IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA Nos. 219/2014 and 239/2014

COMMISSIONER OF INCOME TAX IV ..... Appellant

Through Mr. Sanjay Kumar, Sr. Standing Counsel.

versus

HRITNIK EXPORTS PVT LTD. ..... Respondent

Through Mr. Simran Mehta and Mr. Prabhat Kalia, Advocates.

CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R 13.11.2014

By way of these appeals, the Revenue has challenged the orders passed by Income Tax Appellate Tribunal (Tribunal, for short) dated 11th September, 2013 and 24th October, 2013 relating to assessment years 2008-09 and 2009-10, respectively. Tribunal has followed the decision of their Special Bench in the case of Maral Overseas Ltd. versus Additional Commissioner of Income Tax decided on 20th March, 2012, in which it has been held:-

> "78. Section 10B sub-section (1) allows deduction in respect of profits and gains as are derived by a 100% EOU. Section 10B(4) lays down special formula for computing the profits derived by the undertaking from export. The formula is as under :-
>
> Profit of the business of the Undertaking
>
> Export turnover X Total turnover of business carried out by the undertaking
>
> 79. Thus, sub-section (4) of section 10B stipulated that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, not-with-standing the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits. The mode of determining the eligible deduction u/s 10B is similar to the provisions of section 80HHC inasmuch as both the sections mandates determination of eligible profits as per the formula contained therein. The only difference is that section 80HHC contains a further mandate in terms of Explanation (baa) for exclusion of certain income from the ''profits of the business'' which is, however, conspicuous by its absence in section 10B. On the basis of the aforesaid distinction, sub-section (4) of section 10A/10B of the Act is a complete code providing the

mechanism for computing the ‘‘profits of the business’‘ eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act. As per the computation made by the Assessing Officer himself, there is no dispute that both these incomes have been treated by the Assessing Officer as business income. The CBDT Circular No. 564 dated 5th July, 1990 reported in 184 ITR (St.) 137 explained the scope and ambit of section 80HHC and the mode of determination of profits derived by an assessee from the export of goods. I.T.A.T., Special Bench in the case of International Research Park Laboratories v. ACIT, 212 ITR (AT) 1, after following the aforesaid Circular, held that straight jacket formula given in sub-section (3) has to be followed to determine the eligible deduction. The Hon'ble Supreme Court in the case of P.R. Prabhakar; 284 ITR 584 had approved the principle laid down in the Special Bench decision in International Reserarch Park Laboratories v. ACIT (supra). In the assessee's own case the I.T.A.T. in the preceding years, after considering the decision in the case of Liberty India held that provisions of section 10B are different from the provisions of section 80IA wherein no formula has been laid down for computing the eligible business profit.

80. In view of the above discussion, question no. 2 is answered in affirmative and in favour of the assessee. Accordingly, the assessee is eligible for claim of deduction on export incentive received by it in terms of provisions of section 10B(1) read with section 10B(4) of the Act.”

The aforesaid view is in consonance with the decision of this Court dated 1st September, 2014 passed in ITA 438/2014, Commissioner of Income Tax-VII versus XLNC Fashions in which this court has held as under :-

“Deduction under Section 10B of the Income Tax Act, 1961 (Act, in short) is to be made as per the formula prescribed by Sub-Section (4), which reads as under:

“10B. Special provision in respect of newly established hundred per cent export- oriented undertakings-

.....

.....

(4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking”.

Sub-section (4), therefore, is the special provision which enables the assessee to compute the profits derived from the export of articles or things or computer software. We do not see any conflict between Sub- section (1) and Sub-section (4) to Section 10B, as Sub-section (1) states that deduction of such profits and gains as are derived by a hundred percent export-oriented undertaking from the export of articles or things or software would be eligible under the said Section. Sub- section (1) is a general provision and identifies the income which is exempt and has to be read in harmony with Sub-section (4) which is the formula for finding out or computing what is eligible for deduction under Sub-section (1). Neither of the two provisions should be made irrelevant and both have to be applied without negating the other. In other words, the manner of computing profits derived from exports under Sub-section (1), has to be

determined as per the formula stipulated in Sub-Section (4), otherwise Sub-section (4) would become otise and irrelevant.

The issue in question in this appeal which pertains to the Assessment Year 2009-10, relates to duty draw back in the form of DEPB benefits. As per Section 28, clause (iii-c), any duty of customs or excise repaid or repayable as drawback to a person against exports under Customs and Central Excise Duties Draw Back Rules, 1971 is deemed to be profits and gains of business or profession. The said provision has to be given full effect to and this means and implies that the duty draw back or duty benefits would be deemed to be a part of the business income. Thus, will be treated as profit derived from business of the undertaking. These cannot be excluded.

Even otherwise, when we apply Sub-section (4) to Section 10B, the entire amount received by way of duty draw back would not become eligible for deduction/exemption. The amount quantified as per the formula would be eligible and qualify for deduction/exemption. The position is somewhat akin or close to Section 80HHC of the Act, which also prescribes a formula for computation of deduction in respect of exports.

In view of the aforesaid, we do not find any merit in the present appeal and the same is dismissed."

Karnataka High Court in Commissioner of Income Tax, Central Circle versus Motorola India Electronics (P) Ltd., ITA No. 428/2007, decided on 11.12.2013, reported as [2014] 46 taxmann.com 167 (Karnataka) has also taken a similar view, wherein it has been held:-

"By Finance, Act, 2001, with effect from 01.04.2001, the present Sub- section (4) is substituted in the place of old Sub-section (4). No doubt Sub-section 10(B) speaks about deduction of such profits and gains as derived from 100% EOU from the export of articles or things or computer software. Therefore, it excludes profit and gains from export of articles. But Sub-section (4) explains what is (4) says that profits derived from export of articles or things or computer software shall be the account which bares to the profits of the business of the undertaking and not the profits and gains from export of articles. Therefore, profits and gains derived from export of articles is different from the income derived from the profits of the business of the undertaking. The profits of the business of the undertaking includes the profits and gains from export of the articles as well as all other incidental incomes derived from the business of the undertaking. It is interesting to note that similar provisions are not there while dealing with computation of income under Section 80HHC. On the contrary there is specific provisions like Section 80HHB which expressly excludes this type of incomes. Therefore, in view of the aforesaid provisions, it is clear that, what is exempted is not merely the profits and gains from the export of articles but also the income from the business of the undertaking."

In view of the aforesaid position, the appeals have to be dismissed. We order accordingly.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

NOVEMBER 13, 2014