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

Date of Decision: September 09, 2014

+ **ITA 161/2002**

COMMISSIONER OF INCOME TAX-DELHI Appellant

Through: Mr.N.P.Sahni, Sr.Standing Counsel with
Mr.Nitin Gulati, Advocate

versus

SUBHASH CHAND RASTOGI Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

1. By order dated 18.03.2003, the following substantial question of law was framed in this appeal filed by the Revenue which pertains to the Assessment Year 1991-92:-

“Whether there was any material before the Tribunal to hold that the assessee was entitled to deduction under Section 80HHC of the Income Tax Act, 1961, in respect of alleged export of zinc oxide?.

2. The impugned order dated 20.11.2001 of the Income Tax Appellate Tribunal (‘Tribunal’ for short) was passed in ITA No. 5350/DEL/94.

3. We have heard the counsel for the appellant-Revenue, but, there is no appearance on behalf of the respondent-assessee.



4. The respondent assessee an individual in his return of income filed on 31.10.1991 declared taxable income of Rs. 20,000/- after claiming deduction of Rs. 45,51,898/- under Section 80HHC of the Income Tax Act, 1961 ('Act' for short) on account of export of Zinc Oxide. The Assessing Officer disallowed the deduction under Section 80HHC on export of Zinc Oxide on two grounds; (i) the export had been to Nepal and therefore, was not eligible under Section 80HHC of the Act and (ii) Zinc Oxide was a mineral and thus, Section 80HHC of the Act would not be applicable.

5. The Commissioner of Income Tax (Appeals) ('CIT(A)', in short) reversed the said finding holding that Zinc Oxide was not a mineral but an inorganic chemical and secondly that the export had been routed through Nepal on the instructions of the importer at Hong Kong. He held that the export was made to convertible foreign exchange area.

6. Aggrieved by the order of the CIT(A), Revenue preferred an appeal before the Tribunal. On the question whether export was made to Nepal or through Nepal, the findings of the Tribunal are recorded in paragraphs 3 and 4, which, for the sake of convenience, are reproduced below:

“3. Ground No. 1 relates to the alleged error of the CIT(A) in directing the assessing officer to allow deduction under section 80HHC of the Act on the alleged export of zinc oxide. It has been argued by the learned DR that the finding of the learned CIT(A) that the above goods were routed through Nepal on instruction from Hongkong party over looking the fact



that basic evidence of custom authorities of Indian Government, Nepal Government and Hongkong has not been filed either before the assessing officer or before the CIT(A), evidencing export of goods. Even Nepal exports its goods via India. It has been observed by the assessing officer that some of the details filed by the assessee revealed that he has sent goods to Nepal are not eligible for deduction under Section 80HHC of the Act. At page 3 he has enumerated at Sl. No. 2 item zinc oxide, Bill No. 180 dated 18.2.1991, amount of Rs. 35,81,026/- date of realisation 21.9.1991 and amount realised Rs. 45,51,898/-. Against this order of the assessing officer, the assessee went in appeal before the CIT(A) who allowed the appeal of the assessee and directed the assessing officer to allow deduction under Section 80HHC of the ACT in respect of the items of export including zinc oxide at Sl. No. 2 in para 2 of the CIT(A)'s order. It has been argued by the learned DR that goods were exported via Nepal. The export goods first left from India to Nepal. Hence deduction under Section 80HHC is not available to the assessee and the CIT(A) has wrongly allowed the same. The assessing officer has also disallowed the claim of the assessee under Section 80HHC on the ground that zinc oxide is not a mineral. It has been vehemently argued by the learned AR of the assessee that the appeal of the revenue does not survive since in the case of Shri Narendra Rastogi, Appeal No. 175/94-95 has been decided by the same CIT(A) Shri K.K. Kapila vide order dated 16.6.1994 in which the claim of the assessee has been allowed under Section 80HHC for the same zinc oxide export via Nepal against which the revenue has not gone in appeal. Hence this appeal does not survive on the same facts, circumstances and law. The learned AR of the assessee has also argued that zinc oxide is chemical and not a mineral and all export have been made to hard currency area. It has been further argued by the learned AR that the assessee has complied with all the terms and conditions of dispatch of the goods. They have also got the confirmation from Hongkong regarding receipt of goods. They have also furnished incorporation/Registration Certificate of their buyer in support of the existence before the CIT(A). Details of



export sales have been given by the assessee on page 15 of the Paper Book in which Invoice No. 5/90-91 dated 28.1.1991 of zinc oxide has been shown to be exported to True Field Ltd., 903 Kowloon Centre, Hongkong for US\$ 176400.00 and amounting to Rs. 35,81,026/-. The date of realization is 21.9.1991. At page 16 of the Paper Book details of export realisation for the assessment year 1991-92 have been given regarding the same zinc oxide. At page 18 of the Paper Book is the copy of Shipping Bill for the goods Indian produce in which the consignee's name has been described as M/s. True Field Ltd., Hongkong. Photostat copy of the Bank Realisation Certificate has also been filed at page 20 of the Paper Book. Copies of purchase order and confirmation regarding receipt of goods in Hongkong have been filed at pages 29-30 of the Paper Book. The learned DR has relied on the Circular No. 575 dated 31.8.1990 in which it is contained that, "With a view to removing any doubts in this regard, it is reiterated that the expression "convertible foreign exchange" in the above mentioned provisions of the Income Tax Act, also includes the amounts received in non-convertible rupees from bilateral account countries and receipts in Indian rupees under Government to Government credit. However, it does not include remittances from Nepal and Bhutan.

4. After having heard the rival submissions and considering the material available on record, we are of the view that the goods have been exported to Hongkong through Nepal and not to Nepal. Hence the circular is not applicable on the facts and circumstances of the case against the assessee. All the documents and certified copies have been filed by the assessee. Hence, we do not find any justification to interfere with the order of the learned CIT(A) which deserves to be confirmed and the same is confirmed. Thus both the grounds of appeal are disposed of accordingly".

7. A reading of the aforesaid finding would indicate that the export was in fact made to a Hong Kong party whose name and details stand mentioned. The



export proceeds were specified in U.S. Dollars. The Bank Realisation Certificate was filed and upon receipt converted into Indian Rupees.

8. The paper-book referred to in the order of the Tribunal has not been filed by the Revenue before us and we, therefore, cannot comment on the contents of the documents and what was stated and apparent from them. Revenue, being the appellant before us, should have placed the said documents on record, specially when the plea taken is that the decision of the Tribunal is factually perverse. As noticed, no specific question of perversity stands framed while admitting the appeal. It is also not clear whether the aforesaid documents were not filed before the Assessing Officer, as is argued. The Assessing Officer had denied entire claim under Section 80HHC of the Act including claim on exports of Brass Artware and Readymade Garments and this factum has been adversely commented upon by the CIT(A), who has recorded that the documents and details have been filed before the Assessing Officer but were ignored and not adverted to. Hence, on the first stand, we are not inclined to interfere with the order passed by the Tribunal.

9. However, learned counsel for the appellant-Revenue is correct that the Tribunal in the impugned order, has not considered their contention that Zinc Oxide is a mineral and therefore in terms of Sub-Section (2) to Section 80HHC of the Act, the export proceeds were not eligible. Our attention was drawn to Sub-clause (ii) of Section (b) to Section 80HHC, which states that the Section



would not apply to minerals and ores other than processed minerals and or specified in the 12th Schedule. It is stated that processed Zinc Oxide was not included in the 12th Schedule. Senior Standing Counsel has filed before us articles and extracts from books and internet to submit that Zinc Oxide widely considered to be a mineral in its purist form, yet to be thoroughly accurate, it is an inorganic chemical compound with varying chemical properties depending upon the application or use. Zinc Oxide, it is opined could never and cannot be used directly in the extracted form as a raw mineral and must undergo some synthetic chemical process to purify and alter its mineral structure. This compound in particular in crystallized form is primarily used in mineral make up and products of like nature. It is a sun blocker.

10. The order of the Tribunal, on the said issue and question is silent and does not deal and answer whether the product exported was a mineral or an ore and whether the product was a processed mineral or ore as specified in 12th Schedule. The contention of the Revenue is that this product is not mentioned in the list of processed mineral and ores specified in the 12th Schedule. What was exported, whether it was mineral in the pure form or was it a processed mineral or something else, is primarily a question of fact and this had to be decided and determined by the Tribunal. They are the final fact finding authority. We have already quoted paragraphs 3 and 4 of the order of the Tribunal. These are the only finding/discussion. The Tribunal, therefore, has



not examined the aforesaid aspect though relevant and important to the issue question.

11. We record that the counsel for the Revenue has relied upon the decision of the Supreme Court in *Gem Granites Vs. Commissioner of Income-Tax*, [2004] 271 ITR 322 and *Stonecraft Enterprises Vs. Commissioner of Income Tax*, [1999] 237 ITR 131 on the question of what would and should be considered to be a mineral, mineral oil etc. Reference is also made to the decision of the Karnataka High Court in *Mithy Granite (P.) Ltd. Vs. Income Tax Officer*, [2004] 266 ITR 151 in which, again the question of what is ‘mineral’ has been examined and elucidated.

12. In these circumstances, we have no option but to answer the question of law framed above in favour of the appellant-Revenue, but with an order of remand to the Tribunal to decide the issue whether the exported goods were a “mineral” and therefore, not eligible for deduction in view of Section 80HHC (2)(b)(ii) of the Act. The issue and contention whether the product were processed mineral and whether it would be eligible for deduction in terms of 12th Schedule is also an aspect which will have to be considered. In case, the stand of the respondent-assessee is that it was not a mineral or processed mineral, but a different product, again, the issue of fact will have to be considered and answered. It is in these circumstances that we have passed an



order of remand. The appeal is accordingly disposed of. There will be no order as to costs.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

SEPTEMBER 09, 2014/akb