ITAT JODHPUR BENCH

Sarraf Export

v.

Income-tax Officer

IT Appeal Nos. 22 & 23 (Jodh.) of 2012
[ASSESSMENT YEARS 2005-06 & 2006-07]

Date of Pronouncement – 12.10.2012

ORDER

Hari Om Maratha, Judicial Member – We proceed to decide above captioned appeals by a common order because it would be convenient to do so, as identical issue (s) arising out identical facts are involved, therein.

ITA No.22/Jodh/2012 (A.Y. 205-06)

2.1 This appeal is directed against the order of the ld. CIT(A)-III, Jaipur, dated 14-11-2011.. The assessee had credited an amount of Rs. 1,24,312/- as Duty Entitlement Pass Book (DEPB in short) in its Profit & Loss Account (P&L A/c) and had also claimed deduction u/s 80IB on this amount. Initially, the Assessing Officer allowed this claim u/s 80IB qua DEPB amount while completing assessment u/s 143 (3) of the Act. Subsequently, he noticed that such claim is not allowable as per the verdict of Hon'ble Apex Court rendered in the case of *Liberty India* v. *CIT* [2009] 317 ITR 218. Therefore, he has treated this action as s a mistake rectifiable u/s 154 of the Act. Therefore, he has initiated proceedings u/s 154 of the Act by issuing notice proposing withdrawal ofdeduction on 30-09-2009. The assessee-firm vide reply dated 10-11-2009 objected to this action of the Assessing Officer stating that this provision of Section 28 has since been amended with retrospective effect with a view to neutralize the effect of Liberty India which has been aptly discussed in the case of *Saraf Seasoning Udyog* v. *ITO* [2008] 174 Taxman 594 (Raj.). So, based on the view of Liberty India, the order cannot be subjected to Section 154 proceedings. But the Assessing Officer did not agree and withdrew the deduction earlier allowed u/s 80IB qua the DEPB amount, vide his order dated 08-02-2010. This order was challenged before the ld. CIT(A), who has also approved the action of the Assessing Officer. Now, the firm is in second appeal before us by raising the following grounds:-

1. That the order passed by the ld. CIT(A)-III, Jaipur is illegal and against the law.

2. That the ld. CIT(A) should have rectified the mistake as pointed out in the appeal.

3. That the ld. CIT(A) should have appreciated that the provision of the statute is binding on the Revenue Officer which was neither declared unconstitutional nor stayed by any of the competent court.

4. That the order passed by the ld. CIT(A) is against the judicial decorum an discipline.

5. That the cost may kindly be awarded to the appellant.

2.2 We have heard rival submissions. We have also perused the sections of the Act referred to and the decisions relied on, by the parties. After considering them in entirety vis-à-vis the facts of this case, we are in agreement with the submissions of the appellant.

2.3 The amended section came into force w.e.f. 01-4-1998. This amendment was brought into by inserting clause (iiid), which reads as under:-

Section 28 – The following income shall be chargeable to income tax under the head 'Profit and Gains of Business or Profession:-

.....

.....

(*iiid*) Any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced u/s 5 of the Foreign Trade (Development and Regulation Act, 1992) (22 of 1992)"

2.4 The Hon'ble Rajasthan High Court after considering the amended Section has given the following verdict

"Whether profit upon sale of DEPB lincense shall be eligible for deduction u/s 80IB of the Act treating it as profit from industrial undertaking? Held yes, in view of the newly inserted clause (iiid) in Section 28 of the Act w.e.f. 01-04-1998″

2.5 Before arriving at the above conclusion, their Lordships have carefully considered and referred to the following decisions

CIT v. *Sterling Foods* [1999] 237 ITR 579

Pandian Chemicals Ltd. v. *CIT* [2003] 262 ITR 278

B. Desraj v. *CIT* [2008] 301 ITR 439

CIT v. *Sharda Gum & Chemicals* [2007] 288 ITR 116 (Raj.)

2.6 Now, let us examine the provisions of section 80IB which reads as under:-

"80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.–(1)

Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), 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 from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.;;"

2.7 It is an undeniable and undisputed fact that Assessing Officer has passed the impugned order based on the verdict given in Liberty India (supra). The perusal of the judgement reveals that their Lordships have not considered the amended provision. As against which as rightly pointed by the ld. AR, the Hon'ble Rajasthan High Court in the decision of *Saraf Seasoning Udyog* (*supra*) have discussed and relied on

even the amended provision. Further, it is trite that when any amended provision is not considered or for that matter, any relevant provision of the Act is not considered while giving a judgement, it is treated as in per curium.

2.8 The Hon'ble High Court has taken its view while deciding the case of *CIT* v. *Chokshi Contacts (P) Ltd*. [2001] 251 ITR 587 that in case amended provisions of an Act are not considered the judgement looses the character of a binding nature. The court has held as under:-

"Coming to the judgement relied on by ld. counsel for the Revenue in Shree Engineer's case, we are of the opinion that the answer question no. 3 which was referred by the Tribunal has been rendered solely with the Deference to the earlier decision of the court in *'Vishnu Oil and Dal Mills'* case [1996] 218 ITR 71 (Raj) only without noticing the relevant provisions of Sections 80A and 80AB and Section 80B(5) and also sect 80HH(9). It may be noticed that the decision in *Vishnu Oil and Dal Mills* case [1996], 218 ITR 71 (Raj) dealt with the question whether in computing the gross total income for the purpose of Chapter VI-A requires adjustments of unabsorbed carried forward loss or unabsorbed carried forward depreciation in terms of part D of Chapter IV or in terms of Chapter VI of the Act, which as seen above has to be computed without taking into account the provisions of Chapter VI-A, but after taking into account other provisions of Act-whether under Chapter IV or Chapter VI. However, the court was not dealing with the interaction of the various sections contained in Chapter VI-A on the issue of deduction of any amount which is to be allowed under Chapter VI-A. Thus, the decision rendered in Shree Engneers' case without Deference to the relevant provisions of the Act merely by Deference to *Vishnu Oil Mills* case [1996] 218 ITR 71 (Raj) was *per incuriam* and cannot be taken as a binding precedent and does not assist the Revenue in any manner."

2.9 Similar view has been taken by the Jodhpur bench in the case of *Bothra International* v. *ITO* in ITA No. 37/JU/2011 – A.Y. (2002-03) dated 21-09-2012. Therefore, the decision of Liberty India will not rule the field after amendment. Moreover, in any other case, the issue becomes a debatable one in the light of the above decision. It is settled position of law that where any issue is debatable, it cannot be corrected u/s 154 of the Act. In this regard, the Hon'ble Apex Court in the case of *T.S. Balaram ITO* v. *Volkart Bros*. [1971] 82 ITR 50 is relevant wherein an action taken by Assessing Officer u/s 154 of the Act was found to be illegal. The Hon'ble Apex Court has held thus :-

"In *Satyanarayan Laxminarayan Hegde* v. *Mallikarjun Bhavanappa Tirumale*, this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record-see *Sidhramappa Andannappa Manvi* v. *Commissioner of Income-tax* (2). The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record." In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the face of the record" and "mistake apparent from the record." But suffice it to say that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent."

We have found that the allowance of deduction is not a glaring, obvious, patent and apparent from record. Hence, it cannot be rectified, in view of our above discussion.. Accordingly, we accept the appeal of the assessee and set aside the finding of the ld. CIT(A) by reversing the same and allow this appeal.

3.0 In the result, the appeal of the assessee stands allowed.

ITA No.23/Jodh/2012 (A.Y. 2006-07)

4.1 This appeal is directed against the order of ld. CIT(A), Jaipur dated 04-1-2011 pertaining to Assessment Year 2006-07.

4.2 The facts, the issue and the circumstances of this year are exactly identical to the facts, issue and circumstances obtaining in the Assessment Year 2005-06, in ITA No. 22/Jodh/2012 as discussed and decided above.

4.3 Therefore, by importing same reasoning as given in other case as above, we reverse the impugned finding of the ld. CIT(A) and allow the appeal of the assessee-firm.

5.0 In the result, both the appeals of the assessee-firm stand allowed.

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