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

\+ ITA No.328/2007

Date of Decision: 3rd December, 2009

COMMISSIONER OF INCOME TAX, DELHI-V ..... Appellant
Through: Mr. Subhash Bansal, Adv.

Versus

PENGUIN BOOKS INDIA (PVT.) LTD. ..... Respondent
Through: Mr. C.S. Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

WITH

ITA No.27/2008 with CM 117/2008

PENGUIN BOOKS INDIA PRIVATE LIMITED
11, COMMUNITY CENTRE, PANCHSHEEL PARK
NEW DELHI ..... Appellant
Through: Mr. C.S. Aggarwal, Sr. Adv. with Mr. Prakash Kumar

Versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Subhash Bansal, Adv.

% **CORAM**
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether 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?

J U D G M E N T

A.K. SIKRI, J (ORAL)

1. For the assessment year 1994-95 the assessee had filed its return declaring income of Rs.17,64,090/-. Assessment was completed under Section 143(3) of the Income Tax Act on 8th January, 1997. In this return filed by the assessee it had claimed deduction under Section 80-O of the Act as foreign exchange receipt in the sum of Rs.23,14,398/- on account of royalty, technical fee etc. As per the figures shown by the assessee total royalty in the sum of Rs.23,64,876/- was received. Expenditure to the tune of Rs.50,479/- which was direct expenditure, was incurred and after adjusting this amount on the net foreign exchange convertible into Indian rupees amounting to Rs.23,14,397/- the benefit under Section 80-O of the Act was claimed which was allowed by the Assessing Officer while framing the assessment.

2. The Assessing Officer thereafter reopened the proceedings by issuing notice under Section 148 of the Act. This was done on the ground that deduction allowed under Section 80-O was excessive as the same was allowable on the net receipt from royalty and not on gross receipts. Pursuant thereto re-assessment order was framed in the following manner:

> "Perusal of record shows that the assessee has claimed deduction u/s 80 'O' on gross profit received as foreign exchange amounting to Rs.2314398/- on account of Royalty technical fee after excluding expenditure incurred to earn the income. As the income attributable to technical fee earned in foreign currency was required to be computed after considering the expenditure incurred thereon and the deduction @ 50% on the balance net income was to be allowed. But this was not followed and the deduction was allowed on gross income. This resulted in allowance of excess deduction of Rs.1016792/-

> In view of the above findings taxable income is recomputed as under:
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> | | | |
> |---|---|---|
> | Total taxable income u/s 143(3) | :- | 1764090/- |
> | Add: Excess deduction u/s 80O allowed in the original order earlier | :- | 1016792/- |
> | | | 2780882/-“ |

3. The assessee filed appeal before the CIT(A). The assessee had in this appeal challenged the service of notice under Section 148 and initiation of re-assessment proceedings under Section 147 of the Act. Appeal was dismissed.

4. The assessee carried the matter further before the Income Tax Appellate Tribunal (ITAT). Vide impugned judgment dated 24th February, 2006 the ground of the assessee relating to validity of the proceedings under Section 148 of the Act has been rejected. However, on merits the ITAT has come to the conclusion that the re-assessment order was wrongly framed as the deduction under Section 80-O is admissible on the foreign exchange brought into India and the expenses incurred in India for earning of such expenses are not relevant. Both the Revenue as well as assessee have preferred instant appeals.

5. Appeal of the assessee is against that part of the order of the Tribunal whereby proceedings under Section 148 are upheld. Revenue on the other hand is aggrieved by the deletion of aforesaid additions.

6. It is the submission of the Revenue, in the appeal preferred by it, that Section 80AB stipulates that the gross total income is to be computed and thereafter the deduction under Section 80-O is allowable. For calculating the gross total income, all expenses

incurred by the assessee for carrying out the business have to be deducted from the gross receipt and thereafter, the deduction under Section 80-O would be allowed as held by the full Bench of this Court in ***Commissioner of Income Tax*** vs. ***Chemical and Metallurgical Design Co. Ltd.-247 ITR 749*** and similar view is expressed by the Supreme Court in ***IPCA Laboratory Ltd.*** vs. ***Deputy Commissioner of Income Tax, Mumbai-266 ITR 521***. On that basis his submission is that indirect expenses which would be attributable to the aforesaid foreign exchange earning shall be taken into consideration and deducted from the said foreign exchange and the benefit under Section 80-O would be allowed only on the merit.

7. While there may not be any quarrel about this proposition, in the facts of the present case we find that no basis has been disclosed by the Assessing Officer for attributing the so called indirect expenses. We have already extracted the relevant portion of the order of the Assessing Officer. After mentioning that the expenditure incurred for earning foreign exchange had to be deducted, the Assessing Officer mentioned the figure of so called excess deduction as Rs.10,16,792/-. No exercise is done and it is also not shown as to what was the indirect expenditure incurred in India which were related to earning of the foreign exchange currency and which was not taken into consideration when the original assessment was framed. On our specific query to the counsel for the parties as to what was the reasons given by the Assessing Officer for reopening the assessment, Mr. Aggarwal, learned counsel stated at bar that in spite of various requests made by the assessee no such reasons were ever

supplied, except saying that these were sent by post and, therefore, it was presumed that they were received by the assessee.

8. Be as it may, as no basis is disclosed for arriving at any figure relating to the so called indirect expenditure and it is also not mentioned as to how the excess deduction of Rs.10,16,792/- has been worked out, we are of the opinion that on this ground alone the appeal preferred by the Revenue needs to be dismissed. In view thereof it is not necessary to deal with the appeal of the assessee questioning the reopening of the assessment under Section 148 though, in view of our aforesaid observations we prima facie feel that there was no basis for reopening of the assessment either. We accordingly are of the opinion that no question of law arises in the appeal preferred by the Revenue.

9. This appeal is accordingly dismissed.

10. Consequently, appeal preferred by the assessee is disposed of as not pressed.

A.K. SIKRI, J.

SIDDHARTH MRIDUL, J.

DECEMBER 03, 2009
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