IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. **ITA No.242 of 2012** (O&M)
RESERVED on: 23.07.2015
DATE OF DECISION: 30.07.2015

Commissioner of Income Tax-I

.....Appellant

versus

M/s Sunder Forging .....Respondent

2. **ITA No.243 of 2012** (O&M)

Commissioner of Income Tax-I

.....Appellant

versus

M/s Sunder Forging .....Respondent

3. **ITA No.92 of 2014** (O&M)

Commissioner of Income Tax-I

.....Appellant

versus

Sunder Forging .....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Rajesh Katoch, Advocate for the appellant

Mr. Akahsy Bhan, Senior Advocate with
Mr. Alok Mittal, Advocate for the respondent

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

These three appeals against the orders of the Income Tax Appellate Tribunal raise common questions of law and are, therefore, disposed of by this common order and judgment. The facts are noticed from ITA-242-2012, which pertains to the assessment year 2007-08.

2. The appellant contends that the following substantial questions of law arise in this case:-

> "(i) Whether on the facts and circumstances of the case, the Hon'ble ITAT was right in allowing the deduction u/s 80IB during the year under consideration i.e. 2007-08 when the assessee lost the status of Small Scale Industrial Unit in the previous year and even did not claim deduction u/s 80IB in the A.Y. 2006-07?
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> (ii) Whether on the facts and circumstances of the case, the Hon'ble ITAT was justified in holding that interest paid to the persons specified in section 40A(2)(b) of I.T. Act, 1961 @ 15% is reasonable, whereas the average rate of interest paid by the assessee to Financial Institutions as well as banks is not more than 12%"

3. The appeal is admitted in respect of the substantial question of law No.(i) raised above. Question (ii) does not raise a substantial question of law as we will demonstrate later. We have dismissed the appeal in this regard.

4. Section 80-IB(3) and 14(g) of the Income Tax Act, 1961 reads as under:-

> "**Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.**
>
> **80-IB.**
>
> ……. …… …… ……..
>
> (3) The amount of deduction in the case of an industrial undertaking shall be twenty-five per cent (or thirty per cent where the assessee is a company), of the profits and

gains derived from such industrial undertaking for a period of ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) beginning with the initial assessment year subject to the fulfilment of the following conditions, namely :–

……. …… …… ……..

(ii) where it is an industrial undertaking being a small scale industrial undertaking, it begins to manufacture or produce articles or things or to operate its cold storage plant [not specified in sub-section (4) or sub-section (5)] at any time during the period beginning on the 1st day of April, 1995 and ending on the 31st day of March, 2002."

"(14) For the purposes of this section,–

(a) to (f) ……. …… ……

(g) "small-scale industrial undertaking" means an industrial undertaking which is, as on the last day of the previous year, regarded as a small-scale industrial undertaking under section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951)."

5. Section 11B of the Industries (Development and Regulation Act, 1951 (for short "IDR Act") in so far as it is relevant reads as under:-

"Power of Central Government to specify the requirements which shall be complied with by the small scale industrial undertakings.

11B. (1) The Central Government may, with a view to ascertaining which ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength so as to be effective in:–

(*a*) promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and

(*b*) securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good,

specify, having regard to the factors mentioned in sub-section (2), by notified order, the requirements which shall be complied with by an industrial undertaking to enable it to be regarded, for the purposes of this Act, as an ancillary, or a small scale industrial undertaking and different requirements, may be so specified for different

> purposes or with respect to industrial undertakings engaged in the manufacture or production of different articles:"

6. In respect of the assessment year 2006-07, the assessee did not claim a deduction under Section 80-IB(3)(ii). By a notification dated 10.12.1997 issued in exercise of powers conferred by Section 11B(1) and Section 29B(1) of the IDR Act, the Central Government specified the factors on the basis of which an industrial undertaking would be regarded as a small scale industrial undertaking for the purpose of IDR Act. One of the conditions for considering an industrial undertaking to be regarded as a small scale industrial undertaking was that its investment in fixed assets in plant and machinery did not exceed rupees three crores. Admittedly, the assessee's investment did not exceed rupees three crores. It, therefore, fell within the definition of the words "small-scale industrial undertaking" in Section 80-IB(14)(g). The assessee also fulfilled the other requirements. The assessee was, therefore, entitled to the deduction as provided in Section 80-IB. The amount of deduction in respect of this assessee was stipulated in sub-section(3)(ii) of Section 80-IB and "for a period of ten consecutive assessment years". The respondent-assessee was, therefore, allowed a deduction under Section 80-IB for the assessment years 2002-03 to 2005-06.

7. By a further notification dated 24.12.1999 issued under the IDR Act, the earlier notification dated 10.12.1997 was amended *inter alia* by substituting the words "rupees three crores" with the words "rupees one crore". The assessee, therefore, did not make a claim for deduction for the assessment year 2006-07. Considering the view that we have taken, the assessee unfortunately wrongly did not claim any deduction during that year.

8. The assessee once again claimed the deduction under Section 80-IB in view of a notification dated 29.09.2006 which, the assessee contends, raised the limit to rupees five crores. This notification was, however, not under the IDR Act, but under the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter referred to as the MSMED Act"). The authorities proceeded on the basis that the notification dated 29.09.2006 issued under the MSMED Act was applicable for determining whether an assessee was a small scale industry within the meaning of Section 80-IB(14)(g). The department contended that once the link had been broken the assessee was not entitled to claim a deduction on account of its fixed assets being in excess of the amount stipulated in the notification and it was not entitled to a deduction under Section 80-IB even if thereafter its fixed assets did not exceed the limit stipulated in the notification. However, the department did not contend before the authorities that the notification under the MSMED Act is not relevant while determining whether an assessee is a small scale industry for the purpose of Section 80-IB. We noticed this aspect during the course of the hearing. Had we taken a view against the assessee on the next aspect, which we will be dealing with, we may have found it necessary to decide whether the notification dated 29.09.2006 is relevant or not. However, considering the view that we have taken, it is not necessary to do so.

9. Mr. Alok Mittal, the learned counsel appearing on behalf of the assessee, rightly contended that once an assessee is entitled to a deduction under Section 80-IB, the assessee is entitled to the same for ten consecutive years. Sub-section (3) of Section 80-IB entitles the assessee to the deduction "for a period

of ten consecutive assessment years …….". The deduction is subject to the assessee's fulfilling the conditions mentioned therein. It is not contended that the assessee has not fulfilled the conditions stipulated in clause (ii) of sub-section (3). Sub-section(3) does not provide that in the event of the assessee subsequently not being a small scale industry within the meaning of Section 80-IB(14)(g), the assessee would cease to be entitled to the deduction. There is nothing in the section that persuades us to imply such a condition even assuming we are entitled to do so. Had that been the intention, the legislature would have undoubtedly specified the same.

10. Mr. Mittal's reliance upon a judgment of the Karnataka High Court in *Ace Multi Axes Systems Ltd. vs. Deputy Commissioner of Income Tax, [2014] 367 ITR 266 (KAR)* is well founded. The Division Bench held:

> "2. The substantial question of law that arises for our consideration in this appeal is as under:
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> > "When once the eligible business of an assessee is given the benefit of deduction under Section 80-IB on the assessee satisfying the conditions mentioned in sub-section (2) of Section 80-IB, can the assessee be denied the benefit of the said deduction on the ground that during the said 10 consecutive years, it ceases to be a small scale industry?"
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> 3. Section 80-IB is an incentive provision. It provides deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings. For an industrial undertaking to be eligible for the said deduction, it has to fulfill all the conditions mentioned under sub-section (2) of section 80-IB. The four conditions which are stipulated therein are, firstly, the industrial undertaking must not have been formed by splitting up or reconstruction of a business already in existence. The second condition is, such an undertaking is not formed by transfer of machinery or plant previously used for any purpose. The third condition is that the industrial undertaking manufactures or produces any article or thing not being any article or thing specified in the list in Eleventh Schedule. However, in respect of a small scale industrial undertaking, even that condition is waived. In other words, a small scale industry manufacturing or producing any article or thing specified in the list in the Eleventh Schedule, is also entitled to

the aforesaid deduction. The fourth condition is, the said industrial undertaking employs 10 or more workers in a manufacturing process carried on with the aid of power or employs 20 or more workers in a manufacturing process carried on without the aid of power. Once these four conditions are fulfilled, the assessee is entitled to the benefit under section 80-IB of the Act. sub-section (3) of section 80-IB provides the extent of deduction eligible under section 80-IB and also the number of years such a deduction is available to such an undertaking. Sub-section (3) mandates that the industrial undertaking shall be eligible for the said deduction for a period of 10 consecutive years, beginning with the initial assessment year. However, it is subject to two conditions as stipulated therein. The second condition is what is applicable to the case on hand which provides, if the industrial undertaking is a small scale industrial undertaking, it has to begin manufacture or produce articles or things at any time during the period beginning on the 1st day of April 1995 and ending on the March 31, 2002. This is a condition which a small scale industry has to fulfill in addition to the conditions mentioned in sub-section (2) of section 80-IB . Once all these conditions are fulfilled, a small scale industry is entitled to the benefit of deduction for a period of 10 consecutive years beginning with the initial assessment year. In the entire provision, there is no indication that these conditions had to be fulfilled by the assessee all the 10 years. When once the benefit of 10 years, commencing from the initial year, is granted, if the undertaking satisfy all these conditions initially, the undertaking is entitled to the benefit of 10 consecutive years. The argument that, in the course of 10 years, if the growth of the industry is fast and it acquires machinery and the total value of the machinery exceeds Rs.1 crore, it ceases to have the said benefit, do not follow from any of the provisions. It is true that there is no express provision indicating either way, what would be the position if the small scale industry ceases to be a small scale industry during the said period of 10 years. Because of that ambiguity, a need for interpretation arises. If we keep in mind the object of the Legislature providing for these incentives and when a period of 10 years is prescribed, that is the period, probably, which is required for any industry to stabilize itself. During that period the industry not only manufactures products, it generates employment and it adds to the wealth of the country. Merely because an industry stabilizes early, makes profits, makes future investment in the said business, and it goes out of the definition of the small scale industry, the benefit under section 80-IB cannot be denied. If such a literal interpretation is placed on the said provision, it would run counter to the very object of granting incentives. It would kill the industry. Therefore keeping in mind the object with which these provisions are enacted, keeping in mind the industrial growth which is required to be achieved, if two interpretations are possible, the courts have to lean in favour of extending the benefit of deduction to an assessee who has availed of the opportunity given to him under law and has grown in his business.

> Therefore we are of the view, if a small scale industry, in the course of 10 years, stabilizes early, makes further investments in the business and it results in it's going outside the purview of the definition of a small scale industry, that should not come in the way of its claiming benefit under section 80-IB for 10 consecutive years, from the initial assessment year. Therefore the approach of the authorities runs counter to the scheme and the intent of the Legislature. Thereby they have denied the legitimate benefit, an incentive granted to the assessee. Both the said orders cannot be sustained. Therefore the substantial question of law is answered in favour of the assessee and against the Revenue." *(emphasis supplied)*

We are entirely in agreement with the judgment. The question is, therefore, answered in favour of the respondent/assessee and against the department/appellant. The appeal regarding this question is dismissed.

11. The second question does not raise a substantial question of law. The assessee availed of loans from the banks with interest at 12% per annum. The assessee also availed of loans from various other persons including family members with interest at 15% per annum. The CIT observed that funds available from family members are available for longer period of time and without any formality. The risk element in such advances is higher. There is nothing unusual in payment of higher rate of interest to persons other than banks.

12. The appeals are, therefore, dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

30.07.2015
parkash*

(G.S. SANDHAWALIA)
JUDGE

Note: Whether reportable: YES