

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of Decision:06.02.2013

1. I.T.A. .No.60 of 2012 (O&M)

Commissioner of Income Tax-I, Ludhiana

.....Appellant

Vs.

M/s Abhishek Industries Ltd.

.....Respondent

2. I.T.A. .No.61 of 2012 (O&M)

Commissioner of Income Tax-I, Ludhiana

.....Appellant

Vs.

M/s Abhishek Industries Ltd.

.....Respondent

**CORAM:- HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MS. JUSTICE RITU BAHRI**

Present:- Mr. Rajesh Katoch, Advocate for the appellant.

HEMANT GUPTA, J.(Oral)

This order shall dispose of two income tax appeals bearing I.T.A. No.60 of 2012 and I.T.A. No.61 of 2012 arising out of an order dated 27.9.2011 passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh. The revenue has claimed the following substantial questions of law in I.T.A. No.60 of 2012:-

- (i) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in considering the Software expenses amounting to Rs.58,82,239/- as revenue expenditure instead of capital expenditure by ignoring the decision of Hon'ble Gujrat High

Court reported at 96 ITR 672?

- (ii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in considering the Software expenses amounting to Rs.58,82,239/- as revenue expenditure instead of capital expenditure whereas the concern is not involved in the business of development and selling computer software and computer software is only use for overall improvement and functioning of the concern and whether the acquisition of the said computer software is to be treated in the same way as development and customization of any machinery helping in the production process?'
- (iii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in dismissing the appeal of revenue on the issue of Software expenses by relying upon the decision of Hon'ble P & H High Court in the case of CIT Vs. Varinder Agro Chemicals Ltd. reported at 309 ITR 272, whereas the department has filed appeal against this order before the Hon'ble Supreme Court which is still pending?"
- (iv) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in holding that sales tax subsidy amounting to Rs.6,80,61,977/- is to be treated as "business income" but at the same time 90% of such receipt is to be excluding from the profits of business?"
- (v) Without prejudice to above, whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in directing the A.O not to exclude 90% of the amount of sales tax subsidy from "profits of business" for the purpose of computing deduction u/s 80HHC of the Act by ignoring the decision of Hon'ble Supreme Court in the case of K. Ravindranathan Nair reported at 295 ITR 228(SC), as the Sales Tax Subsidy is an independent income of the assessee not related to export income and, hence, 90% of the same has to be excluded by considering it as "any other

receipt of a similar nature included in such profit” in clause (baa) to Section 80HHC?”

- (vi) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in upholding the decision of CIT(A) in directing to reduce only 90% of discount received from customers from profits of business for computation of deduction u/s 80HHC as these receipts are of similar nature to receipts such as brokerage, commission etc. as per explanation (baa) to section (4C) of section 80HHC?

The revenue has claimed the following substantial questions of law in I.T.A. No.61 of 2012:-

- (i) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in restoring back the matter to the file of the A.O regarding prior period expenses whereas the A.O had passed a well reasoned order and the assessee had been accorded due opportunity to represent itself on this issue during the assessment proceedings?
- (ii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in directing the A.O not to exclude 90% of the amount of sales tax subsidy from “profits of business” for the purpose of computing deduction u/s 80HHC of the Act by ignoring the decision of Hon'ble Supreme Court in the case of K. Ravindranathan Nair reported at 295 ITR 228(SC), as the Sales Tax Subsidy is an independent income of the assessee not related to export income and, hence, 90% of the same has to be excluded by considering it as “any other receipt of a similar nature included in such profit” in clause (baa) to Section 80HHC?”

Learned counsel for the revenue has pressed Question Nos.(iii), (v) and (vi) in I.T.A. No.60 of 2012 and Question No.(i) in I.T.A. No.61 of

2012.

In respect of Question No.(iii), the same stands answered against the revenue by a judgment of this Court reported as 309 ITR 272 – CIT v. Varinder Agro Chemicals Ltd. The argument of the learned counsel for the Appellant is that the revenue's appeal against the order passed by this court is pending before the Supreme Court.

We don't find any merit in the said argument. As far as this court is concerned, the matter has attained finality. The question of law stands answered against the revenue by this court. We do not find that such question of law arises for consideration in the present appeal.

Question No.(v) relates to sales tax subsidy received by the assessee and Question No.(vi) relates to discounts received by the assessee from customer. The assessee has received sales tax subsidy of Rs.6,80,61,977/- and the discount of Rs.31,92,077/-. Such questions relates to interpretation of Section 80HHC (4C)(baa) of the Act, which deals with the deductions from profits earned from export businesses. The relevant clause reads as under:-

“(baa) `profits of the business' means the profits of the business as computed under the head “Profits and gains of business or profession” as reduced by--

- (1) ninety per cent of any sum referred to in cls. (iiia), (iiib) and (iiic) of s.28 or of any receipts by way of brokerage, commission, interest, rent charges or any other receipt of a similar nature included in such profits; and
- (2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India.”

Learned counsel for the appellant relies upon the Supreme Court judgment reported as 295 ITR 228 – Commissioner of Income Tax v. K. Ravindranathan Nair, to contend that the 90% of the amount of eligible profits has to be deducted for the purposes of Section 80HHC.

In K. Ravindranathan Nair's case (supra), the amount which was reduced from the profits was the processing charges incurred by the assessee for processing of cashew nuts grown in his farm. The assessee was an exporter and also a job worker when he processed cashew nuts on job basis. Clause (1) of Explanation (baa) permits deduction of profit by 90% for the purposes of Section 80HHC if the profits relates to receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature. The sales tax subsidy cannot be said to be either brokerage, commission, interest, rent or charges. Nor it is anyway similar to such expression. The expression “similar nature” has to be interpreted *ejusdem generis* to the brokerage, commission, interest, rent or charges. It does not include income totally unrelated to such expressions. Therefore, neither the sales tax subsidy nor the profits from discounts on early payments is of similar nature to brokerage, commission, interest, rent or charges, which may allow the revenue to deduct profit to the extent of the 90% of such sum for the purposes of Section 80HHC. The judgment in Ravindranathan Nair's case (supra), relates to processing charges, which will fall within the expression “charges” which are to be reduced by 90% for the purposes of calculating the export income. Therefore, the aforesaid judgment has no applicability to the issue raised in the present case.

In view of the above, we do not find any substantial question of

law arises for consideration in I.T.A. No.60 of 2012. The same is dismissed.

Questions No.(i), which has been raised for consideration in I.T.A. No.61 of 2012, is again does not arise. The Tribunal has remanded the matter to the Assessing Officer to decide the issue afresh keeping in view the directions and guidelines issued by the Tribunal in the assessee's own case, relating to assessment year 2002-03 and 2003-04 in its order dated 31.3.2008. Since the matter has been remanded, there is no finding which may give rise to any substantial question of law.

Consequently, we do not find any question of law arises in the present appeals and the same are dismissed.

**(HEMANT GUPTA)
JUDGE**

**February 06, 2013
renu/Vimal**

**(RITU BAHRI)
JUDGE**