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**(1996) 09 KL CK 0021**

**In the High Court Of Kerala**

**Case No : Income-tax Reference No. 38 of 1993**

Commissioner of Income Tax

APPELLANT

Vs

V.T. Joseph

RESPONDENT

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**Date of Decision : 26-09-1996**

**Acts Referred:**

Income Tax Act, 1961 — Section 263, 80AB, 80HHC, 80HHC(1)

**Citation :** (1997) 137 CTR 318 : (1997) 225 ITR 731

**Hon'ble Judges :** V.V. Kamat, J;K.A. Mohamed Shafi, J

**Bench :** Division Bench

**Advocate :** P.K.R. Menon, for the Appellant; M.A. Firoz, amicus curiae, for the Respondent

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## **Judgement**

V.V. Kamat, J.—The following question expects our answer : " Whether, on the facts and in the circumstances of the case -

(i) is not the claim for deduction u/s 80HHC restricted by the provisions of Section 80AB of the Income Tax Act, 1961 ?

(ii) is not the deduction u/s 80HHC to be allowed only to the extent of the income from export business included in the total income ?

(iii) and on an interpretation of the relevant provisions, the assessee is entitled to claim anything in excess of Rs. 33,103 u/s 80HHC of the Income Tax Act ?"

In fact after hearing the matter, the answer is firstly provided by the inbuilt material of the statutory provisions of Section 80HHC of the Income Tax Act, 1961, and in addition, the background and nature of the circumstances in which Section 80AB of the Income Tax Act, 1961, came up on the statute book, apart from the statutory provisions thereof, if necessary.

2. The question is now fully answered in all its perspective by the decision of the Constitution Bench of the apex court in Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, , finally settling the position which unfortunately

however, does not appear to have been brought to the notice of the Income Tax Appellate Tribunal when it decided the matter on February 28, 1992. Otherwise the Tribunal would not have been required to despatch the proceedings to this court for a reference to answer the question as has been brought before us by the Revenue.

3. In essence, the question is relating to the deduction in accordance with the provisions of Section 80HHC of the Income Tax Act, 1961, and as a result thereof what would be really relevant for the matter of deduction, whether the export turnover or, as held by the Tribunal, that the deduction should be computed without being restricted to the quantum of income derived from export, making computation of export profit for ascertaining the quantum of deduction as not necessary at all.

4. The assessee is an exporter of sea-foods. When the assessment was completed, by an order dated February 28, 1986, the Income Tax Officer allowed deduction u/s 80HHC amounting to Rs. 2,77,878. This was required to be revised as a result of the decision of the Commissioner of Income Tax (Appeals) who granted deduction with regard to the provision of purchase tax to the extent of Rs. 3,88,974 obviously as business expenditure. This had to be taken into consideration and this was done by the revised order dated September 30, 1986.

5. There was yet another occasion for revision for giving set off of carried forward business loss of Rs. 86,580. This amount was required to be carried forward, and related to the assessment year 1981-82. This was done by the Income Tax Officer on January 9, 1987. All this was for the assessment year 1983-84, in regard to which the present proceedings are required to be dealt with. On this occasion, it would be found that the net income of the assessee was computed at Rs. 2,39,894. This was before considering allowance of deduction u/s 80HHC. The Income Tax Officer granted deduction u/s 80HHC to the extent of the whole of the net income of Rs. 2,39,894 showing, as a result thereof, the total income as reduced to "nil". This was an occasion for the Commissioner of Income Tax to move u/s 263 of the Income Tax Act. The Commissioner of Income Tax, acting u/s 263 of the Income Tax Act, 1961, found the said order dated January 9, 1987, of the Income Tax Officer showing the total income as reduced to "nil" as erroneous and prejudicial to the interests of the Revenue. This order u/s 263 of the Income Tax Act, 1961, is dated February 22, 1989. The Commissioner of Income Tax came to the conclusion that the grant of relief u/s 80HHC of the Act of Rs. 2,39,894 was much in excess. The Commissioner took the view that the deduction u/s 80HHC should have been limited to the business income.

6. From the proceedings of assessment (see page 6 of the paper book), the Commissioner took the income originally shown by the assessee at Rs. 5,08,657. Accepting the result of the earlier two orders which had received finality, the Commissioner, from this original income, deducted business loss of Rs. 86,580 as well as the provision for purchase tax of Rs. 3,88,974, totalling to Rs. 4,75,554.

Thus the Commissioner acting u/s 263 of the Act determined the balance income of Rs. 33,103.

7. In the process of reasoning, the Commissioner has observed that the maximum amount admissible as deduction u/s 80HHC would be restricted to Rs. 33,103. In accordance with this conclusion, the Income Tax Officer was directed to redetermine the admissible deduction u/s 80HHC of the Act, taking into account all the facts and circumstances of the case and on giving due weightage to the assessee's submissions and contentions in regard to the nature of the notional profit u/s 41(2) of the Act, and such related matters.

8. Accordingly, the assessment order was modified by the order dated February 27, 1990, u/s 143(3) read with Section 263 of the Income Tax Act, 1961. The assessee approached the Commissioner of Income Tax (Appeals), Trivandrum, and the first appellate authority by the order dated December 31, 1990, dismissed the appeal confirming the assessment order limiting the question of deduction u/s 80HHC referable to the amount of Rs. 33,103 arrived at in the above process.

9. The first appellate authority has emphasised certain aspects in the following manner :

" It is not in dispute that the appellant is having income from several other sources including income from export of marine food products. The provisions of Section 80HHC provide for deduction in respect of profits earned on export of goods or merchandise to which the said section applies."

Thereafter the authority placed reliance on the statutory provisions of Section 80AB of the Income Tax Act. The statutory provisions of Section 80AB are reproduced hereinbelow :

" Where any deduction is required to be made or allowed under any section (except Section 80M) included in this Chapter under the heading "C.-Deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

However, after quoting the statutory provision, the authority proceeded to record reasons to the effect that the deduction in respect of any income of the nature specified in that section is allowable only with reference to the amount of income of that nature which is included in the gross total income of the assessee.

10. It needs to be noted at this stage that learned senior tax counsel, although in substance supports this order, has a submission that the really important

provisions of Section 80AB (reproduced above) of the Act have not been really emphasised and appreciated. Learned counsel brought to our attention precisely the statutory provision in regard to which we have supplied underlining to the reproduction thereof. Learned counsel submitted that the more important words are that the amount of income of that nature as computed in accordance with the provisions of this Act shall alone be deemed to be the amount of income. Learned counsel submitted that these statutory provisions provide a clear answer and would have really fortified the above reasoning of the first appellate authority.

11. Further travel of the proceedings to the Income Tax Appellate Tribunal, Cochin Bench, shows that the Tribunal took the view that Section 80AB is not applicable to the facts of the case. Even then the Tribunal has emphasised that the fact that the assessee derived income from export business of marine food products is not in dispute. The Tribunal concentrated on the position according to it that the dispute is in respect of computation u/s 80HHC alone and therefore the deduction has to be calculated on the income from export business. The Tribunal has also referred to the new proviso added for the assessment year 1987-88 to the following effect :

" 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."

It is on the basis of the above proviso the Tribunal continues with the reasoning that the deduction is computed without being restricted to the quantum of income derived from export as per the law as stood at the relevant time. In other words, the Tribunal relied on the proviso coming on the statute for the assessment year 1987-88 as a situation of its being inapplicable till then. The Tribunal held that Section 80AB is not applicable and consequently a conclusion that the computation by the Income Tax Officer is not correct. The Tribunal appears to have relied upon the Tribunal's decisions referred to therein for the proposition that the provisions of Section 80AB need not govern Section 80HHC.

12. As stated at the outset, in the first instance the perusal of the statutory provisions of Section 80HHC itself provide sufficient assurance with reference to determination of the source in regard to which deduction can be considered. The very marginal note, apart from the statutory contents, specifies that the deduction is in respect of export turnover. Then the provisions of Section 80HHC(1) also provide further intrinsic material. Deduction is statutorily applicable where the assessee exports out of India, subject to other provisions, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, certain deductions specified thereafter in Clauses (a) and (b). Clause (a) refers to deduction of four per cent. of the export turnover whereas Clause (b) refers to deduction of five per cent. of the amount by which the export turnover of such goods or merchandise during the previous year exceeds the export of such goods or merchandise during the immediately preceding previous year. Thus, it is

abundantly clear that the statutory provision under consideration links the question of deduction inseparably with "the export turnover and five per cent. of the difference specified in Clause (b) thereof additionally.

13. Learned senior tax counsel placed before us the decision of the Constitution Bench of the apex court in *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, . On going through the decision, we find that this was in view of the earlier three-judge Bench decision in *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I*, of the apex court taking a different view. Learned senior tax counsel also brought to our notice that this view in *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I*, did not in fact consider a yet earlier decision in *Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad*, of the apex court. We have gone through all the three decisions. However, the Constitution Bench has finally settled the situation with reference to the relevant quantum of income referable to the specified category. The Constitution Bench was considering the question of deduction with reference to the provisions of Section 80M(1) of the Act and it has ruled in this connection that the deduction is required to be calculated with reference to the amount of dividend computed in accordance with the provisions of the Act and forming part of the gross total income and not with reference to the full amount of dividend received by the assessee. In this context, the Constitution Bench has particularly observed that Section 80AA is merely declaratory of the law and, therefore, retrospective in operation. The Constitution Bench was also more than aware of the ordinary and consistent reluctance to overturn the earlier decision given by a Bench. Reading of the judgments of the Constitution Bench, this awareness is writ large. The apex court has declared that what is included in the gross total income in such a case is a particular quantum of income belonging to the specified category and has in the context of the reasoning emphasised the statutory provisions with particular emphasis on the phrase "such income by way of dividends" to hold that such income must be referable not only to the category of income included in the gross total income, but also to the quantum of income so included. The Constitution Bench found it as a matter of plain grammar that the words "such income by way of dividends" must have reference to the income by way of dividends mentioned earlier and that would be income by way of dividends from a domestic company which is included in the gross total income. The approach of the Constitution Bench also goes a long way in the determination of the controversy before us.

14. Learned senior tax counsel brought to our notice the occasion and the necessity for bringing Section 80AB by way of insertion through the Finance (No. 2) Act, 1980, with effect from April 1, 1981.

15. Learned counsel contended that an independent provision (Section 80AB) with effect from April 1, 1981, to provide that the deductions specified in that Chapter (Chapter VI-A) will be granted with reference to the net income

includible in the gross total income computed in accordance with the other provisions of the Income Tax Act has been made. To be precise, learned counsel submitted that the deduction from the gross total income in relation to the various provisions in Chapter VI-A will be calculated with reference to the gross amount of such income as reduced by the expenditure specified in the other sections of the Act. Learned counsel also submitted that even the Constitution Bench has also observed that these provisions are declaratory in character and have to be understood with reference to the intrinsic material in the statutory provision itself.

16. For all the above reasons, the order of the Income Tax Appellate Tribunal gets quashed and set aside and that of the Commissioner of Income Tax (Appeals) would require endorsement.

17. For the above reasons, we answer the question--the first two parts thereof in the affirmative and the third part in the negative to mean that the assessee is not entitled to claim anything in excess of Rs. 33,103 u/s 80HHC of the Income Tax Act.

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