* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 1158/2008**

Reserved on: September 14, 2009

Pronounced on: September 17, 2009

COMMISSIONER OF INCOME TAX, DELHI- IV ...Appellant

Through: Mr. N.P.Sahni, Advocate.

VERSUS

M/S GUJARAT GUARDIAN LTD. ....Respondent

Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Advocate and Mr. Sriram Krishnan, Advocate.

CORAM:
HON'BLE MR. JUSTICE A. K. SIKRI
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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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VALMIKI J. MEHTA, J

1. The present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) has been preferred by the revenue against the order dated 31st January, 2008 of the Income Tax Appellate Tribunal

(hereinafter referred to as the I.T.A.T.) whereby appeal of the respondent hei was accepted and the order of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] dated 22nd March, 2007 passed under Section 263 was set aside.

2. The relevant facts of the case are that the assessee is a company engaged in the business of manufacture and sale of float glass. A return of income for the year under consideration was filed by it on 30.10.2002 declaring its income "Nil" under the normal provisions of the Act and Rs.34,37,36,599/- under Section 115JB of the Act. The said return was originally processed by the Assessing Officer under Section 143(1), however, subsequently, a notice under Section 148 was issued by the Assessing Officer because of the following reasons:

> "1. The assessee company has returned a taxable income of Rs. Nil during the year. It has claimed deduction u/s 80 HHC amounting to Rs.9,31,67,949/- which has been computed on profits of the business before the set off of brought forward losses. The profit after the set off of the brought forward losses is Rs.3,20,42,693/- and deduction u/s 80 HHC has been restricted to this figure and thus, the total income which has been returned comes to NIL.
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> Deduction u/s 80 HHC is available on export activity. For the computation of deduction the profits of the business have to be computed as per provisions of the Act and then deduction should be allowed on the available profit. In this case, the available profit for the computation of deduction was the profit which has been computed as per provisions of the Act, i.e. after set off of brought forward losses. The deduction u/s 80 HHC should have been computed after

arriving at the profit available after set-off of brought forward losses.

2. The assessee has debited to its P & L accounts a sum of Rs.6,28,32,100/- on account of royalty (including cess of Rs.29,92,006/-) which pertains to prior period as has been disclosed in Para 22(b) of the tax audit report. As the same does not pertain to the previous year relevant to the assessment year 2002-03, therefore, is not eligible for deduction.

I have reasons to believe that income in respect of above has escaped assessment. Issue notice under section 148"

3. The assessment was thereafter completed by the Assessing Officer under Section 143(3)/147 vide his order dated 30.3.2005 assessing the total income of the assessee under the normal provisions of the Act at Rs.5,64,56,750/- and at Rs.41,38,16,366/- under Section 115JB. This assessment was challenged by the assessee in appeal before the CIT(A). Meanwhile, the assessment record in the assessee's case for the year under consideration was examined by the learned CIT(A). He was of the view that mistakes were apparently committed by the Assessing Officer and therefore he was of the prima facie opinion that the order of the Assessing Officer being erroneous as well as prejudicial to the interest of the revenue, he issued a show cause notice to the assessee under Section 263. For issuing the notice under Section 263, the CIT(A) noticed the following mistakes on the part of the Assessing Officer:

"(i) The royalty of Rs.628.32 lakhs, which was clearly in the nature of capital expenditure was allowed as

was claimed in the return. The mistake resulted into underassessment of income to the extent of Rs.628.32 lakhs.

(ii) The deduction u/s 80 HHC was allowed at Rs.70.60 lakhs, as against the correct deduction allowable at Rs.61.89 lakhs. The mistake resulted into underassessment of income to the extent of Rs.8.71 lakhs."

The CIT(A) proceeded thereafter to revise the assessment exercising his powers under Section 263. With respect to the issue of royalty he held the same to be referable to a prior period expenditure and therefore deserves to be disallowed. As regards the deduction under Section 80 HHC, the CIT(A) said that it was not possible to record conclusive finding on this issue and therefore directed the Assessing Officer to decide this issue afresh.

4. Before the I.T.A.T, the assessee stated that both the issues pointed out by the learned CIT(A) in the notice under Section 263 were duly considered and examined by the Assessing Officer during the course of the assessment proceedings and after applying his mind the assessment was completed. Attention was invited by the assessee to the written submissions filed before the Assessing Officer pointing out the relevant portion wherein submissions were made with respect to two issues raised by the CIT(A) in his notice under Section 263 i.e. admissibility of royalty paid for earlier years and deduction under Section 80HHC.

5. I.T.A.T. has accepted the appeal of the assessee and held the payment of royalty as an allowable expenditure in the present assessment year and has with

respect to deduction under Section 80HHC, it held that it is not understood a- how exclusion of other income to the extent of Rs.2 lakhs from the business profits would result in computation of deduction under Section 80HHC at Rs.61.89 lakhs as against Rs.70.60 lakhs computed by the Assessing Officer and without throwing any light on this important aspect, the CIT(A) was therefore in error in holding that the computation of deduction under Section 80HHC allowed by the Assessing Officer was factually incorrect and that there was no such error in the order of the Assessing Officer allowing the deduction under Section 80HHC to the extent of Rs.70,60,279/- much less an error prejudicial to the interest of the revenue.

6. Before us, the learned counsel for the revenue has vehemently pointed out that the payment towards royalty was for the earlier assessment years and since the assessee was maintaining his books of account on mercantile basis, the claim towards the royalty for the earlier years was rightly disallowed by the CIT(A). On the other hand, the counsel for the respondent has specifically referred to the fact that unless and until Industrial Development Bank of India (IDBI) allowed payment of royalty to the parent company M/s. Guardian Industries Corp. USA, the royalty could not be paid to the parent company. In fact, this was a term in the agreement between the assessee company and IDBI, that the assessee shall not make payment of royalty to the parent company if payment of instalments of principal, interest and any other monies are

outstanding to the institutions. Due to inadequate/cash profits accruals, consequent defaults in the payment of the institutional dues, the assessee did not pay any royalty to the parent company from 1.3.1993 to 31.3.1999. It was only after receipt of a letter dated 26.11.1999 from the IDBI that the payment of royalty was made from 1.4.1999 to 28.2.01 and as regards past royalty up to 31.3.1999, IDBI advised that a view would be taken at a later stage.

7. On the aforesaid basis, the issue is whether liability had actually accrued to the assessee during the earlier previous years for royalty although such liability could have only accrued with the consent of the IDBI. We are of the view that since IDBI had not given any consent in the relevant assessment years when the royalty was payable, no liability can be said to be accrued to be payable for being claimed by the assessee as an expenditure in those earlier previous years merely because the books are maintained by the assessee on a mercantile basis. More so, it was a question of one possible view out of the two views which the Assessing Officer could have taken and the CIT(A) could not have interfered with the same in exercise of his powers under Section 263. The following pertinent observations made by the Tribunal are relevant and with which we concur:

> " In our opinion, these submissions made on behalf of the assessee company were self-explanatory as regard its claim for deduction on account of payment of royalty pertaining to earlier years and having regard to the said submissions, it cannot be said that the said claim of the assessee was

allowed by the AO without making necessary enquiry or that there was any error in accepting the same even on merits. A possible view in the matter was taken by the AO while allowing the said claim and merely because the same was not found acceptable by the ld. CIT, he, in our opinion, was not empowered to exercise his jurisdiction u/s 263."

8. As regard the second issue of deduction under Section 80HHC, the I.T.A.T. has correctly observed as under and in which not much fault was found by the counsel for the appellant:

"13. As regards the second issue relating to deduction u/s 80HHC, it is observed that this issue was also raised by the AO himself in the reasons recorded while reopening the assessment in this case. The assessment order passed by him further shows that the assessee's claim for deduction u/s 80 HHC was examined by him as is evident from the fact that the deduction so claimed at Rs.3,30,42,693/- was restricted by him to Rs.70,60,279/- in the assessment finally completed. In the notice issued u/s 263, it was mentioned by the ld. CIT that the correct deduction allowable to the assessee u/s 80HHC was only Rs.61.89 lakhs as against Rs.70.60 lakhs allowed by the AO. No details of such so called correct deduction however were given by him in the said notice. When this aspect of the matter was pointed out on behalf of the assessee company during the course of proceedings u/s 263, he observed in his impugned order that the other income to the extent of Rs.9,87,654/- only has been taken for calculating the amount deductible from the business profits as per clause (baa) of Explanation below Section 80HHC (4C) as against such income credited in the profit and loss account at Rs.11,87,654/-. One really fails to understand how this exclusion of other income to the extent of Rs.2 lakhs from the business profits would result in computation of deduction u/s 80HHC at Rs.61.89 lakhs as against Rs.70.60 lakhs computed by the AO. The Ld. CIT has not thrown any light on this important aspect of the matter. Moreover, a perusal of the details of other income given at page no.68 of the assessee's paper book shows that the said sum of Rs.2 lakhs included in

the other income was on account of cash subsidy written back and the computation of profit of the business given at page no.34 of the assessee's paper book further shows that the said amount of Rs.2 lakhs was excluded by the assessee company itself while computing the profits of the business for the purpose of computing deduction u/s 80HHC. The error as allegedly pointed out by the ld. CIT in the computation of deduction u/s 80HHC allowed by the AO thus was factually incorrect and in our opinion, there was no such error in the order of the AO in allowing the deduction u/s 80HHC to the extent of Rs.70,60,279/- much less than an error prejudicial to the interest of the Revenue."

9. Therefore no substantial question of law arises and the present appeal is therefore dismissed.

VALMIKI J.MEHTA, J

A.K. SIKRI, J

September 17, 2009
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