IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.435 OF 2012

The Commissioner of Income Tax
Central-III, Mumbai 400 020 ...Appellant
v/s
M/s Valiant Glass Works Pvt.Ltd.,
Mumbai 400 002 ...Respondent

Mr Abhay Ahuja for the Appellant.
Ms A. Vissanjee with Mr S.J. Mehta for the Respondent.

CORAM : S.C. DHARMADHIKARI AND B.P. COLABAWALLA JJ.

Reserved on : 17th July 2014.
Pronounced on : 13th August 2014.

JUDGMENT ***[Per B.P. Colabawalla J.]*** :-

1. This Appeal under section 260A of the Income Tax Act 1961 has been filed by the Commissioner of Income Tax, Central-III, Mumbai challenging the order passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") dated 29th July 2011. The Assessment Year in question is 2003-04. The ITAT, by the impugned order inter alia held that the amount of deemed credit of Rs.89,34,887/- under the CENVAT incentive scheme

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was part of the business profits of the Assessee, eligible for deduction under section 80HHC of the Act. The ITAT therefore allowed the Appeal filed by the Assessee and reversed the order of the CIT (Appeals) on this issue.

2. Mr Ahuja, the learned counsel appearing on behalf of the Appellant, submitted that the ITAT had gravely misdirected itself in construing the provisions of section 80HHC of the Act and correspondingly allowing the deemed credit of Rs.89,34,887/- under the CENVAT Incentive Scheme as part of business profits of the Assessee eligible for a deduction under the said section. In a nutshell Mr. Ahuja submitted that when an assessee, being an Indian company or a person (other than a company) resident in India, was engaged in the business of export out of India of any goods or merchandise to which section 80 HHC applied, then subject to the other provisions of the said section, the Assessee whilst computing it's total income, was allowed a deduction to the extent of profits, referred to in sub-section (1-B) thereof derived by the assessee from the export of such goods or merchandise. He submitted that CENVAT Credit was not one of the items included under section 80 HHC(3) and therefore this Appeal gives rise to the following substantial questions of law and which needs to be answered by this Court and read as under :-

> *"(A) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was correct in holding that CENVAT credit is in the nature of credit against excise duty payable and hence business income even while holding that CENVAT incentive is not one of the*

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various export incentives under clauses (iiia) to (iiie) of section 28 of the Income Tax Act 1961 ?

(B) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was correct in holding that the Assessee will be entitled to relief under section 80HHC as CENVAT credit should be considered either as Duty Drawback or an incentive which is not excludable from business profits ?

(C) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was correct in holding that in case CENVAT incentives are considered on part with duty drawback then 10 % of the drawback will be included in the business profits and the balance 90 % will be entitled to relief under proviso to section 80HHC(3) and if it is not any of the incentives under section 28(iii), then no part of it can be excluded and the entire amount will be taken into account for computing relief under section 80HHC ?"

3. The brief facts are that the Assessee filed it's return of income on 28th February, 2003 declaring a total income of Rs.88,16,140/-. The case of the Assessee was selected for scrutiny and thereafter, the Assessing Officer completed the assessment and passed his order on 29th March 2006 under section 143(3) of the Act determining the total income of the Assessee at Rs.1,63,79,073/-. In the said order, the Assessing Officer held that CENVAT incentives were not eligible profits for claiming a deduction under section 80HHC of the Act and thus had to be excluded from the business income while calculating deductions under section 80HHC. Being aggrieved by the said order dated 29th March 2006, the Assessee preferred an Appeal before the CIT (Appeals), who by his order dated 14th December 2006 dismissed the same. The Assessee thereafter preferred an Appeal before the ITAT. The ITAT, by the impugned order partly allowed the Appeal filed by the Assessee. The ITAT held that the CENVAT incentives are in the nature of

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export incentives and hence allowed for the purpose of calculating business income whilst calculating a deduction under section 80HHC of the Act. Being aggrieved by the order of the ITAT, the present Appeal has been filed by the Revenue under section 260A of the Act.

4. Mr Ahuja, the learned counsel appearing on behalf of the Appellant, submitted that though CENVAT incentive was in the nature of export incentives, in order that the same qualify for a deduction under section 80HHC, it should be covered under any of the clauses (iiia) to (iiie) of section 28 of the Act. Admittedly, CENVAT incentives were not covered under any of these clauses, is the submission. According to Mr Ahuja, CENVAT incentive was similar to duty drawback and it was the choice of the exporter either to obtain CENVAT or duty drawback. Since in the present case, the Assessee has chosen the refund of the CENVAT which was not covered under section 28(iiia) to (iiic), the benefit of proportionate increase in business profits for allowing deduction under section 80HHC could not be allowed to the Assessee. He therefore submitted that the Tribunal had gravely misdirected itself by holding that the amount of Rs.89,34,887/- was a part of the business profits of the Assessee eligible for a deduction under section 80HHC.

5. On the other hand, Ms Vissanjee, the learned counsel appearing on

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behalf of the Respondent, submitted that in computing the admissible deduction under section 80HHC, the CENVAT incentive of Rs.89,34,887/-, being the refund of the tax and duty paid on inputs consumed for goods manufactured and exported, should be reduced from the costs of manufacture of the exported goods and correspondingly, the "profit of the business" for quantifying the admissible deduction under section 80HHC of the Act should be enhanced by the said amount, and the admissible deduction under section 80HHC as well as the total income for the year should be determined accordingly. She submitted that this is the exact path that was followed by the ITAT and therefore called for no interference by this Court.

6. With the help of the learned counsel, we have perused the memo of appeal, annexures thereto as well as orders passed by the Assessing Officer, CIT (Appeals) and ITAT. We agree with the submission of Ms Vissanjee that the said CENVAT incentive being the refund of tax and duty paid on inputs consumed for goods manufactured and exported would automatically reduce the cost of manufacture of the exported goods, thereby necessarily increasing the profit. In view thereof, the deemed credit under the CENVAT Incentive Scheme at Rs.89,34,887/- would be a part of the business profits eligible for a deduction under section 80HHC. Section 80HHC inter alia provides that where an assessee, being an Indian company or a person (other

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than a company) resident in India, was engaged in the business of export out of India of any goods or merchandise to which section 80 HHC applied, then subject to the other provisions of the said section, the Assessee whilst computing it's total income, was allowed a deduction to the extent of profits, referred to in sub-section (1-B) thereof derived by the assessee from the export of such goods or merchandise.

7. In the present case, it can hardly be argued that the deemed credit under the CENVAT Incentive Scheme would not reduce the material / manufacturing cost of the goods exported by the Assessee. This was not the case of the Revenue also. That being the case, under the provisions of section 80HHC, the Assessee would be entitled to a deduction to the extent of the profits referred to in sub-section (1-B) thereof derived by the Assessee from the export of such goods or merchandise. No other provision was brought to our notice that would justify the disallowance of CENVAT incentive whilst computing the admissible deduction u/s 80HHC of the Act. In this view of the matter, we do not find that in the peculiar facts and circumstances of the present case, the ITAT misdirected itself in coming to the conclusion that the amount of deemed credit under the CENVAT Incentive Scheme was a part of the business profits of the Assessee eligible for a deduction under section 80HHC despite the fact that it did not specifically find place in section 80HHC(3).

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8. For all the aforesaid reasons, we are of the view that the order of the ITAT cannot be said to be perverse or vitiated by any error apparent on the face of the record. We find that this Appeal raises no substantial question of law that needs to be answered by this Court and in view thereof, is dismissed. No order as to costs.

(B.P. COLABAWALLA J.) **(S.C. DHARMADHIKARI J.)**

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