Commissioner Of Income Tax, Karnataka vs Sterling Foods, Mangalore on 15 April, 1999

Equivalent citations: AIR 1999 SUPREME COURT 2036, 1999 (4) SCC 98, 1999 AIR SCW 1746, 1999 TAX. L. R. 647, 1999 (4) ADSC 276, 1999 (5) KANT LD 239, 1999 (2) LRI 635, 1999 (4) SCC 989, (1999) 3 JT 227 (SC), 1999 (5) SRJ 109, (1999) 104 TAXMAN 204, (1999) 46 KANTLJ(TRIB) 570, (1999) 83 ECR 481, (1999) 2 SCALE 678, (1999) 150 TAXATION 347, (1999) 4 SUPREME 172, (1999) 108 ELT 3, (1999) 153 CURTAXREP 439, (1999) 237 ITR 579

Bench: S.P.Bharucha, R.C.Lahoti

PETITIONER:
COMMISSIONER OF INCOME TAX, KARNATAKA

Vs.

RESPONDENT:
STERLING FOODS, MANGALORE

DATE OF JUDGMENT: 15/04/1999

BENCH:
S.P.Bharucha, R.C.Lahoti,

JUDGMENT:

BHARUCHA.J. The Judgment and order under appeal (190 ITR 274) was pronounced by a Division Bench of the Karnataka High Court on a reference made by the assessee, and the Revenue is in appeal. The High Court answered in favour of the assessee the following question:

"Whether, on the fact and circumstances of the case, the Tribunal was justified in law in holding that the receipt from the sale of import entitlements could not be included in the income of the assessee for the purpose of computing the relief under Section 80HH of the Income-tax Act, 1961?"

The identical question had arisen in respect of the same assessee for an earlier year and the High Court had then answered the question against the assessee (150 ITR

293). The assessee had not carried the matter further Ordinarily, therefore, the Division Bench hearing the assessee's appeal for the later assessment year would have been bound by the earlier decision. However, it chose not to do so relying upon the fact that Section 28 of the Income Tax Act, 1961 had been amended in the

meanwhile by the Finance Act, 1990 with effect from 1st April, 1962 by insertion of clause (iiia) and clause (iiib) with effect form April 1, 1967, which read as follows:

(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 off 1947).

(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Govt. of India.

As we shall point out, these amended provisions have no relevance to the point at issue and the High Court was in error in relying thereon and not following the earlier judgment.

The facts are :

The assessee firm is engaged in processing prawns and other sea food, which it exports during the Assessment Years 1975-76 and 1976-77. It also earned some import entitlements granted by the Central Govt. under an Export Promotion Scheme. The assessee was entitled to use the import settlements itself or sell the same to others. It sold the import entitlements that it had earned to others. Its total income for the aforementioned assessment years included the sale proceeds for such import entitlements and it claimed relief under Section 80HH of the Act in respect also of the sale proceeds of the import entitlements.

Section 80HH, so far as it is relevant, read at all relevant times thus:

"80HH, Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas. (1) where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, he allowed, in computing the total income of the assessee, a deduction from such profits and against of an amount equal to twenty per cent thereof."

To analyses the provision so far as it is relevant here, if the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, the assessee is entitled to be allowed, in the computation of his total income, a deduction from the profits and gains derived from the industrial undertaking of an amount equal to 20% thereof.

The question, therefore, was whether the income derived by the assessee by the sale of the import entitlements was profit and gain derived from its industrial undertaking of processing sea food. The Division Bench of the High Court came to the conclusion that the income which the assessee had made by selling the import entitlements was not a profit and gain which it had derived from its industrial undertaking. For that purpose, it relied upon the decision of this Court in Cambay Electric Supply Industrial Co. Ltd. vs. CIT (113 ITR 84). It was there held that the expression "attributable

to" was wider in import than the expression "derived from". The expression of wider import, namely, attributable to was used when the legislature intended to cover receipts from sources other than the actual conduct of the business. The Division Bench of the High Court observed that to obtain the benefit of Section 80HH the assessee had to establish that the profits and gains were derived from its industrial undertaking and it was just not sufficient that a commercial connection was established between the profits earned and the industrial undertaking. The industrial undertaking itself had to be the source of the profit. The business of the industrial undertaking had directly to yield that profit. The industrial undertaking had the direct source of the profit and not a means to earn any other profit. Reference was also made to the meaning of word "source", and it was held that the import entitlements that the assessee had earned were awarded by the Central Govt. under the Scheme to encourage exports. The source referable to the profits and gains arising out of the sale proceeds of the import entitlement was, therefore, the Scheme of the Central Govt. and not the industrial undertaking of the assessee.

The question arose, as aforestated again for the Assessment Year 1979-80 and the Division Bench of the High Court then basing itself on the amendment to Section 28 referred to above, decided otherwise. The relevant portion of the judgment and order under appeal reads thus :

> "We have already extracted what was decided by this court. It cannot be said that that decision is incorrect. What has happened is that that decision as a binding precedent is of little value in the light of amendments made to section 28 retrospectively. If it is not binding on us, then at the time we are called upon to answer a question for the subsequent assessment year, we must look at the law as it was, at the relevant time that is relevant for the assessment year 1979-80. Both the amendments have been effected from 1962-63 and therefore, in 1979-80, the income received from the Govt. of India by sale of import licences and incentives for export was income within the meaning of Section 28 assessable to tax as income from profits and gains of business or profession. It is in that light that we have to answer the question."

It appears to us that the later Division Bench did not fully appreciate what had been held by the earlier Division Bench and to what had so held the provision of Section 28 as amended made no difference. Therefore, in our view, the judgment under appeal would have to be set aside in as much as it did not follow an earlier binding judgment of the High Court itself.

But learned counsel for the assessee submitted that he was entitled to urge since this matter related to a different assessment year, that the earlier Division Bench judgment of the High Court was erroneous. Since we are of the view that the earlier judgment was not erroneous, it is not necessary to decide whether the assessee could so urge.

In learned counsel's submission, the profits and gains were derived from the assessee's industrial undertaking and were, therefore, entitled to the deduction prescribed by Section 80HH. Learned counsel cited the judgment of the Madras High Court in Commissioner of Income-Tax, Madras-I vs. Wheel and Rjn Company of India Ltd. (107 ITR 168) which, no doubt, is squarely on the point and holds in favour of the assessee. To quote what would be fully explanatory, "In the fast place as we

pointed out already, the receipt by way of subsidy and the receipt by way of the profits due to the sale of import entitlement are directly referable to the export of the cycle rims made by the assessee and consequently they can be said to be profits and gains derived from the export of cycle rims even on the basis of any theory of proximity."

Our attention was also invited to the judgment of this Court in National Organic Chemical Industries Ltd. vs. Collector of Central Excise, Bombay (106 STC 467). The relevant portion of the judgment is contained in paragraphs 10,11,& 12 and they read thus:

> "10. The dictionaries state that the word "derive" is usually followed by the word "from", and it means : get to trace from a source; arise from, originate in; show the original or formation of.
>
> 11. The use of the words "derived from" in item 11-AA(2) suggests that the original source of the product has to be found. Thus, as a matter of plain English, when it is said that one word is derived from another, often in another language, what is meant is that the source of that word is another word, often in another language. As an illustration, the word "democracy" is derived from the Greek word "demos", the people and most dictionaries will so state. That is the ordinary meaning of the words "derived from" and there is no reason to depart from that ordinary meaning here.
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> 12. Crude petroleum is refined to produce raw naphtha. Raw naphtha is further refined, or cracked to produce the said products. This is not controverted. It seems to us to make no difference that the appellants buy the raw naphtha from others. The question is to be judged regardless of this and the question is whether the intervention of the raw naphtha would justify the finding that the said products are not derived from refining of crude petroleum. The refining of crude petroleum produces various products at different states. Raw naphtha is one such stage. The further refining, or cracking of raw naphtha results in the said products. The said products must therefore, be held to have been derived from crude petroleum."

We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in the circumstances, only be said to be the Export Promotion Scheme of the Central Govt. whereunder the export entitlements become available. There must be for the application of the words "derived from", a direct nexus between the profits and gains and the industrial undertaking. In the instant case the nexus is not direct but only incidental. The industrial undertaking exports processed sea food. By reason of such export, the Export Promotion Scheme applies. Thereunder, the assessee is entitled to import entitlements, which it can sell. The sale consideration therefrom cannot, in our view be held to constitute a profit and gain derived from the assessees' industrial undertaking.

In the result, the appeals are allowed. The judgment under appeal is set aside. The question is answered in the affirmative and in favour of the Revenue. No order as to costs.