



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

+ **ITA No.937 of 2009**

with

ITA No.940 of 2009 and ITA No.973 of 2009

% Decision Delivered On: SEPTEMBER 29, 2010.

1) ITA No.937 of 2009

ADVANCE ISPAT INDIA LTD. . . . Appellant

through : Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
Advocate

VERSUS

COMMISSIONER OF INCOME TAX . . . Respondent

through: Ms. Prem Lata Bansal, Standing
Counsel

2) ITA No.940 of 2009

ADVANCE ISPAT INDIA LTD. . . . Appellant

through : Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
Advocate

VERSUS

COMMISSIONER OF INCOME TAX . . . Respondent

through: Ms. Prem Lata Bansal, Standing
Counsel

3) ITA No.973 of 2009

ADVANCE ISPAT INDIA LTD. . . . Appellant

through : Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
Advocate

VERSUS

COMMISSIONER OF INCOME TAX . . . Respondent

through: Ms. Prem Lata Bansal, Standing
Counsel

**CORAM :-**

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J. (ORAL)

1. Admit.
2. The following substantial question of law arises for consideration:

“Whether on true and correct interpretation of the provisions contained in Section 80HHC (3)(b) of the Act read with Clause (e) to the Explanation, the Income Tax Appellate Tribunal was justified in law in not allowing reduction (of ₹1,35,422 and ₹1,16,897 being 10% of the export incentives and interest income respectively) being “indirect costs attributable to incomes other than exports” from the total indirect expenses debited in the profit and loss account for computing “indirect costs attributable to export” of trading goods by the assessee?”
3. With the consent of the learned counsel for the parties, we have taken up the matter for final arguments at this stage itself.
4. The facts in brief may first be stated before taking note of the arguments advanced by the counsel for the parties. The appellant/assessee is a public limited company and enjoying the status of 100% trader exporter for last several years. It is, therefore, not in dispute that as being a trader and exporter, the appellant falls under Clause (b) of sub-section (3) of Section 80HHC of the Income Tax Act (hereinafter referred to as ‘the Act’) and is entitled to get the benefit of the said provision. For the Assessment Year 2001-02, it had filed its return declaring a total income of ₹25,36,270. In the return, the appellant also claimed



mentioned that a total turnover for that year was ₹11,82,94,69

The appellant had also shown the direct cost in respect of such export turnover at ₹10,83,07,726. On that basis, deduction under Section 80HHC of the Act was claimed at ₹50,89,100.

5. The Assessing Officer (AO), however, adopted the direct cost at ₹10,95,32,660 instead of ₹10,83,07,726 (in this respect, the Income Tax Appellate Tribunal (in short 'the Tribunal') has already provided necessary relief to the appellant by adopting the export turn over cost as declared by the assessee). That apart, the assessee had declared the indirect expenses in the Profit and Loss account in the sum of ₹38,65,447 and out of these indirect expenses attributable to exports for the purpose of Clause (b) of sub-section (3) of Section 80HHC of the Act were claimed to ₹36,05,649. The calculation given by the assessee is in the following manner:

"Selling & administrative expenses	₹30,15,769
Interest & financial expenses (after set off of interest received on Bank FDRs ₹7,92,204	₹5,91,630
Depreciation	₹2,58,048
Total indirect expenses as per Profit and Loss Account	₹38,65,447
Less: Expenses attributable to other income @10% of such income	
Export Incentives (10% of ₹13,54,219)	₹1,35,422
Dividend Income (10% of ₹74,790)	₹7,497
Interest Income (10% of ₹11,68,973)	<u>₹1,16,897</u>
	₹2,59,798
Indirect cost attributable	₹36,05,649



6. The AO further was of the opinion that the indirect cost attributable to the turnover would be higher at ₹45,99,046 which was calculated as under:

"Indirect cost as shown by the assessee	₹38,65,447
Less: Expenses related to Dividend Income	₹7479
Add: Interest on FDRs	₹7,92,204
	₹46,50,172
Indirect tax attributable to export turnover	= Indirect cost x Export Turnover Total Turnover = $\frac{4650172 \times 1170170059}{11,82,94,690}$ = ₹45,99,046"

7. By taking higher indirect cost attributable to the exports, income for the purpose of benefit under Section 80HHC stood reduced. Thus, the AO allowed deduction under Section 80HHC @ ₹32,72,749 as against the claim of ₹50,89,100 made by the assessee. He, thus, disallowed ₹18,16,351 out of the total claim of deduction under Section 80HHC of the Act of ₹50,89,100.
8. Both CIT(A) as well as the Tribunal have upheld the aforesaid order of the AO. The entire case depends upon the interpretation, which is to be given to Section 80HHC (3)(b) read with Clause (e) to the Explanation below Section 80HHC (3)(b) of the Act so as to compute the deduction of the claim. These provisions are as under:

"Deduction in respect of profits retained for export business
80HHC

(3) For the purposes of sub-section (1),--

(a) Where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be



such goods bears to the total turnover of the business carried on by the assessee;

- (b) Where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;
- (c) Where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits, derived from such export shall, --
- (i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and
- (ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods:

.....

.....

Explanations. For the purposes of this sub-section,--

- (a) adjusted export turnover means the export turnover as reduced by the export turnover in respect of trading goods;
- (b) adjusted profits of the business means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3);
- (c) adjusted total "turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods;
- (d) direct costs means costs directly attributable to the trading goods exported out of India including the purchase price of such goods;
- (e) indirect costs means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover;
- (f) trading goods means goods which are not manufactured or processed by the assessee."

9. Bare perusal of the aforesaid provisions would make it evident that in cases falling under Section 80HHC(3)(b), direct and indirect



export turnover to arrive at export profits. Clause(e) of t Explanation defines 'indirect costs' and stipulates that it is the cost which is not direct cost as defined in clause (d). Moreover, clause (d) defines 'direct costs' to mean cost attributable to trading cost. The word 'attributable' in Section 80HHC(3)(b) of the Act in the main Section itself indicates that apportionment (principle of attribution) is not omitted from the said provision of Section 80HHC (3)(b) of the Act, as such appellant is entitled to reduce from the export turnover the estimated 10% of the other income. As indirect cost attributable to the earning of other income like export incentive and interest income from the export turnover of the trading goods to arrive at the export profits. We are fortified in our view by the judgment of the Supreme Court in the case of ***Hero Exports Vs. Commissioner of Income Tax [(2007) 295 ITR 454 (SC)]***. In that case, the Apex Court held that the assessee was entitled to exclude the costs attributable to export incentives, commission and interest, etc as indirect costs at 10% of such income while computing deduction under Section 80HHC(3)(b) of the Act. We extract the following portion of the said judgment in support of our aforesaid view:

"14. As stated above, in our opinion, the words "attributable" in Section 80HHC(3)(b) in the main section itself indicates that apportionment (principle of attribution) is not omitted from the said provision of Section 80HHC(3)(b). As stated above, assessee has earned Other Income of Rs. 1,60,000 apart from FOB value of exports of Rs. 6,50,000. Therefore, some expense has to be attributed to earning of Rs. 1,60,000. If so, the next question which arises is how to allocate the costs? As stated above, assessee has two incomes with one Common Pool of expenses and since "principle of attribution" has been retained in the scheme of Section 80HHC, both in terms of Section 80HHC(3), Clause (e) to the Explanation to Section 80HHC(3)(b) (a), (b) and (c) and in Clause (baa) to the Explanation to Section 80HHC, instead of going into lengthy exercise of dividing such Common Expenses, the assessee



Ultimately, Clause (baa) to the Explanation is itself based on the assumption that 10% of the income would be an expense. We make it clear that we are not reading Explanation (baa) into Section 80HHC(3)(b). What we say is as a Guidance Value/Factor, 10% of the total. Other income of Rs. 1,60,000 would be fair estimate. This guidance value is not flowing from Clause (baa) but from the scheme of Section 80HHC read with the Memorandum to the Finance Act of 1991. Take a reverse case, if allocation of expenses is to be done on Actual Basis, it would not only be very difficult but in some cases actual apportionment may not be in the interest even of the Department.

15. In conclusion, we may state that under Section 80HHC(3)(b) one has to balance the "principle of attribution" with the concept of "allocation". The concept of allocation is meant to reduce the incentive. However, when "allocation" has to be balanced with the "principle of attribution", the object is to reduce the incentive and not to eliminate it."

10. Furthermore, there is yet another aspect of the case, which needs to be highlighted. In the appellant's own case for the preceding assessment years, the Tribunal by a common order dated 21.07.2006 in ITA No.2378/Del/2002 for Assessment Year 1998-99 & ITA No.2284/Del/2002 for Assessment Year 1999-2000, has held that the appellant be allowed to reduce the indirect cost @ 10% of the amounts of export incentives and other income and only the balance amount be treated as "indirect costs attributable to export" of trading goods by the appellant. It was submitted by the learned counsel for the appellant that there was no change in the facts in this Assessment Year, which could not be controverted by the learned counsel for the Revenue.
11. For all these reasons, we decide the question formulated above in favour of the assessee and against the Revenue. As a consequence, the order of the authorities below is set aside and this appeal is allowed. It is directed that the appellant/assessee



shall be entitled to benefit of ₹50 lacs and not ₹30 lacs under
Section 80HHC (3)(b) of the Act.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 29, 2010
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