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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **DECIDED ON: 08.05.2014**

+ **ITA 1004/2011**

NARESH KUMAR VERMA Appellant

versus

CIT Respondent

ITA 44/2014, CM APPL.1949/2014

NARESH KUMAR VERMA Appellant

versus

COMMISSIONER OF INCOME TAX DELHI-XII Respondent

W.P. (C) 4590/2013, CM APPL.10531/2013

NARESH KUMAR VERMA Petitioner

versus

DY. COMMISSIONER OF INCOME TAX, CIRCLE 35(1)
..... Respondent

CM APPL.8098/2014 IN ITA 1219/2009

NARESH KUMAR VERMA Appellant

versus

DCIT CIRCLE 35(1) Respondent

Appearance: Mr. S. Krishnan, Advocate for appellant in all cases.
Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Nitin Gulati, Jr. Standing Counsel on behalf of Revenue.
Mr. Kamal Sawhney, Sr. Standing Counsel on behalf of Revenue.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. ITA 1004/2011 pertains to assessment year 2006-07, ITA



44/2014 pertains to the assessment year 2005-06 and W.P.(C) 4590/2013 challenges the orders made in rectification proceedings in respect of the same assessee/petitioners for the years 2004-05 and 2005-06.

2. All these proceedings pertain to common questions and issues, i.e., “as to whether the penalty imposed by the Revenue by invoking the Section 271 (1) (c) was warranted in the circumstances of the case”.

3. The uncontroverted facts are that the assessee/appellant had claimed for AY 2004-05, 2005-06 and 2006-07 exemption under Section 10B of the Income Tax Act. He refers, for this purpose, to the manufacturing of engineering products which were in turn exported. The assessee had premised its claim for exemption under Section 10B on the basis that the invoices to the foreign purchaser were issued jointly by itself and an another EOU. The foreign exchange remittances were received in the past, though not in the years in question. These claims were disallowed for the Assessment Year 2004-05 by the Assessing Officer’s order of 22.12.2006; for AY 2005-06 by an order dated 26.12.2007 and for the last year 2006-07 by an order dated 16.12.2008. Concurrently, with the disallowance/assessment orders, penalty proceedings were initiated.

4. The appellant/assessee allowed the assessments to become final and did not impugn the orders made in respect of AYs 2004-05 and 2005-06. However, he appealed to this Court only in respect of the penalty proceedings for AY 2006-07 by filing ITA 1219/2009.

5. On 26.04.2010, this Court recorded withdrawal of ITA



1219/2009. Subsequently, the assessee approached the Tribunal in rectification proceedings. In these circumstances, upon the culmination of rectification proceedings, the assessee approached this Court yet again in respect of the penalty orders in W.P. (C) 4590/2013. In that writ proceedings, on 28.10.2013, the Court observed and held as follows: -

“Learned counsel for the respondent will obtain instructions and point out the quantum or difference in tax on the return income and assessed income after taking into consideration order passed by the CIT (Appeals) for the Assessment Year 2004-05, which has been affirmed by the tribunal. In respect of Assessment Year 2005-06, addition of Rs.47,37,580/- has not been set aside or quashed in appellate proceedings. The assessment order was passed on 26th December, 2007. As the said order was not challenged/questioned, though appeal/revision was maintainable, we do not think it will be proper and appropriate to examine the merits of the said order in this writ petition.

Penalty for concealment under Section 271(1)(c) of the Act for the Assessment Year 2005-06 has been affirmed by the tribunal vide order dated 20th November, 2009. The petitioner herein has now preferred an appeal against the said order along with an application for condonation of delay. The appeal and the said application will be considered and decided on merits.

The petitioner in the present writ petition has impugned the order dated 14th December, 2012 passed by the tribunal on application under Section 254(2) of the Income Tax Act, 1961. We have examined the order on merits and do not see any reason to interfere with the said order keeping in view the limited scope of rectification under Section 254(2) of the Act. To this extent, we are not inclined to entertain the present writ petition.



Re-list the writ petition on 15th November, 2013.

Copy of this order be given dasti to the learned counsel for the parties under signature of the Court Master.”

6. At the outset, the Revenue urges that the belated appeals - ITA Nos.44/2014 and 1004/2011 ought to be dismissed at the threshold. It was argued that ITA 44/2014 is a deliberate and conscious attempt on the part of the assessee to open the issues that had become final and had been observed in the order of 28.10.2013. The Revenue also urges that given the circumstances of the case and the fact that the returns for the earliest assessment year 2004-05 were completed by the assessment orders on 22.12.2006, the explanation of the assessee that there was no deliberateness or lack of *bona fides* in claiming the Section 10B benefit, cannot be countenanced. The Revenue also urged that the assessee never chose the option of filing the revised return in respect of the concerned latter years, which clearly points to the intention to claim unwarranted benefit.

7. The assessee submits that the income tax authorities, in the facts of the case, ought not to have invoked the penalty proceedings. It was submitted that a bare reading of the relevant proceedings of the exemption policy issued and made applicable at all relevant times clarifies that exports through certain parties or sale/purchase transactions made with domestic parties would be deemed to be exports. Learned counsel relies upon paragraph 6.2B (page 131 of ITA 1219/2009) and paragraph 6.12A (page 140 of ITA 1219/2009) and certain other Circulars to say that such transactions are covered within expression



“deemed exports” and that the benefit of Section 10B could have been claimed. Counsel also relies upon certain other Circulars issued by the Ministry of Commerce, Department of Foreign Trade as well as EHTP authorities, and further the invoices said to have been raised jointly in the circumstances of the case, to urge that there was in fact *bona fide* belief to support its contention that Section 10B was applicable. Section 10B to the extent it is relevant reads as follows: -

“[Special provisions in respect of newly established hundred per cent export-oriented undertakings.

10B. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee :

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to the deduction referred to in this sub-section only for the unexpired period of aforesaid ten consecutive assessment years :

[Provided [further] that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software:]

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, [2012] and subsequent years :

[Provided also that no deduction under this section shall be allowed to an assessee who does not furnish a return of his



income on or before the due date specified under sub-section (1) of section 139.]

(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(i) it manufactures or produces any articles or things or computer software;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

***Provided** that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section ;*

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.—The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression “competent authority” means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2.—The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.”



8. Facially, it is apparent from a reading of Section 10B (3) that the twin conditions of an export out of India and receipt of foreign exchange through remittance are pre-conditions for claiming the benefit of the provision. The Revenue had pointed out that in similar circumstances under Section 80HHC(1A), the transactions of the kind that are involved in the present case are deemed to be exports and entitled to the benefit of that provision. The relevant provision in that regard is as follows: -

80HHC (1A) “Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any Export House or Trading House in respect of which the Export House or Trading House has issued a certificate under the proviso to sub-section (1), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee, [a deduction to the extent of profits, referred to in sub-section (1B),] derived by the assessee from the sale of goods or merchandise to the Export House or Trading House in respect of which the certificate has been issued by the Export House or Trading House.]

80HHC (2)(a) This section applies to all goods or merchandise, other than those specified in clause (b), if the sale proceeds of such goods or merchandise exported out of India are [received in, or brought into, India] by the assessee [(other than the supporting manufacturer)] in convertible foreign exchange [within a period of six months from the end of the previous year or, [within such further period as the competent authority may allow in this behalf]”.

9. This Court is of the opinion that the assessee’s submissions



based upon the reading of the provisions of the exemption policy are of no assistance. So long as the terms of the statute are clear and they do not allude to or refer to any external document or instrument or even other enactments, the admissibility of benefits in those external documents or enactments cannot automatically be used as aids of construction or read into the provisions of the controlling enactment, which in the present case is the Income Tax Act, 1961. In other words, *sans* the reference to the exemption policy or a pointed reference to admissibility of such reliefs as are given in that policy, under Section 10B, it would not be open to the assessee to claim that transactions, which are not exports in a strict sense of the term and in which the assessee does not receive foreign exchange remittance, be treated as such. The plain text of Section 10B particularly Section 10 B (3) exclude the possibility of a reasonable argument in this regard. The Revenue is right when it contends that there is some relief to the assessee, to the extent that convertible foreign exchange may be received or brought into India by the assessee. However, that benefit has not been claimed, the existence of such limited relief in another part of the statute in fact excludes the possibility of being read into in Section 10B having regard to the latter's structure.

10. Explanation to Section 271 (1) (c) underlines that where inaccurate particulars are furnished by the assessee or something which is plainly inadmissible, is claimed, penalty proceedings are warranted. In *CIT v. Reliance Petroproducts Pvt. Ltd.*, (2010) 322 ITR 158 (SC), the Court after reviewing the previous law was of the opinion that the expression 'particulars' would embrace the meaning



of the details of the claim made. After elaborate examination of the previous precedents, the Court held as follows: -

“We have already seen the meaning of the word “particulars” in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous.”

11. In the circumstances of the case, there can be no shadow of doubt that the claim to Section 10B benefit was inaccurate in a sense as was understood in *Reliance Petroproducts’* matter (supra). It was plainly erroneous, and neither in accord with the statute nor based on the truth. In these circumstances, the levy of penalty was justified.

12. We clarify that if there is any reduction in the quantum of tax and consequently the penalty amount is to be reduced, the Revenue shall give effect to such reduction.

13. ITA Nos.1004/2011, 44/2014 and W.P. (C) 4590/2013 are dismissed.

14. In view of the conclusions, we have reached, CM APPL.8098/2014 in ITA 1219/2009 recording withdrawal on 26.04.2010 has been rendered infructuous; the same is also dismissed.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

MAY 08, 2014/vks/