**(2003) 03 KL CK 0016**

**In the High Court Of Kerala**

**Case No :** Income-tax Reference No. 161 of 1998

Commissioner of Income Tax — APPELLANT

Vs

Harisons Malayalam Ltd. — RESPONDENT

**Date of Decision :** 12-03-2003

**Acts Referred:**
Income Tax Act, 1961 — Section 80AB, 80HHC, 80HHC(1), 80HHC(3)

**Citation :** (2004) 188 CTR 469 : (2004) 266 ITR 516

**Hon'ble Judges :** J.M. James, J;G. Sivarajan, J

**Bench :** Division Bench

**Advocate :** P.K.R. Menon, for the Appellant; Anil D. Nair, for the Respondent

## Judgement

G. Sivarajan, J.—The Income Tax Appellate Tribunal, Cochin Bench, has referred the following questions of law to this court u/s 256(1) of the Income Tax Act, 1961, for decision at the instance of the Revenue :

"(1) Whether, on the facts and in the circumstances of the case, and on an interpretation of the relevant provisions, the Tribunal is right in law in holding on principle that the assessee is entitled to deduction u/s 80HHC of the Income Tax Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the business income of the assessee as computed by the Assessing Officer in a sum of Rs. 96,49,307 which entered the total income of the assessee amounting to Rs. 1,04,40,020 should be deemed to include the income by way of exports in an extent of a sum computed in accordance with Clause (b) of Sub-section (3) of Section 80HHC ?"

2. The brief facts necessary for decision of this case are as follows : The respondent-assessee is a company in which the public are substantially interested. It has income from growing and manufacturing of tea besides trading activities. In the assessment for the year 1987-88, the assessee claimed deduction u/s 80HHC of the Act to the extent of Rs. 16,27,562. The business

income of the assessee is computed as follows :

Rs. 1.Kerala tea (-) 24,31,425 2. Tamil Nadu tea 5,69,374 3. Trading division 22,57,088 4. Other activities 92,54,270 Net business income 96,49,307

The assessee had an export turnover of Rs. 7,24,00,271. The total turnover of the assessee came to Rs. 40,82,91,806. The assessee had exported tea and had received sale proceeds in foreign exchange. The assessee claimed that the profits derived from export should be computed in accordance with Clause (b) of Sub-section (3) of Section 80HHC. The Assessing Officer, relying on the provisions of Section 80AB, held that there was actually loss from Kerala tea which was exported abroad and only a small profit from Tamil Nadu tea, the '' net result was loss and therefore in terms of Section 80AB, the assessee was not entitled to any deduction u/s 80HHC of the Act. This was confirmed in appeal by the Commissioner of Income Tax (Appeals). In second appeal by the assessee, the Tribunal allowed the claim of the assessee by holding that Section 80AB has no application to a case covered by Section 80HHC of the Act.

3. We have heard Sri P. K. R. Menon, learned senior Central Government standing counsel appearing for the Revenue, and Sri Anil D. Nair, learned counsel appearing for the respondent-assessee. The contention of senior counsel for the Revenue is that in the computation of profits derived from business as profit under Clause (b) of Section 80HH(3), the loss suffered has to be deducted. He, in support of the above, has relied on the decisions of the Supreme Court in Commissioner of Income Tax (Central), Delhi Vs. Harprasad and Co. P. Ltd., and in Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad, . Thus, senior counsel submits that the profits derived from the business contemplated u/s 80HHC(3) has to be computed in accordance with the provisions of the Act, and in such a case, the loss suffered from the business has necessarily to be deducted in arriving at the profits derived from the export business.

4. On the other hand, the contention of learned counsel for the assessee is that the profits of the business have been specifically stated to be computed under the head "Profits and gains of the business", which take in only Sections 28 to 44D, and therefore, there is no scope for application of the provisions of Sections 70 to 72 of the Act. He also submitted that whether there is profit from the export business or not is immaterial, since Section 80HHC(3)(b) provides a particular formula for the computation of the profits derived from the export for the purpose of Section 80HHC(1). Counsel further submits that the formula is,

Profits of the business x Export turnover

Total turnover

5. Counsel in support of this contention has relied on the decision of this court in Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd., , the decision of the Bombay High Court in Commissioner of Income Tax Vs. Shirke Construction

 

Equipments Ltd., and also the decision of the Gujarat High Court in Commissioner of Income Tax Vs. Arvind Mills Ltd., .

6. The short question that arises for consideration in this case is as to whether the assessee can be denied the benefit of deduction available u/s 80HHC, in a case where the assessee had no profit from the export business. In order to decide this question, it is necessary to see the provisions of Section 80HHC of the Act, as is stood at the relevant time. Section 80HHC(1) reads as follows :

"80HHC 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 equal to the aggregate of-

(a) four per cent, of the net foreign exchange realisation ; and

(b) fifty per cent, of so much of the profits derived by the assessee from the export of such goods or merchandise as exceeds the amount referred to in Clause (a) :

Provided that the deduction under this sub-section shall not exceed the profits derived by the assessee from the export of such goods or merchandise ;

Provided further that an amount equal to the amount of the deduction claimed under this sub-section is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purpose of the business of the assessee."

Section 80HHC(3) reads as follows :

"80HHC(3). For the purposes of Sub-section (1), profits derived from the export of goods or merchandise out of India shall be,--

(a) in a case where the business carried on by the assessee consists exclusively of the export out of India of the goods or merchandise to which this section applies, the profits of the business as computed under the head ''Profits and gains of business or profession'' ;

(b) in a case where the business carried on by the assessee does not consist exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head ''Profits and gains of business or profession'') the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee." Sub-section (1) of Section 80HHC provides that the assessee being an Indian company or a person resident in India, who 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 equal to the aggregate of-

(a) 4 per cent, of the net foreign exchange realisation ; and

(b) 50 per cent, of so much of the profits derived by the assessee from the export of such goods or merchandise as exceeds the amount referred to in Clause (a).

The proviso states that the deduction under this sub-section shall not exceed the profits derived by the assessee from the export of such goods or merchandise. At present, we are not concerned with the applicability of the said proviso.

7. Sub-section (3) provides that for the purpose of Sub-section (1), profits derived from the export of goods or merchandise out of India shall be, in a case where the business carried on by the assessee consists exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or profession") the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. So, the first step to be followed in the matter of computation of the benefit provided under Clause (b) of Section 80HHC(1) is to ascertain the profits of the business as computed under the head "Profits and gains of business or profession", then to multiply it by the export turnover and divide it by the total turnover of the business carried on by the assessee. In the present case, as could be seen from the relevant portion of the assessment order, which is extracted in the Tribunal''s order in paragraph 9, the business income of the assessee was computed after deducting the loss of Rs. 24,31,425. The Assessing Officer has not granted the relief u/s 80HHC only on the ground that the assessee did not in fact have any profit from the export business. Whether that can be a ground for denying the benefit is the only question. Going by the provisions of Section 80HHC(1) read with Sub-section (3), we do not find any scope for denying the benefit of this section on the ground that there was no profit from the export business. This is for the reason that the profits of the export business for the purpose of Section 80HHC are being determined by a fiction, that is by applying the formula. That formula as we have already noted is, profits of the business x export turnover divided by total turnover. In other words, what is required is that there must be profit in the business of the assessee. If there is profit in the business of the assessee, then the profits of the export turnover for the purpose of Clause (b) of Sub-section (1) have to be arrived at by applying the formula. In the present case, admittedly, there is profit in the business, which was determined by the assessee at Rs. 96,49,307. Therefore, what is required to be done as provided under Clause (b) of Sub-section (3) is to find out the figure by applying the formula, that is, Rs. 96,49,307 x 7,24,00,271/40,82,91,806. However, we are not called upon to decide the amount of deduction available u/s 80HHC in the present case, for the Tribunal, by applying the provisions of the Act, has only held that Section 80AB has no application and the assessee cannot be denied the deduction simply

 

because there are no profits from the export business. Now that we have held that actual profit in the export business is not a condition precedent for the grant of relief u/s 80HHC, it is for the Assessing Officer to work out the relief as provided under Clause (b) of Sub-section (3) of Section 80HHC. The decision of this court in Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd., , the decision of the Bombay High Court in Commissioner of Income Tax Vs. Shirke Construction Equipments Ltd., and also the decision of the Gujarat High Court in Commissioner of Income Tax Vs. Arvind Mills Ltd., , support the view which have already taken. We have held in our judgment rendered today in I, T. R. No. 96 of 1999 Commissioner of Income Tax Vs. Smt. T.C. Usha, that Section 80HHC is a self-contained code in itself and Section 80AB is subject to the said section. Since we have already dealt with the decisions relied by senior counsel for the Revenue in our judgment in I. T. R. No. 96 of 1999 ( Commissioner of Income Tax Vs. Smt. T.C. Usha, , we are not repeating the same in this judgment.

8. In the above circumstances, we answer the two questions referred by the Tribunal, in the affirmative, that is, in favour of the assessee and against the Revenue.

9. A copy of this judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.