



REPORTABLE

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

+ **ITA No.1145 of 2009**

% **DECISION DELIVERED ON: MARCH 29, 2011**

PRAVEEN SONI

. . . APPELLANT

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

VERSUS

COMMISSIONER OF INCOME TAX . . . RESPONDENT

through: Ms. Suruchi Aggarwal, Sr.
Standing Counsel with Ms.
Shawana Bari, Advocate.

CORAM :-

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA**

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. This appeal was admitted on the following substantial questions of law:

“(i) Whether the Income Tax Appellate Tribunal was justified in law in upholding the order of Commissioner of Income Tax (Appeals) rejecting the claim of deduction of ₹7,49,065/- under Section 80IB of the Income Tax Act, 1961?



(ii) Whether on true and correct interpretation of the provisions of Section 80IB of the Income Tax Act, 1961 the Income Tax Appellate Tribunal was justified in law in holding that assessee since had not claimed deduction under Section 80IB of the Income Tax Act, 1961, in the initial assessment year, i.e., 1998-99, became disentitled to claim such a deduction in the instant assessment year 2004-05, despite the fact the assessee's undertaking fulfils the stipulated conditions for claiming deduction under Section 80IB of the Income Tax Act, 1961?"

2. These questions have arisen in the following factual backdrop. The appellant (hereinafter referred to as 'the assessee') herein is an individual who is running his proprietorship concern under the name and style of M/s Ragnik Exports. This concern is engaged in business of manufacturing and exports of readymade garments. To manufacture these garments for the purpose of exports, the assessee started to manufacture articles from 01.07.1997. The assessee could avail the benefit of Section 80IB of the Income Tax Act (for brevity 'I.T. Act') from the date of manufacture of these articles, i.e., Assessment Year 1998-99, which was the first year of the assessee's manufacture, the assessee did not claim the deduction under the said provision in that assessment year. Obviously, since this claim was not raised in that



assessment year, it could not be examined as to whether the assessee fulfilled the conditions prescribed in Section 80IB of the Act for claiming exemption under the said provision. The assessee did not claim this benefit even in few succeeding years. Section 80IB of the Act further provides that once an industrial undertaking which fulfils the condition stipulated therein gets the benefit, the same is available for 10 successive assessment years. The appellant claimed benefit under the aforesaid provision for the first time in the assessment year in question, i.e., Assessment Year 2004-05. On course, at the same time, the appellant pleaded that even if the appellant had not claimed this benefit for the past years, it should be allowed to him from 2004-05 till the remaining period of 10 years, i.e., upto 2007-08. This was on the premise that had the claim been allowed and given in the Assessment Year 1998-99, the assessee would have been entitled to the same for a period of 10 years, i.e., Assessment Year 2007-08. While claiming the benefit of the aforesaid provision, the assessee also filed requisite documents including Form 10CCB to demonstrate that the



- assessee was investor undertaking which could fulfil conditions stipulated in the said provision.
3. The Assessing Officer (AO) took note of the report in Form 10CCB and also further details and funds provided by the assessee in support of his claim vide letter dated 15.12.2006. However, the claim was denied on the ground that the assessee had not availed the same in the first year in question, i.e., Assessment Year 1998-99. The AO also opined that the small scale industrial undertaking has been denied the benefit under Section 80IB(14)(g) of the I.T. Act and having regard to the said provisions, it should have been registered as a small scale industrial unit in order to claim the status of SSI Unit. Since it was not so registered under the provision of Industries (Development and Regulations) Act, 1951 (hereinafter referred to as the 'IDR Act'), the assessee was not entitled to claim the benefit under Section 80IB of the I.T. Act.
 4. Appeals filed by the assessee before the CIT (A) as well as the Income Tax Appellate Tribunal ('the Tribunal' for brevity) were dismissed, as these two authorities have



also held that the assessee was not entitled to claim benefit under Section 80IB of the I.T. Act.

5. It is, thus, clear that on two grounds, the benefit of Section 80IB was denied to the assessee-appellant and for these reasons, the aforesaid two substantial questions of law in respect of these two grounds were framed while admitting this appeal. As far as second question of law is concerned, viz., whether the assessee can be denied the benefit of Section 80IB of the I.T. Act simply because of the reason that he did not avail this benefit in the initial assessment year, i.e., 1998-99, it should not detain us for long. Section 80IB is a special provision giving benefits to certain class of industries. It provides for deduction in respect of profits and gains to industrial undertakings other than infrastructure development undertakings. The conditions for claiming this benefit are stipulated in sub-section (2) thereof. One of the conditions, with which we are concerned, is that the assessee manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any



part of India. Special provision is made in respect of those industrial undertakings which fulfil the conditions prescribed in sub-section (2) of Section 80IB of the I.T. Act, if such industrial undertaking happens to be small scale industries. This is incorporated in sub-section (3) of Section 80IB of the I.T. Act. In such a case, the amount of deduction in the case of an industrial undertaking shall be twenty-five per cent (or thirty per cent where the assessee is a company), of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years.

6. If the assessee fulfils the requirement of small scale industrial undertaking (which aspect shall be dealt while answering other question of law), it is not in dispute that the assessee would have qualified for this deduction from the Assessment Year 1998-99. Had the assessee claimed this benefit in that year, he would have been allowed this benefit for 10 consecutive years, i.e., till Assessment Year 2007-08. The assessee, thus, becomes entitled to claim the benefit in the Assessment Year 1998-99. However, merely because of the reason that though the assessee



was eligible to claim this benefit, but did not claim in that year would not mean that he would be deprived from claiming this benefit till the Assessment Year 2007-08, which is the period for which his entitlement would accrue. The provisions contained in Section 80IB of the I.T. Act, nowhere stipulates any condition that such a claim has to be made in the first year failing which there would be forfeiture of such claim in the remaining years. It is not the case of the assessee that he should be allowed to avail this claim for 10 years from the Assessment Year 2004-05. The assessee has realized his mistake in not claiming the benefit from the first Assessment Year 1998-99. At the same time, the assessee foregoes the claim upto the Assessment Year 2003-04 and is making the same only for the remaining period. There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under Section 80IB of the I.T. Act are fulfilled.

7. This question of law is thus answered in favour of the assessee and against the Revenue.
8. The other question as to whether it is incumbent upon the assessee that it is registered under the IDR Act for



claiming the benefit under sub-section (3) of Section 80IB of the I.T. Act. The answer to this depends on the interpretation which is to be given to Clause (g) of sub-section (14) of Section 80IB of the I.T. Act, which reads as under:

“(g) “small-scale industrial undertaking” means an industrial undertaking which is, as on the last day of the previous year, regarded as a small-scale industrial undertaking under section 11B of the Industries (Development and Regulation) Act, 1951.”

9. As pointed out above, as per sub-clause (3) of Section 80IB of the I.T. Act where industrial undertaking is small industrial undertaking, it is entitled to deduction of 25% of the profits and gains derived from such industrial undertaking for a period of 10 consecutive years. Small scale industrial undertaking for this purpose is defined in Clause (g) sub-Section (14) of Section 80IB of the I.T. Act reproduced above. As per this provision, small scale industrial undertaking is regarded as “small-scale industrial undertaking under Section 11B of the IDR Act”. The IDR Act is enacted to provide for development and regulation of certain industries. For the purpose of regulating those industries in the meaning prescribed



under the Act, industrial undertaking is defined in Section 3(d) to mean any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government. The first schedule attached to the said Act specifies those industries. In order to regulate these scheduled industries, Section 10 mandates that all existing industrial undertaking have to get registered under this Act. Section 11 of the I.D.R Act deals with new industrial undertaking which would come into existence after the passing of the Act and establish any new industrial undertaking, except under and in accordance with a licence issued in that behalf by the Central Government. However, in case of small scale industrial undertaking, exemption and favourable benefits are provided which means those small scale industrial undertakings which fulfil the conditions of being small scale industrial are not to be regulated as per the provisions of I.D.R. Act. It is in this context, Section 11B is inserted in the statute which gives power to the Central Government to specify the requirements which shall be complied with by small scale industrial undertakings.



Omitting those portions of Section 11B, which are not relevant for our purposes, rest of the Section is extracted below:

“11B. POWER OF CENTRAL GOVERNMENT TO SPECIFY THE REQUIREMENTS WHICH SHALL BE COMPLIED WITH BY THE SMALL SCALE INDUSTRIAL UNDERTAKINGS.

(1) The Central Government may, with a view to ascertaining which ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength so as to be effective in :-

(a) promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and

(b) securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods, specify, having regard to the factors mentioned in sub-section (2), by notified order, the requirements which shall be complied with by an industrial undertaking to enable it to be regarded, for the purposes of this Act, as an ancillary, or a small scale industrial undertaking and different requirements may be so specified for different purposes or with respect to industrial undertakings engaged in the manufacture or production of different articles :

Provided that no industrial undertaking shall be regarded as an ancillary industrial undertaking unless it is, or is proposed to be, engaged in :-

(i) the manufacture of parts, components, sub-assemblies, tooling or intermediates; or

(ii) rendering of services, or supplying or rendering, not more than fifty per cent of its production or its total services, as the case may be, to other units for production of other articles.

(2) The factors referred to in sub-section (1) are the following, namely :-



- (a) the investment by the industrial undertaking in :-
 - (i) plant and machinery, or
 - (ii) land, buildings, plant and machinery;
- (b) the nature of ownership of the industrial undertaking;
- (c) the smallness of the number of workers employed in the industrial undertaking;
- (d) the nature, cost and quality of the product of the industrial undertaking;
- (e) foreign exchange, if any, required for the import of any plant or machinery by the industrial undertaking; and
- (f) such other relevant factors as may be prescribed."

10. Section 29B of the I.D.R. Act gives power to the Central Government to exempt, *inter alia*, such small scale industrial undertakings from the provisions of I.D.R. Act.
11. As is clear from the reading of Section 11B of the I.D.R. Act, it is for the Central Government to specify the requirements which shall be complied with by the industrial undertaking to enable it to be regarded for the purpose of the said Act as small scale industrial undertaking. Appropriate exercise in this behalf has been carried out by the Central Government by issuing notification dated 10.12.1997. Operative portion of the said notification lays down the following conditions to be



fulfilled by the industrial undertakings before it could be regarded as a small scale or ancillary industrial undertakings:

“Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 11B and sub-section (1) of section 29B of the said act, and in supersession of the notification of the Government of India in the Ministry of Industry (Department of Industrial Development) number S.O.232(E), dated the 2nd April, 1991, the Central Government hereby specifies the following factors on the basis of which an industrial undertaking shall be regarded as a small scale or as an ancillary industrial undertaking for the purposes of the said Act:-

1. **Small scale industrial undertaking:** An industrial undertaking in which the investment in fixed assets in plant and machinery, whether held on ownership terms or on lease or on hire purchase, does not exceed rupees three crores;
2. **Ancillary industrial undertaking:** An industrial undertaking which is engaged or is proposed to be engaged in the manufacturing or production of parts components, sub-assemblies, tooling or intermediates, or the rendering of services, and undertaking supplies or proposes or supply or renders not more than fifty per cent of its production or services, as the case may be, to one or more other industrial undertakings and whose investment in fixed assets in plant and machinery, whether held on ownership terms or on lease or on hire purchase, does not exceed rupees three crores.”

12. At the end of this notification, it is provided that every industrial undertaking which has been issued a certificate of registration under Section 10 of the said Act or a license under Sections, 11, 11A and 13 of the I.D.R. Act by the Central government and are covered by the



provisions of paragraphs (1) and (2) above relating to the ancillary or small scale industrial undertaking, may be registered at the discretion of the owner as such within a period of 180 days from the date of publication of this notification. Two things follow from the reading of the aforesaid notification:

- (a) To be regarded as a small scale industrial undertaking - such an undertaking should be given which has invested in fixed assets in plant and machinery either on ownership terms of on lease or on hire purchase.
- (b) Worth of said asset does not exceed ₹3 Crores. The prescription of ₹3 Crores was reduced to ₹1 Crore vide amendment notification dated 04.12.1995.

13. It is not in dispute that the appellant-assessee fulfils these requirements. However, as mentioned above, benefit is denied only on the ground that it is not registered under the provisions of I.D.R. Act. We are of the considered opinion that the registration under the I.D.R. Act will be of



no consequence for availing the benefit under Section 80IB of the I.T. Act. Clause (g) of sub-section (14) of Section 80IB of the I.T. Act only mandates that such an industrial undertaking should be regarded as small scale industrial undertaking under Section 11B of the I.D.R. Act. As per Section 11B of the I.D.R. Act, it is for the Central Government to lay down the conditions which are required to be fulfilled as regards small scale industries. In the aforesaid notification, the conditions which are mentioned for being regarded as small scale industries are the ownership of plant and machinery and value thereof. Registration of such an undertaking under the I.D.R. Act is not a condition for treating the same as small scale industrial undertaking. That registration is prescribed for altogether different purpose, viz., to avail the benefit under the I.D.R. Act either of Section 11B or Section 29B. Thus, insofar as extending the provision of Section 80IB of the I.T. Act is concerned, the only aspect which is relevant and is to be considered is as to whether the conditions stipulated in the notification issued under Section 11B of the I.D.R. Act for regarding the same as small scale



industrial Act are fulfilled or not. It would be of interest to note that Section 80IB (14)(g) used the expression 'regarded as small scale industrial undertaking' under Section 11B of the I.D.R. Act. Likewise, even the notification dated 10.12.1997 while laying down the conditions for claiming the benefit of small scale industrial undertaking used the same expression when it states 'following factors on the basis of which an industrial undertaking is regarded as small scale industrial undertaking'.

14. When we look into the mandatory Form prescribed for availing this benefit, viz., Form 10CCB, such a form has to be filled and submitted by the assessee to the AO for claiming the benefit. The details which are required to be given as per this form include the information which is to be supplied to ascertain, whether such industrial undertaking would be regarded as small scale industrial undertaking for the purpose of Section 11B of the I.D.R. Act inasmuch the assessee is called upon to give the value of machinery or plant, number of workers employed in the manufacturing process, total sales of the undertaking and



also profits and gains derived by the undertaking from the eligible business and deduction under Section 80IB of the I.T.Act.

15. The purpose for industrial undertaking to be regarded as small scale industrial undertaking as per Section 11B of the I.D.R. Act is not far to seek. It was to maintain parity in prescribing the conditions which are required to be fulfilled by the industrial undertaking to qualify itself as small scale industrial undertaking. Since the Central Government has to prescribe such conditions by notification in view of provisions of Section 11B of the I.D.R. Act, the Legislature in its wisdom deemed it fit to incorporate those conditions for the purpose of I.T. Act as well. This issue came up for consideration before the Gujarat High Court, *albeit*, in the context of depreciation which is to be allowed to an assessee under Section 32 of the I.T. Act. We may point out that explanation (3) of Section 32(1) of the I.T. Act also gives special benefit to the small scale industrial undertaking and reads as under:

“(3) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant installed, as on the last day of



the previous year, for the purpose of the business of the undertaking does not exceed seven hundred and fifty thousand rupees; and for this purpose the value of any machinery or plant shall be, -

(a) in the case of any machinery or plant owned by the assessee, the actual post thereof to the assessee; and

(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant.”

16. The question which was posed for consideration before the Gujarat High Court in the case of ***Commissioner of Income-tax Vs. J.H. Kharawala 208 ITR 691*** was as to whether it was incumbent upon a small scale industrial undertaking to have registration under the I.D.R. Act to claim the benefit of depreciation under Section 32 of the I.T. Act. Replying in the negative and holding that there was no such requirement of such registration to avail the said benefit, the Gujarat High Court held as under:

“Section 32 provides for depreciation. Sub-section (1) provides for depreciation in respect of building, machinery, plant or furniture owned by the assessee and used for the purposes of his business or profession. Clause (vi) of sub-section (1) provided for one time depreciation of 20 per cent. on the actual cost of ship, aircraft, machinery or plant. It gave an option to assessee to claim depreciation either in the year in which the machinery or plant was installed or the year in which the assessee had put it to use. But this special depreciation was confined to small scale industrial undertakings. Thus, it was a special provision made for the benefit of small-scale industrial undertakings. By the Explanation, "new ship" and "new machinery or plant" were defined. The Legislature also provided by that Explanation as to which



undertaking was to be regarded as a small-scale industrial undertaking. By the said Explanation, it also provided how the value of the machinery or plant was to be determined. Thus, it cannot be gainsaid that the Legislature thought it fit to make a special provision in this behalf. If registration of an industrial undertaking with the respective State department was to be regarded as sufficient for making such undertaking a small-scale industrial undertaking, then the Legislature would not have made this special provision. Moreover, that would have resulted in discrimination inasmuch as the test laid down for treating an industrial undertaking as a small-scale industrial undertaking might have varied from State to State. Thus, the Legislature, in order to see that there was uniformity, made this special provision and for that reason, it will have to be held that for the purpose of determining whether an industrial undertaking is a small-scale undertaking or not, resort had to be taken to the Explanation to section 32(1)(vi) and not to any other provision of law whereby an industrial undertaking was to be regarded as a small-scale industrial undertaking for other purposes. The Tribunal was, therefore, in error in proceeding on the basis that since the assessee was registered as a small-scale industrial undertaking with the Small-Scale Industries Department, the benefit of section 32(1)(vi) was available to it irrespective of different provision made by that Explanation in that behalf."

17. The upshot of the aforesaid discussion is to answer this question of law in favour of the assessee, as otherwise, there is no dispute that the assessee fulfils eligibility conditions prescribed under Section 80IB of the I.T. Act and is to be regarded as small scale industrial undertaking. We direct the AO to give the benefit of deduction claimed by the assessee under Section 80IB of



the I.T. Act for the Assessment Year in question, i.e.,
2004-05.

18. This appeal is allowed in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 29, 2011
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