

HIGH COURT OF BOMBAY
Commissioner of Income-tax-9

v.

Jyoti Plastic Works (P.) Ltd.*

J.P. DEVADHAR AND A.R. JOSHI, JJ.
IT APPEAL NO.5045 OF 2010
NOVEMBER 15, 2011

JUDGMENT

J.P. Devadhar, J. - The appeal is admitted on the following two substantial questions of law and taken up for final hearing by consent of both the parties.

- (a) Whether the Income Tax Appellate Tribunal was justified in holding that the assessee is engaged in the activity of manufacture or producing an article or thing and, hence, eligible for deduction under Section 80IB of the Income Tax Act, 1961 ?
- (b) Whether the Tribunal was justified in holding that the workers supplied by the contractor are also to be treated as workers employed by the assessee for the purposes of Section 80IB(2)(iv) of the Income Tax Act, 1961 ?

2. The assessee is engaged in the manufacture of plastic parts, which are excisable. The assessment year involved herein is AY 1999-2000.

3. In the assessment year in question, deduction under Section 80IB of the Act was claimed and allowed in the assessment order passed under Section 143(3) of the Act. Thereafter, the assessing officer passed re-assessment order under Section 143(3) read with Section 147 of the Income Tax Act, 1961 ('Act' for short) whereby deduction under Section 80IB (wrongly typed as Section 80IA in the re-assessment order) was denied to the respondent (assessee) on the ground that firstly the assessee is not a manufacturer as the goods were not manufactured at the factory premises of the assessee but the same were manufactured at the factory premises of the job workers; and secondly the total number of permanent employees employed in the factory being less than ten, the assessee had not fulfilled the condition stipulated in Section 80IB(2)(iv) of the Act and, therefore, the assessee was not entitled to the deduction under Section 80IB of the Act.

4. On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) allowed the claim of the assessee by relying upon his order in the case of the assessee for assessment years 2003-2004 and 2004-2005.

5. On further appeal filed by the revenue, the Income Tax Appellate Tribunal ('Tribunal' for short) confirmed the order of the Commissioner of Income Tax (Appeals) and by a common order dated 5th February 2010 dismissed the appeals filed by the Revenue for assessment years

1999-2000 to 2004-2005. Challenging the aforesaid order, the Revenue has filed independent appeal for each of the respective assessment year.

6. Mr. Kazi, the learned counsel appearing on behalf of the Revenue submitted that from the assessment order it is clear that the assessee has paid labour charges / job work charges to third parties, which clearly establish that the assessee got the goods manufactured from the premises of the job worker on labour contract basis and, therefore, the assessee cannot be said to be a manufacturer and, therefore, the condition set out in clause (iii) of Section 80IB(2) being not satisfied, the Tribunal committed an error in holding that the assessee is entitled to deduction under Section 80IB of the Act.

7. Relying upon two decisions of the Allahabad High Court in the case of *R & P Exports v. CIT* [2005] 279 ITR 536/146 Taxman 404 (All) and *Venus Auto (P.) Ltd. v. CIT* [2010] 321 ITR 504 (All.), counsel for the Revenue submitted that where the manufacturing activity is carried out at the premises of the contractor / job worker, the labourers employed by the contractor / job worker cannot be treated as workers employed by the assessee. In the present case, if the employees employed by the contractor job worker are excluded, then the number of employees employed by the assessee being less than ten, the condition imposed under Section 80IB(2) (iv) would stand violated and consequently, the Tribunal was not justified in allowing 80IB deduction to the assessee.

8. We see no merit in the above contentions advanced on behalf of the Revenue.

9. As rightly contended by Mr. Toprani, learned counsel for the assessee, the finding recorded by the Tribunal on verification of the books maintained by the assessee is that (a) the assessee had purchased raw materials and utilized the same in the manufacture of the final products; (b) in the assessment year in question, the assessee has paid central excise duty amounting to Rs. 106.97 lakhs and claimed CENVAT credit of Rs. 53.73 lakhs; (c) the assessee owned plant and machinery worth Rs. 2.32 crores before depreciation and the value of the said plant and machinery after depreciation came to Rs. 1.04 crores; (d) the assessee holds SSI certificate from the Department of Industries, Administration of Daman and Diu for manufacturing the plastic goods; (e) the assessee has paid in the assessment year in question electricity charges worth Rs. 38.94 lakhs and had also spent Rs. 12.01 lakhs towards repairs and maintenance of its machinery.

10. The aforesaid facts, which are uncontroverted, clearly establish that the manufacturing activity was carried out at the factory premises of the assessee and, therefore, no fault can be found with the decision of the Tribunal in holding that the assessee was entitled to deduction under Section 80IB of the Act.

11. The inference drawn by the assessing officer that because the assessee has paid job work charges, the assessee must have got the goods manufactured from the job worker cannot be accepted, because, the finding of fact recorded by the Tribunal is that in the assessment year in question, the assessee has paid to the job-worker Rs. 9,60,575/- which is negligible as compared to the quantity of goods manufactured and cleared on payment of central excise duty amounting to Rs. 106.97 lakhs. Moreover, the finding of fact recorded by the Tribunal is that the assessee in

addition to its regular employees (which is less than ten), the assessee had employed between 84 to 123 contract labourers per month for manufacturing the goods in its factory. Thus, the decision of the Tribunal in holding that the assessee has carried on with the manufacturing activity in its own factory with the help of employees employed on regular basis and on contract labour basis cannot be faulted. Accordingly, the first question raised by the Revenue is answered in the affirmative, that is, in favour of the assessee and against the Revenue.

12. As regards the second question is concerned, the dispute is whether the assessee has fulfilled the conditions set out in Section 80IB(2) (iv) of the Act. Section 80IB(2)(iv) of the Act reads thus :

80-IB (2) This Section applies to any industrial undertaking which fulfils all the following conditions, namely

(i) to (iii) **

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(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

13. The expression 'worker' is neither defined under Section 2 of the Act nor under Section 80IB(2)(iv) of the Act. As per Black's Law Dictionary, the expression 'worker' means a person employed to do work for another. Under Section 2(L) of the Factories Act, 1948, the expression 'worker' means a person employed directly or by or through any agency (including a contractor) with or without the knowledge of the principle employer, whether for remuneration or not in any manufacturing process, or in any other kind or work incidental to or connected with the manufacturing process. Therefore, in the absence of the expression 'worker' defined under the Act, it would be reasonable to hold that the expression 'worker' in Section 80IB(2)(iv) of the Act is referable to the persons employed by the assessee directly or by or through any agency (including a contractor) in the manufacturing activity carried on by the assessee. In the present case, though the workers employed by the assessee directly were less than ten, it is not in dispute that the total number of workers employed by the assessee directly or hired through a contractor for carrying on the manufacturing activity exceeded ten and, therefore, the Tribunal was justified in holding that the assessee complied with the condition set out in Section 80IB(2)(iv) of the Act.

14. Moreover, in the case of *CIT v. Sawyer's Asia Ltd.* [1980] 122 ITR 259/[1979] 1 Taxman 547 (Bom), while considering similar provision contained in the erstwhile Section 84(2)(iv) of the Act has held thus :

"(5) The undertaking is not required to have ten or more regular workers and it may be said to have satisfied that requirement if the aggregate actual number of workers engaged in the manufacturing process, both regular and normal, is ten in number. However, where the undertaking employs less than ten regular workers, it cannot be heard to say that on any particular day it wanted to employ additional casual workers to enhance the figure to ten or more, but that it could not do so by reason of non-availability of casual labourers. If it

chooses to have less than ten regular workers on its muster roll, it runs the risk of not satisfying the requirement on such days on which the necessary number of casual workers is not available."

15. In the present case, it is not the case of the Revenue that the total number of workers employed in the manufacturing were less than ten at any point of time during the relevant assessment year. Therefore, when Section 80IB(2)(iv) of the Act merely provides that the undertaking must employ ten or more workers (whether directly employed or not) in the manufacturing process carried on with the aid of power, it would not be proper to hold that Section 80IB(2)(iv) refers to ten workers employed by the assessee directly. In other words, when the language used in Section 80IB(2)(iv) does not suggest that restricted meaning must be given to the expression 'worker', it would not proper to give a restricted meaning to that expression and hold that Section 80IB deduction is allowable only if the workers directly employed by the assessee exceed ten. To put it simply, the condition imposed under Section 80IB(2)(iv) of the Act is that the assessee must employ ten or more workers in the manufacturing process / production of articles or things and it is immaterial as to whether the workers were directly employed or employed by hiring workers from a contractor.

16. Strong reliance was placed by the counsel for the Revenue on the decision of the Allahabad High Court in the case of *R and P Exports (supra)*, which in our opinion is distinguishable on facts. In that case, the work was entrusted to the karigars / artisans and the amount paid to them were debited to the purchase account by the assessee therein as polishing charges, engraving charges, cutting charges etc. Relying upon the decision of the Apex Court in the case of *Chintaman Rao v. State of Madhya Pradesh* 1958 SCR 1340 and *Harish Chandra Bajpai v. Triloki Singh* AIR 1957 SC 444, the Allahabad High Court held that where the work is entrusted to karigars / artisans, it is a contract for service and not a contract of service and, therefore, the karigars / artisans to whom the work was entrusted cannot be said to be workers employed by the assessee. In the present case, the finding of fact recorded by the Tribunal is that the assessee had entered into a contract of service with the contractor who supplied workers to the assessee and the said workers worked in the factory of the assessee under the direct control and supervision of the assessee. Therefore, the decision of the Allahabad High Court in the case of *R and P Exports (supra)* is distinguishable on facts.

17. No doubt that the decision of the Allahabad High Court in the case of *Venus Auto (P.) Ltd. (supra)* is in consonance with the arguments advanced by the Revenue. However, we find it difficult to subscribe to the views expressed by the Allahabad High Court in the aforesaid case. As held by this Court in the case of *Sawyer's Asia Ltd. (supra)*, the undertaking is not required to have ten or more regular workers and it may be said to have satisfied that requirement if the aggregate actual number of workers engaged in the manufacturing process, both regular and normal, is ten in number. Therefore, under Section 80IB(2)(iv) what is relevant is the employment of ten or more workers and not the mode and the manner in which the said workers are employed by the assessee. In other words, irrespective of the terms of employment, condition of Section 80IB(2)(iv) would stand fulfilled if the assessee in aggregate employs ten or more workers in its manufacturing activity. The fact that the employer - employee relationship between the workers employed by the assessee differs cannot be a ground to deny deduction under Section 80IB of the Act, so long as the workers employed by the assessee in aggregate

exceed ten in number. Accordingly, we find it difficult to follow the decision of the Allahabad High Court in the case of *Venus Auto Private Ltd. (supra)*.

18. In the result, in the facts of the present case, since the actual number of workers employed in the manufacturing process exceeded ten in number, the Tribunal was justified in holding that the condition of Section 80IB(2)(iv) have been fulfilled. Accordingly, the second question is also answered in the affirmative, that is, in favour of the assessee and against the Revenue.

19. In view of our decision that the assessee has employed more than ten workers for carrying on the manufacturing process in its factory, we do not consider it necessary to go into the question as to whether Production Engineer, Quality Control Assistants can also be treated as workers under Section 80IB(2)(iv) of the Act. We leave that question to be decided in an appropriate case.

20. The appeal is disposed of accordingly with no order as to costs.

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