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In the High Court of Judicature at Madras

Dated : 09.10.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal No.1420 of 2008

M/s.SPIC Jel Engineering,
Construction Co.Ltd., Chennai-119 ...Appellant

Vs

The Assistant Commissioner of
Income Tax, Company Circle V(1),
Chennai-34. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 30.11.2007 in ITA No.1777/Mds/2006 on the file of the Income Tax Appellate Tribunal Chennai 'C' Bench for the assessment year 2001-02.

For Appellant : Mr.P.B.Sampathkumar
For Respondent : Mr.Vijayakumar Punna

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Judgment was delivered by T.S.SIVAGNANAM,J

We have heard the learned counsel on either side.

2. This appeal, by the assessee under Section 260A of the Income Tax Act, 1961 (for brevity, the Act), is directed against the order passed by the

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Income Tax Appellate Tribunal dated 30.11.2007 in ITA.No.1777/Mds/2006 for the assessment year 2001-02.

3. The above appeal has been admitted on 05.9.2008 on the following substantial questions of law :

> *"i. Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the activities carried on by the assessee in its project at Abu Dhabi will not come under the definition of 'foreign project' as defined in Section 80HHB of the Income Tax Act, 1961 and consequently the assessee is not entitled to the deduction of the same from its gross total income ? and*
>
> *ii. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that list of items listed by the Commissioner of Income Tax (Appeals) in pages 3.6 (iv) and (v) and pages 5 and 6 of its orders dated 27.3.2006 involve only activities relating to shutting down of refinery ?"*

4. The facts, which are necessary for the disposal of the appeal, are as follows :

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The assessee took up a foreign project in Abu Dhabi through one M/s.EMCO. They filed Form 10CCAH under the Act and claimed deduction under Section 80HHB of the Act to the tune of Rs.37,96,966/-, which was subsequently revised to Rs.27,07,606/-. The assessee claimed deduction of

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Rs.17,42,508/- in respect of the Abu Dhabi project and Rs.9,65,098/- for the Mauritius project. The Assessing Officer, on scrutiny of Form 10CCAH, issued a show cause notice to the assessee calling upon them to explain as to why deduction under Section 80HHB of the Act should not be disallowed, since the project in Abu Dhabi was not a foreign project within the meaning of Section 80HHB of the Act.

5. The assessee submitted their reply. Yet, the Assessing Officer was not satisfied and ultimately had completed the assessment under Section 143(3)(ii) of the Act vide order dated 26.3.2004 disallowing the claim of the assessee to the tune of Rs.17,42,508/- towards the foreign project. Aggrieved by the disallowance, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-V, Chennai [for short, the CIT (A)], who, by order dated 27.3.2006, allowed the appeal filed by the assessee. The Revenue filed an appeal before the Tribunal challenging the order passed by the CIT (A). The Tribunal, by the impugned order, allowed the appeal filed by the Revenue. This is how the assessee is before us by way of this appeal.

6. The short question, which requires to be considered, is as to how the project executed by the assessee requires to be interpreted for being entitled or otherwise to the benefits under Section 80HHB of the Act. The relevant portions of the said provision read as follows :

> *"Deduction in respect of profits and gains from projects outside India.*
>
> *80HHB : (1) Where the gross total income of*

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an assessee being an Indian company or a person (other than a company) who is resident in India includes any profits and gains derived from the business of

(a) the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him, or

(b) the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person,

with the Government of a foreign State or any statutory or other public authority or agency in a foreign State, or a foreign enterprise, there shall, in accordance with and subject to the provisions of this Section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to—

(i) forty per cent thereof for an assessment year beginning on the 1st day of April, 2001;

(ii) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2002;

(iii) twenty per cent thereof for an assessment year beginning on the 1st day of April, 2003;

(iv) ten per cent thereof for an assessment year beginning on the 1st day of April, 2004,

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year :

Provided that the consideration for the

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execution of such project or, as the case may be, of such work is payable in convertible foreign exchange.

(2)(a).....

(b) "foreign project" means a project for—

(i) the construction of any building, road, dam, bridge or other structure outside India;

(ii) the assembly or installation of any machinery or plant outside India ;

(iii) the execution of such other work (of whatever nature) as may be prescribed."

7. The Assessing Officer, after examining the contract entered into between the assessee and the company in Abu Dhabi, to whom, the assessee was a sub-contractor, held that the work awarded to the assessee formed part of general refinery shut down, which was purely a repair and maintenance work, that the assessee only contributed as a sub-contractor to the maintenance work and that the maintenance work did not form part of foreign project defined under the Act. The Assessing Officer further held that the assessee had not contributed for construction of any road, building, dam, bridge or other structure nor had performed the work of assembly or installation of any machinery or plant.

8. Before the CIT (A), the assessee contended that this was a project by itself, as it had resulted in the construction of a new structure, though called as shut down, which was a technical term and did not constitute repairs or maintenance work. The assessee further contended that the

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Assessing Officer had given a very restricted and narrow meaning to the expression 'project work' as mentioned in Section 80HHB of the Act and had not followed the decision of the Hon'ble Supreme Court in the case of ***Continental Construction Limited Vs. CIT [reported in (1992) 195 ITR 81].***

9. Before the CIT (A), the assessee further pointed out that the erection work involved certain technical specialization like rigging, welding and cutting, that the erection works were carried out in normal schedule as well as during shut down period also, that in certain cases, for heavy lifting and welding, etc., an operating plant would not permit a normal schedule of erection due to hazardous chemicals or gases and that it was necessary to carry out the work of erection during plant shut down only. The assessee also explained as to how the process involved in a heat exchange maintenance and submitted that cleaning and plugging of tubes, etc., which were basically a maintenance work, would be done by the maintenance company. The assessee further pointed out that they were basically an erection company and qualified by various Government organizations and consultants like Engineers India Limited, Indian Oil Corporation, etc., and that they were not maintenance specializing company. The brochures of the assessee company were also produced. Further, the assessee produced the curriculum vitae of the Site Manager, the Field Engineers and the Supervisors to show that all of them had expertise in erection of equipment and that they were not carrying

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out any maintenance work.

10. The CIT (A) considered the documents produced by the assessee and after taking note of Section 80HHB of the Act, proceeded to analyze the matter, which in our opinion, in a threadbare manner as to the nature of work carried on by the assessee. The CIT (A) had gone through the agreement and the drawings, which were enclosed as annexures and found that the nature of work carried on by the assessee, as a sub-contractor, for the refinery shut down clearly comes within the scope of foreign project, more specifically, assembly or installation of any machinery or plant outside India i.e. within the definition of the expression 'foreign project' as defined under Sub-Section (2)(b)(ii) of Section 80HHB of the Act. Accordingly, the appeal filed by the assessee was allowed.

11. On appeal by the Revenue against the order passed by the CIT (A), the Tribunal, while reversing the order passed by the CIT (A), did not venture to re-examine the factual exercise done by the CIT (A), but proceeded further based on the dictionary meaning of the words 'assembly' and 'installation' occurring in Sub-Section (2)(b)(ii) of Section 80HHB of the Act. The Tribunal further held that the work of shut down of plant cannot be said to have the same genus as that of assembling or installation. Further reliance placed on the decision of the Hon'ble Supreme Court in ***Continental Construction Limited,*** was held to be of no assistance to the case of the assessee. Thus, the Tribunal ultimately held that the work in

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connection with shut down of refinery undertaken by the assessee would not fall within the definition of the expression 'foreign project' as defined under Section 80HHB(2)(b)(ii) of the Act.

12. The learned Standing Counsel for the respondent/Revenue has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Customs Vs. Dilip Kumar and Company [reported in 2018 SCC Online SC 747].***

13. The decision in the case of ***Dilip Kumar and Company*** had been relied upon to support the submission that strict interpretation involves plain reading of the Statute and it is a well settled principle that when the words in a Statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences.

14. Therefore, it is the submission of the learned Standing Counsel that the words in the Statute and more particularly the definition of the expression 'foreign project' has to be read in the manner mentioned in the Statute, that strict interpretation should be given and that assembly or installation cannot encompass shut down. He further submits that the principle of *ejusdem generis* will come into play.

15. The meaning of the expression 'foreign project' as envisaged in Clauses (i) to (iii) in Sub-Section (2)(b) of Section 80HHB of the Act should be read together and if done so, the activity done by the assessee will not

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qualify as a foreign project. The Hon'ble Supreme Court in the decision in ***Continental Construction Limited,*** considered the question as to whether the activities of an assessee with foreign government/enterprises are governed by the provisions of Section 80HHB of the Act and not of Section 80-O of the Act.

16. In the decision in the case of ***Continental Construction Limited,*** the Hon'ble Supreme Court pointed out as to how Section 80HHB of the Act should be interpreted. It was held that Section 80HHB of the Act should not be interpreted in a narrow or pedantic fashion, as the Section provides for an exemption in respect of profits for a foreign project undertaken outside India in the course of business. The Hon'ble Apex Court further held that the expressions "business of execution of a foreign project" or work forming part of it or the 'profits derived' from the business, take in all aspects of a business involving the activities referred to in Sub-Section (2)(b) of Section 80HHB of the Act together with all activities, commitments and obligations ancillary and incidental thereto and the profits flowing therefrom. It was also held that the definition cannot be restricted to the mere physical activity or putting up the superstructure, machinery or plant, but should be understood to take within its fold all utilization of technical knowledge or rendering of technical services necessary to bring about the construction, assembly and installation.

17. Bearing in mind the above legal principle, if we examine the nature

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of work done by the assessee in the foreign country, we fully subscribe to the factual finding recorded by the CIT (A) after going through the terms and conditions of the agreement and the drawings, etc. The Tribunal lost sight of the most important factor pointed out by the assessee before the CIT (A) that the term 'shut down' does not denote repairs and maintenance and that it is a technical term, which is peculiar to the industry in question. Therefore, if the Tribunal had to come to a different conclusion, it should have re-appreciated the factual position and then rendered a finding, which it has failed to do so. Rather, the Tribunal sought to adopt a very narrow approach by referring to the dictionary meaning of the words 'assembly' and 'installation'.

18. It has to be borne in mind that Section 80HHC of the Act is a provision, which grants incentive to the assessee for growth and development and as held by the Hon'ble Supreme Court in several decisions, such provision should be liberally construed, as it will promote economic growth of the country.

19. The decision in the case of ***Dilip Kumar and Company,*** relied upon by the learned Standing Counsel for the Revenue, does not render any assistance to the case of the Revenue, since the Hon'ble Supreme Court has laid down as to in what manner Section 80HHB(2)(b) is required to be interpreted. Moreover, we are not testing the case of the assessee based on an exemption notification, which was the subject matter of consideration

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before the Hon'ble Supreme Court in the case of ***Dilip Kumar and Company.***

20. The Statute has clearly circumscribed as to what is a foreign project and we agree with the factual findings recorded by the CIT (A) that the scope of work done by the assessee will fall within the meaning of the expression 'foreign project' as defined under Sub-Section (2)(b) of Section 80HHB of the Act.

21. Accordingly, the above tax case appeal filed by the assessee is allowed and the order passed by the Tribunal is set aside. The order passed by the CIT (A) dated 27.3.2006 is restored. The substantial questions of law are answered in favour of the assessee. No costs.

09.10.2018

Internet : Yes

To

1.The Assistant Commissioner of Income Tax, Company Circle V(1), Ch-34.
2.The Income Tax Appellate Tribunal, Chennai 'C' Bench.

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T.S.SIVAGNANAM,J

AND

V.BHAVANI SUBBAROYAN,J

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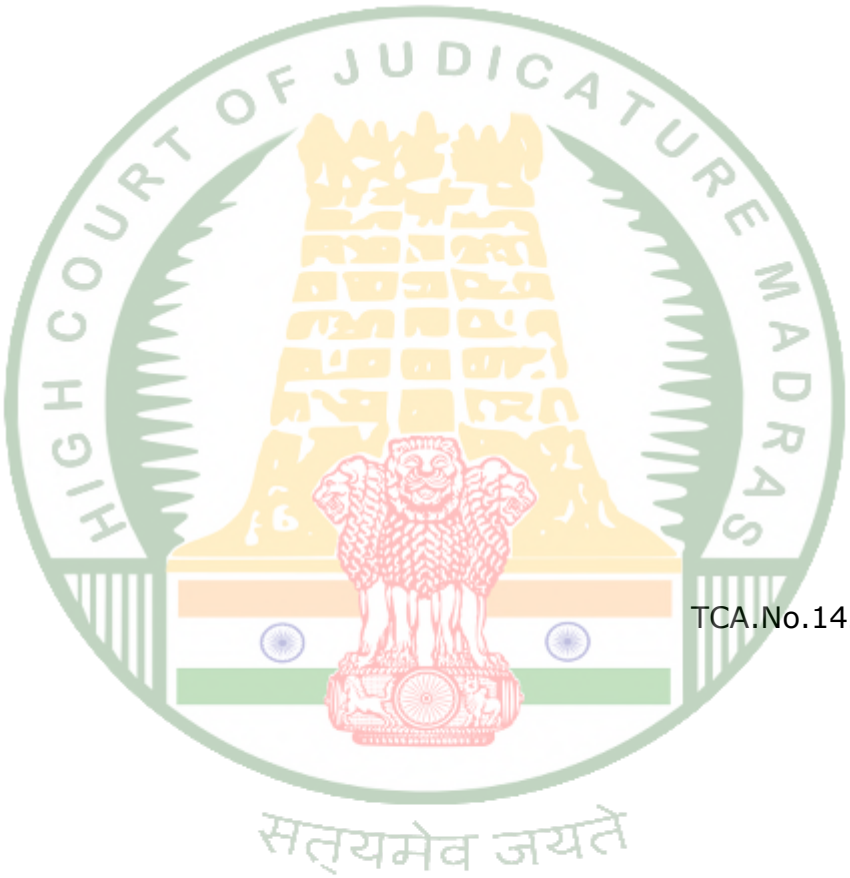

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