

COMMISSIONER OF INCOME TAX, PUNE
v.
SHIRKE CONSTRUCTION EQUIPMENT LTD.

MAY 17, 2007

[ASHOK BHAN AND DALVEER BHANDARI, JJ.]

Income Tax Act, 1961; Ss. 72, 80-AB & 80-HHC:

Section 80 HHC—Profit—Adjustment of unabsorbed business losses of earlier years therefrom in term of s. 72 of the Act—Applicability of s. 80-AB of the Act—Affirming the judgment of the Tribunal, High Court decided the question against the Revenue—On appeal, Held: A contrary view was held by this Court in the decided case of IPCA Laboratory Ltd. v. Dy. Commissioner of Income tax, Mumbai overruling the judgment impugned in the present case—Under the circumstances impugned judgment set aside.

The question arose for determination before this Court in the present appeal filed by the Revenue was as to whether the High Court was right in affirming the decision of the Tribunal by answering the questions framed by it against the Revenue as to whether Section 80-AB of the Income Tax Act, 1961 can be applied to Section 80-HHC of the Act and whether, in determination of business profit under Section 80HHC of the Act, the unabsorbed business losses of the earlier years under Section 72 of the Act should be set off.

Allowing the appeal of Revenue, the Court

HELD: 1.1. Taking a contrary view, this Court in the decided case of *IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai* has held that (i) Section 80-HHC of the Income Tax Act is not independent of Section 80-AB of the Act and would be governed by Section 80-AB; and (ii) losses were to be set off against the profits earned from export of self-manufactured goods. It has further been held in that case Section 80 HHC would be governed by Section 80-AB and the decision of the Bombay High Court and the Kerala High Court taking the contrary view does not lay down the correct law to that extent. [Para 6] [21-F-G]

A *IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai*, [2004] 12 SCC 742, relied on.

CIT v. Shirke Construction Equipments Ltd., (2000) 246 ITR 429 Bom and *CIT v. T.C. Usha*, (2003) 132 Taxman 297 Ker, held not applicable.

B 1.2. This Court has taken a contrary view to that of the High Court of Bombay, in *CIT v. Shirke Construction Equipments Ltd.* (the impugned judgment) and the decision of the High Court of Kerala in *CIT v. T.C. Usha*, and, overruling them, held that the said decisions cannot be said to be the correct law. For the foregoing reasons, impugned judgment is set aside.

[Paras 10 and 15] [23-A-B; G]

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ITO v. Induflex Products (P) Ltd., [2006] 1 SCC 458 and *P.R. Prabhakar v. CIT, Coimbatore*, [2006] 6 SCC 86, at page 92, relied on.

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CIT v. T.C. Usha, (2003) 132 Taxman 297 (Ker.) and *CIT v. Shirke Construction Equipments Ltd.*, (2000) 246 ITR 429 Bom, held not applicable.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6758 of 2001.

From the Final Judgment and Order dated 24.07.2000 of the High Court of Bombay in ITA No. 458/PN/1998.

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Dr. A.E. Chilliah, Sr. Adv., D.K. Singh, Arijit Prasad and Pradeep Shukla (for B.V. Balaram Das) for the Appellant.

S. Ganesh, Sanad Ramakrishan and Rajeev Mishra (for M/s. P.H. Parekh & Co.) for the Respondent.

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The Judgment of the Court was delivered by

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BHAN, J. 1. With the leave of the Court, the Commissioner of Income Tax, Pune (for short "the Revenue") has filed the present appeal against the Final judgment and order dated 24th July, 2000 passed by the High Court of Bombay in ITA No. 458/AN/1998 by which the High Court has affirmed the decision of the Tribunal and dismissed the appeal filed by the Revenue. The issue involved in this appeal relates to the provisions of the Income Tax Act, 1961 (for short "the Act").

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2. The High Court framed the following two questions of law for its determination:

1. Whether Section 80-AB can be applied to Section 80-HHC of the Act? A
2. Whether, in determination of business profit under Section 80HHC, the unabsorbed business losses of the earlier years under Section 72 of the Act should be set off?

3. The High Court has decided both the questions against the Revenue and in favour of the assessee. On the first point, the High Court has held that Section 80-HHC is independent of Section 80-AB and Section 80-AB does not control Section 80HHC of the Act. On the second point, it has been held that unabsorbed business losses of the earlier years could not be set off against the profits from exports. B

4. High Court of Kerala in *CIT v. T.C. Usha*, (2003) 132 Taxman 297 (Ker.) has also taken a similar view and has held that the losses would not be set off against the profits earned by an assessee from export of the goods manufactured by it. This decisions of the Bombay High Court in the present case and the High Court of Kerala in *C.I.T. v. T.C. Usha*, (supra) have been overruled by this Court in *IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai*, [2004] 12 SCC 742. C

5. The facts in the present case are similar as that in *IPCA Laboratory Ltd.* (supra), hence the same are not restated herein. In *IPCA Laboratory Ltd.* (supra), the counsel appearing for the assessee had placed reliance on two judgments, i.e., one by the Bombay High Court in *CIT v. Shirke Construction Equipments Ltd.*, [2000] 246 ITR 429 Bom., which is the judgment impugned in the instant appeal, and another by the High Court of Kerala in *CIT v. T.C. Usha* (supra). D

6. Taking a contrary view, this Court in *IPCA Laboratory Ltd.* (supra) has held that (i) Section 80-HHC of the Act is not independent of Section 80-AB and would be governed by Section 80-AB; and (ii) losses were to be set off against the profits earned from export of self-manufactured goods. It has further been held in this case that Section 80 HHC would be governed by Section 80-AB and the decision of the Bombay High Court and the Kerala High Court taking the contrary view does not lay down the correct law to that extent. E

7. The judgment impugned in the present case, which, as indicated hereof, was relied has been noticed by this Court in paragraph 7 of the F

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A judgment in *IPCA* case (supra), thus:

B "Mr. Dastur also relied upon the case of *CIT v. Shirke Construction Equipments Ltd.* (2000) 246 ITR 429 (Bom.). In this case the Bombay High Court has held that Section 80-HHC is a complete code in itself and that it is not controlled by Section 80-AB. It was held that profits had to be computed under Section 29 and Section 72 was not applicable. It was held that carry-forward losses could not be set off for computing profits for the purpose of Section 80-HHC. In this case it was also noticed that the object was to encourage exports."

C 8. The judgment of the Kerala High Court in *CIT v. T.C. Usha*, (2003) 132 Taxman 297 (Ker.), on which reliance was placed by the assessee in *IPCA Laboratory Ltd.* (supra), has been noticed by this Court in paragraph 10 of the said judgment, thus:

D "Mr. Dastur also relied upon a judgment in the case of *CIT v. T.C. Usha*, (2003) 132 Taxman 297 (Ker). In this case the Kerala High Court was considering an identical question i.e. whether the profits earned from export of self-manufactured goods were to be set off against loss incurred in export of trading goods. The Kerala High Court has accepted arguments similar to those made by Mr. Dastur and has concluded that the losses were not to be set off against the profits earned from export of own manufactured goods. In coming to this conclusion the Kerala High Court has proceeded on the footing that Section 80-HHC is a self contained code and the proceeds have to be worked out strictly in accordance with the provisions."

E 9. Paragraph 14 of the said judgment of this Court in *IPCA Laboratory Ltd.* (supra), which answers the questions, is extracted below:

F "Section 80-AB is also in Chapter VI-A. It starts with the words "where any deduction is required to be made or allowed under any section included in this Chapter". This would include Section 80-HHC. Section 80-AB further provides that "notwithstanding anything contained in that section". Thus Section 80-AB has been given an overriding effect over all other sections in Chapter VI-A. Section 80-AB or over any other provision of the Act. Section 80-HHC would thus be governed by Section 80-AB. *Decisions of the Bombay High Court and the Kerala High Court to the contrary cannot be said to be the correct law* Section 80-AB makes it clear that the computation of income has to be in accordance with the provisions of the Act. If the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into

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consideration.”

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[Emphasis supplied]

10. As stated above, this Court has taken a contra view to that of the High Court of Bombay, in *CIT v. Shirke Construction Equipments Ltd.*, (2000) 246 ITR 429 (Bom.) (the impugned judgment) and the decision of the High Court of Kerala in *CIT v. T.C. Usha*, (2003) 132 Taxman 297 (Ker.) and, overruling them, held that the said decisions cannot be said to be the correct law.

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11. In *ITO v. Induflex Products (P) Ltd.* [2006] 1 SCC 458, this Court has held thus:

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“It is no doubt true that the term ‘profit’ implies positive profit which has to be arrived at after taking into consideration the profit earned from export of both self-manufactured goods and the trading goods and the profits and losses in both the trades have, thus, to be taken into consideration.”

12. The aforesaid decision of this Court in *IPCA Laboratory Ltd.* (supra) has been relied upon in a subsequent decision of this Court in *P.R. Prabhakar v. CIT, Coimbatore*, [2006] 6 SCC 86, at page 92, thus:

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“The expression “income arising out of business of export” brings within its sweep not only the export of any goods or merchandise manufactured or possessed by the assessee but also the trading goods. Parliament, therefore, intended to provide incentive when a positive profit is earned by an exporter.”

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13. Both the aforesaid decisions of this Court in *IPCA Laboratory Ltd.* (supra) and *Induflex Products (P) Ltd.* (supra) have been relied upon in a subsequent decision of this Court in *P.R. Prabhakar v. CIT, Coimbatore*, [2006] 6 SCC 86, at page 92, as indicated above.

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14. Accordingly the two points which had been posed by the High Court for its decision are answered in the negative, i.e., against the Revenue and in favour of the assessee.

15. For the foregoing reasons, we are left with no other option except to accept the appeal and set aside the impugned judgment.

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16. The appeal stands allowed accordingly. There shall be no order as to costs.

S.K.S.

Appeal allowed.

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