IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 19TH DAY OF FEBRUARY 2018 / 30TH MAGHA, 1939

ITA.No. 573 of 2009

AGAINST THE ORDER/JUDGMENT IN ITA 163/COCH/2002 OF INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH DATED 27-10-2004

APPELLANT(S)/APPELLANT/APPELLANT

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC FOR INCOME TAX DEPT.

RESPONDENT(S)/RESPONDENT:

R.PRAKASH, DHANYA FOODS,
KOCHUPILAMOODU, KOLLAM.

BY ADV. SRI.E.K.NANDAKUMAR
BY ADV. SMT.PREETHA S.NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 19-02-2018, ALONG WITH ITA NO.585/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A : COPY OF ORDER OF THE ASSESSING OFFICER DATED 25.3.1996.

ANNEXURE-B : COPY OF ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 26.2.2002.

ANNEXURE-C : COPY OF ORDER OF THE APPELLATE TRIBUNAL DATED 27.10.2004.

//TRUE COPY//

PS TO JUDGE.

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K.VINOD CHANDRAN & ASHOK MENON, JJ.

ITA Nos.573 and 585 of 2009

Dated this the 19th day of February, 2018

J U D G M E N T

Vinod Chandran, J.

The Revenue is in appeal from the order of the Income Tax Appellate Tribunal, which confirmed the order of the first appellate authority. The Revenue has raised a question of law as to whether the assessee is entitled to claim deduction under Sections 80HH and 80I of the Income Tax Act, 1961, with respect to the profit derived by the assessee from the processing of cashew in the factories owned by outsiders.

2. Admittedly, the assessee had been carrying on processing of cashew nuts in its own factory and also in the factories of sister concerns, which were in backward areas. There was also processing done by the assessee in factories which were not in the backward areas. Section 80I does not speak of industrial undertakings in backward areas. Section 80I speaks of 20% deduction in respect of profits and gains derived from industrial undertakings if it is a newly established one. The Assessing Officer found that the

assessee is eligible for deduction only in respect of profits and gains derived from the assessee's own industrial undertaking. The same was affirmed by the first appellate authority and with respect to the claim for factories in places which are not categorised as backward area, the matter was remanded to verify whether they were new industrial undertakings as contemplated in the provision. Two factories of the assessee at Mylakkad and Nathavaram Districts were found to be not new industrial undertakings. Hence, the assessee's claim with respect to the profits and gains derived from the sister concerns was declined under Section 80I. The remand made was only with respect to the industrial undertakings of the assessee, both in the backward and other areas; the remand being confined to verification of they being new.

3. The Tribunal considered the issue under Section 80I along with Section 80HH, insofar as the processing of cashew being carried on in other concerns. Section 80I would not be applicable in the case of processing done in other factories not belonging to the assessee and the deduction granted by

the Assessing Officer was only with respect to the assessee's own factories. The interference made by the first appellate authority was only to verify whether the assessee's own factories, with respect to which the deduction was disallowed are new industrial undertakings. The claim of the assessee for deduction, with respect to profits and gains derived from the industrial undertakings of its sister concerns, under Section 80I was declined by the Assessing Officer and affirmed by the first appellate authority. There was no appeal to the Tribunal by the assessee. We are of the opinion that no question of law arises under Section 80I.

4. With respect to Section 80HH, admittedly, the assessee had been carrying on processing of cashew nuts in its own factories as also in its sister concerns and the claim was only with respect to those situated in backward areas. The question of law, hence, is re-framed as follows:-

> "Whether the Tribunal was right in allowing deduction under Section 80HH as claimed by the assessee, even with respect to the profits and

gains derived from the business of processing of raw cashew nuts, which processing is carried out in the industrial undertaking of its sister concerns?"

5. The learned Senior Counsel appearing for the Revenue would rely on the decision of the Honourable Supreme Court in ***(2003) 262 ITR 278 [Pandian Chemicals Ltd. v. Commissioner of Income Tax]***. The learned counsel for the assessee relies on the Division Bench decision of this Court in ***(1999) 235 ITR 5 [Commissioner of Income Tax v. Indian Resins and Polymers***]. The learned Senior Counsel would argue that the Division Bench decision of this Court as relied on by the assessee and the Tribunal, is not good law, going by the decision of the Honourable Supreme Court in ***Pandian Chemicals Ltd.*** (*supra*).

6. Admittedly, the assessee had claimed the deduction of profits and gains derived from the processing carried out in its own factories and the factories of its sister concerns. There is no dispute that the claim was made only with respect to the industrial undertakings within the backward areas as is

mandatory under Section 80HH. A Division Bench of this Court had considered the very same issue in ***Indian Resins and Polymers*** *(supra)* and answered the question against the Revenue and in favour of the assessee. We have to see whether the judgment of the Honourable Supreme Court nullifies the decision of the Division Bench.

7. In ***Pandian Chemicals Ltd.*** (*supra*), the claim raised by the assessee under Section 80HH was with respect to the interest derived from the deposit made for supply of electricity. Admittedly, in that case, the manufacturing process in the industrial undertaking could be carried out only with electricity. The deposit was made with the licensee for supply of electricity and the income by way of interest was said to be an income derived from the processing. The Hon'ble Supreme Court held so at page 280:

> "It is clear, therefore, that the words "derived from" in Section 80-HH of the Income Tax Act, 1961 must be understood as something which has direct or immediate nexus with the appellant's industrial undertaking. Although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The

> derivation of profits on the deposit made with the Electricity Board cannot be said to flow directly from the industrial undertaking itself."

8. The learned Senior counsel would specifically rely on this extract to contend that the profits and gains should be derived from the assessee's industrial undertaking itself. We find that the declaration is that the words "derived from" should be understood as something which has direct or immediate nexus with the industrial undertaking. Electricity though is an essential requirement for the manufacturing unit, the deposit made with the Electricity Board and the interest derived have no direct or immediate nexus with the derivation of profits from the industrial undertaking, was the finding.

9. The situation in the instant case is quite distinct and different. Here, the assessee is engaged in the processing of cashew nuts and such processing is done in its own factories and also in the factories of other assessees, who are sister concerns. The derivation of income of the assessee is from such processing and it cannot be said to be income which is derived other than from the activity of processing.

10. We find from the order of the Assessing Officer that the rejection was made for the following reason: "For claiming deduction under Section 80HH, the material factor is the industrial undertaking and not the assessee". We agree with the statement, but it would not result in the dis-allowance. On the contrary, the benefit being conferred on the industrial undertakings within backward areas; the assessee who entrusts the processing to third parties would be entitled to claim the deduction for the profits and gains arising from the processing, if the factory is in a backward area. The emphasis is on "the profits and gains derived from an industrial undertaking in backward areas" whether it be the assessee's own industrial undertaking or of another.

11. As has been held by the first appellate authority, an assessee carrying on processing of another will not be able to claim such benefit. But an assessee who carries on processing in an industrial undertaking belonging to another, but situated in a backward area would be entitled to claim the benefit under Section 80HH. We do not think that the decision

in ***Pandian Chemicals Ltd.*** *(supra)* would nullify the decision in ***Indian Resins and Polymers*** *(supra).* In the present case, we are concerned with the assessment years 1993-94 and 1994-95. We answer the question for both the assessment years in favour of the assessee and against the Revenue.

The other question of law raised is with respect to the penalty imposed. It is submitted that the issue has been remanded and the Revenue is not pressing such issues before this Court in these appeals. Hence, we reject these Income Tax Appeals reserving the right of either parties to agitate the question of imposition of penalty before the original authority. No costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE

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