

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, AHMEDABAD.
(BEFORE SHRI D.K.TYAGI AND SHRI A.K. GARODIA)

I.T.A. No.1381/AHD/2010

(Assessment Year: 2000 -2001)

M/s. Bisazza India Pvt. Ltd.,
372/2, Budasan,
Near GAIL Office, GIDC Kalol,
District Mehsana.

(Appellant)

Vs. Commissioner of Income Tax- I,
3rd Floor, Insurance Building,
Ashram Road,
Ahmedabad.

(Respondent)

PAN: AAACB 6284 G

Appellant by : Shri S.N.Soparkar, Sr. Advocate
Respondent by : Shri Anilkumar CIT(DR)

(आदेश)/ORDER

PER: SHRI A.K. GARODIA , A.M.

This is an assessee's appeal directed against the order of the Learned Commissioner of Income tax-I, Ahmedabad dated 31-12-2009 for the Assessment Year 2000-01 passed by him under section 263.

2. The grounds raised by the assessee are as under:-

"1. Learned Commissioner of Income tax has erred in law and on facts in passing order u/s. 263 holding the assessment order passed u/s. 143(3) r. w. s. 147 of the Act as erroneous and prejudicial to the interest of revenue to the extent of allowance of deduction under the provisions of section 80HHC of the Act without setting off of unabsorbed depreciation and unabsorbed business loss. The Learned CIT has failed to appreciate the fact that the assessment order sought to be revised was passed after proper inquiry and verification by Assessing Officer of the claim made by the appellant and hence this order of CIT, which is totally erroneous, Prejudicial, and against the principles of Natural justice deserves to be quashed.

2. Ld. CIT has further erred in directing AO to work out the tax liability of the appellant u/s. 115JA of the act making applicable the ratio

of Supreme Court judgment in Shirke Construction Equipment Ltd., without appreciating the fact that the deduction u/s. 80HHC is to be worked out on the basis of adjusted book profit while computing liability in MAT assessment and not on the basis of profit computed under regular provisions of law. The revisional order of the CIT is harsh, uncalled for and completely against the principles of Natural Justice.”

3. Briefly stated, the facts are that it is noted by the Ld. CIT in paragraph 1.1 of the impugned order that the assessee has filed return of income on 30-11-2000 which was processed u/s. 143(1) on 22-6-2001 and thereafter, reassessment proceedings were undertaken u/s. 147 on the ground that deduction u/s. 80HHC was wrongly claimed in as much as Export Incentive received by the assessee company were not to be included while calculating deduction in view of the amendment introduced by the Taxation Laws Amendment Act, 2005 since the turnover of the assessee company exceeded Rs.10 crores. It is further noted by the Ld. CIT that the reassessment order was completed on 18-12-2007 and as per this order, the gross total income (after claim of unabsorbed business loss of Rs.1,47,51,523/- and unabsorbed depreciation of Rs. 4,14,54,030/-) was worked out at Rs.71,35,818/- and deduction u/s. 80HHC was calculated at Rs. 5,14,01,485/- but was restricted to the gross total income of Rs.71,35,818/- and in this manner, total income was computed at Rs. Nil whereas the MAT liability u/s.115JA was worked out at Rs.7,74,410/-. It is further noted by Ld. CIT that while working out the MAT liability u/s. 115JA, the Assessing Officer has allowed deduction u/s. 80HHC of Rs.5,14,01,785/- and in this manner, book profit was worked out at Rs.67,04,840/- 30% of which was worked out to Rs. 20,11,455/- and tax thereon was worked out at Rs. 7,74,410/-. The Ld. CIT has further pointed out in paragraph 2 of the impugned order that perusal of the assessment records revealed that the assessee company has calculated deduction u/s. 80HHC without setting off of unabsorbed depreciation and business loss. He has referred to the Judgment of Hon'ble Apex Court rendered in C.I.T. vs. Shirke Construction Equipment Ltd., reported at 161 Taxman 212 (SC) and on the basis of this Judgment; Ld. Commissioner of Income Tax was of his opinion that the

assessee is not justified in claiming deduction u/s. 80HHC before setting off of unabsorbed depreciation and brought forward business loss. In paragraph 2.1 of the impugned order, it is further noted by the Commissioner of Income tax that it is also noticed from the record that the entire brought forward business loss and unabsorbed depreciation has been set off against the income for Assessment Year 1999-2000 and nothing remained to be adjusted in Assessment Year 2000-01. It is further noted by him and he accordingly issued a notice u/s. 263 on 4-12-2009. Before the Ld. CIT, it was submitted by the assessee that while working out the amount of deduction as per the provisions of Explanation 2 to section 115JB, the assessee is not required to give effect to the provisions of sub-section (1B) of section 80HHC. It was also an argument of the assessee that amount of profits eligible for deduction u/s. 80HHC is required to be reduced for the purpose of computing book profit and not the actual amount for which the assessee company may be entitled to claim deduction u/s. 80HHC. The Ld. CIT was not satisfied and he held that the assessment order passed by the Assessing Officer u/s. 143(3) r. w. s. 147 dated 18-12-2007 is erroneous as well as prejudicial to the interest of the Revenue in view of decision of Hon'ble Apex Court rendered in the case of C.I.T. vs. Shirke Construction Equipment Ltd., (supra). He modified the assessment order u/s. 263 and computed the book profit at Rs. 5,75,37,965/- and directed the Assessing Officer to work out the tax liability u/s. 115JA along with interest chargeable as per the provisions of law. Against this order of the Ld. Commissioner of Income tax, the assessee is in appeal before us.

4. The Ld. Authorized Representative of the assessee started the argument on this basis that the assessment order is neither erroneous nor prejudicial to the interest of the Revenue and hence, the impugned order passed by the Ld. C.I.T. u/s. 263 should be quashed. At this juncture, it was pointed out by the Bench that the Ld. CIT made adjustment in the book profit on two counts. One adjustment made by him is by way of reduction in the amount of deduction allowable to the assessee u/s. 80HHC while computing book profit and he has allowed deduction u/s. 80HHC to the extent of Rs. 71,35,818/- only as against the deduction allowed by the Assessing Officer u/s. 80HHC of Rs. 5,14,01,785/-

while computing the book profit u/s. 115JA. The second adjustment made by Ld. CIT for the purpose of book profit is this that he has not allowed any deduction on account of set off of brought forward business loss or unabsorbed depreciation whereas the Assessing Officer had allowed deduction of Rs. 65,67,148/- on this account while computing the book profit u/s. 115JA. As per the grounds raised by the assessee, no ground has been raised regarding this aspect of not allowing set off of brought forward loss or unabsorbed depreciation. It was pointed out by the Bench that in this situation, the assessment order passed by the Assessing Officer was definitely erroneous as well as prejudicial to the interest of the Revenue. In reply, the Ld. A.R. of the assessee had nothing to say. He then argued regarding the adjustment made by the Ld. CIT in respect of the deduction allowable to the assessee u/s. 80HHC for the purpose of computing book profit u/s. 115JA. He placed reliance on the Judgment of Full Bench of Hon'ble Kerala High Court rendered in the case of C.I.T. vs. Packworth Udyog Ltd., dated 30-11-2010 as reported in 2010-(IT2)GJX-0336U-KER. It was submitted by him that this Judgment is by full Bench of Hon'ble Kerala High Court after duly considering the latest Judgment of Hon'ble Apex Court rendered in the case of Ajanta Pharma Ltd., as reported in 327 ITR 305 (SC).

5. In reply, it was submitted by the Ld. D. R. of the Revenue that the issue involved is not one but two issues are involved. It was his submission that the Assessing Officer should have computed the deduction allowable to the assessee u/s. 80HHC after adjustment of brought forward business loss and brought forward unabsorbed depreciation instead of restricting the deduction allowable to the assessee to the extent of book profit after computing the deduction allowable to the assessee u/s. 80HHC at Rs.5,14,01,485/- which is computed without adjustment of brought forward loss and unabsorbed depreciation. The second issue as per the Ld. D.R. of the Revenue is this that the deduction allowable to the assessee u/s. 80HHC for the purpose of computing book profit u/s. 115JA should be restricted to deduction actually allowable to him u/s. 80HHC i.e. Rs.71,35,818/- as has been directed by the Ld. CIT. In support of this contention, reliance was placed by him on the Judgment of

Hon'ble Bombay High Court rendered in the case of CIT vs. Al-Kabeer Exports Ltd., as reported in (2010) 233 CTR (Bom.) 443.

6. In the rejoinder, it was submitted by Ld. A.R. of the assessee that this Judgment of Hon'ble Bombay High Court cited by the Ld. D.R. of the Revenue is prior to the decision of Hon'ble Apex Court rendered in the case of CIT vs. Ajanta Pharma Ltd. (supra). It is submitted by him that in this Judgment, Hon'ble Bombay High Court has referred to its own judgment in the case of CIT vs. Ajanta Pharma Ltd., 233 CTR 441 (Bombay) which has been reversed by Hon'ble Apex Court and Hon'ble Kerala High Court has duly considered this later judgment of Hon'ble Apex Court. It was also his submission that the issue i.e. whether brought forward business loss or unabsorbed depreciation should be first set off for the purpose of determining the allowability of deduction u/s. 80HHC for the purpose of computing the book profit was not before the Hon'ble Bombay High Court in the case cited by the Ld. DR of Revenue whereas before Hon'ble Kerala High Court, the issue involved was identical and therefore, the judgment of Hon'ble Kerala High Court should be followed and the Judgment of Bombay High Court cited by the Ld. D.R. of the Revenue has no relevance in the present case.

7. We have considered rival submissions and perused the material on record and gone through the impugned order of the Ld. CIT and the Judgments cited by both the sides. Regarding this argument of the Ld. D.R. of the Revenue that there are two issues involved, we are not satisfied because as per the grounds raised by the assessee before us, it is the only dispute raised as to the amount allowable as deduction u/s. 80HHC while computing the book profit. Hence, only one issue is involved in the appeal before us that what is the amount allowable to the assessee as deduction u/s. 80HHC for the purpose of computing deduction u/s. 115JA. We have already noted that the jurisdiction of the Ld. CIT u/s. 263 has to be upheld because the assessment order is definitely erroneous as well as prejudicial to the interest of the Revenue because the Assessing Officer had allowed the deduction of Rs.65,67,148/- on account of brought forward unabsorbed depreciation for the purpose of computing book profit u/s. 115JA which has been denied by the Ld. CIT in the impugned order passed by

him u/s. 263 on this basis that entire amount of business loss as well as unabsorbed depreciation was allowed in Assessment Year 1999-2000 and as such, no such deduction is available to be set off in the present year. The assessee has not even raised ground against this direction of the Ld. CIT and hence, the Ld. CIT definitely had jurisdiction u/s.263 to revise the assessment order passed by the Assessing Officer. Now, the only dispute to be decided by us is whether the Ld. CIT was justified in restricting the deduction allowable to the assessee u/s. 80HHC while computing book profit u/s. 115JA to the extent of Rs. 71,35,818/- only or not whereas such deduction was allowed by the A.O. to the extent of Rs. 5,14,01,785/- in the assessment order passed by him on 18-12-2007. In this regard, we find that the judgment of Hon'ble Kerala High Court rendered in the case of CIT vs. Packworth Udyog Ltd. (supra) is squarely applicable because in that case also, the dispute was as to whether the amount of brought business loss and unabsorbed depreciation should be first set off before computing the deduction allowable to the assessee u/s. 80HHC for the purpose of computing book profit and it was held by Hon'ble Kerala High Court that it is not so required. It was also held by Hon'ble Kerala High Court that they do not approve the assessee's contention that export profit has to be computed with reference to the Profit and loss account prepared under the Companies Act and it was held that this contention of the assessee is equally unacceptable. It was held by Hon Kerala High Court that the assessee is entitled to deduction of export profit under section 80HHC and the relief is to be granted in terms of sub-section (3) and (3A) of the said section. Hon Kerala High Court directed the Assessing Officer to re-compute the book profit deduction by granting deduction under section 80HHC in terms of sub-section 3 & (3A) and also the decision of Hon'ble apex court rendered in the case of Ajanta Pharma Ltd. (supra),. The relevant paragraph of this Judgment of the Hon Kerala High Court is reproduced below:-

“We feel the restriction contained in Section 80AB or section 80B(5) could not be applied in as much as carry forward of business loss or depreciation should not be first set-off leaving gross total income nil, which disentitles the assessee for deduction under other provisions of

Chapter VIA-C which includes Section 80HHC also. But assessee's contention that export profit has to be computed with reference to the profit and loss account prepared under the Companies Act is equally unacceptable because there is no such provision in Section 80HHC to determine export profit with reference to Profit and loss account maintained under the Companies Act. Consistent with the decision of the Supreme Court, we hold that assessee is entitled to deduction of export profit under Section 80HHC and the relief is to be granted in terms of sub-section (3) and (3A) of the said section.

We therefore, dispose of the appeals by vacating the orders of the lower authorities with direction to the Assessing Officer to recompute the book profit by granting deduction under Section 80HHC in terms of above findings and the decision of the Supreme Court in Ajanta Pharma Ltd.'s case referred above."

8. Now, we consider the judgment of the Hon. Bombay High Court cited by the Ld. D.R. of the Revenue i.e. the judgment in the case of CIT vs. Al-Kabeer Exports Ltd., (supra). In this case, the Hon. Bombay High Court has taken the guidance from its own judgment rendered in the case of CIT vs. Ajanta Pharma Ltd. (supra). Judgment rendered by Hon'ble Bombay High Court in the case of Ajanta Pharma Ltd. (supra) had been reversed by Hon'ble Apex Court. Hence, in our considered opinion, this judgment of Hon. Bombay High Court rendered in the case of CIT vs. Al-kabeer Exports Ltd., is not a good law after the judgment of Hon'ble apex Court rendered in the case of Ajanta Pharma Ltd.(supra) because Hon. Bombay High Court was guided by its own judgment rendered in the case of Ajanta Pharma Ltd., (supra) and that decision of Hon Bombay High Court was reversed by Hon Apex Court. As against this, the judgment of Kerala High Court is squarely applicable in the present case. We feel that the A.O. should re-compute the book profit as per the above judgment of Hon'ble Kerala High Court as per which, it was held by the Hon Kerala High Court that the A.O. should re-compute the book profit by granting deduction u/s. 80HHC in terms of their finding which has been reproduced by us above and as per the decision of Hon Apex Court rendered in the case of Ajanta Pharma Ltd. (supra). Hence, in the present case also, we modify the direction given by the Ld. CIT in this regard and we direct the A.O. to re-compute the book profit by granting deduction u/s.

80HHC as per the this decision of Full Bench of Hon'ble Kerala High Court and the A.O. should also consider the judgment of Hon Apex Court in the case of Ajanta Pharma Ltd., (supra) and thereafter, he should decide and re-compute the book profit of the assessee and pass necessary order as per the above discussion after providing opportunity of being heard to the assessee.

9. In the result, assessee's appeal stands allowed for statistical purposes.

Order pronounced in Open Court on 27 - 05 - 2011.

Sd/-
(D.K. TYAGI)
JUDICIAL MEMBER.

Sd/-
(A. K. GARODIA)
ACCOUNTANT MEMBER.

Ahmedabad.

Dated: 27 - 05 - 2011.
S.A.Patki.

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT-I, Ahmedabad.
4. The CIT concerned.
5. The DR.,ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad.

- 1.Date of dictation 4 - 5 -2011
- 2.Date on which the typed draft is placed before the Dictating Member.....Other Member..... 5 / 5 / 2011
- 3.Date on which the approved draft comes to the Sr.P.S./P.S 6-5 -2011.
- 4.Date on which the fair order is placed before the Dictating Member for pronouncement 27 -5 -2011
- 5.Date on which the fair order comes back to the Sr.P.S./P.S 27 - 5 -2011
- 6.Date on which the file goes to the Bench Clerk 27 - 5 -2011.
- 7.Date on which the file goes to the Head Clerk.....
- 8.The date on which the file goes to the Asstt. Registrar for signature on the order.....
- 9.Date of Despatch of the Order.....