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

Date of decision: 27th April, 2012

\+ **ITA 1005/2011**

POLYPLEX CORPORATION LTD ..... Appellant
Through: Mr. S. Krishnan, Adv.

versus

CIT ..... Respondent
Through: Mr. Anupam Tripathi, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

SANJIV KHANNA, J.: (ORAL)

We have heard counsel for the parties in this appeal, which pertains to the assessment year 2001-02. The following substantial questions of law are framed:

(i) Whether Income Tax Appellate Tribunal ('Tribunal', for short) was right in holding that DEPB credit utilized by the assessee and profit earned on sale of DEPB credit would constitute profits under Section 28 (iiid) of the Income Tax Act, 1961?

(ii) Whether the Tribunal was right in holding that interest income earned shall be excluded while applying Explanation (baa) to Section 80 HHC?

(iii) Whether the Tribunal has correctly applied Explanation

(1)(iv) to Section 115JB of the Income Tax Act, 1961 while computing the book profits?

2. As far as question no.(i) is concerned, it has to be answered in negative i.e. in favour of the appellant-assessee and against the Revenue. ***In Topman Exports v. CIT***, (2012) 3 SCC 593 it has been held by the Supreme Court that DEPB credit which is utilized is covered under Section 28 (iiic) and profits of sale of DEPB are covered by Section 28 (iiid) of the Income Tax Act, 1961 ('Act', for short). The Tribunal was, therefore, wrong in holding that the DEPB credit was covered by Section 28 (iiid) of the Act. The computation and appeal effect will be made by the Assessing Officer by applying the ratio in the case of ***Topman Exports*** (supra).

3. As regards question no.(ii) findings of the Tribunal are as under: -

> "*8. We have heard both the parties. We find that this issue is covered by the decision of Hon'ble High Court of Delhi in the case of CIT Vs. Sri Ram Honda Power Equip (Delhi) 289 ITR 475 (Del.) wherein it has been held that the interest received from fixed deposits was assessable under the head 'order sources'. Since the issue is covered against the assessee by the decision of Hon'ble Delhi High Court in the case of CIT Vs. Sri Ram Honda Power Equip (supra) we do not find any infirmity in the order passed by the ld. CIT (A) confirming the stand of the assessing officer.*"

4. We agree with the counsel for the appellant that the Tribunal has misunderstood and misinterpreted the second part of the decision of the

Delhi High Court in ***CIT v. Shri Ram Honda Power Equip***, (2007) 289 ITR 475. The contention of the assessee is that interest earned on the FDRs was assessable as business income as the FDRs were pledged with bank for bank guarantee, margin money etc. The second part of the decision in Shri Ram Honda Power Equip (supra) deals with netting off interest i.e. reduction of interest received from interest paid, if interest received is assessable under the head "business income". In Shri Ram Honda Power Equip (supra), it has been observed that netting is permissible for computation under Explanation (baa) to Section 80HHC. This view has been upheld by the Supreme Court in ***ACG Associated Capsules (P.) Ltd. v. CIT (Mumbai)***, (2012) 3 SCC 321 observing: -

> "*...9. Explanation (baa) extracted above states that "profits of the business" means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by the receipts of the nature mentioned in Clauses (1) and (2) of the Explanation (baa). Thus, profits of the business of an Assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of Section 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under Section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the Assessee computed*

under the head "Profits and Gains of Business or Profession" from which deductions are to made under Clauses (1) and (2) of Explanation (baa).

10. Under Clause (1) of Explanation (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "Profits and Gains of Business or Profession". The expression "included any such profits" in Clause (1) of the Explanation (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "Profits and Gains of Business or Profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of receipts cannot be reduced under Clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in Clause (1) which is actually included in the profits of the Assessee is to be deducted from the profits of the Assessee for determining "profits of the business" of the Assessee under Explanation (baa) to Section 80HHC…."

5. In this case, the assessee has stated that they had earned interest income of ₹11,31,088/- on FDRs from bank for availing various facilities availing like margin money, packing credit, etc. The Tribunal has not examined the factual matrix and has merely affirmed the decision of the CIT(Appeals) that interest received is assessable under the head "other

sources". Accordingly we pass an order of remit to the Tribunal to factually examine the aforesaid aspect and if it is found that the interest income earned on the FDRs is assessable under the head "business income", netting off the same against interest paid will be permitted and allowed in terms of the directions of the Supreme Court in the case of ACG Capsules (P.) Ltd. (supra). Question No.(ii) is also, therefore, answered in negative i.e. in favour of the appellant-assessee and against the respondent-revenue.

6. As far as the question no.(iii) is concerned, learned counsel for the assessee has relied upon the decision ***CIT v. Ajanta Pharma Ltd.***, (2010) 327 ITR 305 (SC). The Supreme Court in the said case examined Section 80HHC vis-à-vis Section 115JB and a distinction has been drawn between the words "profits eligible for deduction under Section 80HHC" used in Explanation (1)(iv) to Section 115JB and the expression 'deduction of the profit' used in Section 80HHC (1B) of the Act. Noticing the said difference it has been observed: -

> "*The above discussion is only to show that sections 80HHC and 115JB operate in different spheres. Thus, two essential conditions for invoking section 80HHC(1) are that the assessee must be in the business of export and, secondly, that sale proceeds of such exports should be receivable in India in convertible foreign exchange. Hence, section 80HHC(1)*

refers to "eligibility" whereas section 80HHC(3) refers to computation of tax incentive. Coming to section 80HHC(1B) it is clear that after the Finance Act, 2000, with effect from the assessment year 2001-02 exporters would not get 100 per cent deduction in respect of profits derived from exports but that they would get deduction of 80 per cent in the assessment year 2001-02, 70 per cent in the assessment year 2002-03 and so on. Thus, section 80HHC(1B) deals not with "eligibility" but with the "extent of deduction". As earlier stated, section 115JB is a self-contained code. It taxes deemed income. It begins with a non obstante clause. Section 115JB refers to computation of "book profits" which have to be computed by making upward and downward adjustments. In the downward adjustment, vide clause (iv) it seeks to exclude "eligible" profits derived from exports. On the other hand, under section 80HHC(1B) it is the extent of deduction which matters. The word "thereof" in each of the items under section 80HHC(1B) is important. Thus, if an assessee earns ₹100 crores then for the assessment year 2001-02, the extent of deduction is 80 per cent thereof and so on which means that the principle of proportionality is brought in to scale down the tax incentive in a phased manner. However, for the purposes of computation of book profits which computation is different from normal computation under the 1961 Act/ computation under Chapter VI-A. We need to keep in mind the upward and downward adjustments and if so read it becomes clear that clause (iv) covers full export profits of 100 per cent as "eligible profits" and that the same cannot be reduced to 80 per cent by relying on section 80HHC(1B). Thus, for computing "book profits" the downward adjustment, in the above example, would be ₹100 crores and not ₹90 crores. The idea being to exclude "export profits" from computation of book profits under section 115JB which imposes MAT on deemed income. The above reasoning also gets support from the Memorandum of the Explanation to the Finance Bill, 2000.

One of the contentions raised on behalf of the Department was that if clause (iv) of the Explanation to section 115JB is read in entirety including the last line

thereof (which reads "subject to the conditions specified in that section"), it becomes clear that the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, is subject to the conditions specified in that section. According to the Department, the assessee herein is trying to read the various provisions of section 80HHC in isolation whereas as per clause (iv) of the Explanation to section 115JB, it is clear that the book profit shall be reduced by the amount of profits eligible for deduction under section 80HHC as computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section and subject to the conditions specified in that section, thereby meaning that the deduction allowable would be only to the extent of deduction computed in accordance with the provisions of section 80HHC. Thus, according to the Department, both "eligibility" as well as "deductibility" of the profit have got to be considered together for working out of the deduction as mentioned in clause (iv) of the Explanation to section 115JB. We find no merit in this argument. If the dichotomy between "eligibility" of profit and "deductibility" of profit is not kept in mind then section 115JB will cease to be a self-contained code. In section 115JB, as in section 115JA, it has been clearly stated that the relief will be computed under section 80HHC(3)/ (3A), subject to the conditions under sub-sections (4) and (4A) of that section. The conditions are only that the relief should be certified by the chartered accountant. Such condition is not a qualifying condition but it is a compliance condition. Therefore, one cannot rely upon the last sentence in clause (iv) of Explanation to section 115JB (subject to the conditions specified in sub-sections (4) and (4A) of that section) to obliterate the different between "eligibility" and "deductibility" of profits as contended on behalf of the Department."

7. Learned counsel for the appellant-assessee has drawn our attention to

the computation of deduction under Section 80HHC made by the Assessing Officer which is marked as Annexure-I to the assessment order. The Assessing Officer had added several expenses like dis-allowances of amounts under Section 14A, feasibility report expenses, etc. The deduction as computed by the appellant-assessee is not on record and has not been referred to in the orders. In view of the decision of the Supreme Court (supra), we pass an order of remit to the Tribunal to re-compute the deduction under Explanation (1)(iv) of Section 115JB by applying on the said decision of the Supreme Court in the case of Ajanta Pharma (supra). The third question of law is also answered in negative i.e. in favour of the assessee and against the Revenue.

The appeal is disposed of without any order as to costs.

SANJIV KHANNA, J

R.V.EASWAR, J

APRIL 27, 2012
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