974

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' DELHI
BEFORE SHRI K.G. BANSAL AND SHRI GEORGE MATHAN

ITA No. 850(Del)/2009
Assessment year: 2000-01

Goyal Impex & Industries Ltd., 1291, Pocket-I, Sector-6, Vasant Kunj, New Delhi.	Vs.	Commissioner of Income-tax, Delhi-IV, New Delhi.
(Appellant)		(Respondent)

Appellant by : S/Shri Ved Jain, V. Mohan & Ms. Rano Jain
Respondent by : Shri Ashok Pandey, CIT, DR

ORDER

PER K.G. BANSAL : AM

This appeal of the assessee arises out of the order of the CIT(Appeals)-Delhi-IV, New Delhi, passed on 27.01.2009, under the provisions of section 263 of the Income-tax Act, 1961, and it pertains to assessment year 2000-01. The corresponding order of assessment was framed by the Income-tax Officer, Ward 12(2), New Delhi ('AO' for short), on 21.12.2006 under the provisions of section 143(3) read with section 254 of the Act. The assessee has taken 8 substantive grounds in the appeal. However, it was explained before us by the ld. counsel for the assessee that the assessee wants to press only four grounds, which are paraphrased here that on the facts and in the circumstances of

the case, the ld. CIT erred in –(i) holding that the order passed by the AO on 21.12.2006 was erroneous and prejudicial to the interests of revenue; (ii) relying on the first notice issued u/s 263 on 28.12.2006, which was set aside by the Hon'ble High Court; (iii) traversing beyond the show cause notice while passing the final revisionary order; and (iv) in directing that the assessee was not entitled to deduction under section 80HHC. The other grounds regarding limitation, merger of the order of the AO with that of the CIT(A) etc. were not pressed. Therefore, this order deals with the aforesaid grounds argued by the ld. counsel.

2. The facts of the case are that the assessee had filed return of income on 31.11.2000, declaring nil income. In this return, the assessee claimed deduction u/s 80-HHC at Rs. 2,02,25,530/-. The assessment was completed on 28.03.2003 at total income of Rs. 3,05,87,718/-. The deduction u/s 80HHC was computed at Rs. 1,72,14,147/-. It was mentioned by the AO that the export profits from trading of goods amounted to loss of Rs. 57,34,366/-. This amount was deducted from the deduction available in respect of export incentive by applying appropriate formula, which came to Rs. 2,29,48,513/-. Thus, the

deduction was computed at an amount of Rs. 1,72,14,147/-. Thereafter, on an application made by the assessee on 25.4.2003, the deduction was revised upwards at Rs. 2,86,82,879/- and, thus, the total income was computed at Rs. 1,91,18,990/-. In the rectification order, it was mentioned that there was an arithmetical mistake in taking export profit from trading of goods at loss of Rs. 57,34,366/- against the actual profit of Rs. 57,34,366/-, which was rectified in this order.

2.1 The matter was agitated before the ld. CIT(Appeals) and thereafter before the Income-tax Appellate Tribunal. In order dated 20.3.2006, the matter was restored to the file of the AO by the Tribunal. It was mentioned that section 80HHC and section 28 were amended by the Taxation Laws (Amendment) Act, 2005 retrospectively. These amendments have a direct bearing on computation of deduction u/s 80HHC. Therefore, the matter needs to be examined by the AO. Accordingly, the matter was restored to the file of the AO with a direction to examine the allowability of deduction u/s 80HHC afresh, in view of the amendments as well as circular No. 2 of 2006 dated 16.01.2006 issued in connection therewith. The AO, in pursuance of the aforesaid directions, passed the order on 21.12.2006, determining the

total income at nil. It was submitted before him that all disallowances except the one in regard to section 80HHC have been deleted. The deduction u/s 80HHC was wrongly calculated in the assessment order and, therefore, the assessment order was rectified u/s 154 on 11.8.2003. This order may be taken as the order representing correct calculation of the deduction u/s 80HHC at Rs. 2,86,82,879/-. The AO mentioned that the claim made by the assessee has already been considered u/s 154 of the Act. Thereafter, the gross total income of the assessee was computed at Rs. 2,02,25,530/- and the deduction u/s 80HHC was restricted to this amount, thus, computing the total income at nil.

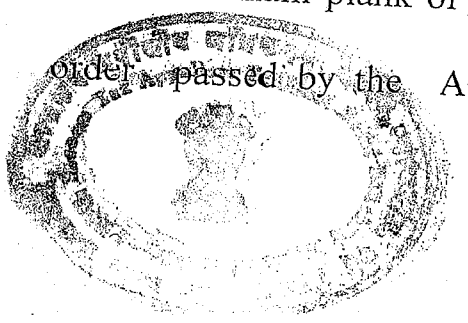
2.2 Subsequently, the ld. CIT examined the records of the proceedings and issued a notice u/s 263 on 28.12.2006. It was mentioned that the assessee has been allowed deduction u/s 80HHC at Rs. 2,02,25,530/- in the order dated 21.12.2006. This deduction was wrongly allowed because the twin conditions mentioned in the third proviso to section 80HHC, effective from 1.4.1998, were not apparently satisfied, resulting into under-assessment of income by an amount of Rs. 2,02,25,530/-. The assessee was required to furnish its objections in respect of the revision of the order as aforesaid. The assessee moved a

writ petition before the Hon'ble High Court of Delhi, which was disposed of on 24.1.2007 in WP (C) 205/2007. The Hon'ble Court mentioned that the ld. counsel for the respondent (the Commissioner of Income-tax) informed that a fresh show cause notice u/s 263 read with section 154 has been issued on 12.1.2007 and the department no longer relies on the amendment carried out in section 80HHC(3) by the Taxation Laws (Amendment) Act, 2005, and de hors the said amendment these proceedings had been initiated. In these circumstances, the ld. counsel for the petitioner states that the petition may be dismissed as withdrawn with liberty to take steps in respect of show cause notice dated 12.1.2007. The liberty prayed for was granted by the Hon'ble Court and the writ petition was dismissed as withdrawn.

2.3 In the second show cause notice u/s 263, a reference was made to the earlier show cause notice issued on 28.12.2006 and it was mentioned that on the basis of facts on record there was an exporting loss from trading goods of Rs. 1,13,00,764/-. Therefore, even if it is presumed that the amendments are not applicable, the deduction allowed at Rs. 2,02,25,530/- is not in order. The assessee was required to submit its objection against the aforesaid proposal regarding under-

assessment of income of Rs. 2,02,25,530/-. Finally, the ld. CIT passed the order on 28.01.2009, in which the order of the AO was held to be erroneous and prejudicial to the interests of the revenue. Further, the AO was directed to make a fresh assessment without allowing any deduction u/s 80HHC. It may be mentioned here that the ld. CIT inter-alia gave the findings that, –(i) the assessee is a trading exporter only; (ii) it was never stated before the Hon'ble Court that the department did not wish to apply amended provision and the intent of the submissions of the ld. counsel for the revenue was that even if the amendment is not considered, the assessee shall not be entitled to deduction u/s 80HHC; (iii) the DEPB entitlement consisted of premium of Rs. 21,93,355/- and income of Rs. 2,93,87,765/-; and (iv) the provision contained in the proviso to section 80HHC(3) will not apply as before the amendment, the profit and the premium were not mentioned anywhere in section 28. Under the amended provision also, the twin conditions mentioned in the third proviso were not satisfied and, therefore, the assessee was not entitled to any deduction. Aggrieved by this order, the assessee is in appeal before us.

3. The main plank of the arguments of the ld. counsel was that the order passed by the AO on 21.12.2006 was not erroneous and



prejudicial to the interest of the revenue. This order was passed on the order of rectification passed by him on 11.08.2003, in which export profit from trading of goods was worked out at Rs. 57,34,366/-, which was increased by an amount of Rs. 2,29,48,513/- being 90% of export turnover multiplied by export turnover and the resultant sum divided by the total turnover. At the time when this order was passed, substantial dispute existed regarding the treatment to be given to benefit by way of DEPB while computing the deduction. The view taken by the AO was a possible view and, therefore, the ld. CIT was not right in substituting her judgment in place of the judgment of the AO. For this purpose, he relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. (2007) 295 ITR 282. The Hon'ble Court mentioned that two views were possible in regard to the word "profits" employed in proviso to section 80HHC(3). The position was clarified by 2005 amendments with retrospective effect by inserting the word "loss" in the new proviso. Therefore, without going into the scope of the amendment, it was held that when the Commissioner of Income-tax passed the order, two views were possible on the word "profits". This court, in the case of Malabar Industrial Co. Ltd. Vs. CIT, (2001) 243 ITR 83, held that the phrase "prejudicial to the interests of

the revenue" used in section 263 has to be read in conjunction with the expression "erroneous" order passed by the AO. Every order, which leads to loss of revenue, cannot be treated as an order prejudicial to the interests of the revenue. For example, when AO adopts one course of action permissible in law which has resulted in loss of revenue, or where two views are possible and the AO has taken one possible view, then, the Commissioner cannot treat the order to be an erroneous order prejudicial to the interests of revenue by substituting his view with that of the AO, unless it is proved that the view taken by the AO was not at all sustainable in law. Further, he relied on the decision of Hon'ble Punjab & Haryana High Court in the case of Max India Ltd. In that case, the AO had ignored the loss while granting deduction u/s 80HHC. The CIT revised the order u/s 263 by setting it aside. The Tribunal held that the view taken by the AO was a possible view. The Hon'ble High Court dismissed the appeal of the revenue by mentioning that the view of the AO was in conformity with views subsequently expressed by various benches of the Tribunal. Therefore, the view taken by him was a possible view and, therefore, the order could not be said to be erroneous and prejudicial to the interest of the revenue.

3.1 In reply, the ld. DR submitted that the assessment order was passed as a consequence of the order of the Tribunal and, therefore, the powers of the AO were circumscribed by the order of the Tribunal and he could not give any relief beyond the relief mentioned by the Tribunal. The Tribunal had taken note of the amendments made in sections 28 and 80HHC by Taxation Laws (Amendment) Act, 2005. It was mentioned that these amendments have a bearing on determination of the quantum of deduction. This matter needed examination on the part of the AO. Therefore, the matter was restored to his file to examine the claim afresh by taking into account 2005 amendments and the circular of the board. However, the AO did not consider the amendments at all. He allowed the deduction on the basis of the order passed u/s 154 on 11.8.2003, without having regard to the amendments, which were to be specifically looked into as per directions of the Tribunal. Such an order was erroneous and prejudicial to the interest of the revenue. Therefore, it was argued that the ld. CIT was right in assuming jurisdiction u/s 263 of the Act.

3.2 We have considered the facts of the case and submissions made before us. It is an established law, as seen from the discussion in the case of Max India Ltd. (supra) that for assuming jurisdiction u/s 263,

the CIT has to show satisfaction of two pre-conditions- (i) the order was erroneous, and (ii) the order was prejudicial to the interests of revenue. These conditions, on the facts of the case, have to be seen in the context of the history of the case, namely, that the matter was restored to the file of the AO by the Tribunal with a direction to make a fresh calculation of the deduction by taking into account 2005 amendments in section 28 and section 80HHC(3). On reading of the order, it is seen that the AO merely repeated his earlier order albeit with rectification made thereto u/s 154, without applying mind to the amendments and their implication in computing the deduction. Thus, non-observance of the directions of the Tribunal in computing the deduction per se made the order erroneous and prejudicial to the interest of revenue. It may be mentioned here that the order revised by the ld. CIT was not the first order passed by the AO, but was an order passed as a consequence of the directions of the Tribunal. The ld. CIT specifically referred to the order passed u/s 143(3) read with section 254 and not the original order passed on 28.3.2003 or the rectificatory order passed on 11.8.2003. The computation of "profits of the business" was made and a reference was made to the third proviso to section 80HHC(3) inserted by way of 2005 amendments retrospectively with effect from 01.04.1998. The

amendments had to be considered by the AO but were not considered by him. In these circumstances, we are of the view that she validly assumed jurisdiction u/s 263.

4. The second plank of the arguments of the ld. counsel was that first notice u/s 263 dated 28.12.2006 did not exist on record by dint of the order of Hon'ble High Court dated 24.1.2007. The ld. counsel for the revenue had submitted before the Hob'ble Court that a fresh show cause notice has been issued on 12.01.2007 and the purport thereof is that the revenue no longer relies on the amendments carried out in 2005. Thus, the proceedings have been initiated de-hors the amendments. In these circumstances, the ld. counsel for the petitioner prayed for withdrawal of the petition with liberty to take steps in respect of show cause notice issued on 12.1.2007. The assessee was allowed liberty to proceed in respect of the second show cause notice and the writ petition was dismissed as withdrawn. In view of this order, it was argued that the revenue cannot now take recourse to the amended provisions for computing the deduction. In reply, the ld. DR submitted that the revenue never submitted before the Hon'ble Court that the amended provisions shall not be invoked, although applicable, for

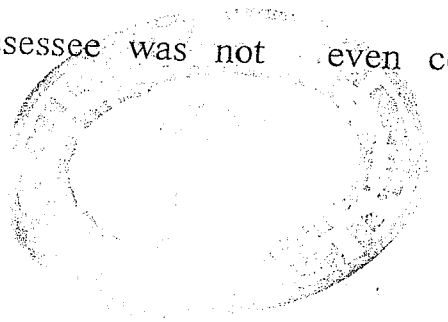
computing the deduction. The real intent and purpose was that since one more notice has been issued, the writ petition has become infructuous. In the circumstances, the Hon'ble Court ordered that the assessee shall have liberty to proceed with the matter in accordance with the second show cause notice and the petition was dismissed as withdrawn.

4.1 We have considered the facts of the case and rival submissions. The only conclusion which we can draw from the order of the Hon'ble Court is that the first notice dated 28.12.2006 does not exist on record as it was specifically mentioned by the ld. counsel for the revenue that one more notice has been issued on 12.1.2007. However, it cannot be said that 2005 amendments can not be taken into consideration as the ld. counsel further explained the intent of the second show cause notice to be that the department no longer relies on such amendments. The reasons for this conclusion are many. Firstly, the assessment order had to be framed as per directions of the Tribunal, which specifically directed the AO to consider 2005 amendments for computing the deduction. This was not done. The purpose as submitted by the ld. counsel for the revenue will frustrate the very order on the basis of which the order was passed on 21.12.2006 by the

AO. Secondly, while the first part of the submissions was factual in nature that the second notice has been issued, the second part, if acted upon, would render the amendments otiose, which cannot be done by way of interpretation of the law. The Hon'ble High Court did not give a finding that the amendments will not be considered by the CIT but merely granted the assessee liberty to proceed with the show cause notice dated 12.1.2007, being the second notice. This notice also makes a specific reference to the order passed by the AO u/s 143(3) read with section 254, under which he was obliged to consider the amendments. And finally, in absence of any specific directions by the Hon'ble Court against consideration of 2005 amendments, the same will have to be considered for proper appreciation of the order passed by the AO as to whether it was erroneous and prejudicial to the interest of revenue or not. We have already held that since the AO did not consider the amendments at all in spite of specific direction of the Tribunal, the order was erroneous and prejudicial to the interest of revenue. Therefore, we are of the view that 2005 amendments will have to be considered to arrive at the correct amount of deduction u/s 80HHC.

40

5. The third plank of the arguments of the ld. counsel was that the ld. CIT traversed beyond the show cause notice while passing the order and, thus, the order was bad in law. In this connection, reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Contimeters Electricals (P) Ltd. in ITA No. 1366/2008, reported at (2009) 22 DTR (Del) 158. The Hon'ble Court mentioned that the Tribunal considered the rival contentions and referred to the decision of Hon'ble Supreme Court in the case of Commissioner of Customs Vs. Toyo Engineering India Ltd. (2006) 7 STC 592, wherein it was held that the department cannot travel beyond the show cause notice. It was mentioned that the Tribunal was of the view that the ground that the assessee had not fulfilled the conditions laid down u/s 80IA did not form part of the show cause notice. The Tribunal accepted the argument of the assessee that the CIT did not even call for any explanation on this issue and, therefore, the assessee did not have any opportunity to meet this ground. The Tribunal was of the view that it would be against the principles of natural justice that a person who has not been confronted with any grounds to be saddled with the liability thereof. Consequently, the Tribunal upheld that as the said issue did not form part of the show cause notice and the assessee was not even confronted with even



before the CIT, it cannot form the basis for revision of the assessment order u/s 263. This finding was upheld by the Hon'ble Court.

5.1 In reply, the ld. DR referred to the first show cause notice, in which a reference was made to the third proviso to sub-section (3) of section 80HHC and mentioned that the conditions stated therein were not satisfied, leading to under-assessment of income of Rs. 2,02,25,530/-. Thereafter, he referred to the second show cause notice, which furnishes the working of trading loss in export sales at Rs. 1,13,00,764/- and mentions that even if it is assumed that 2005 amendments are not applicable, the deduction of Rs. 2,02,25,530/- was wrongly granted, leading to under-assessment of income to the extent of Rs. 2,02,25,530/-. He also referred to the revisionary order, in which the loss was computed at the same figure of Rs. 1,13,00,764/- and the AO was directed not to allow the deduction of Rs. 2,02,25,530/-. His case was that the ld. CIT did not traverse beyond the show cause notice and the assessee had been fully heard in respect of the computation of the deduction.

5.2 We have considered the facts of the case and submissions made before us. From the proceedings before the Hon'ble Delhi High Court in the writ petition, it will be clear that the ld. counsel for revenue clearly submitted that one more notice has been issued on 12.1.2007, the purport of which is that the revenue no longer relies on 2005 amendments. We have already held that the first part being factual has to be followed in as much the petition was dismissed on the representation that such a notice does not exist on record now. At the same time, the intent of the aforesaid representation could not be that amendments will not be considered especially in view of the fact that assessment was made in pursuance of the order of the Tribunal which directed that the deduction may be computed after taking into account the amendments. Therefore, the first notice cannot be taken into account for the purpose of finding out the issues with which the assessee was confronted. However, the second notice, which was allowed to be pursued by the assessee, contained the computation of loss, the provision contained in the third proviso and the tentative conclusion that deduction at Rs. 2,02,25,530/- was wrongly allowed. These very issues were dealt with in the revisionary order from the point of view of pre-amendment and post-amendment position. Therefore, we do not find

42

any reason to hold that the ld. CIT traversed beyond the issues raised in the second show cause notice.

6. It was also the argument of the ld. counsel that the word "profit" has been interpreted by the Special Bench of Mumbai Tribunal in the case of Topman Exports Vs. Income-tax Officer, (2009) 318 ITR (AT) 87, in which it was held that the entire amount received on sale of DEPB entitlement does not constitute the profit. The face value of the DEPB shall be deducted from the sale proceeds before arriving at the profit. The face value of the DEPB is chargeable to tax u/s 28(iiib) at the time of accrual of income when application is filed with the competent authority. The profit, being excess of sale proceeds over the face value, is liable to be considered u/s 28(iiid) at the time of its sale. We find that the Hon'ble Kerala High Court also dealt with the issue in the case of CIT Vs. GPN Cashew Exporting Co. (2009) 184 Taxman 506, in which it was held that sale proceeds of REP license was not export profit. It is deemed business income u/s 28(iiia), thus, 90% of the same has to be excluded in computation of business profit while computing relief u/s 80HHC. However, the matter was restored to the file of the AO to re-work the relief after calling for particulars and to

42

decide the matter afresh in the light of the decision of Hon'ble Supreme Court in the case of CIT Vs. K. Ravindranathan Nayar, (2007) 295 ITR 228 and first and fifth provisos to section 80HHC(3). On the basis of the decision in the case of Topman Exports (supra), his case was that in any case, the computation made by the ld. CIT was not in accordance with law.

6.1 In reply, the ld. DR submitted that the Tribunal had restored the matter to the file of the AO with a direction to compute the deduction in accordance with 2005 amendments.

6.2 We have considered the facts of the case and submissions made before us. It has been held earlier that amendments in section 80HHC in the year 2005 cannot be ignored in view of the specific directions of the Tribunal, on the basis of which the AO had passed the order. He did not follow the directions of the Tribunal but repeated the order passed u/s 154 of the Act on 11.8.2003. It is also seen that while the AO worked out profits of business from export of trading goods at Rs. 57,34,366/-, the ld. CIT computed the loss at Rs. 1,13,00,764/-. No argument was made by either side in respect of the merit on computation of the profits of the business. However, it becomes clear from the decision in the case of K.Ravindranathan Nayar (supra),

42

taken into account in the case of GPN Cashew Exporting Co. (supra) that such profits will have to be worked out by deducting 90% of the DEPB benefit from the profits of business. Thereafter, depending upon whether the resultant figure is a profit or loss, the provision contained in third or fifth proviso, as the case may be, shall be applicable. Further, the decision in the case of Topman Exports (supra), being binding in nature on us, shall be taken into account for interpreting the word "profits" used in the third proviso. The deduction u/s 80HHC shall be computed accordingly. Thus, we modify the order of the ld. CIT to the aforesaid extent and restore the matter to the file of the AO for computation of the deduction in the manner mentioned above and after allowing a reasonable opportunity to the assessee of being heard.

In the result, the appeal is treated as partly allowed.

The order was pronounced in the open court on 5 February, 2010.

(orge Mathan)
Judicial Member

(K.G.Bansal)
Accountant Member

Date of order: 5th February, 2010.

Patia

Copy of the order forwarded to:-

1. Goyal Impex & Industries Ltd., New Delhi.
2. AO
3. CIT(A)
4. CIT-Delhi-IV, New Delhi.
5. DR, ITAT, New Delhi.

-By Hand

सहायक पंजीकार
Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
दिल्ली पीठ, नई दिल्ली
Delhi Benches, New Delhi