

**(2014) 03 GUJ CK 0048**  
**In the Gujarat High Court**

**Case No :** Tax Appeal Nos. 1355, 1360 & 1387 of 2005; 437, 679, 680, 681, 840, 841, 842, 844, 861 & 1468 of 2006; 250, 335, 336, 1705, 1707 & 1709 of 2007; 1053, 1073, 1322 of 2008; 615 of 2009 and 1867 of 2010

Commissioner of Income Tax

APPELLANT

Vs

Priyanka Gems

RESPONDENT

---

**Date of Decision :** 12-03-2014

**Acts Referred:**

Customs Act, 1962 — Section 50

Income Tax Act, 1961 — Section 10A, 28, 80HHC, 80HHC(4C), 80HHE

**Citation :** (2014) 267 CTR 480 : (2014) 367 ITR 575

**Hon'ble Judges :** Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

**Bench :** Division Bench

**Advocate :** Bandish Soparkar, R.K. Patel and Manish J. Shah, Advocate for the Appellant; Sudhir M. Mehta, Nitin K. Mehta and Mrs. Mauna M. Bhatt, Advocate for the Respondent

---

## Judgement

Akil Abdul Hamid Kureshi, J.—All these appeals involve single identical question pertaining to deduction under s. 80HHC of the IT Act, 1961 ("the Act" for short) relating to the receipts arising out of the fluctuation of rate of foreign exchange. The facts are slightly different in different cases. However, there being broad similarities, we may refer to the facts from Tax Appeal No. 1468 of 2006, which is treated as lead matter. For the purpose of all tax appeals, we adopt following substantial question of law:

Whether in the facts and circumstances of the case, Tribunal was justified in holding that the receipt resulting out of exchange rate difference pertaining to the export made by the assessee was not the profit of business within the meaning of s. 80HHC of the IT Act, 1961?

2. Respondent assessee M/s. Priyanka Gems was engaged in the business of export. The assessee filed the return of income for asst. yr. 2003-04 on 28th

Nov., 2003 declaring total income of Rs. 5,13,00,591. This return was taken in scrutiny. One of the issues considered by the AO pertained to the exchange rate difference. AO noted that, the assessee had received a net of Rs. 71,23,361 by way of exchange rate difference on the export made in the earlier year. At the same time, the assessee had incurred net loss of Rs. 84,35,102 due to exchange rate fluctuation on the exports made in the same year. After adjustments of the said two sums, the assessee claimed a negative income of Rs. 13,11,741 on account of exchange rate difference. The AO thereupon inquired with the assessee why the said amount of Rs. 71.23 lakhs (rounded off) being the exchange rate difference relating to the exports of the earlier period should not be deducted from the export turnover and 90 per cent thereof be not excluded from the business profit for the purpose of computation of deduction under s. 80HHC of the Act. He was of the opinion that such amount should be treated as income from other sources. The assessee opposed such proposal relying on its earlier elaborate representation on the same issue for the asst. yr. 2001-02 and pointed out that for the said year Tribunal had already accepted the assessee's stand. It was pointed out that during the year under consideration it represented the exchange rate difference as on 31st March of the previous year, and the date of actual realization of the export proceeds. Since such proceeds were received during the previous year, the same had accrued only during that period. It was pointed out that according to the AS-11, mandatory items, namely, cash, receivables, payables, etc. should be reported at the closing rate i.e. the rate of exchange prevailing at the balance sheet date. The assessee had accordingly adopted the closing rate while reporting the figure of sundry debtors for the immediately preceding year. It was pointed out that when export proceeds are received after the exports are made, it is not possible in every case to realize 100 per cent of the bill amount before the end of the relevant year specially when the exports are made at the fag end of the year. It is because of this that the legislature has permitted a time limit of six months in order to effect remissions. Such time-limit is also extendible. The assessee also contended that r. 115 of the IT Rules, 1962 has no bearing on the computation of the deduction under s. 80HHC of the Act. The assessee relied on the decision of this Court in the case of Hindustan Trading Corporation Vs. Commissioner of Income Tax, in which the Court held that such receipt arising out of the foreign exchange rate fluctuation was revenue receipt.

3. The AO, however, did not accept such explanation. In his assessment order dt. 30th June, 2005, he held that the said sum of Rs. 71.23 lakhs was income from other sources and 90 per cent thereof would be excluded for the purpose of deduction under s. 80HHC of the Act. We must record that we are impressed by the consideration of various issues by the AO in his rather well written order. In the said order, the AO based his conclusion on following factors:

(1) Sec. 80HHC of the Act deals with the sale proceeds of export. The exchange rate difference has no relation with the deduction under s. 80HHC of the Act.

(2) Sec. 80HHC pertains to current year's export profits. The amount in question is related to the proceeds of the earlier year's export, which was realized in the subsequent year.

(3) As per Expln. 2 to sub-s. (2) of s. 80HHC, the value of exported goods would be that declared in the shipping bills or the bills of exports. In the present case, such shipping bills would not reflect the exchange rate difference.

(4) Deduction under s. 80HHC is permitted on the profit derived from the export. Term "derived from" is construed strictly and has a different meaning than the term "attributable to".

(5) Such receipt would also have to be excluded in view of cl. (baa) of Explanation to s. 80HHC.

4. The assessee carried the matter in appeal. CIT(A) allowed the appeal relying on the decision of the Tribunal in the case of this very assessee in which the Tribunal had held that the exchange rate difference would not fall in cl. (baa) to the Explanation. It was held that such receipt on the ground of exchange rate difference was derived from the export sales and was part and parcel of the export proceeds. It cannot be treated as an income from other source to be excluded from the profits of the business.

5. Revenue carried the matter in appeal. The Tribunal by the impugned judgment dismissed the appeal relying on its own decision in case of the very assessee for asst. yr. 2001-02. That is how the Revenue has filed this appeal.

6. Though three different questions were framed by the Court while admitting the appeals, we have modified the question and framed a single question, which would serve the purpose for all appeals. We have also noticed that in many of the appeals, the facts are identical to those recorded hereinabove. In some cases, however, it is not clear whether the exchange rate fluctuation related to exports made in the earlier year or during the same year. We would, however, examine the issue from both angles.

7. Learned counsel appearing for the Revenue raised following contentions:

(1) The foreign exchange rate difference did not arise out of the assessee's business of export. Such income was not derived from the export business. From the plain reading of s. 80HHC, therefore, the same should be excluded for the purpose of deduction.

(2) At any rate such receipt was covered under cl. (baa) to the Explanation and, therefore, 90 per cent thereof had to be excluded for the purpose of computation of the deduction. (3) Explanation 2 below sub-s. (2) of s. 80HHC must be given its full effect and only the sale proceeds as per the export documents can be treated to be the consideration received out of such export.

(4) The decision of this Court in the case of Commissioner of Income Tax Vs. Amba Impex does not lay down any ratio since eventually the Court had only

remanded the proceedings for fresh consideration. Certain authorities were cited by the counsel to which we would refer to at a later stage.

8. On the other hand learned counsel Mr. B.S. Soparkar appearing for the assessee raised following contentions:

(1) Foreign exchange gain is a profit of the assessee arising out of the export and, therefore, it is derived from the export business.

(2) Such receipt does not fall within cl. (baa) to the Explanation and, therefore, cannot be excluded for the purpose of computation of the deduction.

(3) Rule 115 of the IT Rules, 1962 has no application for the purpose of computation of deduction under s. 80HHC.

(4) Explanation 2 below sub-s. (2) of s. 80HHC has no application because (i) the present case is not of branch transfer by the assessee to its foreign branch before eventually selling the goods to the foreign importer and (ii) in any case the Explanation refers to the value of goods declared in the shipping bills and not the price thereof.

(5) In support of his contentions learned counsel relied on several decisions to which we would refer to at a later stage.

9. We also heard learned counsel Mr. R.K. Patel and Mr. Manish Shah who have elaborated such contentions.

10. As noted in the case of M/s. Priyanka Gems the objection of the Revenue to granting deduction under s. 80HHC of the Act on the foreign exchange rate fluctuation gain primarily is on account of the realization of the sale proceeds happening in the year subsequent to the year during which the exports were made. In such a case, the question is whether the stand of the Revenue to exclude such receipt is justified. In the process we would also examine whether if the sale proceeds were received during the same year of the export, exclusion would be warranted.

11. Sec. 80HHC of the Act pertains to deduction in respect of profits retained for export business. Sub-s. (1), which provides for such deduction, reads as under:

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 to the extent of profits, referred to in sub-s. (1B), 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 (hereinafter in this section referred to as an export house or a trading house, as the case may), issues a certificate referred to in cl.

(b) of sub-s. (4A), 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.

(1A) 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-s. (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-s. (1B), 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.

(1B) For the purposes of sub-ss. (1) and (1A), the extent of deduction of the profits shall be an amount equal to

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

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

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

(iv) thirty 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.

12. Sub-s. (1B) of s. 80HHC provides for extent of deduction of the profits referred to in sub-s. (1). Sub-s. (2) pertains to the goods or merchandise to which the said section applies and reads as under:

(2)(a) This section applies to all goods or merchandise, other than those specified in cl. (b), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer) in convertible foreign foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation.--For the purposes of this clause, the expression "competent authority" means the RBI or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(b) This section does not apply to the following goods or merchandise, namely:

(i) mineral oil; and

(ii) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.--The sale proceeds referred to in cl. (a) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the RBI.

Explanation 2.--For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-s. (1) of s. 50 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

13. Sub-s. (3) of s. 80HHC provides a formula for computation of such deduction and broadly aims at granting deduction from the income of the assessee in the proportion of his export turnover compared to the total turnover. We are, however, not concerned with the precise computation of such deduction.

14. Clause (baa) of the Explanation to s. 80HHC of the Act which is relevant for our purpose reads as under:

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-

(1) ninety per cent of any sum referred to in cls. (iia), (iiib), (iiic), (iiid) and (iiie) of s. 28 or of any receipts by way of brokerage, commission, interest, rent charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;

15. In many cases when exports are made by an assessee, particularly, towards the fag end of the accounting year, it may not be possible to realize the sale proceeds of such exports before the end of the year. The period during which such remissions would be made may depend on various factors including the terms of the contract between the exporter and the importer. Such terms may also be bilaterally varied at times. The legislature, therefore, for the purpose of s. 80HHC, recognized a period of six months for remissions in order to avail the benefit of deduction. Sub-s. (2) of s. 80HHC, therefore, provides for limit of six months from the end of the previous year for the foreign exchange to be remitted. Even such period was made extendible at the discretion of the

competent authority, namely, the RBI or such other authority as may have been authorized for such purpose. For the purpose of claiming deduction under s. 80HHC of the Act, therefore, one of the conditions would be that the foreign exchange remittance is made within six months from the end of the previous year during which the export was made or within such extended time as may be permitted. Once this condition along with other essential conditions are fulfilled the assessee would be entitled to deduction under the said provision to be computed in terms of sub-s. (3) thereof.

16. In case of CIT vs. Amba Impex (supra), somewhat similar issue arose. In the said case the assessee received the sale consideration during the year subsequent to the year of export. The foreign exchange gain thus resulted during the later year. In this context the Revenue contended that the difference would not qualify for deduction under s. 80HHC of the Act. Additional feature in the said case was that there was insufficient data to examine whether the exports were made in the immediately preceding year or the rate difference pertained to exports made in different years. It was in this context the Court observed that this aspect would be material taking into consideration the provisions of sub-s. (2) of s. 80HHC as applicable during the year under consideration. Having said that on the question which came up for consideration before the Court, it was held and observed as under:

8. Under sub-s. (2) of s. 80HHC of the Act, sale proceeds of goods or merchandise exported out of India and received in convertible foreign exchange become entitled to the deduction subject to fulfilment of other requisite conditions. Clause (a) of sub-s. (2) of s. 80HHC of the Act provides that such sale proceeds have to be received in convertible foreign exchange within a period of six months from the end of previous year or, within such further period as the competent authority may allow in this behalf. Thus, a plain reading of the provision makes it clear that once the competent authority has extended the time, in a case where it is necessary," or, where the sale proceeds have been received within a period of six months from the end of the previous year, such sale proceeds are directly relatable to the exports made and no further inquiry is necessary. Therefore, the entire controversy as to whether such receipt amounts to "any other receipt" stipulated in Explan. (baa)(1) need not be taken up for consideration. Once legislature has provided for treating a receipt within a period of six months after the end of the previous year, or within further extended period, as sale proceeds relatable to exports, it would not be open to Revenue to raise such a controversy. The legislature in its wisdom has taken into consideration the fact that in case of exports made, sale proceeds are not necessarily realisable immediately within the accounting period in which exports have been made. As a corollary, by the time such sale proceeds are received within the prescribed time, by virtue of exchange rate difference there might be a situation where a larger amount is received than the amount as reflected in the shipping bill. Hence, merely because an amount is received in a year subsequent to the year of export by way of exchange rate difference, it does not necessarily

always follow that the same is not relatable to the exports made.

It is true that the Court ultimately remanded the proceedings for consideration after verifying necessary facts. However, by no stretch can it be said that this judgment does not lay down the binding ratio. The Court in no uncertain terms held that the remittances which were covered within the period specified in sub-s. (2) of s. 80HHC or within the extended period if the period was so extended, cannot be treated as any other receipt stipulated in cl. (baa) to the Explanation. This is precisely how various Courts have approached the issue.

17. In the case of Raghunath Exports (P) Ltd. Vs. Commissioner of Income Tax, , the Calcutta High Court followed the decision of this Court in the case of CIT vs. Amba Impex (supra). It was a case where the tea was exported and the payment was received in foreign currency. There was higher realization of the export proceeds due to fluctuation in the foreign currency. The Court considered whether surplus realization can be treated to be part of the export turnover. It was held as under:

14. However, the legislature in its wisdom has cleared that in case of convertible foreign exchange, a time-limit of six months has been prescribed. Therefore, this aspect cannot be ignored. Factually, neither the CIT(A) nor the Tribunal have gone into the question whether the export turnover was realised beyond six months or not. Hence, we do not think that this question should be decided by us as no such point has been formulated by this Court, nor any cross appeal has been filed in this case. We are of the view that this amount received in a year or subsequent year by virtue of exchange rate difference cannot be said to be unrelatable to the export made. The same view has also been taken by the Gujarat High Court in the case of Commissioner of Income Tax Vs. Amba Impex and it has been held almost on the identical fact that "As a corollary, by the time such sale proceeds are received within the prescribed time, by virtue of exchange rate difference there might be a situation where a larger amount is received than the amount as reflected in the shipping bill. Hence, merely because an amount is received in a year subsequent to the year of export by way of exchange rate difference, it does not necessarily always follow that the same is not relatable to the exports made.

18. In the case of Commissioner of Income Tax Vs. Amber Exports (India), , the Bombay High Court also followed the decision in the case of CIT vs. Amba Impex (supra) and observed as under:

3. On the aforesaid reasoning the Gujarat High Court accepted the contention that the amount received by way of exchange rate fluctuation cannot be considered to be "any other receipt" as stipulated in cl. (bba) of the Explanation to s. 80HHC(4C). The reasoning is that once the legislature has provided for treating a receipt within a period of six months after the end of the previous year or within further extended period, as sale proceeds relatable to exports, it would not be open to the Revenue to raise such a contention. We respectfully concur

with the findings of the Gujarat High Court.

19. Independently also different High Courts have taken a similar view. As pointed out by the learned counsel for the assessee; in the case of *The Commissioner of Income Tax Vs. Pentasoft Technologies Ltd.*, , the Madras High Court considered a situation in the context of s. 10A of the Act. The assessee due to diminished rupee value gained higher sum while earning foreign exchange. The question arose whether such difference in rupee value should be allowed as deduction under s. 10A of the Act. The Court upheld the decision of the Tribunal making following observations:

4. In order to allow a claim under s. 10A of the Act, what all is to be seen is whether such benefit earned by the assessee was derived by virtue of export made by the assessee. The exchange value based on upward or downward of the rupee value is not in the hands of the assessee. In other words, the assessee does not determine the exchange value of the Indian rupee. It has to be remembered but for the fact that the assessee is an export house, there was no question of earning any foreign exchange. Therefore, when the fluctuation in foreign exchange rate was solely relatable to the export business of the assessee and the higher rupee value was earned by virtue of such exports carried out by the assessee, there is no reason why the benefit of s. 10A should not be allowed to the assessee.

20. In the case of *Commissioner of Income Tax and Another Vs. Infosys Technologies Ltd. (No. 4)*, , the Karnataka High Court held that gain of the assessee due to fluctuation in the rate of exchange cannot be treated as income from other sources. It was observed as under:

8. We have heard the learned counsel appearing for the parties and scrutinised the material on record. Both the first appellate authority and the Tribunal have answered the abovesaid substantial question of law in favour of the assessee and against the Revenue. The said concurrent finding arrived at by the authorities is justified as the fluctuation in the valuation of currency which has to be converted to foreign currency has direct nexus to the export of software and can never be included as income from other sources. Wherefore, the said finding does not suffer from any error or illegality as to call for interference in this appeal. Accordingly, we answer the fourth substantial question of law also against the Revenue and in favour of the assessee. Accordingly, we hold that the appeal is devoid of merits and pass the following order:

The appeal is dismissed.

21. In the case of *Commissioner of Income Tax and Another Vs. Novell Software Development (I) Pvt. Ltd.*, , once again the Division Bench of Karnataka High Court in the context of s. 80HHE of the Act, which contained similar provisions for deduction as s. 80HHC held that gain from fluctuation of foreign exchange cannot be excluded for computing the profits of the business. It was observed as under:

16. In view of the submissions at the Bar, we have examined the questions. The amount which is sought to be attributed as gain from fluctuation of foreign exchange no doubt might have been due to some fluctuation but as these are amounts received in Indian currency as the total amount that an exporter receives ultimately for the export of the goods, it should be taken together with the value of the goods itself in which event, in our opinion, even the amount said to be attributable to the fluctuation in the foreign exchange rate forms part of the value of the export goods and cannot be distinguished therefrom. In fact the converse of this, viz., if the fluctuation in foreign exchange brought down the value, an assessee cannot claim that this amount should be excluded and the export value maintained at a higher figure.

17. Though it may be an aspect beyond the control of the assessee or the Revenue, it does affect the actual value of the exported goods either way. We are of the opinion that the Tribunal has not committed any error on this aspect. Therefore, there is no occasion to exclude 90 per cent of the amount attributable to export gains from the foreign exchange rate fluctuation and, accordingly, we answer the first question against the Revenue and in favour of the assessee.

22. Unreported decision of Punjab & Haryana High Court has been brought to our notice in case of CIT vs. Roadmaster Industries of India, dt. 27th Nov., 2006 passed in IT Ref. No. 13 of 1996, in which also similar view has been taken in the following manner:

7. It is not disputed before us that, in the present case, the amount received in excess on account of fluctuations in foreign exchange by the assessee was on account of export of goods out of India. This being the undisputed factual position, considering the scheme of the provision, there is no escape from the conclusion that the amount received by the assessee for export of goods on account of fluctuations in foreign exchange has to be treated as part of the gross turnover, resultantly entitling the assessee to the benefit of deduction under s. 80HHC of the Act.

Accordingly, we answer the; question referred against the Revenue and in favour of the assessee.

23. It can thus be seen that across the country different High Courts have taken the same view in context of similar fact situation. Many of these judgments have placed reliance on the decision of this Court in the case of CIT vs. Amba Impex (supra). Some of the decisions have been rendered independent thereof. No decision of any Court has been brought to our notice where contrary view has been taken.

24. Under the circumstances, we have no hesitation in upholding the view of the Tribunal. Quite apart, the issue is substantially covered by the decision of the CIT vs. Amba Impex (supra). Consistent and at times independent trend of the judicial pronouncements of Courts across the country need not be disturbed. Even independently, we are of the view that the foreign exchange gain arising

out of the fluctuation in the rate of foreign exchange cannot be divested from the export business of the assessee. As noted, once export is made, due to variety of reasons, the remission of the export sale consideration may not be made immediately. Under the accounting principles, therefore, the assessee, on the basis of accrual, would record sale consideration at the prevailing exchange rate on the quoted price for the exported goods in the foreign currency rates. If during the same year of the export, the remission is also made, the difference in the rate recorded in the accounts of the assessee and that eventually received by way of remission either positive or negative, would be duly adjusted. May be the accounting standards require that the same may be recorded in separate foreign exchange fluctuation account. Nevertheless any deviation either positive or negative must have direct relation to the export actually made. Payment would be due to the assessee on account of the factum of export. Current price of the goods so exported would also be pre-decided in the foreign exchange currency. The exact remittance in Indian rupees would depend on the precise exchange rate at the time when the amount is remitted. This fluctuation and possibility of increase or decrease, in our opinion, can have no bearing on the source of such receipt. Primarily and essentially, the receipt would be on account of the export made. If this is so, any fluctuation thereof also must be said to have arisen out of the export business. Mere period of time and the vagaries of rate fluctuation in international currencies cannot divest the income from the character of the income from assessee's export business. In that view of the matter, the Revenue's contention that such income cannot be said to have been derived from the export business must fail. If this is the position when the remittance is made during the same year of the export, we fail to see what material change can it bring about if within the time permitted under sub-s. (2) of s. 80HHC, the remittance is made but in the process accounting year has changed. To our mind mere change in the accounting year can have no real impact on the nature of the receipt. The conclusion of the AO that since the year during which such sale proceeds were received by the assessee export was not made, would not in any manner change the situation. The assessee being engaged in the business of export and having made the export, mere fact of the remittance being made after 31st of March the year when export was made, would not change the situation insofar as, relation of such income to the assessee's export business is concerned. Clause (baa) to the Explanation to s. 80HHC provides for exclusion of certain incomes for computation of export profit under s. 80HHC. Sub-cl. (1) of cl. (baa) thereof pertains to 90 per cent of the sum referred to in cls. (iiia), (iiib), (iiic), (iiid) and (iiie) of s. 28 or any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature included in such profits. The term "foreign exchange difference" is not specified in any of the categories specifically mentioned in the said clause. The Revenue, however, contended that the same must be included by necessary implication as part of other receipts. Legislature, however, has used the term "any other receipt of similar nature". This expression "similar nature" would have considerable bearing on the ultimate conclusion that we arrive in this respect. What is to be excluded

under the said sub-cl. (1) of cl. (baa) is any other receipt of a nature similar to the brokerage, commission, interest, rent or charges. The receipt by way of foreign exchange fluctuation not being similar to any of these receipts mentioned above, application of cl. (baa) must be excluded. Sub-r. (1) of r. 115 only provides for adopting the rate of exchange for calculation of value of rupee of any income accruing or arising in case of an assessee and provides that the same shall be telegraphic transfer of buying rate of such currency on the specified date. The term "specified date" has been defined in Expln. 2 to the said sub-r. (1). Rule 115 of the IT Rules, 1962 thus has application for a specific purpose and has no bearing while judging whether foreign exchange rate fluctuation gain can form part of the deduction under s. 80HHC of the Act. In case of Commissioner of Income Tax, Karnataka (Central), Bangalore and Others Vs. Chowgule and Co. Ltd., , the Court held that r. 115 does not lay down that all foreign currencies received by the assessee will be converted into Indian rupees only on the last date of the accounting period. Rule only fixed the rate of conversion of foreign currency. If there is no foreign currency to convert on the last date of accounting period, then no question of invoking r. 115 will arise.

25. Reference to Expln. 2 below sub-s. (2) of s. 80HHC also is of no avail. Such Explanation covers the cases where any goods or merchandise are transferred by an assessee to its branch office, warehouse or any other establishment situated outside India and thereafter sold from such branch, office, warehouse or establishment. In such a case, it is provided that transfer shall be deemed to be export out of India and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-s. (1) of 50 of the Customs Act, 1962 shall, for the purpose of s. 80HHC, be deemed to be sale proceeds thereof. Two things thus emerge. Firstly, the Explanation would have application only if it is a case of transfer of goods or merchandise by an assessee to its branch office, warehouse or establishment situated outside India before the sale of goods to the foreign importer. In none of the cases, it is even contended by the Revenue that such facts arise and that, therefore, the Explanation would apply. Second aspect is that even in such a case what is to be adopted for the purpose of value of goods or merchandise is that declared in the shipping bill or bill of export referred to in sub-s. (1) of s. 50 of the Customs Act. Here the term used is "value of goods or merchandise" and such value of goods or merchandise can as well be the price agreed to between the parties and indicated in foreign currency terms. Having so adopted the value of goods as indicated in the export documents, what the assessee may actually receive in terms of Indian currency, would depend on the time of remission and the precise foreign exchange rate of the foreign currency at that point of time.

26. We would now refer to the decision cited by counsel for the Revenue. In case of Pandian Chemicals Ltd. Vs. Commissioner of Income Tax, , the question arose whether interest derived by the industrial undertaking from the deposit made with the Electricity Board for supply of electricity for running the industrial undertaking can be said to have been derived from its business. It was in this

context held that such income cannot be said to have been derived from the industrial undertaking and would, therefore, not be eligible for deduction under s. 80HHC of the Act.

27. In case of *Liberty India Vs. Commissioner of Income Tax*, , the question examined by the Supreme Court was whether duty draw back receipts and duty exemption pass book benefits form part of the net profit of eligible industrial undertaking for the purpose of deduction under s. 80-I, 80-IA or 80-IB of the Act. In this context, it was held that the words "derived from" has narrower connotation as compared to the words "attributable to" by using the expression "derived from". Parliament intended to cover sources not beyond the first degree.

28. In case of *Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore*, , the Court held that the facts were that the assessee was engaged in the processing of prawns and sea food and exporting it. In the process the assessee earned import entitlements granted by the Government of India under Export Promotion Scheme. The assessee could use such import entitlements itself or sell the same to others. The assessee sold such entitlements and earned income and included such income for relief under s. 80HHC of the Act. The Court held that such income cannot be said to have been derived from assessee's industrial undertaking. In the present case, however, we find that the source of the income of the assessee was the export. On the basis of accrual, income was already reflected in the assessee's account on the date of the export on the prevailing rate of exchange. Further income was earned merely on account of foreign exchange fluctuation. Such income, therefore, was directly related to the assessee's export business and cannot be said to have been removed beyond the first degree.

29. In case of *The Commissioner of Income Tax Vs. Shah Originals*, , the Bombay High Court considered a case where the assessee, an exporter, was given an option to keep a specified percentage of the receipts on account of the export in its Exchange Earners Foreign Currency (EEFC) account. The assessee realized the full amount on account of the export but kept the portion thereof in EEFC account. The assessee received higher amount in Indian rupees on such amount so set apart due to the fluctuation in the foreign exchange rate. Conscious of the fact that the assessee had received the entire proceeds of the export transaction and thereafter, gained due to the foreign fluctuation on the account kept by the assessee in the EEFC account, the Court held that such gain cannot be said to have been derived from the assessee's export business. Thus the significant and distinguishing feature of this case is that the assessee had received the entire proceeds of the export sale. The foreign exchange fluctuation gain arose subsequent to the assessee receiving the sale consideration. It was in this background, the Court held and observed as under:

11. The assessee admittedly in the present case received the entire proceeds of the export transaction. The RBI has granted of facility to certain categories of exporters to maintain a certain proportion of the export proceeds in an EEFC

account. The proceeds of the account are to be utilized for bona fide payments by the account holder subject to the limits and the conditions prescribed. An assessee who is an exporter is not under an obligation of law to maintain the export proceeds in the EEFC account but, this is a facility which is made available by the Reserve Bank. The transaction of export is complete in all respects upon the repatriation of the proceeds. It lies within the discretion of the exporter as to whether the export proceeds should be received in a rupee equivalent in entirety or whether a portion should be maintained in convertible foreign exchange in the EEFC account. The exchange fluctuation that arises, it must be emphasized, is after the export transaction is complete and payment has been received by the exporter. Upon the completion of the export transaction, what the seller does with the proceeds, upon repatriation, is a matter of his option. The exchange fluctuation in the EEFC account arises after the completion of the export activity and does not bear a proximate and direct nexus with the export transaction so as to fall within the expression "derived" by the assessee in sub-s. (1) of s. 80HHC. Both the AO and the CIT(A) have made a distinction, which merits emphasis. The exchange fluctuation, as both those authorities noted, arose subsequent to the transaction of export. In other words, the exchange fluctuation was not on account of a delayed realization of export proceeds. The deposit of the receipts in the EEFC account and the exchange fluctuation which has arisen therefrom cannot be regarded as being part of the profits derived by the assessee from the export of goods or merchandise.

30. In the case of *Universal Radiators, Coimbatore Vs. Commissioner of Income Tax, Tamil Nadu*, , the assessee was engaged in the business of manufacturing radiators. For such purpose the assessee would import ingots. In transit the goods were seized by Pakistan authorities. The insurance company settled the claim. On account of devaluation of Indian rupee, the assessee received in Indian currency amount higher than that computed on the date of settlement of claim. The assessee claimed that the difference was not taxable. In this background, the Court held that the assessee was not engaged in the business of buying and selling of ingots and, therefore, compensation paid by the insurer to the assessee was not for any trading or business activity, but a just equivalent in money of the goods lost, nevertheless such receipt was taxable.

31. Under the circumstances, we find no error in the judgments of the Tribunal.

32. Learned counsel Mr. Nitin Mehta for the Revenue, however, contended that the foreign exchange fluctuation gain may arise under various circumstances, not all of them may be covered under s. 80HHC of the Act. Primarily, we do not see any distinction possible on the basis of different situations under which foreign exchange fluctuation may result. We are conscious that law permits hedging of foreign exchange fluctuation risk to an importer or an exporter. The exporter may, therefore, take steps as found commercially prudent to safeguard himself against drastic foreign exchange rate fluctuations and in the process may also limit the possibility of gain in case of favourable currency rate trends.

Nevertheless, the resultant gain in foreign exchange rate would still be due to the export made by the assessee. In any case, no such facts are recorded by the AO in any of these cases. We would, therefore, not entertain such speculative contention. In the result, the question is answered in favour of the assessees and against the Revenue. All Tax Appeals are dismissed.