



* IN THE HIGH COURT OF DELHI
 + ITA No. 334 of 2004
 % DECIDED ON : September 23, 2004.

Commissioner of Income Tax, Delhi-V, New Delhi

.... Appellant.

Through : Mrs. Prem Lata Bansal, Advocate
 with Mr. Ajay Jha, Advocate.

Versus

M/s Ritesh Industries Limited

.... Respondent

Through Mr Ajay Vohra, Advocate with
 Mr. Shammi Kapoor and Mr. Vinay Vaish,
 Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

1. Whether the Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

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B.C.PATEL, C.J. (ORAL)

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1. The present appeal under Section 260 A of the Income Tax Act, 1961 (hereinafter referred as the Act) is preferred by the Revenue raising the following question:-

Whether the amount of "duty draw back" can be regarded as income derived from

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an industrial undertaking so as to entitle the assessee a deduction under section 80-I of the Income Tax Act, 1961?

2. In this matter one need not go into the facts as it is an admitted position that the assessee who is a manufacturer, has received "duty draw back" in view of the export of garments. The question is whether the amount of "duty draw back" which the assessee has received can be considered to be "profits and gains derived from an industrial undertaking" in the context of Section 80-I of the Act. Sub-section (1) of Section 80-I of the Act, is relevant for our purpose and, therefore, we reproduce it below:-

"80-I (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft 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 from such profits and gains of an amount equal to twenty per cent thereof."

3. As aforesaid, we are required to consider whether the expression "profits and gains derived from an industrial

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undertaking" would include the duty draw back or not. In case of Commissioner of Income Tax v. Jameel Leathers and Uppers :(2000) 246 ITR 97 a Division Bench of the Madras High Court had an occasion to consider the similar provisions contained in Section 80-HH as well as in Section 80-J of the Act. The question raised in that case was as under :-

"Whether the Appellate Tribunal is right in law in holding that "cash assistance" and "duty drawback" received from the Government by assessee are includible in the profits derived from the industrial undertaking and eligible for relief under sections 80HH and 80J of the Income Tax Act, 1961?"

4. We need not set out Section 80HH or Section 80J of the Act as the relevant part is the same as that of Section 80-I of the Act. In that case the assessee's claim was negated by the Income Tax Officer and ultimately the Tribunal upheld the order made by the Commissioner, who granted benefits. The Court, considering various decisions, answered the question in favour of the revenue and against the assessee. The Division Bench in that case held that:-

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"While the "cash assistance", "duty drawback" and import entitlements are undoubtedly attributable to the business carried on by the assessee and the assessee would not have been in a position to receive any of these benefits, had the assessee not been carrying on business, it cannot be said, however, that such income is 'derived' from the business."

5. The Division Bench for the proposition aforesaid, relied on the decisions of the Supreme Court in National Organic Chemical Industries Ltd v. Collector of Central Excise: AIR 1997 SC 690 and Cambay Electric Supply Industrial Co. Ltd v. Commissioner of Income Tax : (1978) 113 ITR 84 (SC).

6. The Madras High Court had another occasion to examine a similar question in the case of Commissioner of Income Tax v. Viswanathan and Co : (2003) 261 ITR 737. In the said judgment the Court pointed out as under:-

"Though the assessee's right to receive those benefits under those schemes was attributable to the fact that it was running the industrial undertaking, that however did not render such benefits "derived" from the industrial undertaking the scope of the term "derived from" being narrower than the scope of the term "attributable to".



7. The Court also stated that there is no reason to doubt or depart from the law that has been laid down in case of Commissioner of Income Tax vs. Jameel Leathers and Uppers (2000) 246 ITR 97.

8. The Supreme Court in case of Commissioner of Income Tax v. Sterling Foods :(1999) 237 ITR 579 examined the question of import entitlements. The Court observed as under:-

"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 Government 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 assessee's industrial undertaking."

9. In our view this would apply with equal vigour to duty

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drawback. It is required to be understood that on the raw materials utilised as inputs the assessee pays duty (D) and on the total component of costs the assessee adds his profit component (P) to arrive at the sale price. It is this profit (P) which is included in the expression "*profits and gains derived from an industrial undertaking*". Merely because under the scheme to encourage exports the duty (D) is refunded subsequently by way of "duty drawback", it cannot be regarded as the profit or gain "derived" from the industrial undertaking. It may constitute profits or gains of the business by virtue of section 28 of the Act, but, it cannot be construed as profits or gains "derived" from the industrial undertaking for, its immediate and proximate source is not the industrial undertaking but the scheme for duty drawback. Whether duty drawback is or is not allowed, the profit "derived" from the industrial undertaking remains to be the profit (P). On account of the duty drawback, business profit may be increased, but so far as profits and gains "derived" from an industrial undertaking is concerned, it will not increase. It will remain the same.

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10. In view of this, the appeal is required to be allowed.

We answer the question in favour of the revenue and against the assessee. Ordered accordingly.

Belair
CHIEF JUSTICE

Badar Durrez Ahmed
BADAR DURREZ AHMED, J

September 23, 2004
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