Print

TAXAP/528/2009 14/17 ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 528 of 2009

with

TAX APPEAL NO.529 OF 2009

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COMMISSIONER OF INCOME TAX-III - Appellant(s)

Versus

PATEL FIELD MARSHAL INDUSTRIES - Opponent(s)

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Appearance :
MRS MAUNA M BHATT for Appellant
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 03/05/2010

ORAL ORDER

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Since both the appeals arise out of common order dated 29th

August, 2008 made by the Income Tax Appellate Tribunal (the Tribunal), the same were taken up for hearing together and are decided by this common judgement.

2. In these appeals under section 260A of the Income Tax Act, 1961 (the Act), appellant-revenue has proposed the following questions in relation to Assessment Year 1996-97:

Tax Appeal No.528 of 2009:

[i] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.28,66,529/- made by the Assessing Officer and confirmed by the Appellate Commissioner by disallowing expenses being `export expenditure'?

[ii] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting Rs.1,30,000/- by disallowing administrative expenses made by the Assessing Officer and confirmed by the Appellate Commissioner?

[iii] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.3,99,388/- made by the Assessing Officer and confirmed by the Appellate Commissioner as unaccounted money received from M/s National Automobile, Patiala?

[iv] Whether, on the facts and in the circumstances of the case, the impugned order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of

the case and is suffering from non-application of mind and, hence, perverse or not?

Tax Appeal No.529 of 2009:

[i] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in coming to the conclusion that M/s Topland Exports is independent and genuine concern and is not benami concern of the assessee which has resulted in excessive deduction u/s 80HHC to the Field Marshal Group?

[ii] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs.25,17,730/- made by the Assessing Officer on the ground of suppression of profit for the sale to M/s Topland Exports?

[iii] Whether, on the facts and in the circumstances of the case, the impugned order passed by the Income Tax Appellate Tribunal is contrary to the evidence and material on the record of the case and is suffering from non-application of mind and, hence, perverse or not?

3. Insofar as proposed question No.1 in Tax Appeal No.528 of 2009 is concerned, the assessee had claimed expenditure of Rs.28,66,529/- incurred in respect of the products manufactured by it, but exported by M/s Topland Exports and M/s Crystal Engineers as sales to them was on C& F basis. The Assessing Officer was of the opinion that the expenses were not deductible

in the computation of total income of the assessee as the goods were not exported by it, but were exported by others, one of whom, that is, M/s Topland Exports, being an associate concern of the assessee, whereas M/s Crystal Engineers was an unrelated party. The Assessing Officer observed that the expenses were related to exports and considered the same to be deductible protectively since the income of M/s Topland Exports has been clubbed with income of the assessee firm. He, however, made the disallowance on protective basis on the ground that if M/s Topland Exports were held to be a separate firm, then this expenditure would be disallowable in the case of the assessee firm and would be allowable in the case of M/s Topland Exports to arrive at the actual profit of M/s Topland Exports. In appeal by the assessee, Commissioner (Appeals) observed that the expenses had not been borne by the assessee firm in other years and there was no agreement between the assessee firm and M/s Topland Exports for bearing such expenses. It was further observed that when the products had been sold at such competitive rates to M/s Topland Exports, further payment of shipment expenses for exports made by the said firm was unreasonable or excessive and would attract the provisions of section 40A(2) of the Act. Commissioner (Appeals), accordingly, confirmed the disallowance with a direction to give relief of Rs.3,58,584/- being expenses in respect of sales to M/s Crystal Engineers, after verification.

4. The assessee carried the matter in appeal before the Tribunal. The Tribunal upon perusal of the record found that the assessee firm had agreed to sell engines to M/s Topland Exports on CIF

basis. Freight and other expenses for delivering the engines on CIFR basis to M/s Topland Exports were borne by the assessee firm as agreed. The Tribunal also found that assessee had also borne such expenses in respect of sales through other parties and that the product was sold to M/s Topland Exports on comparative rates. The Tribunal was of the view that since the assessee was bearing such expenses as per the agreement, no disallowance could have been made and accordingly, allowed the appeal.

5. Thus, it is apparent that the Tribunal upon appreciation of the evidence on record has found that the assessee had agreed to bear the expenses for delivering the engines on CIF basis to M/s Topland Exports and that the assessee was also bearing such expenses in respect of sales to other parties. The Tribunal arrived at the aforesaid conclusion on the basis of findings of fact recorded by it upon appreciation of the evidence on record. In the circumstances, in absence of any perversity being pointed out in the findings recorded by the Tribunal, no question of law can be stated to arise out in relation to the proposed question. In the circumstances, merely because it may be possible to take a different view on the basis of same facts, no interference is warranted insofar as the said ground is concerned.

6. Insofar as proposed question No.3 is concerned, the Assessing Officer had made addition of Rs.3,99,388/- as unaccounted money received from M/s National Automobiles, Patiala, on the basis of a spiral note-book found and marked as Annexure A-1 and statement of one of the partners recorded during the course of survey proceedings under section 133A of the Act. The

Assessing Officer worked out ratio of on-money of 16.46% on the basis of figures appearing on page 4 of Annexure A-1 and applied this ratio to the sales of Rs.24,26,417/- made during the year and worked out the on-money at Rs.3,99,388/-. Commissioner (Appeals) confirmed the addition on the ground that the partner in whose hands the income of on-money had been offered was not doing any separate business and the goods of the assessee firm had been sold to M/s National Automobile, Patiala, and therefore, the assessee firm alone was the beneficiary of the said money and as such, the same could be assessed only in the hands of the firm. In appeal before the Tribunal, the said ground came to be allowed.

7. The learned Senior Standing Counsel for the appellant-revenue has reiterated the grounds stated by Commissioner (Appeals) while confirming the addition.

8. As can be seen from the impugned order of the Tribunal, the Tribunal upon perusal of the record of the case has found that page 1 of the spiral notebook does not indicate that it pertains to sales and that there was no evidence to show that any sale transaction had taken place outside the books of account. The products manufactured by the assessee were excisable and no defect had been found in the stock records of the assessee firm. The partner had received the additional amount, which was already offered for taxation by the partner in his personal capacity. The Tribunal also noted that the assessee had retracted the statement immediately on the second day. In the light of the aforesaid findings of fact recorded by the Tribunal, the Tribunal has deleted the addition made on this count

9. A perusal of the order made by Commissioner (Appeals) as well as the Tribunal indicates that the Shri Pankaj Patel, a partner had subsequently filed an affidavit retracting his earlier statement, wherein he had stated that he had disclosed the amount in his return of income filed after the date of survey. The record indicates that despite the affidavit having been filed by the partner, he had not been examined thereafter, nor had any steps been taken to ascertain the correct date of the affidavit. On the same set of evidence, Commissioner (Appeals) and the Assessing Officer have taken one view, whereas the Tribunal has taken a different view. However, in absence of any perversity being pointed out in the findings recorded by the Tribunal, merely because it may be possible to take a different view, the same would not give rise to any question of law so as to warrant interference.

10. Insofar as the proposed question No.2 is concerned, **ADMIT**. The following substantial question of law arises for determination:

    Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in deleting Rs.1,30,000/- by disallowing administrative expenses?

11. Insofar as proposed question No.1 in Tax Appeal No.529 of 2009 is concerned, during a survey under section 133A of the Act carried out at the business premises of the respondent on 19th February 1998, it was found that a part of the turnover of the firm comprised of sales to M/s Topland Exports, an associated concern, which in turn used to export the engines. The Assessing Officer held that the business shown to have been carried out in

the name of M/s Topland Exports was in reality the business of the respondent firm. He, accordingly, clubbed the income of M/s Topland Exports with the income of the respondent and computed the deduction under section 80HHC of the Act on the total turnover as well as profit of both the firms together. Accordingly, the deduction was worked out at Rs.8,65,448/- as against Rs.64,18,835/- claimed by Topland Exports. This was the assessment made on substantive basis. However, without prejudice to the contention that M/s Topland was the business of the respondent firm, the Assessing Officer made the following additions in the alternative on protective basis: (i) Disallowance of shipment expenses for export claimed by the respondent firm: Rs.28,66,529/- and (ii) Suppression of profit by under billing in the name of M.s Topland Exports: Rs.25,50,713/-. According to the Assessing Officer, M/s Topland Exports had been created on paper to claim higher benefit under section 80HHC by selling goods at a lower price to it and then, exporting the same at higher prices; that in the sales to the assessee, there was under-billing of invoices with a view to have higher profit in export firm and the sale price for the sale to M/s Topland Exports was substantially lower in comparison to the price in indigenous market and price for the sale to the other exporters. The Assessing Officer noted that the beneficiaries of the profit in the case of M/s Topland Exports were ultimately the partners of the assessee firm, who derived benefit of the tax free profit earned by M/s Topland Exports. According to the Assessing Officer M/s Topland Exports had been floated with a view to avoid taxes. He, accordingly, held that M/s Topland Exports was a benami

concern of the assessee firm and that the entire income of M/s Topland Exports was required to be included in the income of the assessee.

12. During the course of appellate proceedings before Commissioner (Appeals), the assessee submitted a chart showing the Assessing Officer's contentions and its submission on each and every contention. Commissioner (Appeals), for the reasons stated in his order, held that M/s Topland Exports could not be said to be a benami concern of the assessee firm or its partners and accordingly, he deleted the substantive assessment made by considering the business of M/s Topland Exports as that of the assessee firm. Revenue carried the matter in appeal before the Tribunal, which came to be partly allowed, however, the said ground came to be disallowed.

13. Commissioner (Appeals) in the order dated 20th December 2000, has recorded the following findings :

..... I find from the records that M/s Topland Exports was formed in the financial year 1992-93. At the time of formation, there were 5 parties, out of which 3 were outsiders with a 50% share in profit. Till 19.1.1995, the outside partners had 50% shares in profit. It is not anybody's case that these partners were benami of the present partners of the firm. Right from beginning, M/s Topland Exports is a 100% exporting firm. It has been shown that the outside partners had past experience in export. The appellant firm is in existence since 1973 and it has never exported goods directly. The meagre deduction of Rs.12,330/- claimed in A.Y. 1990-91 is not on account of any direct export. Prior to the formation of M/s Topland Exports, the firm used to sell the

engines meant for export to merchant exporters. The fact that the price at which the engines meant for export were sold to merchant exporters were lower than the price for engines meant or domestic market sold to dealers is evident from the details called for by me and submitted by the appellant counsel in the second paper book. These details are appearing on pages 03, 57, 105, 156 etc. for different years with supporting bills. From the details, it is apparent that in A.Y. 1991-92, the price charged for export quality engine was around Rs.4000/- per engine whereas price for domestic engine was more than Rs.5000/- and Rs.6000/-. Similar differences are noticed in subsequent years also barring a few exceptions. Thus, it is evident that in the earlier years also the price of Non ISI engine which are normally exported in low. It is also a fact that M/s Topland Exports is registered with Registrar of Firms. It has a sales tax registration under the Gujarat and Central Sales Tax Act. It is registered as an exporter with RBI and EEPC. All these registrations may not be conclusive evidence as regard its existence as a separate entity but are nevertheless important evidence, which cannot be ignored. Though the capital introduced by the partners is meager, the fruits have been enjoyed by the partners of M/s Topland Exports and can be seen from the fact that the partners have placed fixed deposits of huge amounts with bank etc. out of the profits earned by them from M/s Topland Exports. Thus, the destination of profits is surely not the appellant firm or its partners. The constitution of both the firms, even after the retirement of the outside partners, is different as shown herein above. A partnership firm is a compendium of partners and

partners of both the firms are quite different. It is also a fact that M/s Topland Exports has directly purchased and exported other items and made profit of 60% out of such direct dealings. It may be true that the other export is of spares or related items nevertheless, the same have been procured from the market and not from the appellant firm wherein M/s Topland Exports earned huge profit. M/s Topland Exports has its own bank account. The exports are made in its name and the foreign currency has been realized in its name. The existence of M/s Topland Exports as a separate entity has been accepted in the past. M/s Topland Exports takes the risk incidental to export business. Whenever, there is bad debt, it is of this firm and nobody else shares it.

14. In the background of the aforesaid findings of fact recorded by him, Commissioner (Appeals) was of the view that it cannot be said that M/s Topland Exports was a benami concern of the assessee firm or its partners. Accordingly, he directed that the substantive assessment made considering the business of M/s Topland Exports as that of the assessee firm be deleted.
15. The Tribunal, in the impugned order, has concurred with the aforesaid findings of fact recorded by Commissioner (Appeals). The Tribunal also noted that the revenue has treated M/s Topland Exports as a benami concern of the assessee firm only in Assessment Years 1996-97, 1997-98, 1998-99 and 2001-02. However, no action was taken for years prior to or in between or subsequent. Similarly, substantive assessment was made for Assessment Year 1996-97 in the case of the assessee, but there was no protective assessment in M/s Topland Exports's case. The Tribunal found that, therefore, there was an inconsistency

inasmuch as the Department has treated M/s Topland Exports as benami of the respondent assessee in some of the years, but had not disturbed other years for giving similar treatment.

16. Thus, both Commissioner (Appeals) as well as Tribunal have recorded concurrent findings of fact, inter alia, to the effect that M/s Topland Exports was formed in the Financial Year 1992-93. At that time there were three outsiders out of five partners with 50% share in the profit. M/s Topland Exports was a 100% export oriented firm. The assessee firm was in existence in 1973 and it had never exported goods directly. Prior to the formation of M/s Topland Exports, the assessee used to sell engines to other merchant exporters. M/s Topland Exports was registered with the Registrar of Firms. It had a sales tax registration under the Gujarat and Central Sales Tax Acts. It was registered as an exporter with RBI and EEPC. It is in the aforesaid factual matrix that both, Tribunal as well as Commissioner (Appeals), have found that M/s Topland Exports was not a benami concern of the respondent assessee. In the circumstances, insofar as the proposed question is concerned, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference. ***Besides as noted by the Tribunal, revenue has treated M/s Topland Exports as benami of the respondent only in A.Y. 96-97, 97-98, 98-99 and 2001-02, and that no action had been taken for prior years, or in between or subsequent years. In this regard it may be pertinent to refer to the decision of the Apex Court in the case of Radhasoami Satsang v. Commissioner of Income-tax, (1992) 193 ITR 321 wherein it has been held thus:***

We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

17. ***In the light of the principle enunciated in the above cited decision, in absence of any material change justifying the Revenue to take a different view in the matter it was not permissible for the Revenue to take a contrary stand to that adopted in the earlier proceedings. For this reason also, the said ground raised by the Revenue does not merit acceptance.***

18. Insofar as proposed question No.2 is concerned, Commissioner (Appeals) has noted that the protective addition had been made on the ground that the selling price to M/s Topland Exports had been under-stated on the basis that similar products had been sold to M/s Batliboi International Ltd. and M/s Crystal Engineers at lower rates. Commissioner (Appeals) referred to a few other manufacturers who were stated to have shown better gross profits and upon verification, found that the actual gross profit was less than that taken by the Assessing Officer. Commissioner (Appeals) found as a matter of fact that the respondent assessee had shown gross profit in the same range and was, accordingly,

of the view that the gross profit shown was reasonable and it could not be said, in absence of conclusive proof, that the sale price of engines sold to M/s Topland Exports was suppressed as otherwise the gross profit would have come down. Commissioner (Appeals) further observed that there were facts showing close connection between the assessee firm and M/s Topland Exports, but there was nothing to conclusively prove that there had been any suppression of selling price. It was also found that the assessee had charged lower price from M/s Topland Exports because the components used in the engines were of cheaper variety and also because of bulk order received from them. Commissioner (Appeals) was of the view that it is not uncommon to have a separate trading or exporting firm in the family business groups and that the provisions of section 40A (2) apply to purchases and not to sales. Commissioner (Appeals) recorded that section 80HHC does not contain provisions similar to section 80I(8) or section 80IA(9) which provide for considering market value of goods transferred in computing business profits. He accordingly found that even otherwise, suppression had not been conclusively proved and that suspicion however strong, cannot take place of proof. It is in these circumstances, that Commissioner (Appeals) deleted the addition made by the Assessing Officer of Rs.25,50,713/- on account of alleged suppression.

19. The Tribunal has concurred with the aforesaid findings recorded by Commissioner (Appeals).
20. ***In the light of the concurrent findings of fact recorded by Commissioner (Appeals) as well as the Tribunal, to the effect***

that there was nothing to conclusively prove that there was any suppression of selling price and that the revenue had not been able to establish suppression, it cannot be said that any case has been made out for sustaining the addition of Rs.25,50,713/-. As such, the said ground also does not merit acceptance.

21. Insofar as the third question is concerned, the same is general in nature. The learned Senior Standing Counsel for the appellant-revenue is not in a position to point out any perversity in the impugned order of the Tribunal and as such, the said ground is also required to be rejected.

22. In the light of the aforesaid, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference. In absence of any question of law, much less any substantial question of law, Tax Appeal No.529 of 2009 is dismissed.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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