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

Decided on : 28.04.2015

\+ **ITA 263/2015, C.M. APPL.7337/2015**
\+ **ITA 264/2015, C.M. APPL.7349/2015**
\+ **ITA 265/2015, C.M. APPL.7351/2015**

SHRI LAL MAHAL LIMITED ..... Appellant

Versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through : Sh. Salil Aggarwal, Sh. Prakash Kumar and Sh. Ravi Pratap Mall, Advocate, for the appellant.
Ms. Suruchii Aggarwal, Sr. Standing Counsel and Sh. Abhishek Sharma, for the revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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Issue notice.

1. Ms. Suruchii Aggarwal, Sr. Standing Counsel accepts notice. With consent of learned counsel for the parties, the matter was heard finally.

2. The following two questions of law are sought to be urged by the assessee in this appeal under Section 260-A of the Income Tax Act, 1961 (hereafter referred to as “the Act”):

(a) Whether in the given facts of the case, the assessment could have

been completed by invoking 153A of the Income Tax Act;

(b) Whether the amendment to Section 80HHC(3) by inserting three provisos with retrospective effect from 01.04.1998 could have been invoked to disallow the amounts in respect of concluded assessments for AY 1999-2000 in the assessee's case.

3. The admitted facts are that the assessee is an exporter entitled to the benefits of Section 80HHC. Its assessment was finalized for AY 1999-2000 when the returns were processed under Section 143(1). The search operations were conducted in the assessee's premises on 18.06.2003. In the meanwhile, on 01.06.2003, provisions of Chapter XIV were brought into force with effect from 01.06.2003. In the circumstances, search operations were to be and were conducted in accordance with its provisions.

4. Based upon the materials collected, the Assessing Officer (AO) issued notice under Section 153A to the assessee on 31.05.2005. In response, the assessee, through a letter, intimated on 27.08.2005 that it stood by the original returns which had been processed under Section 153(1). However, the AO thereafter proceeded to finalize the assessment under Section 153A. Whilst doing so, he disallowed certain amounts in the sense that all the deductions permissible under Section 80HHC and granted originally (to the tune of ₹11,17,71,086/-), the deduction actually permitted pursuant to these proceedings was ₹5,31,80,520/-. The CIT(A) on being approached by the assessee rejected its contentions and gave full effect to the AO's order in the light of the retrospective amendment to Section 80HHC which had come into force by then by Taxation Laws (Amendment) Act, 2005 with effect from 01.04.1998. The appeal to the Income Tax Appellate Tribunal (ITAT) met with a similar fate.

5. It is contended at the outset by the assessee that the disallowance sought to be made was solely on the basis of the retrospective amendment to Section 80HHC(3) by virtue of Taxation Laws (Amendment) Act, 2005 since it was brought into force with retrospective effect. It is contended that this amendment was challenged on both a substantive basis as well as on the ground of its unreasonable retrospective operation, before the Gujarat High Court in *Avani Exports and Ors. v. CIT* 2013 (348) ITR 391. Learned counsel relied on the said decision to say that the classification made by the said amendment as between those assessees who had an export turnover of more than ₹ 10 crores and those who had less than that amount was held to be unreasonable so far as the retrospective operation of the amendment is concerned. Learned counsel submits that the ruling of the Gujarat High Court was carried in appeal to the Supreme Court which by its order dated 30.03.2015 in *CIT-5 and Anr. v. M/s. Avani Exports and Anr.* (SLP(C) 9273/2013 decided on 30.03.2015) upheld the reasoning.

6. Learned counsel for the Revenue did not dispute the legal position but submitted that the first question of law, i.e. as to the completion of the assessment, does not arise. It was submitted that since the ruling of the Gujarat High Court has been indeed allowed with some modification by the Supreme Court, the decision in this appeal should be confined to that question alone.

7. Section 80HHC to the extent it is relevant is as follows:

> ***"[Deduction in respect of profits retained for export business.***
> [69]***80HHC.*** [70]*[(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, 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 export of such goods or merchandise :

***Provided** that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the [74][total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods].*

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(2)(a) This section applies to all goods or merchandise, other than those specified in clause (b), if the sale proceeds[78] of such goods or merchandise exported out of India are [79][received in, or brought into, India] by the assessee [80][(other than the supporting manufacturer)] in convertible foreign exchange [81][, within a period of six months from the end of the previous year or, [82][within such further period as the competent authority may allow in this behalf].]

[83][Explanation.—For the purposes of this clause, 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.]

(b) This section does not apply to the following goods or merchandise, namely :—

(i) mineral oil ; and

(ii) minerals[84] and ores [85][(other than[84] processed minerals and ores specified in the Twelfth Schedule)].

[86][Explanation 1.—The sale proceeds referred to in clause (a) 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.

Explanation 2.—For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50[87] of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.]

[88][(3) For the purposes of sub-section (1),—

(a) where the export out of India is of goods or merchandise manufactured [89][or processed] by the assessee, the profits[90] derived from such export shall be the amount which bears to the profits[90] of the business[90], the same proportion as the export turnover in respect of 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[90] 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 [91][or processed] by the assessee and of trading goods, the [92]profits derived from such export shall,—

(i) in respect of the goods or merchandise manufactured [91]*[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 :

***Provided** that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

[93]*[**Provided further** that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

***Provided also** that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if*

the assessee has necessary and sufficient evidence to prove that,—

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

***Provided also** that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—*

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, "rate of credit allowable" means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :]

*[94] [**Provided also** that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss*

shall be set off against the amount which bears to ninety per cent of—

(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or

b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,

the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.]

Explanation.—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 [95][or processed] by the assessee.]"

8. The second, third and fourth proviso to Section 80HHC(3) were introduced by the Taxation Laws (Amendment) Act, 2005 but with retrospective effect from 01.04.1998.

9. After discussing the nature of the amendment and noticing that the

provision, i.e. Section 80HHC(3) as existing have been interpreted by several judicial decision, the Gujarat High Court observed as follows:

> *"10. After hearing the learned counsel for the parties and after going through the impugned amendment, we find that classification based on export turnover is a recognized way of classification throughout the world. We find substance in the contention of the learned counsel for the Revenue that progressive levy is based on income classification in terms of both, the basis of taxation and the rate of tax, and on this ground, the same cannot be said to be arbitrary. In this connection, we may profitably refer to the following observations of the Supreme Court in the case of KERALA HOTEL AND RESTURANT ASSOCIATION VS. STATE OF KERALA reported in MANU/SC/0170/1990 : AIR 1990 SC 913 dealing with the question in detail:*
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> *12. After hearing the learned counsel for the parties, we are of the view that the benefit based on pendency of the proceedings of assessment and discrimination based thereon definitely violates Article 14 of the Constitution of India. In the matter of completion of assessment, the assessees have little role to pay. After the assessees have submitted their returns within the time fixed by law, if for any reason the respondent delays in making the assessment, taking advantage of their own delay, the Revenue cannot deprive a class of the assessees of the benefit whereas other assessees of the same class whose assessment have already been completed would get the benefit. We, therefore, find that discrimination based on two classes, first, whose assessments have become final and secondly, whose assessment are pending, definitely violates Article 14 of the Constitution of India as there is no rationale nexus with the object of the amendment, and, therefore, such classification fails the test of Article 14 of the Constitution, being a case of 'palpable arbitrariness'.*

13. We fully agree with the submissions made by the learned counsel for the petitioners that the burden was upon the Revenue to prove that the restrictions imposed by the amending Act are reasonable. We find that the Revenue has failed to discharge that burden by pointing out the reason for making classification based on the above two aspects which have no reasonable connection with the object of amendment.

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19. After hearing the learned counsel for the parties and after going through the decisions cited at the bar, we are of the view that although in taxing statute laxity is permissible and after giving a benefit to the assessee based on some specific conditions, such benefit can definitely be curtailed but the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the Revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could arrange his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. In the case before us, the object of the amendment, as it appears from the statements of the Finance Minister while moving the bill, is to get rid of the alleged wrong decision of the Tribunal interpreting the then provision of the Statute in a way beneficial to the assesses, which according to the Finance Minister, was never the intention of the legislature. If such be the position, the Revenue has definitely right to challenge the decision of the Tribunal as a wrong one before the higher forum; but on a plea of delay in disposal of appeal if filed, without challenging the decision of the Tribunal before High Court or Supreme Court, the Revenue cannot curtail such benefits by proposing amendment, incorporating a new provisions in the Statute from an anterior date. According to the existing law enacted by the Parliament itself, wrong orders passed by a Tribunal should be

> *challenged by the aggrieved party before the appropriate High Court and if such party is still aggrieved by the order of the High Court, he should move the Supreme Court."*

10. The Court thereafter noticed that the legislation was not just an amendment of the taxing statute creating a new provision retrospectively. Recognising that the legislature could confer benefits prospectively or retrospectively and noticing several past judgments, the Court held as follows:

> *"24. In the case before us, it is not one where the executive has failed to carry out the object of the Parliament necessitating exercise of control by retrospective amendment what the executive ought to have achieved.*
>
> *In the present case, according to the Finance Minister presenting the Bill, a valid piece of legislation has been wrongly interpreted by the Tribunal. We have already pointed out that according to the existing law, if a valid piece of legislation is wrongly interpreted by the Tribunal, the aggrieved party should move higher judicial forum for correct interpretation. As pointed by the Apex Court in the case of Pritvi Cotton Mills Ltd (supra), the legislature does not possess or exercise power to reverse the decision in exercise of judicial power. Thus, we are of the view that the principles laid down in the case of R. C. Tobacco (P) Ltd. (supra) has no application to the facts of the present case. The impugned amendment granting benefit restricting it to a class of assessee whose turnover is less than Rs. 10 Crore is permissible prospectively but the way it has been enacted, it takes away an enjoyed right of a class of citizen who availed of the benefit by complying with the requirements of the then provisions of law.*
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> *25. On consideration of the entire materials on record, we, therefore, find substance in the contention of the learned counsel*

for the petitioners that the impugned amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assesses.

26. We, accordingly, quash the impugned amendment only to this extent that the operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assessees whose export turnover is above Rs. 10 Crore. In other words, the retrospective amendment should not be detrimental to any of the assesses. The writ-applications are, thus, disposed in terms of the above order. In the facts and circumstances, there will be, however, no order as to costs.

In view of the above order passed in the writ-applications, the Civil Applications do not survive and are disposed of accordingly."

11. The Revenue filed several appeals before the Supreme Court by special leave, claiming direction against the operative part of the Gujarat High Court in *Avani Exports* extracted above. After noticing the reasoning of the High Court, the Supreme Court stated that the entitlement of benefits to exporters with turnover of more than ₹10 crores was premised upon the conditions spelt out in the third and fourth proviso brought in through amendments. The Court discussed these aspects as follows:

".................the amendment also carved out two categories of exporters, namely, those whose export is less than Rs. 10 crores per year and those exporters whose exports turn over is more

than Rs. 10 crores per annum. Insofar as entitlement of these benefits to the exporter having turn over of more than Rs. 10 crores p.a. is concerned, two conditions contained in third and fourth proviso to the said amendment were to be satisfied for claiming the benefits. Those were:

(a) He had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) The rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being Duty Remission Scheme.

All the respondents in these SLPs, who are the exporters, belong to the second category. They filed the writ petitions challenging conditions mentioned in third and fourth proviso to Section 80 HHC(3). In fact it was their precise contention that these conditions are severable and therefore these two conditions should be declared ultra vires and severed. The rationale behind seeking such a prayer was obvious inasmuch as the writ petitioners did not want entire Notification to be declared ultra vires which was to their advantage. What they wanted was that the benefit of amended provision be accorded, without insisting on the aforesaid conditions."

12. Subsequently, the Court extracted the operative portion of the Gujarat High Court judgment – which has been reproduced above. The Supreme Court recorded its conclusion and reasoning in the following terms:

"We find that in essence the High Court has quashed the severable part of third and fourth proviso to Section 80HHC(3) and it becomes clear therefrom that challenge which was laid to the conditions contained in the said provisos by the respondent has succeeded. However, to make the position crystal clear, we substitute the direction of the High Court with the following direction:

"Having seen the twin conditions and since 80HHC benefit is not

available after 1.4.05, we are satisfied that cases of exporters having a turnover below and those about 10 cr, should be treated similarly. This order is in substitution of the judgment in Appeal.

With the aforesaid clarification all these SLPs including that of assesses fled against the judgment of M.P. High Court are disposed of."

13. In the light of the above developments, this Court is of the opinion that the appellants are entitled to the reliefs claimed by them to the extent it is admissible – in line with the final order of the Supreme Court. Accordingly, the substantial question of law (b) relating to the rejection made is answered in favour of the assessee. The matter shall be re-examined by the AO in the light of the Supreme Court's final order. Since this Court has already ruled upon the merits of the disallowance made, the question as to whether the assessments could have been made under Section 153A is rendered academic; the same is accordingly kept open. The appeals are allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

APRIL 28, 2015
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