3)(a) and (b) make it clear that if there is a loss, then no deduction would be available under sub-section (1) or (3). For arriving at positive profits, one has to consider both the profits and the losses and if the net amount is a positive profit, then the assessee would be entitled to deduction, whereas if the net figure is a loss, then the assessee would not be entitled for deduction. Further sub-section (3)(c) makes it abundantly clear that the profits have to be calculated by counting both the exports and deduction could be permitted only if there is a positive profit in the exports of both selfmanufactured goods as well as trading goods. If there is a loss in either of the two, then the loss has to be taken into account for the purposes of computing the profits.

12. In the present case, though the assessee was carrying two different trades, since the assessee had suffered loss as per sub-sections (1) and (3)(a), he is not entitled for deduction. In order to ascertain whether the profits from such such export was a positive profit, we have specifically put a question to the learned counsel for the assessee, who answered that it is a positive profit. Therefore, if there is a loss in either of the two business, then the loss has to be taken into account for the purposes of computing the profits. The Assessing Officer by applying the aforesaid provisions, has correctly observed that the assessee was not be liable for deduction. The aforesaid view receives ample support from the decision of the Supreme Court in IPCA Laboratory case (cited supra), relied on by the Revenue. In the aforesaid decision, the Apex Court has held that when the assessee was exporting trading goods as well as the manufacturing goods, the loss suffered by the assessee in export of any one of the goods, cannot be ignored and it has to be taken into consideration while computing the profit for the purpose of deduction u/s 80HHC. The Apex Court has further proceeded to observe as follows :-

12.... Undoubtedly, Section 80-HHC has been incorporated with a view to providing incentive to export houses. Even though a liberal interpretation has to be given to such a provision, the interpretation has to be as per the wordings of this section. If the wordings of the section are clear then benefits, which are not available under the section, cannot be conferred by ignoring or misinterpreting words in the section. In this case we are concerned with the wordings of sub-section (3)(c) of Section 80-HHC. As noted earlier, sub-section (3)(a) deals with the case where the export is only of self-manufactured goods. Sub-section (3)(b) deals with the case where the export is only of trading goods. Thus when the legislature wanted to take exports from self-manufactured goods or trading goods separately, it has already so provided in sub-sections (3)(a) and (3)(b). It would not be denied that the word "profit" in Section 80-HHC(1) and Sections 80-HHC(3)(a) and 3(b) means a positive profit. In other words, if there is a loss then no deduction would be available u/s 80-HHC(1) or (3)(a) or (3)(b). In arriving at the figure of positive profit, both the profits and the losses will have to be considered. If the net figure is a positive profit then the assessee will be entitled to a deduction. If the net figure is a loss then the assessee will not be entitled to a deduction. Subsection (3)(c) deals with cases where the export is of both self-manufactured goods as well as trading goods. The

opening part of sub-section (3)(c) states "profits derived from such export shall". Then follow clauses (i) and (ii). Between clauses (i) and (ii) the word "and" appears. A plain reading of sub-section (3)(c) shows that "profits from such exports" has to be profits from exports of self-manufactured goods plus profits from exports of trading goods. The profit is to be calculated in the manner laid down in Sections (3)(c)(i) and (ii). The opening words "profit derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. It is clear from a reading of sub-section (1) of Section 80-HHC(3) that a deduction can be permitted only if there is a positive profit in the exports of both self-manufactured goods as well as trading goods. If there is a loss in either of the two then that loss has to be taken into account for the purposes of computing profits.

13. By applying the principle laid down in the aforesaid decision to the facts of the present case, we are unable to accept the view taken by the Tribunal in rejecting the case of the Revenue. The decision relied on by the Tribunal in Madras Motors case (Cited supra) is clearly distinguishable to the facts of the present case and the Tribunal ought not to have interfered with the concurrent finding rendered by the Assessment Authority and the Commissioner of Income Tax (Appeal). Since the Tribunal had committed a mistake of fact, we are constrained to interfere with such order. Accordingly, the substantial question of law raised is this regard is answered against the assessee.

14. In the result, both the substantial questions of law raised are answered in favour of the Revenue and against the assessee. Accordingly, the Tax Case Appeals are allowed. No costs.