

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 1699 OF 2012
(Arising out of SLP (C) NO. 26558 OF 2010)

M/s Topman Exports

... Appellant

Versus

Commissioner of Income Tax, Mumbai

... Respondent

WITH

CIVIL APPEAL No. 1700 OF 2012
(Arising out of SLP (C) No. 27418 of 2010),

CIVIL APPEAL No. 1701 OF 2012
(Arising out of SLP (C) No.27552 of 2010),

CIVIL APPEAL No. 1704 OF 2012
(Arising out of SLP (C) No.27583 of 2010),

CIVIL APPEAL No. 1705 OF 2012
(Arising out of SLP (C) No. 27608 of 2010),

CIVIL APPEAL No. 1706 OF 2012
(Arising out of SLP (C) No.27994 of 2010),

CIVIL APPEAL No. 1707 OF 2012
(Arising out of SLP (C) No.28036 of 2010),

CIVIL APPEAL No. 1708 OF 2012
(Arising out of SLP (C) No.28044; of 2010),

CIVIL APPEAL No. 1709 OF 2012
(Arising out of SLP (C) No.28131 of 2010),

CIVIL APPEAL No. 1710 OF 2012
(Arising out of SLP (C) No.28167 of 2010),

CIVIL APPEAL No. 1711 OF 2012
(Arising out of SLP (C) No.28173 of 2010),

CIVIL APPEAL No. 1728 OF 2012
(Arising out of SLP (C) No.27952 of 2010),

CIVIL APPEAL No. 1729 OF 2012
(Arising out of SLP (C) No.28365 of 2010),

CIVIL APPEAL No. 1730 OF 2012
(Arising out of SLP (C) No.29290 of 2010),

CIVIL APPEAL No. 1731 OF 2012
(Arising out of SLP (C) No.29314 of 2010),

CIVIL APPEAL No. 1732 OF 2012
(Arising out of SLP (C) No.29596 of 2010),

CIVIL APPEAL No. 1733 OF 2012
(Arising out of SLP (C) No.30461 of 2010),

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(Arising out of SLP (C) No.30462 of 2010),

CIVIL APPEAL No. 1735 OF 2012
(Arising out of SLP (C) No.30011 of 2010),

CIVIL APPEAL No. 1736 OF 2012
(Arising out of SLP (C) No.30018 of 2010),

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(Arising out of SLP (C) No.30020 of 2010),

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CIVIL APPEAL Nos. 1723-1724 OF 2012
(Arising out of SLP (C) No.30521-30522 of 2010),

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(Arising out of SLP (C) No.30549 of 2010),

CIVIL APPEAL Nos. 1726-1727 OF 2012
(Arising out of SLP (C) Nos.29853-29854 of 2010),

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(Arising out of SLP (C) Nos.14079-14080 of 2011),

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(Arising out of SLP (C) No.16505 of 2011),

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(Arising out of SLP (C) No.16695 of 2011)

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(Arising out of SLP (C) No.22460 of 2011),

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(Arising out of SLP (C) No.22446 of 2011),

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(Arising out of SLP (C) No.28776 of 2011),

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(Arising out of SLP (C) No.28067 of 2011),

CIVIL APPEAL No. 1912 OF 2012
(Arising out of SLP (C) No.28607 of 2011)

AND

CIVIL APPEAL No. 1913 OF 2012
(Arising out of SLP (C) No.29542 of 2011)

J U D G M E N T**A. K. PATNAIK, J.**

Delay condoned. Leave granted in Special Leave Petitions.

2. These are appeals by way of special leave under Article 136 of the Constitution against the judgment and orders of the Bombay High Court holding that the entire amount received by an assessee on sale of the Duty Entitlement Pass Book (for short 'the DEPB') represents profit on transfer of DEPB under Section 28(iiid) of the Income Tax Act, 1961 (for short 'the Act') for the purpose of the computation of deduction in respect of profits retained for export business under Section 80HHC of the Act.

3. For appreciating the controversy between the parties, we will state the facts of only the lead case of M/s Topman Exports (hereinafter referred to as 'the assessee'). The assessee is a manufacturer and exporter of fabrics and garments. During the previous year relevant to the assessment year 2002-2003, the assessee sold the DEPB and DFRC (Duty Free Replenishment Certificate) which had accrued to the

assessee on export of its products. The assessee filed a return for the assessment year 2002-2003 claiming a deduction of Rs.83,69,303/- under Section 80HHC of the Act. The Assessing Officer held that if the profit on transfer of the export incentives was deducted from the profits of the assessee, the figure would be a loss and there will be no positive income of the assessee from its export business and the assessee will not be entitled to any deduction under Section 80HHC of the Act as has been held by this Court in *IPCA Laboratories Ltd. v. Deputy C.I.T.* (2004) 266 ITR 521 (SC). Aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) and contended that the profits on the transfer of DEPB and DFRC were not the sale proceeds of DEPB and DFRC amounting to Rs.2,06,84,841/- and Rs.1,65,616/- respectively, but the difference between the sale value and face value of DEPB and DFRC amounting to Rs.14,35,097/- and Rs.19,902/- respectively and if these figures of profits on transfer of DEPB and DFRC are taken, the income of assessee would be positive

and the assessee would be entitled to the deduction under Section 80HHC of the Act. The Commissioner of Income Tax (Appeals) rejected this contention of the assessee and held that the assessee had received an amount of Rs.2,06,84,841/- on sale of DEPB and an amount of Rs.1,65,612/- on sale of DFRC and the costs of acquisition of the DEPB and DFRC are to be taken as nil and hence the entire sale proceeds of DEPB and DFRC realized by the assessee are to be treated as profits on transfer of DEPB and DFRC for working out the deduction under section 80HHC of the Act and directed the Assessing Officer to work out the deduction under Section 80HHC of the Act accordingly.

4. Aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal'). A Special Bench of the Tribunal heard the appeal and held that there was a direct relation between the entitlement under the DEPB Scheme and the custom duty component in the cost of imports used in the manufacture of the export product. The

Tribunal further held that DEPB accrues to the exporter soon after export is made and application is filed for DEPB and DEPB is a “cash assistance” receivable by the assessee and is covered under clause (iiib) of Section 28 of the Act, whereas profit on the transfer of DEPB takes place on a subsequent date when the DEPB is sold by the assessee and is covered under clause (iiid) of Section 28 of the Act. The Tribunal compared the language of Section 28(iiib) of the Act in which the expression “cash assistance” is used, with the language of Section 28(iiia), (iiid) and (iiie) of the Act in which the expression “profit” is used and held that the words “profit on transfer” in Section 28 (iiid) and (iiie) of the Act would not represent the entire sale value of DEPB but the sale value of DEPB less the face value of the DEPB. With these reasons, the Tribunal set aside the orders of the Assessing Officer and the Commissioner of Income Tax (Appeals) and directed the Assessing Officer to compute the deduction under Section 80HHC of the Act accordingly.

5. This judgment of the Special Bench of the Tribunal was followed by the Tribunal in all the cases in appeal before us. Against the judgment and orders of the Tribunal, the Commissioner of Income Tax, Mumbai filed appeals in all the cases under Section 260A of the Act before the High Court and by the impugned orders the High Court disposed of the appeals in terms of the judgment delivered in Commissioner of the Income Tax vs. Kalpataru Colours and Chemicals (ITA(L) 2887 of 2009). In Commissioner of the Income Tax vs. Kalpataru Colours and Chemicals (supra), the High Court formulated the following two substantial questions of law:

“(a) Whether the Tribunal is justified in holding that the entire amount received on the sale of the Duty Entitlement Passbook does not represent profits chargeable under Section 28(iiid) of the Income Tax Act, 1961 and that the face value of the Duty Entitlement Passbook shall be deducted from the sale proceeds;

(b) Whether the Tribunal is justified in holding that the face value of the Duty Entitlement Passbook is chargeable to tax under Section 28(iiib) at the time of accrual of income i.e. when the application for Duty Entitlement Passbook is filed with the competent authority pursuant to the exports

made and that the profits on the sale of Duty Entitlement Passbook representing the excess of the sale proceeds over the face value is liable to be considered under Section 28(iiid) at the time of sale.”

In its judgment, on the first question of law formulated under (a), the High Court held that the Tribunal was not justified in holding that the entire amount received on the sale of the DEPB does not represent profits chargeable under Section 28(iiid) of the Act and in holding that the face value of the DEPB shall be deducted from the sale proceeds of the DEPB. On the second question of law formulated under (b), the High Court in its judgment did not agree with the Tribunal that the face value of DEPB is chargeable to tax as income of the assessee under Section 28(iiib) of the Act and instead held that the entirety of sale consideration for transfer of DEPB would fall within the purview of Section 28(iiid) of the Act. In some of the cases, the appellants filed review petitions before the High Court, but the High Court dismissed the review petitions.

6. Learned counsel for the appellants submitted, relying on the provisions of the DEPB Scheme, that the Tribunal was right in coming to the conclusion that DEPB was cash

assistance receivable by a person against exports and accrued to the exporter as soon as he files an application for DEPB. They submitted that DEPB was therefore chargeable to income tax under the head “Profits and Gains of Business or Profession” under clause (iiib) of Section 28 of the Act. They submitted that the contention of the Revenue that DEPB would be income chargeable to tax only on transfer and would be covered under clause (iiid) of Section 28 of the Act is not correct. They submitted that it will be clear from different provisions of the DEPB Scheme that the object of granting DEPB to an exporter is to neutralize the incidence of custom duties which has been incurred on the import component of the export product and this neutralization is achieved by grant of duty credit of the amount specified in the DEPB Scheme. They submitted that the Tribunal, therefore, was right in coming to the conclusion that there was a direct relation between the DEPB and the cost of inputs imported for manufacture of the export product.

7. Learned counsel for the appellants submitted that since DEPB was cash assistance receivable by a person against exports and was covered under clause (iiib) of

Section 28 of the Act and it has a direct relation with the costs of the inputs imported by an exporter from manufacturer of the export product, the DEPB cannot form part of the profits on transfer of DEPB under Section 28(iiid) of the Act. They argued that as and when DEPB is transferred and the sale value realized on such transfer of DEPB is more than the face value of the DEPB, the difference between the sale value and face value of the DEPB will constitute profit on transfer of DEPB and would be covered under clause (iiid) of Section 28 of the Act. They argued that if the intention of the legislature was to cover the entire sale proceeds arising on transfer of DEPB under clause (iiid) of Section 28 of the Act then they would have used the expression “sale proceeds” instead of profit on transfer of DEPB in clause (iiid) of Section 28 of the Act.

8. Learned counsel for the appellants argued that if the entire sale proceeds of the DEPB is treated as profits arising on transfer of DEPB for the purpose of clause (iiid) of Section 28 as contended by the Revenue, then the assessee will be taxed twice for the same income, once as cash assistance under clause (iiib) of Section 28 equivalent to the

face value of the DEPB and for the second time as profit on transfer of DEPB under clause (iiid) of Section 28, the face value of the DEPB being part of the sale proceeds of the DEPB on transfer. They submitted that as the legislature could not have intended such double taxation of the same income, the interpretation suggested by the Revenue should not be accepted by the Court. They submitted that in the present batch of cases, DEPB accrued to the assesseees in the first year when the assesseees made the export and applied for DEPB and the assessee sold the DEPB in subsequent year and the Revenue has taken a stand that in the subsequent year, the entire sale proceeds comprising both the face value of the DEPB and the profits on transfer of DEPB are covered under Section 28(iiid) of the Act and this stand of the Revenue has been accepted by the High Court in the impugned orders on an incorrect interpretation of the DEPB scheme and the provisions of Section 28 of the Act and 80HHC of the Act.

9. Learned counsel for the Revenue, on the other hand, supported the impugned judgment and orders of the High Court and submitted that profit on transfer of DEPB would

represent the entire sale value realized by the assessee on transfer of the DEPB. He submitted that the High Court has rightly held that the assessee does not incur any cost in obtaining the DEPB. He argued that DEPB is an export incentive granted by the Government under DEPB Scheme and it has no direct relation with the cost of purchases made by the assessee and therefore the assessee is not entitled to deduct the face value of the DEPB from the sale proceeds for determining the profit arising on transfer of DEPB and the entire sale proceeds of the DEPB represent the profits earned by the assessee on transfer of the DEPB. He argued that the findings of the Tribunal that there is a direct relation between DEPB and the costs incurred by the assessee for importing inputs for manufacture of export products is, therefore, not correct and the High Court was right in setting aside the findings of the Tribunal and in coming to the conclusion that the entire sale proceeds of DEPB represent the profits on transfer of DEPB within the meaning of clause (iiid) of Section 28 of the Act.

10. For appreciating the nature of the DEPB, paragraphs 4.37 and 4.42 of the Hand Book on DEPB issued by the

Government of India and paragraphs 7.14, 7.15, 7.16 and 7.38 of the Export and Import Policy, 1997-2002 as notified by the Central Government in the Notification No.1(RE-99)/1997-2202 dated 31st March, 2000 are extracted hereinbelow:

Hand Book on DEPB

“4.37 Duty Entitlement Passbook Scheme (DEPB)

The Policy relating to Duty Entitlement Passbook (DEPB) Scheme is given in Chapter-4 of the Policy. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per SION and the basic custom duty payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the scheme.

4.42 Utilization of DEPB credit.

The credit under DEPB shall be utilized for payment of customs duty on any item which is freely importable.

Export and Import Policy, 1997-2002

7.14 For exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The objective of Duty Entitlement Passbook Scheme is to neutralize the incidence of Customs duty on

the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product.

Under the Duty Entitlement Passbook Scheme (DEPB), an exporter may supply for credit, as a specified percentage of FOB value of exports, made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade by way of public notice issued in this behalf, for import of raw materials, intermediates, components, parts packing material etc.

The holder of Duty Entitlement Passbook Scheme (DEPB) shall have the option to pay additional customs duty, if any, in cash as well.

Validity 7.15. The DEPB shall be valid for a period of 12 months from the date of issue.

7.16 The DEPB and/or the items imported against it are freely transferable. The transfer of DEPB shall however be for import at the port specified in the DEPB which shall be the port from where exports have been made. However, imports from a port other than the port of export shall be allowed under TRA facility as per the terms and conditions of the notification issued by Department of Revenue.

7.38 (i) An application for grant of credit under DEPB may be made to the licensing authority concerned in the form given in Appendix-11C alongwith the documents prescribed therein. The provisions of paragraphs 7.2 shall be applicable for DEPB

also. The FOB value in free foreign exchange shall be converted into Indian rupees as per the authorized dealer's T/T buying rate, prevalent on the date of negotiation/purchase/collection of document. The DEPB rate of credit shall be applied on the FOB value so arrived. In case of advance payment, the FOB value in free foreign exchange shall be converted into Indian rupees as per the authorized dealer's T/T buying rate, prevalent on the date of receipt of advance payment.

(ii) The DEPB shall be initially issued with non transferable endorsement in such cases where realization has not taken place to enable the exporter to effect import for his own use. However, upon receipt of realization, the DEPB shall be endorsed transferable. In such cases where the applicant applies for DEPB after realization, the DEPB shall be issued with transferable endorsement.”

On a reading of the aforesaid paragraphs of the Hand Book on DEPB and the Export and Import Policy of the Government of India, 1997-2002, it is clear that the objective of DEPB scheme is to neutralize the incidence of customs duty on the import content of the export products. Hence, it has direct nexus with the cost of the imports made by an exporter for manufacturing the export products. The neutralization of the cost of customs duty under the DEPB scheme, however, is by granting a duty credit against the

export product and this credit can be utilized for paying customs duty on any item which is freely importable. DEPB is issued against the exports to the exporter and is transferable by the exporter.

11. We may now consider the relevant provisions of Section 28 for determining whether DEPB will fall under clause (iiib) or under clause (iiid) of Section 28. The relevant provisions of Section 28 of the Act are reproduced hereunder:

Section 28. Profits and Gains of Business or Profession.—The following income shall be chargeable to income-tax under the head “Profits and gains of business or profession”,--

.....

(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947);

(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India;]

(iiic)

(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5

of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)

(iiiie) any profit on the transfer of the Duty Free Replenishment Certificate, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992).”

12. It will be clear from the aforesaid provisions of Section 28 that under clause (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income tax under the head “Profits and Gains of Business or Profession”. DEPB is a kind of assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. We have, therefore, no doubt that DEPB is “cash assistance” receivable by a person against exports under the scheme of the Government of India and falls under clause (iiib) of Section 28 and is chargeable to income tax under the head “Profits and Gains

of Business or Profession” even before it is transferred by the assessee.

13. Under clause (iiid) of Section 28, any profit on transfer of DEPB is chargeable to income tax under the head “Profits and Gains of Business or Profession” as an item separate from cash assistance under clause (iiib). The word “profit” means the gross proceeds of a business transaction less the costs of the transaction. To quote from Black’s Law Dictionary (Fifth Edition):

“Profit. Most commonly, the gross proceeds of a business transaction less the costs of the transaction, i.e. net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures.”

This Court in *E.D. Sassoon & Company Ltd. and Others v. Commissioner of Income-Tax, Bombay City* (1954) 26 ITR 27 (SC) has quoted the following observations of Lord Justice Fletcher Moulton in *The Spanish Prospecting Company Limited* [(1911) 1 Ch. 92] on the meaning of the word “profits”:

“.... ‘Profits’ implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.”

‘Profits’, therefore, imply a comparison of the value of an asset when the asset is acquired with the value of the asset when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person. As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assesseees over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB.

14. We are, thus, of the considered opinion that while the face value of the DEPB will fall under clause (iiib) of Section 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of Section 28 of the Act and the High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the DEPB realized on transfer of the DEPB and

not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB.

15. We may now point out the errors in the impugned judgment of the High Court. The first reason given by the High Court is that clause (iiia) of Section 28 treats profits on the sale of an import license as income chargeable to tax and when the license is sold, the entire amount is treated as profits of business under clause (iiia) of Section 28 and thus there is no justification to treat the amount which is received by an exporter on the transfer of the DEPB any differently than the profits which are made on the sale of an import license under clause (iiia) of Section 28 of the Act. In taking the view that when the import license is sold the entire amount is treated as profits of business, the High Court has visualized a situation where the cost of acquiring the import license is nil. The cost of acquiring DEPB, on the other hand, is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against exports has a cost element in it. Accordingly, when DEPB is sold by a person, his profit on transfer of DEPB would be

the sale value of the DEPB less the face value of DEPB which represents the cost of the DEPB. The second reason given by the High Court in the impugned judgment is that under the DEPB scheme, DEPB is given at a percentage of the FOB value of the exports so as to neutralize the incidence of customs duty on the import content of the export products, but the exporter may not himself utilize the DEPB for paying customs duty but may transfer it to someone else and therefore the entire sum received on transfer of DEPB would be covered under clause (iiid) of Section 28. The High Court has failed to appreciate that DEPB represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When, therefore, DEPB is transferred by a person, the entire sum received by him on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB.==

16. The High Court has sought to meet the argument of double taxation made on behalf of the assesseees by holding that where the face value of the DEPB was offered to tax in the year in which the credit accrued to the assessee as business profits, then any further profit arising on transfer of DEPB would be taxed as profits of business under Section 28(iiid) in the year in which the transfer of DEPB took place. This view of the High Court, in our considered opinion, is contrary to the language of Section 28 of the Act under which “cash assistance” received or receivable by any person against exports such as the DEPB and “profit on transfer of the DEPB” are treated as two separate items of income under clauses (iiib) and (iiid) of Section 28. If accrual of DEPB and profit on transfer of DEPB are treated as two separate items of income chargeable to tax under clauses (iiib) and (iiid) of Section 28 of the Act, then DEPB will be chargeable as income under clause (iiib) of Section 28 in the year in which the person applies for DEPB credit against the exports and the profit on transfer of the DEPB by that person will be chargeable as income under clause (iiid) of Section 28 in his hands in the year in which he

makes the transfer. Accordingly, if in the same previous year the DEPB accrues to a person and he also earns profit on transfer of the DEPB, the DEPB will be business profits under clause (iiib) and the difference between the sale value and the DEPB (face value) would be the profits on the transfer of DEPB under clause (iiid) for the same assessment year. Where, however, the DEPB accrues to a person in one previous year and the transfer of DEPB takes place in a subsequent previous year, then the DEPB will be chargeable as income of the person for the first assessment year chargeable under clause (iiib) of Section 28 and the difference between the DEPB credit and the sale value of the DEPB credit would be income in his hands for the subsequent assessment year chargeable under clause (iiid) of Section 28. The interpretation suggested by us, therefore, does not lead to double taxation of the same income, which the legislature must be presumed to have avoided.

17. The High Court has held that as the assessee had an export turnover exceeding Rs.10 crores and did not fulfill the conditions set out in the third proviso to Section 80HHC(3) of the Act, the assessee was not entitled to a

deduction under Section 80HHC on the amount received on transfer of DEPB and to get over this difficulty the assesseees have contended that the profits on transfer of DEPB in Section 28(iiid) would not include the face value of the DEPB so that the assesseees get a deduction under Section 80HHC on the face value of the DEPB. This finding of the High Court is not based on an accurate understanding scheme of Section 80HHC of the Act.

18. The relevant provisions of Section 80HHC are quoted hereinbelow:

“Section 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-section (1B),] derived by the assessee from the export of such goods or merchandise:

.....

(1B) For the purposes of sub-sections (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.]

.....

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

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

.....

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

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee;

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of [section 28](#), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

- (a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and
- (b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme.

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits

computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of [section 28](#), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that—

- (a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and
- (b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, ‘rate of credit allowable’ means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government:]

.....

Explanation:- For the purposes of this section,-

- (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), (iiic), (iiid) and (iiie) 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”

19. Sub-section (1) of Section 80HHC quoted above makes it clear that an assessee engaged in the business of export out of India of any goods or merchandise to which this Section applies shall be allowed, in computing his total income, a deduction to the extent of profits referred to in sub-section (1B), derived by him from the export of such goods or merchandise. Sub-section (1B) of Section 80HHC gives the percentages of deduction of the profits allowable for the different assessment years from the assessment years 2001-2002 to 2004-2005. Sub-section (3)(a) of Section 80HHC provides that where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such exports shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee. In *Commissioner of Income-Tax v. K.*

Ravindranathan Nair (2007) 295 ITR 228 (SC), the formula in sub-section (3)(a) of Section 80HHC was stated by this Court to be as follows:

$$\text{Profits derived from exports} = \frac{\text{Profits of the business} \times \text{Export Turnover}}{\text{Total Turnover}}$$

20. Explanation (baa) under Section 80HHC states that “profits of the business” in the aforesaid formula 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), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature including any such receipts and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situated outside India. Thus, ninety per cent of the DEPB which is “cash assistance” against exports and is covered under clause (iiib) of Section 28 will get excluded from the “profits of the business” of the assessee if such DEPB has accrued to the assessee during the previous year. Similarly, if during the same previous year, the assessee has transferred the DEPB and the sale

value of such DEPB is more than the face value of the DEPB, the difference between the sale value of the DEPB and the face value of the DEPB will represent the profit on transfer of DEPB covered under clause (iiid) of Section 28 and ninety per cent of such profit on transfer of DEPB certificate will get excluded from “profits of the business”. But, where the DEPB accrues to the assessee in the first previous year and the assessee transfers the DEPB certificate in the second previous year, as appears to have happened in the present batch of cases, only ninety per cent of the profits on transfer of DEPB covered under clause (iiid) and not ninety per cent of the entire sale value including the face value of the DEPB will get excluded from the “profits of the business”. Thus, where the ninety per cent of the face value of the DEPB does not get excluded from “profits of the business” under explanation (baa) and only ninety per cent of the difference between the face value of the DEPB and the sale value of the DEPB gets excluded from “profits of the business”, the assessee gets a bigger figure of “profits of the business” and this is possible when the DEPB accrues to the assessee in one previous year and transfer of the DEPB

takes place in the subsequent previous year. The result in such case is that a higher figure of “profits of the business” becomes the multiplier in the aforesaid formula under sub-section (3)(a) of Section 80HHC for arriving at the figure of profits derived from exports.

21. To the figure of profits derived from exports worked out as per the aforesaid formula under sub-section (3)(a) of Section 80HHC, the additions as mentioned in first, second, third and fourth proviso under sub-section (3) are made to profits derived from exports. Under the first proviso, ninety per cent of the sum referred to in clauses (iiia), (iiib) and (iiic) of Section 28 are added in the same proportion as export turnover bears to the total turnover of the business carried on by the assessee. In this first proviso, there is no addition of any sum referred to in clause (iiid) or clause (iiie). Hence, profit on transfer of DEPB or DFRC are not to be added under the first proviso. Where therefore in the previous year no DEPB or DFRC accrues to the assessee, he would not be entitled to the benefit of the first proviso to sub-section (3) of Section 80HHC because he would not have any sum referred to in clause (iiib) of Section 28 of the

Act. The second proviso to sub-section (3) of Section 80HHC states that in case of an assessee having export turnover not exceeding Rs.10 crores during the previous year, after giving effect to the first proviso, the export profits are to be increased further by the amount which bears to ninety per cent of any sum referred to in clauses (iiid) and (iiie) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. The third proviso to sub-section (3) states that in case of an assessee having export turnover exceeding Rs.10 crores, similar addition of ninety per cent of the sums referred to in clause (iiid) of Section 28 only if the assessee has the necessary and sufficient evidence to prove that (a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and (b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme. Therefore, if the assessee having export turnover of more than Rs.10 crores does not satisfy these two conditions, he

will not be entitled to the addition of profit on transfer of DEPB under the third proviso to sub-section (3) of Section 80HHC.

22. The aforesaid discussion would show that where an assessee has an export turnover exceeding Rs.10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section 80HHC, but he would get the benefit of exclusion of a smaller figure from “profits of the business” under explanation (baa) to Section 80HHC of the Act and there is nothing in explanation (baa) to Section 80HHC to show that this benefit of exclusion of a smaller figure from “profits of the business” will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs.10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit. The High Court, therefore, was not

right in coming to the conclusion that as the assessee did not have the export turnover exceeding Rs.10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and (iiie) of Section 28, the assessee was entitled to a deduction under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.

23. The impugned judgment and orders of the Bombay High Court are accordingly set-aside. The appeals are allowed to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction

under Section 80HHC in the case of the appellants in accordance with this judgment. There shall be no order as to costs.

.....CJI.
(S.H. Kapadia)

.....J.
(A. K. Patnaik)

.....J.
(Swatanter

Kumar)
New Delhi,
February 08, 2012.