

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.154/Coch/2018
Assessment Year : 2004-05

M/s. Fortune Elastomers P. Ltd., Kolathara P.O., Kozhikode-673 635. [PAN:AAACF 5028Q].	Vs.	The Assistant Commissioner of Income-tax,Circle-2(1), Kozhikode.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri M.V. Venugopal, CA
Revenue by	Smt. A.S. Bindhu, DR

Date of hearing	24/10/2018
Date of pronouncement	25/10/2018

ORDER

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A), Kozhikode dated 27/02.2018 and pertains to the assessment year 2004-05.

2. The assessee has raised the following grounds:

- 1) The CIT(A) erred in deducting brought forward loss while computing 'adjusted profit' for the purpose of quantifying deduction u/s. 80HHC.
- 2) The CIT(A) was not justified in subtracting deduction u/s. 80HHC and calculating 30% of the balance amount while computing deduction u/s. 80IB.

3. The facts of the case are that the assessee claimed deduction u/s. 80HHC by taking the profit of business at Rs.78,52,403/- without deducting set off of carry forward business loss of Rs.14,37,969/-. The Assessing Officer allowed the deduction on a profit of Rs.64,14,434/- after setting off brought forward business losses. The deduction u/s. 80HHC was restricted to Rs.7,56,635/-. The Assessing Officer further observed that the assessee claimed deduction u/s. 80IB without deducting claim u/s. 80HHC . The Assessing Officer allowed deduction u/s. 80IB after deducting 80HHC deduction of Rs.7,56,635/-.

4. On appeal, the CIT(A) relied on the judgment of the Karnataka High Court in the case of J.K. Industries Ltd. vs. ACIT in ITA No.1105/2006 dated 19/02/2013 wherein it was held that when there existed unabsorbed depreciation and brought forward losses, deduction u/s. 80HHC can be given only on that part of profit as reduced by the value of unabsorbed losses and unabsorbed depreciation. Accordingly, the CIT(A) held that assessee was not entitled to claim the benefit of deduction even before adjusting unabsorbed depreciation of the earlier years. Regarding 80IB deduction, the CIT(A) relied on the judgment of the Jurisdictional High Court in the case of Olam Exports (India) Ltd. vs. CIT reported in 332 ITR 40 wherein it was held that the assessee is not entitled to simultaneous deduction u/s. 80IB and 80HHC on the same profit, i.e., it shall be entitled to deduction u/s. 80IB only for that part of the profit as reduced by deduction u/s. 80HHC. Therefore, the CIT(A) decided the issue against the assessee and upheld the action of the Assessing Officer.

5. Against this, the assessee is in appeal before us.
6. The Ld. DR relied on the order of the lower authorities.
7. We have heard the rival submissions and perused the record. Regarding deduction of brought forward loss while computing 'adjusted profit' for the purpose of quantifying deduction u/s. 80HHC, in our opinion, this issue is squarely covered by the judgment of the Jurisdictional High Court in the case of Olam Exports (India) Ltd. vs. CIT (332 ITR 40) wherein it was held that by virtue of specific exclusion u/s. 80-IB(13) r.w.s. 80-IA(9) of the Act, the assessee will not be entitled to claim deductions both u/s. 80-IB and u/s. 80HHC of the Act. The Tribunal following their Full Bench decision upheld the disallowance u/s.80-IB(13) of the Act, but granted deduction u/s.80HHC of the Act. Even though the Ld. AR contended that deduction u/s. 80HHC is a full code by itself and no exclusion would be made while computing eligible deduction, the Court noticed that s.80-IB and s.80HHC come under Chapter VI-A and by virtue of specific exclusion u/s. 80-IB(13) of the Act, the assessee was not entitled to simultaneous deduction of both. In other words, while computing deduction u/s. 80HHC deduction granted u/s. 80-IB cannot be reckoned or has to be excluded. The Court found the order of the Tribunal was consistent with the statutory provisions and therefore appeal on this issue was rejected. Further, the Supreme Court considered a similar issue in the case of CIT vs. Shirke Construction Equipments Ltd. (291 ITR 380) wherein it was held that section

80AB of the I.T. Act, specifying that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the purposes of the deduction u/s. 80HHC and in determining business profits for the deduction u/s. 80HHC, the unabsorbed business losses of earlier years u/s. 72 should be set off. In view of the above judgments cited supra, this ground of appeal of the assessee is rejected.

8. Regarding the second ground relating to subtraction of deduction u/s. 80HHC and calculating 30% of the balance amount while computing deduction u/s. 80IB, this issue is squarely covered by the Jurisdictional High Court in the case of Olam Exports (India) Ltd. vs. CIT (332 ITR 40) wherein it was held that so far as the assessee's claim for determination of deduction before excluding carry forward or set off of loss is concerned, the judgment of the supreme Court in the case of CIT vs. Shirke Construction Equipments Ltd. (291 ITR 380) is against the proposition canvassed by the assessee. Therefore, the assessment on this does not warrant any modification. In view of the above judgment cited supra, we reject this ground of appeal of the assessee.

8.1 However, before us, the Id. AR submitted that there was a divergent view expressed by the Judge of a two member Division Bench of the Supreme Court in the case of ACIT vs. M/s. Micro Labs Ltd. (Civil Appeal No. 7427 of 2012) and the case is pending before the Supreme Court for adjudication by the Third Judge. Hence, he submitted that the view expressed by the Third Judge is to be

considered. We agree with this proposition, though as of now, the judgment of the Jurisdictional High Court cited supra has decided the issue against the assessee. Since the issue is pending before the Supreme Court in the case cited above by the Third Judge, the Assessing Officer has to consider the judgment to be delivered by the Supreme Court on this issue while passing a consequential order. With this observation, we dismiss this ground of appeal of the assessee.

9. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on this 25th October, 2018.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 25th October, 2018

GJ

Copy to:

1. M/s. Fortune Elastomers P. Ltd., Kolathara P.O., Kozhikode-673 635.
2. The Assistant Commissioner of Income-tax, Circle-2(1), Kozhikode.
3. The Commissioner of Income-tax(Appeals), Kozhikode.
4. The Pr. Commissioner of Income-tax, Kozhikode.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

		Date	
1.	Draft Order dictated on	24/10/2018	Sr.PS
2.	Draft Order placed before author	25/10/2018	AM
3.	Approved draft comes back		Sr. PS
4.	Fair order placed before the author.		AM
5.	Fair order placed before the Second Member for signature		JM
6.	Pronouncement on		
7.	File sent to the Bench Clerk		
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		