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CASE NO.:
Appeal (civil) 4144 of 2007

PETITIONER:
A.M. MOOSA

RESPONDENT:
COMMISSIONER OF INCOME TAX, TRIVANDRUM

DATE OF JUDGMENT: 10/09/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 4144 OF 2007
[Arising out of SLP(C) No. 11814 of 2006]

Dr. ARIJIT PASAYAT

1. Leave granted.
2. Challenge in this appeal is to the legality of order passed by a Division Bench of Kerala High Court answering the reference made to it in favour of the department and against the assessee appellant.
3. Background facts in a nutshell are as follows.
For the assessment year 1992-93, the assessee appellant had claimed deduction under Section 80-HHC of the Income Tax Act, 1961, (in short, 'the Act'). The assessing officer disallowed the claim on the ground that the 'profits of the business' computed under Section 80-HHC indicated a negative figure. An appeal was preferred before Commissioner of Income-Tax (Appeals), Cochin Bench, hereinafter, referred to as 'the CIT(A)'. The said appellate authority also was of the same view and dismissed the appeal. The assessee appellant preferred an appeal before the Income Tax Appellate Tribunal, Cochin Bench, in short 'the ITAT'. By Order dated 14th September, 1995 in ITA No. 498 (Coch)/1995, the view of the assessing officer as well as of CIT(A) was affirmed. On being moved for reference, ITAT referred the following questions for adjudication by the High Court:

"(1) Whether, on the facts and circumstances of the case, the Tribunal was justified in entertaining the additional ground raised by the assessee on an issue which had not been disputed earlier before the assessing officer or the first appellate authority?

(2) Whether, on the facts and circumstances of the case, the Tribunal is right in law in holding that the payment received from the export houses under the agreements could not partake the nature of receipt towards "charges" mentioned in clause (baa) of Explanation to Sec.80HHC?

(3) Whether, on the facts and in the circumstances of the case, and on an interpretation of Sec. 8OHHC(3) would the assessee be entitled to the deduction in an amount equal to 90% of the sums referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person) and clause (iiib) and clause (iiic) of section 28, the same proportion as the export turnover bears to the total

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turnover to the business carried on by the assessee?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal is right in its interpretation of the term 'profits of business'?

(5) Whether, on the facts and in the circumstances of the case, the assessee is entitled to the benefits of sec. 80HHC of the Income Tax Act?

4. By the impugned Judgment, the High Court held that the view taken by the assessing officer, CIT(A) and ITAT was in order. Accordingly, as noted above, the reference was answered in favour of the department and against the assessee.

5. In support of the appeal, learned counsel for the appellant submitted that the view taken by the High Court is clearly untenable and does not reflect a true interpretation of the provision, that is, Section 80-HHC of the Act. Learned counsel for the Revenue on the other hand supported the orders stating that the view taken is unexceptional. At this juncture, it should be appropriate to take note of the relevant provision. Same reads as follows:

"80-HHC. Deduction in respect of profits retained for export business.- (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, 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 to the extent of profits, referred to in sub-section (1-B) derived by the assessee from the export of such goods or merchandise:

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an export house or a trading house, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4-A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1-A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any export house or trading house in respect of which the export house or trading house has issued a certificate under the proviso to sub-section (1), 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 to the extent of profits, referred to in sub-section (1-B) derived by the assessee from the sale of goods or merchandise to the export house or trading house in respect of which the certificate has been issued by the export house or trading house.

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(3) For the purposes of sub-section (1), -

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c) where the export out of India is of goods or merchandise manufactured [or processed] by the assessee and of trading goods, the profits derived from such export shall, -

(i) in respect of the goods or merchandise manufactured [or processed] by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic), of section 28, the same proportion as the export turnover bears to the total turnover of business carried on by the assessee.

Explanation : For the purposes of this sub-section,-

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3);

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods;

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(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods;

(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover;

(f) "trading goods" means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be, -

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section."

6. Learned counsel for the appellant submitted that a reading of Section 80-HHC would show that where the assessee exports goods manufactured by him, he would be covered by sub-section (3) (a) and only the profits of such business would be taken into account. Where the assessee exports only trading goods then the profits of those goods only would be taken into account in sub-section (3)(b). Sub-section (3)(c) dealt with a case where the assessee exported goods manufactured by him as well as trading goods. In such a case profits from export of goods manufactured by the assessee were to be considered separately and the profits from export of trading goods were to be considered separately. If there were profits from both then both the profits would be taken into consideration. If there were profits only in respect of one type of exports then those profits could not be negatived or set off against the loss from the other export. The word "and" in Section 80-HHC (3)(c) has to be liberally construed and cannot be taken to mean that both the profits have to be clubbed or considered together. Persons who earn valuable foreign exchange cannot be deprived of the benefits of his export by adopting a construction which would defeat the very purpose for which the provision has been enacted. The fact that the word "and" does not mean that sub-clauses (3) (c)(i) and (ii) have

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to be taken together is clear from the fact that in other sections, such as Section 80-HHD, the legislature has used the words "aggregate of". Wherever the legislature intended that both were to be taken together it has used words like "aggregate of". When the legislature has not used such words, it necessarily meant that the intention of the legislature was that the two are not to be taken together, but that each has to be considered separately and on its own. Aim being to give an incentive for earning foreign exchange, so long as there was a profit from export either of self manufactured goods or from export of trading goods deduction has to be given for that profit by ignoring a loss in respect of other export.

7. The stand needs careful consideration. Undoubtedly, Section 80-HHC has been incorporated with a view to providing incentive to export houses. Even though a liberal interpretation has to be given to such a provision, the interpretation has to be as per the wordings of this section. If the wordings of the section are clear, then benefits, which are not available under the section, cannot be conferred by ignoring or misinterpreting words in the section. In this case we are concerned with the wordings of sub-section (3)(c) of Section 80-HHC. As noted earlier, sub-section (3)(a) deals with the case where the export is only of self-manufactured goods. Sub-section (3)(b) deals with the case where the export is only of trading goods. Thus, when the legislature wanted to take exports from self-manufactured goods or trading goods separately, it has already so provided in sub-sections (3)(a) and (3)(b). It would not be denied that the word "profit" in Section 80-HHC (1) and Sections 80-HHC(3)(a) or (3)(b)means a positive profit. In other words, if there is a loss then no deduction would be available under Section 80-HHC (1) or (3)(a) or (3)(b). In arriving at the figure of positive profit, both the profits and the losses will have to be considered. If the net figure is a positive profit, then the assessee will be entitled to a deduction. If the net figure is a loss then the assessee will not be entitled to a deduction. Sub-section (3)(c) deals with cases where the export is of both self-manufactured goods as well as trading goods. The opening part of sub-section (3)(c) states "profits derived from such export shall". Then follow clauses (i) and (ii). Between clauses (i) and (ii) the word "and" appears. A plain reading of sub-section (3)(c) shows that "profits from such exports" has to be profits from exports of self-manufactured goods plus profits from exports of trading goods. The profit is to be calculated in the manner laid down in Sections (3)(c)(i) and (ii). The opening words "profit derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. It is clear from a reading of sub-section (1) of Section 80-HHC(3) that a deduction can be permitted only if there is a positive profit in the exports of both self-manufactured goods as well as trading goods. If there is a loss in either of the two then that loss has to be taken into account for the purposes of computing profits.

8. Under Section 80-HHC(1), the deduction is to be given in computing the total income of the assessee. In computing the total income of the assessee both profits as well as losses will have to be taken into consideration. Section 80-AB is relevant. It reads as follows:

"80-AB. Where any deduction is required to be made or allowed under any section included in this Chapter under the heading 'C'. Deductions in respect of certain incomes in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the

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deduction under that section, the amount of income of that nature as computed in accordance with the provision of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."
(emphasis in original)

9. Section 80-B(5) is also relevant. Section 80-B(5) provides that "gross total income" means total income computed in accordance with the provisions of the Income Tax Act.

10. 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-HHC does not provide that its provisions are to prevail over 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 in CIT v. Shirke Construction Equipment Ltd. (2000 (246) ITR 429) and the Kerala High Court in CIT v. T.C. Usha (2003 (132) Taxman 297) 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 consideration.

11. Even under Section 80-HHC (3) (c) (i) the profit is to be adjusted profit of business. The adjusted profit of the business means a profit as reduced by the profit derived from business of exports out of India of trading goods. Thus in calculating the profits under sub-section (3)(c)(i) one necessarily has to reduce profits under sub-section (3)(c)(ii). As seen above, the term "profit" means positive profit. Thus if there is loss then those losses in export of trading goods have to be adjusted. They cannot be ignored. A plain reading of Section 80-HHC makes it clear that in arriving at profits earned from export of both self-manufactured goods and trading goods, the profits and losses in both the trades have to be taken into consideration. If after such adjustments there is a positive profit, the assessee would be entitled to deduction under Section 80-HHC(1). If there is a loss he will not be entitled to any deduction.

12. It was submitted that the word "profit" in Section 80-HHC must have the same meaning in the entire section, and that as the word profit in Section 80-HHC(1) means only positive profit, it will have the same meaning in Section 80-HHC(3)(c). It is submitted that thus the word profit in Section 80-HHC(3)(c) would not include losses and if there are any losses, they are to be ignored. The plea is clearly without substance. Firstly, it is not necessary that the word "profit" must have the same meaning. The meaning of the word "profit" will depend on the context in which it is used. In Section 80-HHC (1) it is admittedly used to indicate positive "profit" because the deduction will only be of a positive profit. Section 80-HHC(3) is the sub-section which provides how profits are to be worked out in computing total income. For purposes of such computation both profits and losses have to be taken into account. Thus the word "profit" in Section 80-HHC(3) will mean profits after taking into account losses, if any. More importantly, in our view,

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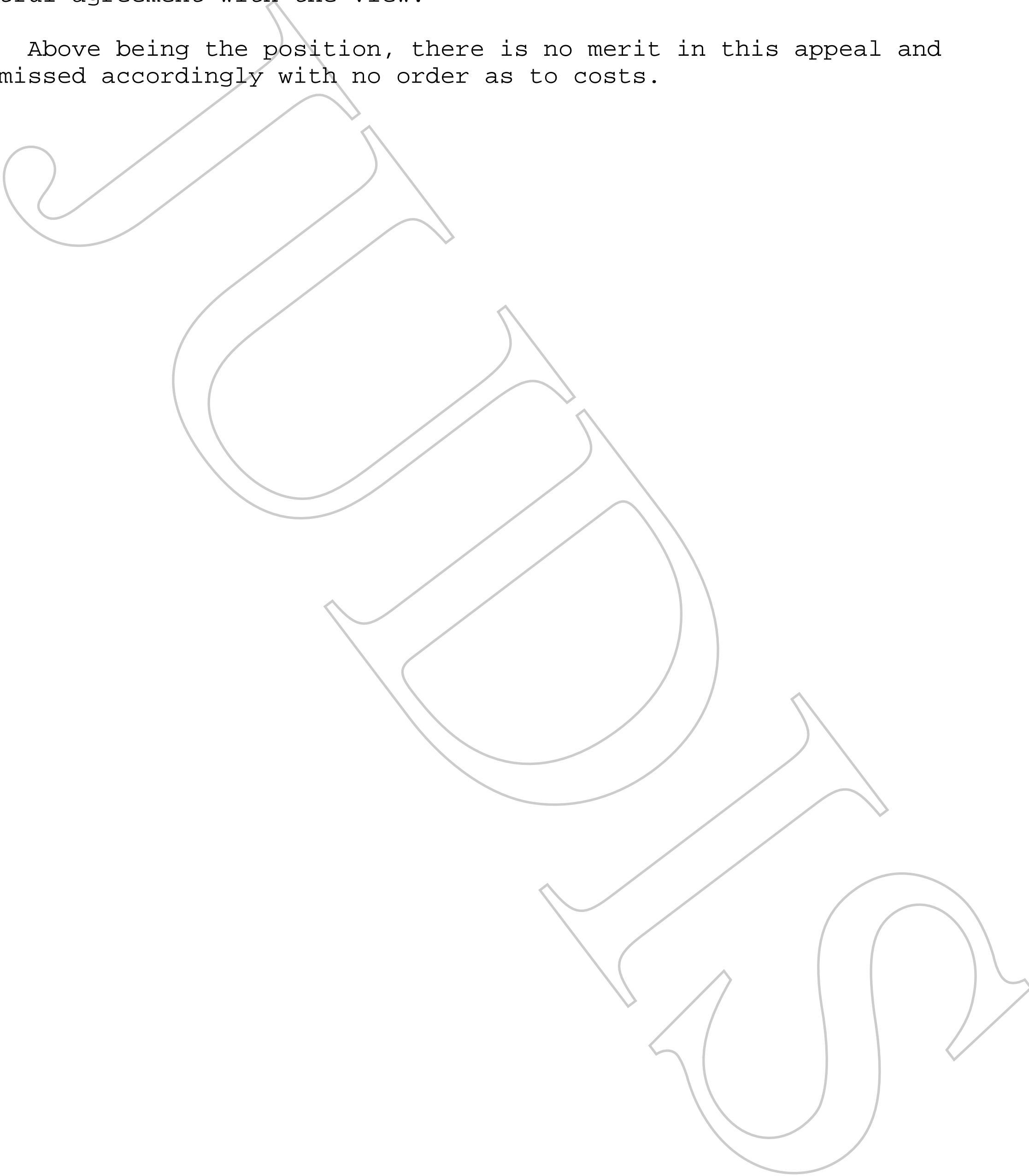
the term "profit" in Section 80-HHC both in sub-section (1) and in sub-section (3) means a positive profit worked out after taking into consideration the losses, if any. Thus the word "profit" has the same meaning in Sections 80-HHC(1) and (3).

13. In IPCA Laboratory Ltd. Vs. Dy. Commissioner of Income Tax, Mumbai, (2004) 12 SCC 742), after analyzing the position in the manner done above, it was held that the profit as contemplated under Section 80-HHC (1) and Section 80-HHC (3) means positive profit. Said view was reiterated in Income Tax Officer, Bangalore Vs. Induflex Products (P) Ltd., (2006 (1) SCC 458). We are in respectful agreement with the view.

14. Above being the position, there is no merit in this appeal and is dismissed accordingly with no order as to costs.



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