

(2003) 03 KL CK 0042

In the High Court Of Kerala

Case No : IT Appeal No. 96 of 1999 & IT Appeal No. 96 of 1999 12 March 2003

Commissioner of Income Tax

APPELLANT

Vs

Smt. T.C. Usha

RESPONDENT

Date of Decision : 12-03-2003

Acts Referred:

Income Tax Act, 1961 — Section 2(45), 5, 70, 71, 80AB

Citation : (2003) 185 CTR 256 : (2004) 266 ITR 497

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

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and George K. George, for the Appellant;
P. Balachandran, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—The CIT, Trivandrum has filed this appeal against the order of the Tribunal, Cochin Bench, in ITA 637/C/95, in respect of the asst. yr. 1992-93. The respondent-assessee is an individual running a cashew business in the name and style of "Chethana Cashews", and also doing other business; transport business and trading business in electronic goods. In this case, we are only concerned with the cashew business of the assessee. The assessee is engaged in the processing of cashewnuts and its export. The assessee had also purchased cashewnuts from outside parties and exported the same to foreign countries. The cashewnuts purchased from outside parties will hereinafter be referred to as "trading goods" as defined in Clause (f) of Sub-section (3) of Section 80HHC of IT Act, 1961, for short "the Act". The assessee had profit in the export of own goods manufactured by it. But the assessee incurred loss in the export of trading goods. In the assessment for the year 1992-93, the AO computed the deduction available u/s 80HHC of the Act by deducting the loss incurred in the export of trading goods from the profits derived from the export of own goods (manufactured goods). The assessee inter alia challenged the deduction of the loss in the computation of profits for the purpose of Section 80HHC. The first

appellate authority confirmed the order of the AO on this point. In further appeal by the assessee, the Tribunal allowed the appeal on this point by relying on the decision of the Supreme Court in Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, and held that the AO was not justified in setting off the negative profit in respect of the export of trading goods against the aggregate of the export profits on manufactured goods, Being aggrieved by the said order of the Tribunal, this appeal is filed by the Revenue.

2. The appellant had formulated the following three questions of law on which notice was ordered :

"1. Whether, on the facts and in the circumstances of the case, while computing the relief u/s 80HHC of the IT Act, the processing charges could be excluded from the profits of the business as also from the turnover of the business?

2. Whether, on the facts and in the circumstances of the case and in view of Expln. (ba) to Section 80HHC and Clauses (iiia), (iiib) and (iiic) of Section 28, will not turnover take into account all other receipts other than the excluded items of receipts?

3. Whether, on the facts and in the circumstances of the case, the negative profit could be set off against the aggregate of the export profits on manufactured goods, incentives and sales to export house ?"

3. We have heard Sri P.K.R. Menon, Senior Central Government standing counsel for taxes appearing for the appellant and Sri. P. Balachandran, the learned counsel appearing for the respondent. The senior counsel for the appellant submitted that the benefit available u/s 80HHC of the Act can be worked out only after deducting the loss incurred by the assessee on the export of trading goods from the profits on the export of the manufactured goods. The senior counsel in support of the above, relied on the provisions of Section 80HHC(3)(c)(i) of the Act, r/w the provisions of Clause (baa) of the Explanation to Sub-section (3) thereof and the decisions of the Supreme Court in Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad, , Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, and Commissioner of Income Tax (Central), Delhi Vs. Harprasad and Co. P. Ltd., . Senior counsel further relied on the decision of the Madras High Court in Commissioner of Income Tax Vs. Macmillan Co. of India Ltd., and the decision of the Bombay High Court in IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax, . The senior counsel further submitted that Section 80AB of the Act will apply in respect of the computation of the deduction available u/s 80HHC of the Act, and that by virtue of the said provisions, the profits derived from the export business as provided u/s 80HHC(3)(c)(i) of the Act can be worked out only in accordance with the provisions of the Act which includes the provisions of Sections 70 and 71 dealing with set off of loss incurred in the business.

4. The learned counsel for the assessee, on the other hand, submits that Section 80HHC of the Act is a self-contained code in itself and that the computation of

the deduction has to be made strictly in accordance with the said provisions, and so construed, the profits of the business referred in Sub-clause (i) of Clause (c) of Sub-section (3) of Section 80HHC r/w the provisions of Clause (baa) of the Explanation to Sub-section (3), the profit has to be worked out strictly in accordance with the provisions of Sections 30 to 44D, which falls under the head "Income from profits and gains of business or profession and there is no question of applying the other provisions of the Act, particularly, the provisions of Sections 70 and 71 thereof. The counsel further submitted that the decision of the Supreme Court in *Cambay Electric Supply Industrial Co. Ltd.*'s case (supra) or the decision in *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax, Gujarat-I*, rendered in the context of the provisions of Sections 80M, 80E and 80AA of the Act has no application to Section 80HHC. The counsel pointed out that those provisions opens with the words, "Where the gross total income of an assessee being a company includes....." and it is in those circumstances, the Supreme Court has held that the benefit under the said provisions has to be worked out in accordance with the provisions of the Act. The counsel also pointed out that Section 80HHC does not start with such words and that Section 80HHC specifically makes the expression "the assessee is engaged in the business out of India of merchandise to which this section applies and further states that the deduction shall be allowed in accordance with and subject to the provisions of this section", which would clearly indicate that the profits derived from the export has to be arrived strictly in accordance with the provisions of this section and not by resort to the other provisions of the Act. The counsel submitted that the Tribunal has correctly applied the ratio of the decision of the Supreme Court in *Canara Workshops (P) Ltd.*'s case (supra). The counsel pointed out that the decisions of the Supreme Court in *Cambay Electric Supply Industrial Co. Ltd.*'s case (supra) and *Distributors (Baroda) (P) Ltd.*'s case (supra) were distinguished in that decision. The counsel also relied on the decision of the Bombay High Court in *Commissioner of Income Tax Vs. Shirke Construction Equipments Ltd.*, and the decision of the Gujarat High Court in *Commissioner of Income Tax Vs. Arvind Mills Ltd.*, . The counsel further submitted that this Court in *Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd.*, has held that Section 80AB of the Act is subject to the provisions of Section 80HHC, which decision has been affirmed by the Supreme Court, by its judgment dt. 2nd April, 2002, in Civil Appeal No. 4605/1998.

5. After hearing the counsel for the parties on 4th March, 2002, we found that there is a conflict of views on the question of applicability of the provisions of Sections 80A, 80AB and 80B of the Act between the two decisions of this Court, one in *Commissioner of Income Tax Vs. V.T. Joseph*, and the other in *A.V. Thomas & Co. Ltd.*'s case (supra), At that time, we were not aware of the fact that the decision in *A.V. Thomas & Co. Ltd.*'s case (supra) had been affirmed by the Supreme Court by the judgment mentioned above. In those circumstances, we referred the matter to a larger bench for resolving the conflict between the said two decisions of this Court. However, before signing the order, the learned

counsel appearing for the assessee brought to our notice the decision of the Supreme Court in Civil Appeal No. 4605/1998 affirming the decision in A.V. Thomas & Co. Ltd.'s case (supra), Hence, the case was posted as "to be spoken to" to this date and the matter was further heard on merits. Now there is no surviving conflict between the two decisions of this Court. We also note that both the said decisions were rendered in the context of the provisions of Section 80HHC which was different from the one with which we are now considering. In these circumstances, we are disposing of this case on merits by this judgment.

6. The question for consideration in this case, as already noted, is as to whether in the computation of the relief u/s 80HHC of the Act, the AO is entitled to deduct the loss incurred from the export of the trading goods from the profits derived from the export of own goods, namely, the manufactured goods. In order to appreciate the rival contentions, it is necessary to refer to the relevant provisions of the Act. Section 80HHC(1) as it stood at the relevant time reads as follows :

"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 or 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 of the profits derived by the assessee from the export of such goods of merchandise;"

Sub-section (3), Clause (c)(i) of Section 80HHC reads as follows :

"(3) For the purpose of Sub-section (1),--

(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-exports 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"

Explanations (a), (b), (c) and (f) to Sub-section (3) of Section 80HHC reads as follows :--

"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;

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

Explanation (baa) to Section 80HHC reads as follows :

"(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 Clauses (iiia), (iiib) and (iiic) of Section 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,"

7. Since the Revenue relies on the decision of the Supreme Court rendered in the context of the provisions of Section 80E of the Act, as it stood upto 1st April, 1989, and also Section 80M of the Act, the said provisions are also extracted :

"80E. Deduction in respect of profits and gains from specified industries in the case of certain companies.--(1) "In the case of a company to which this section applies, where the total income (as computed in accordance with the other provisions of this Act) includes any profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the list in the fifth schedule, there shall be allowed a deduction from such profits and gains of an amount equal to eight per cent, thereof, in computing the total income of the company.

(2) This section applies to--

(a) an Indian company; or

(b) any other company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India, but does not apply to any Indian company referred to in Clause (a), or to any other company referred to in Clause (b), if such Indian or other company is a company referred to in Section 108 and its total income as computed before applying the provisions of Sub-section (1) does not exceed twenty-five thousand rupees."

The relevant portion of Section 80M reads as follows :

"Deduction in respect of certain intercorporate dividends.--(1) Where the gross total income of an assessee being a company includes any income by way of dividends received by it from a domestic company, 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 from such income by way of dividends of an amount equal to--

(a) where the assessee is a foreign company--

(i) in respect of such income by way of dividends received by it from an Indian company which is not such a company as is referred to in Section 108 and which is mainly engaged in a priority industry--80 per cent of such income;

(ii) in respect of such income by way of dividends other than the dividends referred to in Sub-clause (i)--65 per cent of such income.

(b) where the assessee is a domestic company--in respect of any such income by way of dividends--60 per cent of such income."

8. u/s 80HHC(1), in a case 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 of the profits derived by the assessee from the export of such goods or merchandise. The profits derived by the assessee referred to in Sub-section (1) from the export of such goods or merchandise has to be computed in accordance with the provisions of Sub-section (3) thereof. In a case where the exclusive business of the assessee is the export out of India of goods of merchandise manufactured or processed by the assessee, the profits has to be worked out under the provisions of Clause (a) of Sub-section (3). In a case where the export out of India is exclusively of trading goods, the profits have to be worked out in accordance with the provisions of Clause (b) of Sub-section (3). However, when the export out of India is of goods or merchandise, both manufactured or processed goods and trading goods--the computation is provided under Clause (c) of Sub-section (3). Under the said clause, where the export out of India is of goods or merchandise, manufactured or processed by the assessee, and of trading goods, the profit derived from such export shall 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, There is no difficulty in finding out the adjusted export turnover and the adjusted total turnover of the business, with reference to the definition of the said two terms contained in clauses (a) and (c) of the Explanation to Sub-section (3). However, the difficulty arises only in arriving at the adjusted profits of the business referred to in Sub-clause (i) of Clause (c). The adjusted profits of the business as already extracted earlier, 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). Here also there is no difficulty in finding out the profits derived from the business of export out of India of trading

goods, because the computation is provided under Clause (b) of Sub-section (3). The expressions, "the profits of the business" is defined in Clause (baa) of the Explanation to Section 80HHC as the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by 90 per cent of the sum referred to in Clauses (iiia), (iiib) and (iiic) of Section 28 or on any receipts by way of brokerage, commission interest, rent, charges or any other receipt of a similar nature, included in such profits and the profits of any branch, office warehouse or any other establishment of the assessee situate outside India,

9. The dispute in the present case thus narrows down to the meaning of the expression "profits of the business as computed under the head profits and gains of business or profession." According to the senior counsel for the Revenue when the definition of profits of the business says that it has to be computed under the head profits and gains of business or profession, necessarily, the profits and gains of business or profession has to be computed in accordance with the provisions of the Act. If the meaning of profits and gains of business is understood in that manner necessarily, the loss suffered in the export of trading goods has to be deducted from the profits of the export of own goods by applying the provisions of Section 70 of the Act, On the other hand, the contention of the counsel for the assessee is that Clause (baa) which defines profits of the business clearly says that the profits of the business has to be computed under the head profits and gains of business or profession, which in turn means that by virtue of the provisions of Section 29 computed under the provisions of Sections 30 to 44D of the Act, and no further.

10. Here, it must be noted that Section 80HHC is a special provision which provides for a deduction in respect of profits retained for export business. Sub-s. (1) clearly provides that the deduction is in respect of the goods or merchandise to which the said section applies, and that the deduction shall be allowed in accordance with and subject to the provisions of this section. Further, the deduction is in respect of the profits derived by the assessee from the export of such goods or merchandise computed in accordance with the provisions of Sub-section (3). In Clause (c) of Sub-section (3), regarding computation of profits, where the export out of India is of goods or merchandise, manufactured or processed by the assessee and of trading goods, there is no reference to any "gross total income" or "total income" or any computation of total income. We find that the reference in Sub-clause (i) of Clause (c) of Sub-section (3) is to the amount which bears to the adjusted profits of the business, and the definition of the expression adjusted profits of the business also refers to the profits of the business, and by virtue of Clause (baa) of the Explanation to Section 80HHC, it means the profits of the business as computed under the head profits and gains of business or profession. Nowhere in the computation provision, we find any requirement to compute the profit derived from export business in accordance with the provisions of the Act, Clause (baa) only provides for computation of the profits of the business under the head "Profits and gains of business or profession". Chapter 4 under the heading D-Profits and gains of business or

profession, Sections 28 to 43D, occurs. Thus, though the computation is of the profits of the business, by virtue of the definition of "profits of the business", all the provisions under the head profits and gains of business or profession has to be read into the Explanation (baa) besides the deduction provided under Clauses 1 and 2 to the Explanation. Admittedly, Sections 70 and 71 of the Act does not fall under the head profits and gains of business or profession. As already noted, Section 80HHC is a self-contained provision and the benefit available under Sub-section (1) of Section 80HHC has to be worked out in accordance with and subject to the provisions of Section 80HHC only. When Section 80HHC clearly says so, according to us, there is no warrant to give the meaning of the words profits of the business, occurring in Clause (baa) of the Explanation to the said section, a wider meaning than what is provided therein. If the legislative intention was to define the "profits of the business" as computation of the profits of the business in accordance with the provisions of the Act, legislature would have said so. In such a case, there was no need to confine the computation of profit under the head profits and gains of business or profession. According to us, the legislative intention was clearly to exclude the computation of the profits of the business in accordance with the provisions of the Act, for the computation of the profits in accordance with the provisions of the Act arises only for arriving at the total income or gross total income. In a case where the benefit is geared to a percentage pf the total income or gross total income, certainly, the definition of total income contained in Section 2(45) will apply, which clearly provides for arriving at the total income referred to in Section 5, computed in the manner as laid down in the Act. Even in the absence of specific mention about the computation of the total income, in accordance with the provisions of the Act in the concerned section, if the expression "gross total income or total income" occurs in the said section, the total income has to be computed in accordance with the provisions of the Act. As we have already noticed, Section 80HHC(1) or the computation provision under Sub-section (3), particularly, Clause (c) thereof, does not refer to either gross total income or total income, with reference to which the computation of the profits of the business has to be arrived at.

11. Thus, we are of the view that the Tribunal was justified in its conclusion that the loss incurred in the export of trading goods cannot be deducted from the profit derived from the export of own goods. Under the scheme of Section 80HHC as it stood at the relevant time, actual profits from the export business was not a necessary requirement for grant of relief under the said section, The profits derived from the export business has to be worked on a formula which is not based on any actual export profit.

This view of ours finds support from the decision of the Bombay High Court in *Shirke Construction Equipments Ltd.*'s case (supra), and the decision of the Gujarat High Court in *Arvind Mills Ltd.*'s case (supra). Two questions arose for consideration before the Bombay High Court in *Shirke Construction Equipments Ltd.*'s case (supra); the first one was as to whether Section 80AB apply to Section 80HHC. The second question was as to whether, in the determination of

business profits u/s 80HHC, the unabsorbed business losses of the earlier years u/s 72 should be set off. The assessee in that case claimed deduction u/s 80HHC in respect of the profits derived from exports. The export profits were calculated with reference to the profits of the business in proportion of the export turnover to the total turnover as per Section 80HHC(3). The assessee contended that in view of Section 80HHC r/w Explanation (baa) the profits of the business has been defined to mean profits computed under the head profits and gains of business which in turn refers to Sections 28 to 44D and did not refer to Section 72 of the Act. In view of the aforesaid provisions the assessee did not set off the brought forward losses while computing the profits of the business. The AO did not accept this computation. He came to the conclusion that in view of Section 80AB which contain a non obstante clause, the assessee was required to compute business profits by setting off brought forward losses as contemplated by Section 72 of the IT Act. The assessee succeeded before the CIT(A) and before the Tribunal, The Department in appeal before the High Court contended that Chapter VI-A deals with the deductions to be made in computing the total income, that Section 80A expressly provides that in computing the total income of an assessee, there shall be allowed from its gross total income the deduction specified in Section 80C to Section 80U which included Section 80HHC and emphasised that Section 80AB which refers to the deductions to be made with reference to the income included in the gross total income, and therefore, any income of a specified nature which is included in the gross total income shall be computed in accordance with the provisions of the Act. In other words, the contention was that in computing the total income of an assessee, deduction specified in Section 80HHC shall be allowed from the gross total income and such deduction shall not exceed the gross total income. On the other hand, the counsel for the assessee contended that the object of Section 80HHC was to encourage exports and that the object was to ascertain the export profits out of the business profits, for which the basic formula to be applied u/s 80HHC(3) is to arrive at the export profits by multiplying the business profits with export turnover by total turnover. He also contended that the effect of Section 80AB was that where any income in respect of which deduction is claimed falls under the heading "C" of Chapter VI-A is included in the gross total income, then the amount of income of that nature shall first be decided in accordance with the provisions of the Act before making any deductions under Chapter VI-A. However, Section 80HHC does not provide that income from exports should be included in the gross total income and that the legislature has made a departure from other sections of Chapter VI-A in enacting Section 80HHC. He also contended that Section 80AB came into the picture because a controversy arose as to whether dividend income was relatable to gross income or whether it was relatable to net income and Section 80AB came to be introduced to make it applicable to all specified incomes like royalty. He consequently contended that Section 80AB did not control Section 80HHC. The division bench considered the questions and observed that for the purpose of computing the deduction u/s 80HHC(3) the formula of business profit export turnover/total turnover is very important, and that a bare reading of the section

along with Clauses (ba) and (baa) indicate that profits of the business were required to be computed under the head "Profits and gains of business or profession". Sections 28 and 29 of the IT Act clearly lay down different types of income chargeable to Income Tax under the above head. Section 28 comes under the caption "profits and gains of business". Section 29 categorically states that the income referred to in Section 28 computed in accordance with the provisions contained in Sections 30 to 43D, Therefore, Section 72 is excluded; the object being to, encourage the exports; the object being to ascertain the export profits out of the business profits. Moreover, a reading of Section 80HHC with the explanations show that the profits of the current year were required to be taken into account and hence Section 72 of the IT Act did not apply. It was also observed that in the case of Section 80P and Section 80M as it then stood, and other set of Sections under Chapter VI-A the business profits in the above formula is required to be worked out by computing the same as per the provisions of the Act. It will include Section 72 also. The Court further observed as follows :

"... However, when it comes to Section 80HHC(3), the special definition of the words "profits of the business" as mentioned in Clause (baa) of the Explanation is required to be kept in mind. This clause expressly refers to profits of the business under the head "Profits and gains of business". It refers to Sections 28 and 29. Therefore, the legislature has provided, for an artificial formula only in Section 80HHC(3) under which the profits of the business are required to be computed on the basis of Sections 28 to 44D. It excludes Section 72. This is because the legislature wanted the profits of the current year to be taken into account. Hence, the legislature intended Section 72 to be kept out. The object appears to be to give maximum benefit to the exporter who earns foreign exchange for the country, Therefore, even though Section 80AB contemplates a non obstante clause, the said Section 80AB will be subject to Section 80HHC to the extent of export profits being worked out from the business profits. This view is also supported by the language of Section 80AB. In the case of Section 80P, etc., the same formula would work. However, in those cases, the business profits are required to be computed on the basis of the provisions of the Act in their entirety including Section 71 and Section 72 of the Act. However, when it comes to the artificial formula for computing the export profits for the purposes of deduction from the gross total income in Section 80HHC(3) the business profits shall be computed under the head "Profits and gains of business" which, in turn, refers to Section 28 to Section 44D and which will exclude Section 71 and Section 72 of the Act. Therefore, Section 80AB does not control Section 80HHC(3). Therefore, Section 80HHC is a complete code by itself. Hence, there is no merit in this appeal..."

The High Court also considered the decision of the Supreme Court in *Motilal Pesticides (I.) Pvt. Ltd. Vs. Commissioner of Income Tax*, rendered in the context of Section 80P of the Act, and observed that there is difference in language between Section 80AB and Section 80P on the one hand, and Section 80HHC on

the other hand. The High Court also referred to the decision of this Court in V.T. Joseph's case (supra) and the decision in A.V. Thomas & Co. Ltd.'s case (supra) with regard to the application of the provisions of Section 80AB to the provisions of Section 80HHC of the Act, and had followed the decision in A.V. Thomas & Co. Ltd.'s case (supra) which has taken the view that Section 80AB of the Act is subject to Section 80HHC. The decision of the Supreme Court in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) and Distributors (Baroda) (P) Ltd.'s case (supra) rendered in the context of Sections 80E and 80M of the Act were also distinguished.

The Gujarat High Court in Arvind Mills Ltd.'s case (supra) has also taken the very same view and in fact it followed the view taken by the Bombay High Court and by this Court in A.V. Thomas & Co. Ltd.'s case (supra). In A.V. Thomas & Co. Ltd.'s case (supra), the assessee claimed deduction u/s 80HHC on the turnover relating to the export of cardamom. The assessee had suffered loss in the business of export of cardamom. The AO rejected the claim in view of Section 80AB, The appellate authority and the Tribunal took the view that Section 80AB has no application. This Court after referring to the provisions of Sections 80AB and 80HHC observed that a mere reading of Section 80AB would show that computation of deduction is geared to the amount of income, but coming to the provisions of Section 80HHC, quantification of the amount of deduction is geared to the export turnover and not to the income. It was held that the assessee is entitled to the deduction u/s 80HHC. Here it must be noted that the provisions of Section 80HHC is slightly different from the one considered in A.V. Thomas & Co. Ltd.'s case (supra). In that case, as already observed, the deduction was geared to a percentage of the turnover whereas in the present case the deduction was of the profit derived by the assessee from the export business.

12. Now, we will also refer to the decisions of the Supreme Court relied on by the senior counsel appearing for the applicant. The senior counsel submitted that even in a situation where the expression profits of the business is defined under Clause (baa) of the Explanation to Section 80HHC which means profits of the business computed under the head profits and gains of business, the income has to be computed in accordance with the provisions of the Act, which will certainly take in Section 70 of the Act providing for setting off the loss incurred in the business. In that context, the senior counsel has relied on the decision of the Supreme Court in Harprasad & Co. (P) Ltd.'s case (supra). There, the question before the Supreme Court was whether the capital loss could be determined and carried forward in accordance with the provisions of Section 24 of the Indian IT Act, 1922, when the provisions of Section 12B of the Indian IT Act, 1922 itself were not "applicable in the asst. yr. 1955-56. In that case, the assessee a Private Limited Company had purchased 1124 shares of M/s Intercontinent Travancore (P) Ltd. at a cost of Rs. 1,12,400 from M/s Escorts (ASM) Ltd. In the relevant accounting year, the assessee received 562 bonus shares from the said company. It thus acquired a total number of 1986 shares, During the relevant previous years; the assessee sold all these 1686 shares to M/s Escorts (Agents) Ltd. For

Rs. 84,300 and claimed a loss of Rs. 84,862 in the IT return filed by it. The ITO disallowed the entire loss on the ground that it was a loss of capital nature. This was confirmed in appeal by the first appellate authority, In further appeal before the Tribunal, the assessee's counsel took up the plea that the amount of loss which had been held to be a capital loss by the authorities below, should be allowed to be carried forward and set off against profits and gains, if any, under the head capital gains earned in future as laid down in Sub-sections (2A) and (2B) of Section 24 of the said Act.

The Tribunal, in spite of the objection from the Departmental Representative accepted the new ground and also accepted the contention of the assessee and directed that the capital loss should be carried forward and set off against capital gains, if any, in future. It is in those context, the question has arisen before the Supreme Court. The contention taken by the Revenue before the High Court that the expression capital gains in Sub-section (2A) of Section 24 has reference only to Section 12B so that the loss suffered in the year in which the profits under the head capital gains were not taxable could not fall within Sub-section (2A) of Section 24. The Supreme Court considered the said question with reference to the meaning of the terms income, total income, computation of total income, carry forward of loss and its purpose, in the context of the scheme of the Act. In that context the Supreme Court made the following general observations :

"Section 2(6c) provides that "income" includes (among other things)--

"(vi) any capital gain chargeable u/s 12B,"

From the charging provisions of the Act, it is discernible that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits and gains" represent plus "income" whereas losses represent "minus Income". In other words, loss is negative profit. Both positive and negative profits are of a Revenue character. Both must enter into computation wherever it becomes material, in the same mode of the taxable income of the assessee. Although Section 6 classifies income under six heads, the main charging provision is Section 3 which levies Income Tax, as only one tax, on the "total income" of the assessee as defined in Section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the "total amount of income, profits and gains referred to in Section 4(1). Secondly, it must be "computed in the manner laid down in the Act," If either of these conditions fails, the income will not be a part of the total income that can be brought to charge."

13. According to us, the above general observations made by the Supreme Court has no application in a case of determination of profits derived from the business u/s 80HHC of the Act, for as already noted, Section 80HHC is a self contained one and it provides that the mode of computation of the profits derived from the business, which in turn refers to the provisions of Sections 28 to 44D, by virtue of the Explanation contained in Clause (baa) of Section 80HHC of the Act. The

general observations of the Supreme Court will apply only to a case of determination of income, total income, or the computation of total income. It has no application to a case of determination of profits of business contained in Section 80HHC(3)(c)(i) of the Act.

14. The other decision relied on by the senior counsel is the decision of the Supreme Court in Cambay Electric Supply Industrial Co. Ltd.'s case (*supra*). The question involved in that case was as to whether unabsorbed depreciation and development rebate is not deductible in computing profits u/s 80E(1) of the Act. The Supreme Court observed that the answer to the question really turns on the proper construction of the provision contained in Section 80E(1) of the Act. After extracting the provisions of Section 80E of the Act, the Supreme Court observed that the aforesaid provision has been enacted for the purpose of providing for certain special deduction to be made in computing the total income in the case of specified industries over and above the other general deductions contemplated by the Act. It was also observed that the question to be considered is regarding the manner in which the deduction of 8 per cent contemplated by that provision should be computed. Regarding this, the Supreme Court observed thus :

"... On reading Sub-section (1) it will become clear that three important steps are required to be taken before the special deduction permissible thereunder is allowed and the net total income exigible to tax is determined. First, compute the total income of the concerned assessee in accordance with the other provisions of the Act, i.e., in accordance with all the provisions except Section 80E; secondly ascertain what part of the total income so computed represents the profits and gains attributable to the business of the specified industry (here generation and distribution of electricity) and, thirdly, if there be profits and gains so attributable, deduct 8 per cent thereof from such profits and gains and then arrive at the net total income exigible to tax. As regards the first step mentioned above, the important words in Sub-section (1) are those that appear in parenthesis, namely, "as computed in accordance with the other provisions of this Act" and these words clearly contain a mandate that the total income of the concerned assessee must be computed in accordance with the other provisions of the Act without reference to Section 80E and since in the instant case it is income from business the same as per Section 29 will have to be computed in accordance with Sections 30 to 43A which would include Section 41(2)...."

The Supreme Court also noted that the assessee had contended before the High Court that the expression total income appearing in Section 80E(1) had been used in its commercial sense and since the unabsorbed depreciation and the unabsorbed rebate has nothing to do with the commercial profits attributable to the business, the said two items would not be deductible before arriving at the figure that would be exigible to the 8 per cent deduction. Repelling the said contention, the Supreme Court observed as follows :--

"... First, in Sub-section (1) of Section 80E, the expression "total income" is followed by the words "as computed in accordance with the other provisions of

this Act" in parenthesis and the mandate of these words clearly negatives the argument that the expression "total income" has been used in the sense of commercial profits. Secondly, the expression of the "total income" has been defined in Section 2(45) of the Act as meaning "the total amount of income referred to in Section 5, computed in the manner laid down in this Act" and when this definition has been furnished by the Act itself the expression as appearing in Section 80E(1) must, in the absence of anything in the context suggesting to the contrary, be construed in accordance with such definition.

Since the words in the parenthesis occurring in Sub-section (1) lay down the manner in which the total income of the concerned assessee is to be computed there would be no scope for excluding items like unabsorbed depreciation and unabsorbed development rebate while computing the total income on the basis that the total income spoken of by Sub-section (1) means commercial profits,"

15. A constitution bench of the Supreme Court in Distributors (Baroda) (P) Ltd.'s case (supra) has noted that there is a conflict between two decisions of the Supreme Court, one in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) and the other in Cloth Traders (P) Ltd.'s case (supra), and resolved the said conflict by holding that the decision of the Supreme Court in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) represents the correct legal position. The Supreme Court in Distributors (Baroda) (P) Ltd.'s case (supra) was concerned with the provisions of Section 80M of the Act, which according to the Supreme Court is almost similar to the provisions of Section 80E of the Act considered in Cambay Electric Supply Industrial Co. Ltd.'s case (supra). The Supreme Court accordingly followed its earlier decision in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) with regard to the scope and content of Section 80M of the Act. It must be noted that the aforesaid decision of the Supreme Court relied on by the senior counsel for the Revenue are rendered in the context of the provisions of Sections 80E and 80M of the Act. It is also relevant to note that the wording of Sections 80E and 80M of the Act is different from the wording of Section 80HHC. Both in section 80E and in Section 80M there occurs the expression total income and therefore, the total income must necessarily be computed in accordance with the provisions of the Act, in view of the definition of the total income in Section 2(45) r/w the charging section of the Act. That is the reason why the Supreme Court in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) held that it is not possible to accept the view that Section 72 has no bearing or is unconnected with the computation of the total income of the assessee under the head "Profits and gains of business or profession". In other words the question of applying Section 72 of the Act arises only in the computation of total income under the Act.

16. The Tribunal in this case has relied on the decision of the Supreme Court in Canara Workshops (P) Ltd.'s case (supra). The Supreme Court in that case was concerned with a claim for deduction u/s 80E of the Act. The said provision provided for a deduction of 8 per cent from the profits and gains. The question

was whether, for the purpose of granting relief u/s 80E, the loss suffered by the assessee in the manufacture of alloy steels can be set off against the profits arising from the manufacture of automobile ancillaries. The Supreme Court observed that having regard to the object and scheme of the provisions of Section 80E, the profits and gains earned by an industry mentioned in that section cannot be reduced by the loss suffered by any other industry or industries owned by the assessee. The Supreme Court referred to its earlier decisions which we have considered hereinabove and observed that the said decisions have no application. In fact the Bombay High Court in the decision discussed earlier had considered all these decisions and took the view that those decisions have no application to the provisions of Section 80HHC.

17. In this case, as we have already noted, Section 80HHC Explanation in Clause (baa) of the Act clearly defines the expression profits of business as profits of business computed under the head profits and gains of business or profession, which means, profits computed in accordance with the provisions of Sections 30 to 44D of the Act. In view of the special provisions contained in Section 80HHC (3) r/w Explanation in Clause (baa) according to us, there is no scope for the application of the decisions of the Supreme Court rendered in the context of the provisions of Section 80E or 80M of the Act.

As we have already noted that there is no scope for the application of Section 80AB in the computation of profits derived from export business as provided u/s 80HHC(3)(c)(i) r/w Expln. (baa) of the Act. For all these reasons, we answer question No. 3 formulated by the appellant on which notice is issued, against the Revenue and in favour of the assessee.

18. Questions 1 and 2 formulated by the assessee on which notice is issued is already covered by our judgment dt. 13th Feb., 2003, in ITA Nos. 30/00, 72/00 and 105/00 against the Revenue and in favour of the assessee. In the circumstances we answer the said questions against the Revenue and in favour of the assessee. There is no merit in this appeal. It is accordingly dismissed.