REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos…2506-2509 OF 2020
(Arising out of SLP (Civil) Nos. 23535 – 23538 of 2016)

RAMNATH & CO. ….Appellant (s)

Vs.

THE COMMISSIONER OF INCOME TAX ….Respondent (s)

With

Civil Appeal No. 2510 of 2020 @ SLP(C) No. 23699 of 2016

JUDGMENT

Dinesh Maheshwari, J.

PRELIMINARY WITH BRIEF OUTLINE

Leave granted.

2. The short point calling for determination in these appeals against the common judgment dated 09.06.2016 passed by the High Court of Kerala at Ernakulam in a batch of appeals is as to whether the income received by the appellants in foreign exchange, for the services provided by them to foreign enterprises, qualifies for deduction under Section 80-O of the Income Tax Act, 1961[1], as applicable during the respective assessment years from 1993-94 to 1997-98.

1 Hereinafter also referred to as 'the Act of 1961' or 'the Act'

3. Put in a nutshell, the question involved in these appeals has arisen in the backdrop of facts that the appellants herein, who had been engaged in providing services to certain foreign buyers of frozen seafood and/or marine products and had received service charges from such foreign buyers/enterprises in foreign exchange, claimed deduction under Section 80-O of the Act of 1961, as applicable for the relevant assessment year/s. In both these cases, the respective Assessing Officer/s[2] denied such claim for deduction essentially with the finding that the services rendered by respective assessees were the 'services rendered in India' and not the 'services rendered from India' and, therefore, the service charges received by the assessees from the foreign enterprises did not qualify for deduction in view of clause (iii) of the *Explanation* to Section 80-O of the Act of 1961. After different orders from the respective Appellate Authorities, the Income Tax Appellate Tribunal[3], Cochin Bench accepted the claim for such deduction under Section 80-O of the Act with the finding in case of the assessee Ramnath & Co.[4] for the assessment year 1993-94 that as per the agreements with the referred foreign enterprises, the assessee had passed on the necessary information which were utilised by the foreign enterprises concerned to make a decision either to purchase or not to purchase; and hence, it were a service rendered from India. The same decision was followed by ITAT in the case of this assessee for other assessment years under consideration as also in the case of other assessee M/s Laxmi

2 'AO' for short
3 'ITAT' for short
4 Related with the appeal arising out of SLP (Civil) Nos. 23535-23538 of 2016.

Agencies[5]. The revenue preferred appeals before the High Court against the orders so passed by ITAT in favour of the present appellants as also a few other assessees. These appeals have been considered together by the High Court of Kerala; and similar questions regarding eligibility for deduction under Section 80-O of the Act in relation to the similarly circumstanced assessees have been decided by the impugned common judgment dated 09.06.2016. The High Court has essentially held that the assessees were merely marine product procuring agents for the foreign enterprises, without any claim for expertise capable of being used abroad rather than in India and hence, the services rendered by them do not qualify as the 'services rendered from India', for the purpose of Section 80-O of the Act of 1961. Therefore, the High Court has allowed the appeals of revenue while setting aside the respective orders of ITAT. Aggrieved, the assessees have preferred these appeals[6].

4. The basic factual and background aspects relating to the two assessees in appeal before us are more or less similar in nature but, having regard to the position that ITAT had decided all other appeals based on its order dated 19.11.2001 for the assessment year 1993-94 in relation to the assessee-appellant Ramnath & Co. and the High Court has also rendered common judgment essentially with reference to the facts relating to this assessee (with other assessees having adopted the same contentions), it

5 Related with the appeal arising out of SLP(Civil) No. 23699 of 2016.
6 The appeals herein relate to ITA Nos. 132 of 2002, 11 of 2003, 761 of 2009 and 294 of 2009 as also ITA No. 771 of 2009, decided by High Court in the common impugned judgment dated 09.06.2016, rendered in the batch of appeals led by ITA No. 131 of 2002.

appears appropriate to elucidate the same facts and background aspects for dealing with the questions raised in these appeals.

RELEVANT FACTUAL AND BACKGROUND ASPECTS:

5. The appellant Ramnath & Co. is a firm engaged in the business of providing services to foreign buyers of Indian marine products. The appellant filed its return of income for the assessment year 1993-1994 on 29.10.1993 declaring total taxable income at Rs. 6,21,710/- while claiming 50% deduction (amounting to Rs. 22,39,825/-) under Section 80-O of the Act in relation to the amount of Rs. 44,79,649/- received by it as service charges from foreign enterprises[7].

5.1. While asserting its claim for such deduction under Section 80-O of the Act, the appellant submitted that it had rendered myriad services to the foreign enterprises like: (i) locating reliable source of quality and assured supply of frozen seafood for the purpose of import and communicating its expert opinion and advice in that regard; (ii) keeping a close liaison with agencies concerned for bacteriological analysis and communicating the result of inspection together with expert comments and advice; (iii) making available full and detailed analysis of seafood supply situation and prices; (iv) advising and informing about the latest trends in manufacturing and markets; and (v) negotiating and finalising the prices for Indian exporters of frozen marines products and communicating such other related information

7 It was noticed by the Assessing Officer in the assessment order dated 28.03.1996 that the assessee had been in the business of marine products export since a very long time; and until the assessment year 1992-93, the assessee had been claiming deduction under Section 80HHC of the Act of 1961, which provides for deduction in respect of profits derived from export of the specified class of goods or merchandise.

to the foreign enterprises. The appellant claimed that pursuant to the terms and conditions of the agreements with the foreign enterprises, it had received the said service charges; and its services had directly and indirectly assisted the foreign enterprises to organise, develop, regulate and improve their business.

5.2. In regard to such claim for deduction under Section 80-O of the Act, the AO, by his letter dated 29.01.1996, raised the following queries and sought clarifications from the appellant:-

> "1.The location of services rendered by the assessee may be mentioned if there are any services rendered outside India.
>
> 2. Whether the technical/professional services rendered by the assessee were utilized by the foreign enterprises anywhere in India or outside India independently of the assessee.
>
> 3. Whether the technical/professional services rendered by the assessee were utilized by the foreign enterprises, in India, independently and without the assessee.
>
> 4. To clarify whether the technical/professional services rendered by the assessee are capable or being made use of by the foreign enterprises independently and without the assessee."

5.3. In response, the appellant justified its claim for deduction under Section 80-O of the Act by way of its letter dated 19.02.1996 while asserting as under:

> "1. The technical/professional services rendered by us are "from India".
>
> 2. Foreign buyers to whom we have rendered these services are located in Japan, U.S.A., U.K. and France. None of these foreign enterprises have utilized our services in any part of India. But the entire benefit of our services were

utilized by them in effectively distributing and marketing the Indian sea-foods in their respective countries.

3. We would like to emphasize that the foreign enterprises have no place of business in India nor do they market any goods or services in India.

4. Without services the import of marine products from India by the foreign enterprises will not be possible."

5.4. In his assessment order dated 28.03.1996, the Assessing Officer proceeded to analyse the agreements of the appellant with the two foreign enterprises and reproduced the relevant terms thereof *in extenso*. This part of the order of the AO, containing material terms of agreements, being relevant for the present purpose, is reproduced as under: -

"In the context of the above claim of the assessee, it is necessary to go through the agreements entered into by the assessee with the foreign enterprises to find out the nature of the relationship of the assessee with the foreign enterprises. I have gone through the agreements entered into by the assessee with HOKO Fishingco Ltd. is captioned agreement regarding marine products and that with GELAZURE S.A. is captioned agency agreement regarding marine products. Articles 1 to 4 of the agreement with HOKO fishing Co. Ltd. reads as under:-

Article 1: HOKO desires to avail of the benefit of the commercial and technical knowledge experience and skill of "RC-CN foods/Marine products of good quality and on favourable terms and is willing to remunerate "RC-CN" for use of such commercial and technical knowledge, expert and skill and other related services.

Article 2: "RC-CN agrees to render to "HOKO" the following services on a continuing basis.

a) Locating reliable sources of quality and assured supply of frozen seafood/marine products for the purpose of import by HOK and communicate its expert opinion and advice to HOKO."

b) In addition to the above services rendered by "RC-CN, it will also keep a close liaison with agencies such as EIA/LLOYDS/SGS especially for organoleptic/bacteriological analysis and communicate the results of inspection along with its expert comment and advise.

c) Making available full and detailed analysis of the sea food supply situation and prices.

d) To advise HOKO and keep them informed of the latest trends/processes application in manufacturing and of all valuable commercial and economic information about the markets. Government Policies, exchange fluctuations, banking laws which will directly or indirectly assist HOKO to organize, develop control or regulate their import business from India.

e) To negotiate and finalize prices for Indian Exporters of frozen marine products and to communicate such and other related information to HOKO.

Article 5 RC-CN" shall also do everything that is required to ensure highest standards of quality hygiene and freshness of products including supervision at various stages.

Article 4: HOKO pays to RC-CN 0.7% of the invoice amount on the C & F basis and US$ 2,000.00 per month as commission. When the quality of goods is found to be unsatisfactory to HOKO after inspection in Japan, HOKO shall have no responsibility to pay the agent fee."

Similarly, articles 1 to 4 of the Agreement with GELAZUR S.A read as under:-

Article 1:'GELAZUR appoints RAMNATH" as agent to operate in priority their purchases in frozen seafood's products in India.

Article 2 : RAMNATH' does the following business as Agent on behalf of GELAZUR."

1)To negotiate with the local packers for the purchase of the frozen seafood products which 'GELAZUR' requires:

2)To give "GELAZUR' all the accurate information in respect of the standard, quantity, price, quality, time of shipment, etc. promptly, whenever the purchase of the products is made

3)To carry out technical guidance for processing and for quality control and inspection of the products and to advise "GELAZURE" of the results.

4)To inform GELAZURE' regularly about the market situation, i.e. fishing situation, prices paid by other markets, prices paid by French competitors, business opportunities, monthly supplies of seafood-data.

Article 3: After reception of the goods, GELAZURE' will pay RAMNATH" commissions calculated on the following basis:

-CHAM ICE/Porbandar-Veraval-Bombay:

Cephalepods or Fishes : 1.5% of the C+F Value

Shripps-Lobsters: 0.75% of the C+F Value

OTHER PACKERS

SHRIMPS & LOBSERS : 1% OF THE C+F value

Squids, cuttlefish, Cockies

Mussels and other Fishes: USD O.65/Kg

When the quality and the packaging of the goods are found to be unsatisfactory to 'GELAZUR" after inspection in FRANCE, GELAZURE, shall have no responsibility regarding the payment of the Agent's fee.

Article 4: If any claim arises out of or in relation to the purchases of products for which 'GELAZUR' has no responsibility, RAMNATH will do their best to settle the claim through negotiation with manufacturers. The settlement of the claim will have to be carried out 60 days after the reception of the goods."[8]

5.5. Having examined the contents of two agreements, the Assessing Officer did not feel convinced with the claim that the appellant had been rendering services from India so as to qualify for deduction under *Explanation* (iii) to Section 80-O of the Act. The Assessing Officer was

8 Note: In the papers placed on record, the name of this foreign company has been mentioned both as 'GELAZUR' and 'GELAZURE'. We have retained the particulars in extractions as stated in the respective papers but in our discussion, have referred it as 'GELAZUR'.

firmly of the view that the appellant had worked only as an agent of the foreign enterprises in the matter of procurement of marine products from India; and all the services envisaged in the agreements were incidental to the carrying out of main function as agent. The Assessing Officer recorded his observations and findings as follows: -

> "….A close study of the articles extracted above, would establish that the assessee is merely an agent of the foreign enterprises in India in the matter of procurement of marine products from India. All the services which are required to be carried out by the assessee in terms of the agreements are incidental to the carrying out of the primary function of acting as an agent. The assessee's role is to act on behalf of the foreign principals within the limits allowed by them. In terms of the agreements, the assessee negotiates with local packers with regard to quality, quantity and price. On behalf of the principals, the assessee carries out technical guidance for processing and for quality control and also inspection of the products and also keeps close liaison with various agencies. These are definitely services rendered in India and cannot be construed as services rendered from India merely relying on the facts that the foreign principals are advised of the results and that they are stationed outside India. It is true that as per agreement, the assessee was to supply certain information of a general nature regarding markets, government policies, exchange fluctuations, banking laws, prices paid by competitors, monthly supplies of seafood data etc. However, the agreements do not envisage any payment of separate in commission or service charge for such information. The commission is payable to the assessee as a percentage of the C & F value of the imports by the foreign enterprises through the assessee. **However, the payment of commission is conditional on the foreign enterprises finding the quality of goods satisfactory. This would reinforce my earlier observation that the assessee is only an agent of the foreign enterprises in the matter of procurement of marine products from India** and all the services envisaged in the agreement are incidental to the carrying out of the main function as agent. It is also not as if the foreign enterprises completely stayed away from India. Though it might be a fact that none of the foreign enterprises

had any office or branch anywhere in India, available information indicates that the representatives of the foreign enterprises used to visit India in connection with the procurement of marine products from various packers in India and it fell upon the assessee to take these persons to the processing facilities of various suppliers with a view to ensure quality and hygiene standards. This is evident from the fact that a sum of Rs.23,122/- has been incurred by the assessee during the visit of buyers, representatives to various seafood packers in Calcutta, Bombay vizag, Madras Nandapam, Cochin, Calicut etc. Expenses for souvenirs, compliments and samples of the value of Rs.29,411.99 have also been incurred presumably in connection with the visit of the representatives of the foreign buyers. By any stretch of imagination, it cannot be claimed that the services rendered on the occasions of the visit of the representatives of foreign enterprises were not rendered in India. The foreign travels undertaken by the Managing Partner for meeting various buyers can been seen as only an extension of the assessee's role as an agent of the foreign enterprises in India. An agent of a foreign enterprise in India necessarily acts on behalf of the foreign enterprise in India, and **therefore, the services, namely carrying out inspections to ensure quality of the products and packaging, supervision of processing, negotiating prices in respect of marine products exported with the assistance of the assessee, could not have been rendered outside India as the parties to be contacted, products to be inspected, processing to the supervised etc. were situated in India only.** In my view services that are incapable of being rendered outside India will not come under the category of services that can be rendered from India. Therefore, there is no merit in the contention of the assessee that these services were rendered from India but not within India…."

(emphasis in bold supplied)

5.6. The appellant also relied upon Circular No. 700 dated 23.03.1995 issued by the Central Board of Direct Taxes[9] in support of its contentions. The Assessing Officer distinguished the matter dealt with by the said Circular from that involved in the present case in the following passage: -

9 'CBDT' for short

"…..The assessee also strongly relies on circular No.700 dated 23/3/95 issued by the C.B.D.T. In my view, the reliance on the above circular by the assessee to buttress its case is misplaced. Para 3 & 4 of the above circular which are quits relevant, reads as under : -

> "3. A question has been raised as to whether the benefit of Section 80-O would be available if the technical and professional services, though rendered outside India, are used by the foreign government or enterprise in India.
>
> "4. The matter has been considered by the Board. It is clarified that as long as the technical and professional services are rendered from India and are received by a foreign government or enterprise outside India deduction under Section 80-O would be available to the person rendering the services even if the foreign recipient of the services utilizes the benefit of such services in India."

As is clear from the above, the C.B.D.T. was dealing with a question whether deduction under Section 80-O could be denied on the ground that the foreign enterprise uses the services rendered outside India, in India. It has been clarified that merely because the foreign enterprises utilized the benefit of services rendered outside India, the deduction under Section 80-O cannot be denied. In the case before the C.B.D.T, there was not dispute as to where the technical services were rendered, In the case before me, there is absolutely no scope for doubt that the services as an agent were rendered by the assessee in India only. In 132 ITR 637, the Bombay High Court held that an assessee acting as a mere employment recruiting bureau was not entitled for deduction under Section 80-O and the services rendered in locating prospective candidates and collecting their bio-datas and conveying names of candidates to foreign employers did not represent services rendered outside India. Similarly, in 145 ITR 673 in the case of Searls (India) Ltd, the same High Court ruled that testing of samples in India and giving results and certificate to foreign company did represent technical services rendered outside India. In view of the forgoing discussion, I would hold that the assessee is not entitled for deduction u/s 80-O as the services made available to the foreign enterprises were rendered in India."

5.7. In the aforesaid view of the matter, the AO disallowed the claim for deduction under Section 80-O of the Act.

5.8. In the appeal taken by the appellant, the Appellate Authority did not agree with the opinion of the Assessing Officer, particularly with reference to the decision of Delhi High Court in the case ***E.P.W. Da Costa and Ors. v. Union of India:*** **(1980) 121 ITR 751 (Delhi)** and a decision of ITAT Delhi, D Bench in the case of ***Capt. K. C. Saigal v. Income Tax Officer:*** **(1995) 54 ITD 488 (Delhi)** and hence, allowed the appeal while observing, *inter alia*, as under: -

> "14……In the present case, there is no dispute that the appellant is supplying information with regard to the markets, government policies, exchange fluctuations, banking laws, data with regard to monthly supply of sea-food etc. to the foreign enterprises. Secondly, **even if the appellant is a mere agent of the foreign enterprises, he is bringing the foreign enterprises in contact with the manufacturers or processors of shrimps, lobsters etc. and negotiating with the local packers and is locating sources of frozen sea-foods for the foreign enterprises.** Though the various items of activity are rendered in India, they **are done on behalf of the foreign enterprises** and the market and other information had been supplied from India to the foreign enterprises.
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> 15. In section 80-O, Explanation (iii) reads as under : -
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> > "Services rendered or agreed to be rendered outside India shall include services rendered from India but shall not include services rendered in India".
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> The word "from" means "out of" or "springing out of". Thus, 'from India' necessarily means that some of the activities will spring out of or will be in India because the services are rendered from India. In this connection, I am of the view that the decision of the Delhi High Court in E.P.W. De Costa & Another vs. Union of India (121 ITR 751) is really applicable to the facts of the case. The services rendered with regard to

assessing the radio-listening habits of the people were rendered in India i.e. The data had been collected in India. However, it was held that a mere mass of information without analysis and without being understandable would not be of use to the B.B.C. **The information is not, therefore, mere data but scientific knowledge.** In the present case, the appellant has located reliable source of quality and assured supply of frozen sea-food products to the various foreign enterprises at Japan, France and other countries and supplied information with regard to sea-food processing, manufacturing details and also government policies, exchange fluctuations etc. to the foreign enterprises. The appellant has negotiated and finalised prices for the Indian exporters of frozen sea-food products and communicated the same to the foreign enterprises. Thus, the appellant has rendered the services from India to these foreign enterprises. That the appellant's information and experience have been effectively utilised by the foreign enterprises can be seen from the fact that the export effected by the appellant-concern have risen from 20 crores in the AY 1991-92 to 100 crores by AY 1996-97. For the year under consideration, the exports are approximately 60 crores on which the appellant has earned a commission of Rs. 44.79 lakhs.

16. The major issue to be decided in this case is whether the services rendered by the appellant can be said to be 'from India'. On the facts and circumstances of the case, I am of the opinion that the services have been rendered from India and hence, the appellant is eligible for deduction u/s 80-O, especially in view of the decision of the Delhi High Court in E.P.W. De Costa & Another vs. Union of India (121 ITR 751) and the I.T.A.T. Delhi 'D' Bench decision in the case of Capt. K. C. Saigal vs. I.T.O. (54 ITD 488)."

(emphasis in bold supplied)

5.9. Aggrieved by the decision aforesaid, the revenue preferred appeal before the ITAT, being ITA No. 84/Coch/1997, that was considered and decided by ITAT by its order dated 19.11.2001. The ITAT took note of the history of introduction of Chapter VI-A and Section 80-O to the Act of 1961 by the Finance (No. 2) Act, 1967 as also the fact that Section 80-O had undergone several amendments over the course of time. The ITAT

concurred with the findings of the Appellate Authority that the services rendered by the appellant, which helped the foreign parties to import marine products from India, had been specialised and technical services and thereby, the appellant was entitled to claim deduction under Section 80-O of the Act. The ITAT observed and held, *inter alia,* as follows: -

> "9. The case of the Revenue is that the assessee has rendered services only in India and not from India. The services that entitle the assessee for the benefit under Section 80-O should be of such nature that it can only be rendered outside India and not services that are capable of being rendered in India. According to the revenue, the assessee was rendering only a generalised service such as market studies, study of processing, etc. so as to satisfy the quality of the materials exported, like any other general agent. Therefore, the assessee is not entitled to claim the benefit under Section 80-O. Considering the facts and circumstances of the case, we are unable to agree with the above proposition. In CBDT v. Oberoi Hotels (India) (P) Ltd. [1998] 231 ITR 148' the Supreme Court has held that the agreement for managing modern hotel, including promotion of business, recruiting and training staff are all such services that entitle the assessee for the benefit of Section 80-O…. ……In circular No.700 issued on 23-3-1995 the Board clarifies the position. It clarifies that "as long as the technical and professional services are rendered from India and are received by a foreign Government or enterprise outside India, deduction under Section 80-O would be available to the person rendering the services even if the foreign recipient of the services utilises the benefit of such services in India". Now the question is whether the assessee rendered any service and communicated the same to the foreign party. Article 2 (4) of the agency agreement regarding marine products entered into between Gelazur S.A. and Ramnath & Co. (assessee) states that the assessee is to inform "GELAZUR" regularly about the market situation, i.e. fishing situation, prices paid by other markets, prices paid by French Competitors, business opportunities, monthly supplies of seafood data. **This indicates that the assessee has to communicate the data it collected, and on the basis of this, the foreign party acts either to purchase or not to**

purchase. It is also true that Article 4 of the said agreement states that "if, any claim arises out of or in relation to the purchase of products for which 'GELAZUR', has no responsibility, 'RAMNATH' will do their best to settle the claim through negotiation with manufacturers". **This indicates that the party is also doing supply of services. But, this part of the service is only consequential to the first.** The agreement entered into between Hoko Fishing Co. Ltd., Tokyo, Japan and the assessee also **stipulates that the assessee has to keep "Hoko" informed of the latest trends/processes applications in manufacturing and of all valuable commercial and economic information about the market, Government Policies,** exchange fluctuations, banking laws which will directly or indirectly assist "Hoko" to organise, develop, control or regulate their import business from India. **In addition to this, the assessee has to render services to ensure highest standards of quality, hygiene and freshness of products including supervision at various stages. The second mentioned services may be considered as services rendered in India. But, definitely the other services rendered and informed to the other party like latest trends/processes applications in manufacturing, commercial and economic, information about the markets, Government Policies, exchange fluctuations, banking laws etc. which help the foreign party to import marine products from India is a specialised and technical service.** That, in our view, qualifies the assessee to claim deduction under Section 80-O."

(emphasis in bold supplied)

5.10. The ITAT also referred to the subtle distinction in the two phrases: 'the services rendered from India' and 'the services rendered in India'; and while referring to a decision of Bombay High Court in the case of ***Godrej & Boyce Mfg. Co. Ltd. v. S.B. Potnis, Chief Commissioner:*** **(1993) 203 ITR 947 (Bom)** as also other decisions, observed that if the assessee had not passed on the requisite information, the export would not have materialised. According to ITAT, if the assessee had done the services like packing, shipping etc., in that case, the assessee would have been merely an

exporter and could not have claimed the benefit under Section 80-O but, the services rendered by the assessee were of specialised nature, which had been utilised by the foreign party. Accordingly, the ITAT dismissed the appeal of revenue while observing as under:-

> "10. It is true that the difference between 'the services rendered from India' and 'the services rendered in India' used in the Explanation below the proviso to the section is wafer-thin. But still the difference exists when looked from the point of view the Indian Exporter. The services rendered in India are services to make the goods eligible for export. On the other hand, the services rendered from India can be treated as services rendered, as desired by the foreign party, which need specialisation. **If the foreign party is interested in details or information or specific details and such details are supplied by the Indian party and such details are utilised either to purchase or not to purchase from India, such services can be treated as "services rendered from India". If the foreign party seeks any service and it is rendered, it is a service rendered from India,** whereas the services rendered in India are not necessarily by virtue of the other party's request or demand. In Godrej & Boyce Mfg. Co. Ltd. vs. S.B. Potnis, Chief Commissioner [1993] 203 ITR 947' the Hon'ble Bombay High Court held that a provision made for the giving of all marketing, industrial manufacturing, commercial and scientific knowledge, experience and skill for the efficient working and management of the foreign company could be treated as services rendered that make the assessee eligible for the benefit under Section 80-O.
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> 11. In Mittal Corporation's case (supra), the Delhi bench-D of the Tribunal held that the object and spirit of Section 80-O was to mainly encourage Indian technical know-how and skill abroad and since the information was given outside India party and it was used outside India and payment was received in convertible foreign exchange, the condition required for allowing deduction under Section 80-O could said to have been fulfilled. In the case of E.P.W. Da Costa (supra) the Delhi High Court has held that if the information passed on by the assessee is of practical nature and was a result of making or manufacturing some concrete thing and such information has been utilised by the foreign party, such

information is sufficient to claim the benefit under Section 80-O.

12. Before parting with, let us think in a negative way. **If the assessee had not passed on the information like marketing, processing, quality control, etc. to the other party, the export would not have materialised. Short of this information, if the assessee had done services like packing, shipping, etc. and ensured quality and quantity, the assessee is merely an exporter and cannot claim the benefit contemplated under Section 80-O.** If we look from this angle also, we are of the opinion that the assessee is entitled to succeed."

(emphasis in bold supplied)

6. The facts discernible from the material on record make out that on the similar pattern, the ITAT also allowed the claim of this appellant in relation to the assessment years 1994-95, 1995-96 and 1996-97, while following its earlier orders. As noticed, the appeals against the orders passed for these assessment years were clubbed together and disposed of by the High Court by way of the common judgment dated 09.06.2016, which is in challenge in these appeals.

The impugned judgment by the High Court

7. In its impugned common judgment dated 09.06.2016, the High Court of Kerala has disagreed with ITAT and has disallowed the claim for deduction by the appellant essentially with the finding that the appellant was merely a marine product procuring agent for the foreign enterprises, without any claim for expertise capable of being used abroad rather than in India and hence, the alleged services do not qualify as the 'services rendered from India', for the purpose of Section 80-O of the Act of 1961.

8. In view of the submissions made and the subject-matter of these appeals, we may examine the observations and reasoning in the impugned judgment that have led the High Court to disagree with ITAT and to reject the claim of the appellant for deduction under Section 80-O of the Act in requisite specifics.[10]

8.1. The main plank of submissions on behalf of revenue, with reference to the agreements between the assessee on one hand and the two foreign companies respectively on the other, had been that the assessee was simply an agent of the foreign enterprises for procuring marine products from India; that all its services were incidental to its main functioning as a fish-procuring agent; and that the assessee rendered its services "in India", contra-distinguished with the expression "from India". It was also contended on behalf of the revenue that mere communication between the assessee based in India and the principal based abroad does not bring their transactions within the purview of Section 80-O. The submissions on behalf of the revenue were supported with a Division Bench decision of that High Court in ***Commissioner of Income Tax v. Thomas Kurian (Dead) through LR Smt. Primari C. Thomas,*** since reported as **(2012) 72 DTR (Ker)**. On the other hand, it was contended on behalf of the assessee that on reading the principal provision of Section 80-O of the Act with clause (iii)

10 It may, in the passing, be observed that one of the preliminary points raised before the High Court by the assessees had been on the maintainability of appeals by the revenue in the face of Circular No. 21/2015 dated 10.12.2015 due to low-tax effect and no likelihood of cascading effect because the provision having been amended subsequently. The High Court did not agree with the assessees on this aspect while observing that ITAT has passed all the orders by following its initial order relating to ITA No. 131 of 2002; and the order impugned has a cascading effect. This aspect of the matter does not concern us in these appeals and hence, need no further comment.

of the *Explanation*, it was clear that once the service is provided by an Indian company (or other person who is resident in India) and the same is 'used' by a foreign entity outside India, it made no difference if the advice is rendered from Indian soil. In relation to the query of the Court as to whether all the services mentioned in the agreement would come within the purview of Section 80-O, the response on behalf of the assessee had been that '*if the recipient of services is situated outside, all the services rendered by the assessee in terms of the agreement come within the sweep of the provision'.* It was, therefore, contended on behalf of the assessee that the assessee's establishing *'which of its services qualifies for the deduction is of no consequence, rather unnecessary'*. The decision in ***Thomas Kurian*** (supra) was distinguished on behalf of the assessee with reference to the facts that the assessee therein was engaged only in verification of quality and fitness of marine products but provided no commercial or technical information from India to the foreign buyers whereas the assessee in the present case had been supplying commercial and technical information and, using the information supplied by the assessee, the foreign companies had taken decision outside India as regards how they could purchase the merchandise. The submissions on behalf of the assessee were supported with reliance on the said Circular No. 700 dated 23.03.1995 and the decisions in ***M/s Continental Construction Ltd. v. Commissioner of Income Tax, Central-I:*** **(1992) 195 ITR 81 (SC)*; Commissioner of Income Tax v. Mittal Corporation*: (2005) 272 ITR 87 (Delhi)*; Li & Fung***

India (P) Ltd. v. Commissioner of Income Tax: **(2008) 305 ITR 105 (Delhi)*; Commissioner of Income Tax v. Chakiat Agencies (P) Ltd.:* (2009) 314 ITR 200 (Mad)*; Commissioner of Income Tax v. Inchcape India (P) Ltd:* (2005) 273 ITR 92 (Delhi)*; Central Board of Direct Taxes, New Delhi & Ors. v. Oberoi Hotels (India) Pvt. Ltd.: (1998) 231 ITR 148 (SC)*** and ***E.P.W. Da Costa*** (supra)***.***

8.2. Having thus taken note of the rival submissions, the High Court proceeded to analyse Section 80-O of the Act with its *Explanation* (iii). After reproducing the relevant text of the provisions, the High Court entered into the lexical semantics of the prepositions 'from' and 'in' with reference to their dictionary meanings. Then, reverting to Section 80-O of the Act, the High Court observed that therein, the constants were the Indian agent, the foreign principal, and the Indian agent rendering services from India but the variables were as to 'how' and 'where' the services were used. Thereafter, the High Court looked at the intent and purpose behind Section 80–O of the Act and observed as under: –

> "29. Every nation meets any measure more than half way if it results in the nation's augmenting the foreign reserves. India is no exception. It encourages and provides incentives to those who earn foreign exchange. Over and above the incentive is the facility of deduction from the taxable income in foreign exchange--that is what Section 80-O is. The legislative intent behind the provision is not far to seek. The Government encourages entrepreneurial initiative and innovation by the Indian companies at the international level. In a measure, the nation encourages any Indian showcasing the Indian intellect internationally. That accepted, if Indian technology, know-how, etc., is used in India itself even by a foreign company, it is an intellectual enterprise not only *from*

> India but also *in* India. We reckon that *use* means the end use of the information or know-how, but not its mere processing."

8.3. Proceeding further, the High Court examined the position obtainable in regard to the interpretation and application of Section 80-O of the Act from the precedents cited at Bar. The High Court pointed out that in ***Thomas Kurian*** (supra), a case dealt with by the same High Court, the main service rendered by the assessee was admittedly of examining the quality and type of fish processed by the exporters in India and certifying the fitness of the product for shipment; and such a service was rendered entirely in India. It was further pointed out that in ***E.P.W. Da Costa*** (supra), the assessee had been a consultant engaged in conducting specialised economic and public opinion research on an all-India basis to assess the attitudes of political, social and economic subjects and in the given nature of work, the High Court of Delhi held that BBC, based in London, can be said to have used the information received from the assessee to formulate or modify its broadcasting programmes to India; and though the information was provided by the assessee from India, it was used in another country in its entirety. As regards the decision in ***Mittal Corporation*** (supra), the High Court observed that the assessee therein received commission as a buying agent of certain foreign enterprises and it was held that it was not necessary that the assessee must provide technical services even where it received consideration for only providing commercial information. The High Court, however, observed that from the said decision, it could not be

gathered as to how the commercial information provided by the assessee was used by the foreign enterprises outside India which was '*a crucial aspect for determining the application of the provision*'. As regards the decision in ***Oberoi Hotels*** (supra), the High Court again observed that the factual background was not explicit, but since the agreement involved the assessee's training the Nigerian personnel, it was held that the assessee undoubtedly under the contract must make use of its commercial and scientific expertise as well as experience and skill, outside India. As regards the case of ***Inchcape India*** (supra), it was pointed out that the assessee had to work in textile testing, inspection of soft lines, electrical and electronic products according to the existing standards of European and American markets, etc. It was also pointed out that the issue arose much before the insertion of *Explanation* (iii) to Section 80-O of the Act. In reference to the decision in ***Li & Fung*** (supra), the High Court pointed out that therein, assessee claimed to have rendered technical services out of India as a buying agent and the High Court of Delhi held that the services rendered by the assessee required knowledge, expertise and experience; and, therefore, the fee it received from foreign enterprises for supply of commercial information sent from India for use outside India was eligible for deduction under Section 80-O of the Act. The Court observed that the said decision gave judicial imprimatur to the Board's clarification to the effect that if an assessee renders technical or professional services from India to a foreign Government or enterprise outside India, it can claim deduction even

if the foreign recipient utilises the 'benefit of such services in India'. In this line of consideration, the High Court lastly referred to the decision in the case of ***Chakiath Agencies*** (supra) and pointed out that therein, the assessee, a shipping agent, was to ensure that the ship owner picks up the cargo and transports it within time and at the agreed rates; and the information regarding the availability of cargo to ship owners and its destinations at frequent intervals enabled the ship owners to program the ships' travel touching the Indian coasts. In the given facts, it was held that the assessee had rendered commercial service to the foreign shipping owner for his use outside India and received a commission in convertible foreign exchange, entitling it to the benefit of Section 80-O of the Act. After such discussion in relation to the aforesaid decisions, the High Court observed that two crucial aspects of Section 80-O of the Act had not fallen for consideration therein: as to what type of services rendered by an Indian entity falls within the sweep of the provision and as to what is the true import of the expression ‘use outside India’. The High Court said thus:

> “46 With due regard to the above pronouncements, we, however, feel it necessary to point out that in none of them, two crucial aspects of Section 80-O of the Act have not fallen for consideration : (i) What type of services rendered by an Indian entity falls within the sweep of the provision; (ii) what is the true import of the expression ‘use outside India’?”

8.4. Having said so in relation to the aforementioned decisions, the High Court took note of the decision of this Court in the case of ***Continental Construction*** (supra), wherein the assessee was a civil construction company that had entered into various contracts for the construction, *inter*

alia, of a dam and irrigation projects in Libya and water supply projects in Iraq after obtaining the approval of CBDT in terms of the then applicable requirements of Section 80-O of the Act. The High Court noticed that in that case, on the assessee's claim for the benefit under Section 80-O of the Act, this Court has held that the assessee was undoubtedly rendering services to the foreign Government and those were technical services indeed, for they required specialised knowledge, experience and skill. The revenue's contention that those services were not covered by Section 80-O of the Act because there was no privity of contract between the employees of the assessee and the foreign Government was rejected by this Court while observing that the assessee was a company and any technical services rendered by it could only be through the medium of its employees. As regards the claim for a deduction based on labelling of the receipts, this Court held that that eligibility of an item to tax or tax deduction could hardly be made to depend on the label given to it by the parties in that, an assessee was not entitled to claim deduction under Section 80-O merely because certain receipts were described in the contract as royalty, fee or commission and at the same time, absence of a specific label cannot destroy the right of an assessee to claim deduction if, in fact, the consideration for the receipts can be attributed to the sources stated in the section. The High Court also noted the dictum of ***Continental Construction*** that it is the duty of the revenue and the right of the assessee to see that the consideration paid under the contract legitimately attributable

to such information and services is apportioned, and the assessee is given the benefit of deduction available under the section to the extent of such consideration.

8.5. The High Court further took note of a decision of Madras High Court in the case of ***Commissioner of Income Tax v. Khursheed Anwar:*** **(2009) 311 ITR 468 (Mad)** wherein the assessee had an exclusive agency for promoting and concluding sales contract in India for machinery and equipment for an enterprise based in Italy. On the strength of agreement, the assessee worked with the foreign enterprise but the Court observed that the benefit under Section 80-O of the Act was not available to the assessee for mere asking; the records and materials must support the claim and the benefit of the said Section cannot be claimed as a matter of right, it being a question of fact, which could be considered by the AO on the basis of the records. In that case, the Appellate Authority had recorded a specific finding that the assessee has simply effected the sale of machinery and spares manufactured by the foreign enterprise; and, therefore, the assessee received only the sales commission, which was not for any activities relating to technical or professional services and hence, the assessee was not entitled to claim deduction under Section 80-O of the Act.

8.6. The High Court summed up the requirements, as emanating from the ratio of the decisions in ***Continental Construction*** and ***Khursheed Anwar*** (supra) as follows: -

> "53. Both from *Continental Construction* and *Khursheed Anwar* we gather that not every receipt from a foreign enterprise in convertible foreign exchange does not *(sic)* automatically get qualified for deduction under Section 80-O--the nomenclature notwithstanding. The burden, in fact, is on the assessee to prove before the Revenue through cogent material that the commission is for the services it rendered falling within the scope of the section. Neither of the facts--the existence of the contract and the receipt of convertible foreign exchange--leads to a presumption that the commission is deductible as provided in Section 80-O of the Act."

8.7. Having, thus, traversed through the provision of law applicable; the meaning of the expressions occurring in text thereof; and the position obtainable from the precedents, the High Court proceeded to examine the facts and, with reference to the aforesaid agreements of the appellant with French and Japanese companies respectively, held that some of the functions said to have been discharged by the assessee cannot qualify for deduction under Section 80-O of the Act; and in none of the appeals, the assessees had placed any material as regards the services they had rendered to qualify under that provision.

8.8. While referring to *Explanation* (iii) to Section 80-O of the Act, the High Court held that mere transferring information abroad would not establish that the service is rendered from India and not in India; that all receipts cannot qualify for concession; that the range of services referred to in Section 80-O of the Act have the thread of connectivity in all the intellectual endeavours mentioned therein. The High Court summed up its discussion in the following passages:-

"56. To sum up, we wish to conclude that the Tribunal has erred on two counts in holding that the assessees are entitled to the benefit of deduction under Section. 80-O of the Act : First, **mere transmission of the information to a foreign enterprise, evidently, abroad does not go to show that it is a service rendered from India, but not in India.** With an element of certainty, we can as well say that once there is a contract, an Indian agent always interacts with and sends information--even technical know-how--to a foreign enterprise abroad. If that alone qualifies for deduction without reference to 'the services rendered in India', the very expression in explanation (iii) becomes otiose. Trite it is to observe that statutory surplusage is not a settled canon of construction; rather it is to be avoided.

57. **The purpose of the provision is to provide an incentive to the indigenous know-how of whatever nature that reaches** the shores of foreign **nations and gets applied** there. The resultant fruits may percolate to India, too, as is the case in *E.P.W. Da Costa* and *Continental Construction*, even in which the Apex Court has held that **not all receipts can claim the concession**. If we refer back to the analogy employed by the learned senior counsel for the assessees, an advocate in India may render services to a foreign client stationed abroad concerning a case pending in India. It is a service rendered not only from India, but also in India. On the other hand, if that piece of professional advice is used abroad, even involving clients of Indian origin or laws of this nation as it happens in international arbitrations, the remuneration is qualified for the benefit.

58. **Once we look at the range of services referred to in Section 80-O, we can discern the thread of connectivity in all the intellectual endeavours mentioned therein** : any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee. It can also be in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee. They cannot be said to be entirely discrete and disparate. **The services have an air of intellectuality; as such, all and sundry services rendered to a foreign enterprise cannot be taken into account, lest it should amount to doing violence to the explanation (iii)**."

(emphasis in bold supplied)

8.9. While concluding on the matter, the High Court referred to the dictionary meaning of the expression “render” and observed that “rendering” includes both “providing” and “performing”; and that in the context of Section 80-O of the Act, the services may be rendered in India but have to be performed on the foreign soil. The High Court also observed that, if the assessees had at all rendered certain services which qualify for deduction, they had failed to place any material in that regard; and the agreements in question only point out that the assessees were marine product procuring agents for the foreign enterprises without any claim for expertise capable of being used abroad rather than in India. Accordingly, the High Court answered the question of law in favour of revenue and set aside the orders passed by ITAT.

RIVAL SUBMISSIONS

Lead arguments on behalf of the appellant

9. On the debate relating to the question of applicability of Section 80-O of the Act to the foreign exchange earned by the appellant in lieu of the services rendered by it to the foreign enterprises, the learned senior counsel for the appellant has made wide-ranging emphatic submissions on the process of interpretation, the scheme and object of Section 80-O and has also referred to the decisions which, in his contention, cover the present case on the substance and principles.

9.1. The learned senior counsel for the appellant has strenuously argued that the High Court has approached the entire case from an altogether wrong angle and with rather linguistic and pedantic approach to interpretation while ignoring the basic object and purpose of Section 80-O of the Act, which is meant to give incentive for earning foreign exchange. With reference to the decision in ***Abhiram Singh v. C.D. Commachen (Dead) by LRs. and Ors.:*** **2017(2) SCC 629,** the learned counsel has submitted that this Court has cautioned against making a 'fortress out of the dictionary' but the High Court has proceeded with excessive reliance on dictionary and has merely looked at the text without its context and object and with such approach, has unjustifiably upturned the well-considered decision of ITAT. Learned counsel has also referred to the decision of this Court in the case of ***Commissioner of Income Tax, Thiruvananthapuram v. Baby Marine Exports, Kollam*****: (2007) 290 ITR 323 (SC),** to submit that an incentive provision has to be construed purposively, broadly and liberally; and for the provision like Section 80-O of the Act, when the basic object is to earn foreign exchange, the incentive is required to be granted if the object is to be achieved. With reference to the decision in ***Commissioner of Income Tax-IV, Tamil Nadu v. B. Suresh:*** **(2009) 313 ITR 149 (SC),** the learned counsel has pointed out that therein, even five years' licence to exhibit an Indian film abroad was held to be that of export of goods and merchandise, covered by Section 80HHC of the Act; and Section 80-O of the Act, being equally a provision for incentives to earn

foreign exchange, ought to receive the same liberal approach. According to the learned counsel, the approach of High Court in the present case had been too narrow and rather unrealistic.

9.2. The learned senior counsel would contend that on a plain reading of Section 80-O, it is clear that it applies to the income by way of royalty, commission, fees or any similar payment received by the assessee from a foreign enterprise in consideration for the use outside India, *inter alia*, of "information concerning industrial, commercial or scientific knowledge, experience or skill" made available to foreign enterprises, provided that the income is received in convertible foreign exchange in India; and *Explanation* (iii) to Section 80-O makes it clear that this Section would apply even to the services rendered from India, which are to be treated for the purpose of this Section as services rendered outside India. Learned counsel has argued that Section 80-O is by no means confined to grant of user of intellectual property rights or intellectual activities, as contended by the revenue and as observed by the High Court. In this regard, the learned counsel has again referred to the words "information concerning industrial, commercial or scientific knowledge, experience or skill" in the latter part of Section 80-O and has argued that these words are distinct from the initial part of this Section, dealing with the use of intellectual property rights. The learned counsel has further argued that even 'commission', which could relate to ordinary commercial activities, is also covered by Section 80-O.

9.3. While strongly relying upon the decision of this Court in the case of ***J. B. Boda & Co. Pvt. Ltd v. Central Board of Direct Taxes, New Delhi:*** **(1997) 223 ITR 271 (SC)**, the learned senior counsel has argued that therein, even a commission received by the reinsurance broker, who only sent information to the foreign reinsurance company regarding the risk involved and other related data, was held entitled to the benefit of Section 80-O of the Act in respect of the entire commission. The learned counsel has argued that the activity of reinsurance broker cannot possibly be described as an intellectual activity or as a technical or professional service; and in that case of ***J.B. Boda & Co.,*** the activity only consisted of sending commercial information from India about a proposed reinsurance contract on the basis of which, the reinsurance company took a commercial decision to enter into the contract. The learned counsel has pointed out that in that case, this Court had referred to the Circular issued by CBDT specifically directing that the deduction under Section 80-O should be allowed on the commission received by an Indian reinsurance broker even though it was only deducted from the remittance made to the company abroad and there was no actual inward remittance of foreign exchange. According to the learned counsel, this judgment decisively negatives the stand of the revenue that Section 80-O applies only to a payment for use of intellectual property rights or for intellectual activities. The learned counsel would argue that the broad, liberal and purposive interpretation of Section 80-O in ***J. B.***

Boda & Co. is of crucial importance and the analogy thereof applies to the appellant.

9.4. The learned senior counsel for the appellant has further relied upon the decision of Delhi High Court in ***E.P.W. Da Costa*** (supra) with the submissions that therein, the Indian assessee only carried out market survey of radio listeners in India and communicated the information to BBC in London; and BBC utilized that information to frame Hindi language broadcasts to India. However, the payments made towards such services by BBC to the assessee were also taken to be covered by Section 80-O of the Act.

9.5. As regards the services and activities of the appellant, the learned senior counsel has referred to the findings of the Appellate Authority as also of ITAT and has submitted that the said findings are to the effect that the appellant rendered services from India to its foreign customers by making over to them the information regarding seafood available in various Indian markets, their quality, price ranges etc.; and, on the basis of this information, the foreign customers took decisions on whether or not to import seafood from India, what to import and from which market and supplier. Further, the other basic requirement of Section 80-O, i.e., remittance of the amount in convertible foreign exchange to India has also been fulfilled. According to the learned counsel, the clear and unequivocal findings of the Appellate Authority and ITAT are findings of fact and they fully establish that the appellant furnished information from India to its

customers abroad regarding its industrial and commercial knowledge and skill, and such information was utilized abroad by the said foreign customers and the appellant's commission was remitted to India in convertible foreign exchange. The learned counsel would argue that nothing of perversity was shown in regard to such findings of fact so as to call for interference but the High Court has proceeded on a basis which is totally inconsistent with those findings. With reference to the decision of this Court in the case of ***K. Ravindranathan Nair v. Commissioner of Income Tax, Ernakulam:*** **(2001) 247 ITR 178 (SC)**, the learned counsel has argued that there was no scope of interference in the findings of fact in this case.

9.6. Assailing the findings of High Court in the impugned judgment, the learned senior counsel has also argued that the approach of the High Court that unless services were rendered abroad, the amount received would not qualify for the benefit of Section 80-O is directly contrary to the plain provision contained in *Explanation* (iii) to Section 80-O and is also contrary to Circular No. 700 dated 23.09.1995 which had clarified that Section 80-O covered not only the services rendered outside India but also the services rendered from India to a party outside India; and it does not matter if the service is subsequently utilized by the foreign customer in India. In regard to the case of the appellant, the learned counsel would submit that in fact, the foreign enterprises related with the appellant do not have any operation or place of business in India and in such a situation, there was no question of the appellant rendering service to the customers in India. Thus, according

to the learned senior counsel, the activities in question are squarely covered by Section 80-O of the Act.

The respondent-revenue

10. In counter to the submissions so made on behalf of the appellant, learned senior counsel for the respondent-revenue has also referred to the object and purpose behind the provisions contained in Section 80-O of the Act; the rules of interpretation, which, in his contention, ought to be applied to these provisions; and, while seeking to distinguish the decisions cited on behalf of the appellant, has relied upon other decisions, which, according to him, apply to the present case and which duly support the view taken by the High Court in the impugned judgment.

10.1. The learned senior counsel for the revenue has pointed out that the provisions similar to Section 80-O were originally available in the former Section 85-C of the Income Tax Act, 1961, which was introduced with the purpose to encourage Indian industries to develop technical know-how and services and make it available to foreign companies so as to augment the foreign exchange earning of our country and to establish a reputation of Indian technical know-how in foreign countries. Reverting to the contents of Section 80-O of the Act, as applicable to the case at hand, the learned counsel has submitted that its purpose is indicated in the heading itself that the same is for providing deduction in respect of royalties etc., received from certain foreign enterprises. Dissecting the relevant parts of this provision, the learned counsel would submit that some of the essential

requirements for its applicability are that the assessee must receive income by way of royalty, commission, fees or similar payment from a foreign enterprise; the consideration must be for technical or professional services, of patents, inventions or similar intellectual property or information concerning industrial, commercial or scientific knowledge; and the services must be rendered outside India. While reiterating and emphatically underscoring the observations in impugned judgment, the learned counsel would submit that the intention of legislature behind introducing Section 80-O was to provide deductions for only that income which is received through intellectual activity/intellectual endeavours; and simple trading activity, though may require certain commercial or industrial information, cannot be said to be covered by this provision. With reference to *Explanation* (iii) to Section 80-O, the learned counsel would argue that the principal provision specifically states that it covers the services rendered "outside India" and the explanation clarifies that the services rendered or agreed to be rendered outside India shall include services rendered from India but shall not include services rendered in India; and therefore, services rendered by the assessee to a foreign entity must be rendered outside India, in foreign soil, and not in India, though they may be rendered from India.

10.2. As regards the principles of interpretation, the learned senior counsel for revenue has strongly relied upon the Constitution Bench decision in ***Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Co. and Ors:*** **(2018) 9 SCC 1** to submit that it is now settled beyond

doubt that taxing statutes are subject to the rule of strict interpretation, leaving no room for any intendment; and the benefit of ambiguity in case of an exemption notification or an exemption clause must go in favour of the revenue, as exemptions from taxation have a tendency to increase the burden on the unexempted class of tax payers. The same principles, according to the learned counsel, shall apply to Section 80-O of the Act and, for the law declared by the Constitution Bench, the decision relied upon by the learned counsel for the appellant in ***Baby Marine Exports*** (supra), which even otherwise dealt with Section 80HHC of the Act and not Section 80-O, is of no help to the appellant.

10.3. Taking on to the facts, the learned senior counsel would submit that the activities alleged to be rendered by the appellant to foreign entities as per the respective agreements were not of technical or professional services so as to be covered by the main part of the provision; and further, they are excluded by virtue of *Explanation* (iii) to Section 80-O, for having been rendered “in India” and not “from India”. The learned counsel would elaborate on the submissions that as per the agreements, the appellant was only to locate reliable and assured suppliers of marine products, to finalise pricing and before exporting, to check the quality of goods to be exported from India to the foreign entity and to communicate the same to the foreign entity. Moreover, the payment was made on the basis of invoice amount; and not on basis of any specialised commercial or technical knowledge given to the foreign entity. The learned counsel has particularly referred to

Article 3 of the above-referred agreement with GELAZUR to point out that if the quality or packaging of the goods was found to be unsatisfactory after inspection in France, the foreign company had no liability to pay the agent's fee. Thus, according to the learned counsel, the activities in respect of which the agreements were entered into by the appellant were only that of a 'buying or procuring agent' and do not fall within the ambit of Section 80-O of the Act; and the primary activity being of certification, which is done in India, and of sourcing the goods, which is also done in India, Section 80-O of the Act is not applicable per the force of its *Explanation* (iii). The learned counsel has yet further submitted, while supporting the observations of High Court, that if one were to assume that the appellant had rendered certain services which qualify for deduction, no material in that regard has been placed on record.

10.4. The learned senior counsel for the revenue has drawn support to his contentions that Section 80-O of the Act does not apply to the appellant by making reference mainly to two decisions. In the first place, the learned counsel has relied upon the decision of this Court in ***B.L. Passi v. Commissioner of Income-Tax:*** **2018 (404) ITR 19 (SC)** with the submissions that this decision applies on all fours to the present case. Therein, the assessee stated that as per the agreement, it was to provide blueprints for manufacture of dies for stamping of doors of cars, though no blueprint sent was produced and there was nothing to show that sales were effected because of information given by assessee. This Court held that the

assessee was only a managing agent and was not rendering 'technical services' within the meaning of Section 80-O of the Act. Hence, there was no basis for grant of deduction. Next, the learned senior counsel has referred to the decision of Kerala High Court in the case of ***Thomas Kurian*** (supra), where the assessee was only examining the quality and type of fish processed by the exporters and was certifying fitness for shipment to foreign buyer, who was bound to accept the goods shipped from India. It was held that the referred services were rendered "in India" and hence, the first eligibility condition of Section 80-O, that the services should be rendered outside India, was not fulfilled and hence, benefit of deduction under Section 80-O of the Act was held not available even though the second condition of receiving foreign exchange was fulfilled. The learned senior counsel would submit that the principles available in the said decisions directly apply hereto and the appellant is not entitled to claim deduction under Section 80-O of the Act.

10.5. Seeking to distinguish the decisions cited by the other side, the learned counsel for revenue has submitted that in the case of ***J.B. Boda & Co.*** (supra), the issue was only about the method of receipt of foreign exchange which would qualify for Section 80-O deduction, which is not in dispute in the present appeals; and the relied upon Circular of 1995 was also limited to the point as to what constitutes receipt of foreign exchange. According to the learned counsel, the nature of activity was not in issue in that case and hence, there is no such *ratio decidendi* which could support

the case of appellant. The learned counsel has further submitted that the case of ***E.W.P. Da Costa*** (supra) was of entirely different activity inasmuch as therein, statistical tables were compiled by the assessee after analysing masses of numerical data, which was collected with audience research studies in India to assess and analyse the radio listening habits of Indians for BBC; and such services were held to be highly technical, pertaining to scientific knowledge and not mere data collection because those services enabled BBC to broadcast not only in India but other parts of the world. As regards the decision in ***B. Suresh*** (supra), it has been submitted that in that case, there was admittedly transfer of rights of feature films for exploitation 'outside India' and the main issue was only whether there could be said to be a 'sale' within the meaning of Section 80HHC, which is irrelevant to present case.

10.5.1. It has also been submitted on behalf of the respondent that, in the judgments relied upon by the appellant before the High Court, the crucial twin aspects of Section 80-O, i.e., as to what type of service rendered by the Indian entity comes within the sweep of this provision; and as to what is the true import of the expression "use outside India" as per *Explanation* (iii) to Section 80-O, did not fall for consideration and hence, those judgments were of no support to the proposition sought to be advanced by the appellant. It has also been submitted that in the case of ***Continental Construction*** (supra), the contracts were for carrying out physical construction of dams and irrigation projects in foreign countries, i.e., 'not in

India' and besides that, in special circumstances, the benefit of Section 80-O was only allowed in part rather than on the entire contract, where the revenue was directed to bifurcate and look at each of the services rendered. According to the submissions on behalf of the respondent, the appellant relied upon this decision in the High Court but gave it up in this Court realising that the same is in favour of revenue; and if at all the ratio is applied, at best, the benefit of Section 80-O might have been considered activity-wise, if the appellant had placed any material as to the actual services rendered, but no such material had been placed on record by the appellant.

10.6. In regard to different services by the same assessee, some of which may not qualify for deduction, apart from relying on the observations in ***Continental Construction*** (supra), reference has also been made on behalf of revenue to two circulars of CBDT i.e., Circular No. 187 dated 23.12.1975 and Circular No. 253 dated 30.04.1979. It has been pointed out that Circular dated 23.12.1975 provided, *inter alia*, that in the case of a composite agreement which specified a consolidated amount as consideration for purposes which included matters outside the scope of Section 80-O, CBDT may not approve such an agreement for the purposes of Section 80-O if it was not possible to properly ascertain and determine the amount of consideration relatable to the provision of the know-how or technical services etc., qualifying for Section 80-O. Thus, the benefit of Section 80-O could have been denied to the entire amount of royalty,

commission, fees etc., receivable under such an agreement. Thereafter, by Circular dated 30.04.1979, it was decided that in such cases of composite agreement, approval would be granted by CBDT subject to a suitable disallowance for the non-qualifying services, after taking into consideration the totality of agreement, so that the balance of the royalty/fees, etc., which was for the services covered by Section 80-O, could be exempted. This Circular also clarified that trade enquires will not qualify for deduction under Section 80-O as also technical services rendered in India. It has been contended that if at all the appellant had been rendering some such services which could qualify for deduction, it had not given any such break-up of services and corresponding receipts and therefore, benefit of Section 80-O of the Act is not available to the appellant.

10.6.1. As regards the circular relied upon by the counsel for the appellant, i.e., Circular No. 700 dated 23.03.1995, it has been contended on behalf of revenue that the same is of no assistance to the appellant because, as per paragraphs 3 and 4 thereof, the services have to be rendered outside India, and it only clarifies that the foreign recipient of the services may utilise the benefit of such services in India whereas in the present case, the appellant merely rendered services in India and only as an agent.

10.7. The learned senior counsel for revenue has also submitted that the findings of fact arrived at by the ITAT were clearly challenged before the High Court in ITA No. 131 of 2002 and, in any case, it being a matter of interpretation of statutory language of Section 80-O and its *Explanation* (iii),

the contention on behalf of the appellant about want of challenge to the findings is without substance.

Rejoinder submissions on behalf of the appellant

11. The submissions made on behalf of the respondent have been duly refuted on behalf of the appellant by way of rejoinder submissions.

11.1. As regards the principles of interpretation in the case of ***Dilip Kumar* & Co.** (supra), it has been contended on behalf of the appellant that reference to the said decision is wholly inapposite because that deals with interpretation of an exemption notification and not an incentive provision like Section 80-O, which has been interpreted in ***J.B. Boda & Co.*** (supra) or Section 80HHC, which has been interpreted in ***B. Suresh*** and ***Baby Marine Exports*** (supra).

11.2. As regards the decisions relied upon by revenue on application of Section 80-O of the Act, it has been submitted that reference to the case of ***B.L. Passi*** (supra) is completely misplaced because therein, the assessee had not placed any material whatsoever to show that it had rendered any service to the foreign customer; and therefore, the issue regarding the nature of service did not even arise. As regards the decision of Kerala High Court in ***Thomas Kurian*** (supra), it has been submitted that the nature of services rendered therein were very different from those of the appellant because the said assessee was only an inspector and certifier; and even otherwise, the said decision is not of any force because the decision of this Court in ***J.B. Boda & Co.*** (supra) was not considered therein and the

decision of Delhi High Court in ***E.P.W. Da Costa*** (supra), which was accepted by revenue and was allowed to become final, was also not considered. It has also been submitted that there is no cogent or specific reply by the respondents to the submissions based on the decisions of this Court in the case of ***J.B. Boda & Co.*** (supra); and it has been reiterated that even the activity of reinsurance broker was taken to be covered for the benefit of Section 80-O though such activity cannot possibly be described as an intellectual activity or as a technical or professional service. It has been contended that a liberal and purposive approach adopted by this Court in ***J.B.Boda & Co.*** for interpreting the incentive provision of Section 80-O is of utmost importance to the present case. It has further been contended in rejoinder submissions that there is no material distinction between the cases of ***J.B. Boda* & Co.** and ***E.P.W. Da Costa*** on one hand and that of the appellant on the other; and superficial comments made on behalf of the respondents in regard to these decisions remain meritless.

11.2.1. Similarly, as regards the Circulars dated 23.12.1975 and 30.04.1979, it has been contended that reference to these circulars is wholly misplaced because they dealt with the matter of approval by CBDT of an agreement with foreign customers but such need for approval of CBDT had been dispensed with by amendment of Section 80-O long ago and these circulars have nothing to do with the issues involved in the present case.

11.3. With reiteration of the submissions relating to the nature of activity of the appellant and the findings of ITAT, it has been argued that the contention of the respondents that the primary activity of the appellant had merely been of procuring agent remains untenable. It has also been contended that as per the finding of fact of ITAT, it is but clear that whole of the services rendered by the appellant and the entire amount received by it in foreign exchange was covered by Section 80-O of the Act; and that the attempt on the part of the respondent to suggest as if only a part of the amount received by the appellant may be eligible for benefit of Section 80-O remains baseless. In the rejoinder submissions, it has also been indicated that reference to the decision of this Court in ***Continental Construction*** (supra) by the respondents is irrelevant, as the same has not been relied upon by the appellant.

12. We have given thoughtful consideration to the rival submissions and have examined the records with reference to the law applicable.

SECTION 80-O OF THE INCOME TAX ACT, 1961

13. Having regard to the subject-matter and the questions involved, appropriate it would be to take note of the relevant provisions contained in Section 80-O of the Act of 1961 and clause (iii) of the *Explanation* thereto at the outset. This Section 80-O has undergone several amendments from time to time but, for the present purpose, suffice would be to extract the relevant and pivotal provisions therein, as existing at the relevant time and as applicable to the present appeal, as under: -

“80-O. Deduction in respect of royalties, etc. from certain foreign enterprises.— Where the gross total income of an assessee, being an Indian company or a person (other than a company) who is resident in India, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of an amount equal to fifty per cent of the income so received in, or brought into, India, in computing the total income of the assessee:

*** *** ***

Explanation.—For the purposes of this section,—

*** *** ***

(*iii*) “services rendered or agreed to be rendered outside India” shall include services rendered from India but shall not include services rendered in India;

*** *** ***”[11]

14. Worthwhile it would also be to take a little excursion into the relevant parts of history related with Section 80-O of the Act while putting a glance over some of the features of developments relating to the provision/s in the Income Tax, 1961 concerning such deduction in respect of particular class of income, received by way of royalty, commissions etc., by an assessee in

11 This extraction is after omitting the other parts of Section 80-O of the Act, including its Provisos and other clauses of *Explanation*, being not relevant for the question at hand.

consideration of imparting specified intellectual property, or extending specified information, or rendering specified services to foreign State or foreign enterprise.

14.1. In the early stages of advent of the Act of 1961, Chapters VI-A, VII and VIII respectively dealt with the deductions to be made in computing the total income, exempted portion/s of income, and rebates and reliefs but, several of the provisions in these Chapters as also some of the provisions of Chapter XII were recast and were put together in the newly framed Chapter VI-A by the Finance (No.2) Act, 1967 with effect from 01.04.1968 with the result that all such incentives or reliefs were directly provided by way of deductions from the total income itself. In its framework, while Part A of this Chapter VI-A contains general provisions including definitions, Part B thereof provides for deductions in respect of certain payments and Part C provides for deductions in respect of certain incomes in computation of total income. Part CA and Part D making provisions for special class of income or persons were introduced later.

14.2. The aspect germane to the present case is that forerunner to the provision relating to deduction of tax on royalties etc., received from certain foreign companies, was Section 85-C in the Act of 1961, that was inserted by Act No.13 of 1966 w.e.f. 01.04.1966 and was placed in Chapter VII. The said Section 85-C and several other provisions of Chapter VII were omitted by Section 33, read with Third Schedule, item 14, of the Finance (No.2) Act, 1967. The reason for omission of the said Section 85-C was that similar

provision, with revised requirements, came to be introduced by way of Section 80-O in the new Chapter VI-A[12]-[13].

14.3. Section 80-O as introduced in Chapter VI-A got several modifications/alterations in regard to the entities eligible to claim such deductions as also the extent (that is percentage) of admissible deduction, but the core of object remained that of encouraging the export of Indian technical know-how and augmentation of the foreign exchange reserves of the country. While the relief was originally admitted in Section 80-O for

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12 For the purpose of reference, we are reproducing the said repealed Section 85-C as under:-

> **"85C. Deduction of tax on royalties, etc., received from certain foreign companies –** Where the total income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by it from a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India (hereafter, in this section, referred to as the foreign company) in consideration for the use of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to the foreign company by the assessee, or in consideration of technical services rendered or agreed to be rendered to the foreign company by the assessee, under an agreement approved by the Central Government in this behalf before the 1st day of October of the relevant assessment year, the assessee shall be entitled to a deduction from the income-tax with which it is chargeable on its total income for the assessment year of so much of the amount of income-tax calculated at the average rate of income-tax on the income so included as exceeds the amount of twenty-five per cent. thereof."

13 For the purpose of reference, we may also reproduce Section 80-O in its original form, as inserted by the Finance (No.2) Act, 1967 as under:

> "**80O. Deduction in respect of royalties, etc., received from certain foreign companies**. – Where the gross total income of an assessee being an Indian company includes any income by way of royalty, commission, fees or any similar payment received by it from a foreign company in consideration for the use of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to the foreign company by the assessee, or in consideration of technical services rendered or agreed to be rendered to the foreign company by the assessee, under an agreement approved by the Central Government in this behalf before the 1st day of October of the relevant assessment year, there shall be allowed a deduction from such income of an amount equal to sixty per cent. thereof, in computing the total income of the assessee."

dealing with a foreign company only, but later on, dealing with a foreign Government or foreign enterprise was included and thereby, the scope of coverage and activities was substantially expanded. However, as noticed from the erstwhile Section 85-C and the originally inserted Section 80-O, any such agreement with the foreign entity required the approval of Central Government and this requirement was later on altered to that of the approval of CBDT. Various other features and aspects related with the development and operation of Section 80-O, as then existing, were dealt with by the two circulars referred to on behalf of the revenue that is, Circular No. 187 dated 23.12.1975 and Circular No. 253 dated 30.04.1979. In fact, these circulars came up for their fuller exposition by this Court in the case of ***Continental Construction*** (supra), as we shall notice hereafter a little later. At this juncture, we may usefully reproduce the relevant text of these two notifications which throw light on the provisions as then existing and as applied. The relevant parts of the said circulars read as under:-

"***Circular No. 187, dated 23rd December, 1975.***

Subject : *Section 80-O of the Income-tax Act, 1961- Guidelines for approval of agreements.*

"With the twin objectives of encouraging the export of Indian technical know-how and augmentation of the foreign exchange resources of the country, section 80-O of the Income-tax Act, 1961, provides for concessional tax treatment in respect of income by way of royalty, commission, fees or any similar payment received from a foreign Government or a foreign enterprise, subject to the satisfaction of certain conditions laid down in the said section.

2. One of the conditions for availability of the tax concession under section 80-O is that the agreement should be approved by the Central Board of Direct Taxes in this

behalf. The application for the approval of the agreement is required to be made to the Central Board of Direct Taxes before the 1st day of October of the assessment year in relation to which the approval is first sought. The form of application for this purpose has been standardised and a specimen is given in the Appendix.

3. The object of the provision when it was first introduced as section 85C in the Income-tax Act, 1961, was stated in Board's Circular No.4P (LXXVI-61) of 1966, to be to encourage Indian companies to export their technical know-how and skill abroad and augment the foreign exchange resources of the country. This was reiterated in Board's Circular No.72 explaining the changes introduced by the Finance (No.2) Act, 1971. Keeping in view the purpose behind this tax incentive and the requirements of the statutory provisions, the Board have evolved the following guidelines for the grant of such approval:-…..

*** *** ***

(ix) In the case of a composite agreement specifying a consolidated amount as consideration for purposes which include matters outside the scope of Section 80-O (e.g., use of trade-marks, supply of equipment, etc.) the amount of the consideration relating to the provision of technical know-how or technical services, etc., qualifying for purposes of section 80-O will have to be determined by the Income-tax Officer separately at the time of assessment after due appreciation of the relevant facts. Where, however, in the opinion of the Board, it will not be possible to properly ascertain and determine the amount of the consideration relatable to the provision of the know-how or the technical services, etc., qualifying for section 80-O, the Board may not approve such an agreement for the purposes of section 80-O of the Act."

*** *** ***"

Circular No.253, dated 30th April, 1979.

Section 80-O of the Income-tax Act, 1961 – Guidelines for approval of agreements – Further clarifications. – Attention is invited to the Board's Circular No. 187 (F. No. 473/15/73-FTD), dated 23rd December, 1975, on the above subject laying down the guidelines for the grant of approval under section 80-O. The Board has had occasion to re-examine the aforesaid guidelines and it has been decided to modify the guidelines to the extent indicated below : -

(i) Para.3(*iii*) of the Circular dated 23-12-1975 provided that the agreement should have been genuinely entered into on and after the date when the tax concession was announced by the introduction of the relevant Bill in the Lok Sabha. It has now been decided that approvals under section 80-O would not be denied on this ground. In other words, para 3(*iii*) of the Circular dated 23-12-1975 may be treated as deleted.

(ii) In para (*ix*) of the said circular, it was mentioned that consideration for use of trade-mark would be outside the scope of section 80-O. It has now been decided that payments made for the use of trade-marks, are of the nature of royalty, and, therefore, fall within the scope of section 80-O.

(iii) It was also stated in para 3(*ix*) of circular dated 23-12-75 that in the case of a composite agreement which specified a consolidated amount as consideration for purposes which included matters outside the scope of section 80-O, the Board may not approve such an agreement for the purposes of section 80-O of the Act if it was not possible to properly ascertain and determine the amount of the consideration relatable to the provision of the know-how or technical services, etc., qualifying for section 80-O. Thus, the benefit of section 80-O could be denied to the entire amount of royalty, commission, fees, etc., receivable under such an agreement. **It has since been decided that in such cases approval would be granted by the Board subject to a suitable disallowance for the non-qualifying services, after taking into consideration the totality of the agreement, so the balance of royalty/fees, etc., which is for the services covered by section 80-O, can be exempted.**"

(emphasis in bold supplied)

14.4 There had been several other modifications of Section 80-O from time to time. The relevant aspects noticeable for the present purpose are that the extent of deduction under Section 80-O was also altered from time

to time and it even came to be allowed 100 per cent. but, by the Finance Act, 1984, it was reduced to 50 per cent. of the referred income. Then, the requirement of approval by CBDT was substituted by Finance Act, 1988 to the approval by Chief Commissioner or Director General. However, by Finance (No. 2) Act of 1991, even that requirement was deleted. In fact, the Finance (No. 2) Act of 1991 brought about a sea of changes in Section 80-O whereby, first and second provisos were omitted and the above-mentioned clause (iii) of *Explanation* was inserted. The words "*or a person (other than a company) who is resident in India*" were also inserted by this very Finance (No. 2) Act of 1991 expanding the reach of Section 80-O even to non-corporate tax payers. Moreover, the earlier expressions "*technical services*" were also altered to "*technical or professional services*". There is no gainsaying the fact that Finance (No. 2) Act of 1991 led to a considerable recasting of Section 80-O of the Act of 1961 with substantial expansion of its ambit and area of coverage. These amendments were made applicable from the assessment year 1992-93 onwards and obviously, this had been the reason that the assessees like the appellant, who had earlier been taking the benefit of deduction under Section 80HHC with reference to their earning of foreign exchange, attempted to shift, for the purpose of deduction, to this provision of Section 80-O. The effect of the amendments to Section 80-O by Finance (No. 2) Act of 1991 was also explained by the revenue in its Circular No. 621 dated 19.12.1991, the relevant part whereof could be extracted as under:-

"Circular No. 621, dated 19th December, 1991:-

'*Extending the scope of deduction in respect of income from royalties, commission, technical fee, etc*. ---**37**. Under the existing provisions of section 80-0 of the Income-tax Act, an Indian company, deriving income by way of royalties, commission, fees etc., from a foreign Government or a foreign enterprise in consideration of the provision of technical know-how or technical services under an approved agreement, is entitled to a deduction, in computing its taxable income, of an amount equal to 50 per cent. of such income provided such income is received in, or brought into, India in convertible foreign exchange.

37.1 With a view to bringing this provision on a parity with other tax concessions for the export sector and also as a measure of rationalisation, the benefit under section 80-0 has been extended to a non-corporate tax payers resident in India. The concession will now also be available in relation to professional services as well as for services rendered to foreign enterprise from India. Further, the requirement of prior approval of the tax authorities in this regard has been done away with.

37.2 This amendment will take effect from 1st April, 1992 and will, accordingly, apply in relation to the assessment year 1992--93 and subsequent years.

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14.5 There had been several further clarifications concerning Section 80-O, as refurbished by the Finance (No. 2) Act of 1991; and one such clarification by the revenue had been by way of Circular No. 700 dated 23.03.1995, which has been strongly relied upon by the learned senior counsel for the appellant. The relevant contents of this circular could also be extracted as follows:-

"*Circular No. 700, dated 23rd March, 1995*

'Deduction under section 80-O of the Income-tax Act, 1961 – Clarification regarding.- Section 80-O of the Income-tax Act,1961, provides for a deduction of 50% from the income of an Indian resident by way of royalty, commission, fees or any similar payment from a foreign Government or enterprise:

(a) in consideration for the use outside India of any patent, invention, model, design, secret formula or process, etc.; or

(b) in consideration of technical or professional services rendered or agreed to be rendered outside India to such foreign Government or enterprise.

In either case, the requirement is that the income should be in convertible foreign exchange.

2. It has been clarified in the *Explanation (iii)* to section 80-O that services rendered or agreed to be rendered outside India [*i.e.,* item *(b)* above] shall include services rendered from India but shall not include services rendered in India.

3. A question has been raised as to whether the benefit of section 80-O would be available if the technical and professional services, though rendered outside India, are used by the foreign Government or enterprise in India.

4. The matter has been considered by the Board. It is clarified that as long as the technical and professional services are rendered from India and are received by a foreign Government or enterprise outside India, deduction under section 80-O would be available to the person rendering the services even if the foreign recipient of the services utilises the benefit of such services in India.

5. The contents of this circular may be given wide publicity and brought to the notice of all the subordinate authorities under your charge for information and necessary action."

14.6 In summation of what has been noticed hereinabove, it turns out that with the objectives of giving impetus to the functioning of Indian industries to provide intellectual property or information concerning industrial, commercial or scientific knowledge to the foreign countries so as to augment the foreign exchange earnings of our country and at the same time, earning a goodwill of the Indian technical know-how in the foreign countries, the provisions like Section 85-C earlier and Section 80-O later were inserted to the Act of 1961. Noteworthy it is that from time to time, the

ambit and sphere of Section 80-O were expanded and even the dealings with foreign Government or foreign enterprise were included in place of “foreign company” as initially provided. The requirement of approval by the Central Government of any such arrangement was also modified and was ultimately done away with. Significantly, while initially the benefit of Section 80-O was envisaged only for an Indian company but later on, it was also extended to a person other than a company, who is resident of India. The extent of deduction had also varied from time to time.

14.7. Broadly speaking, a few major and important factors related with Section 80-O of the Act of 1961, with reference to its background and its development, make it clear that the tax incentive for imparting technical know-how and akin specialities from our country to the foreign countries ultimately took the shape in the manner that earning of foreign exchange, by way of imparting intellectual property, or furnishing the information concerning industrial, commercial, scientific knowledge, or rendering of technical or professional services to the foreign Government or foreign enterprise, was made eligible for deduction in computation of total income, to the tune of 50 per cent. of the income so received. The finer details like those occurring in *Explanation* (iii) of Section 80-O were also taken care of by providing that the services envisaged by Section 80-O ought to be rendered outside India but they may be rendered ‘from India’, while making it clear that the services which are rendered ‘in India’ would not qualify for such a deduction.

The relevant principles for interpretation

15. Having thus taken note of annals and historical perspectives of development of Section 80-O of the Act and the relevant parts of the circulars issued by the department from time to time in tune with such developments, we may now examine the principles for interpretation and application of this provision. In this regard, as noticed, it has been argued on behalf of the appellant, with reference to the decisions in ***Baby Marine Exports*** and ***B. Suresh*** (supra), that an incentive provision like Section 80-O of the Act has to be construed purposively, broadly and liberally so as to achieve its avowed object to earn foreign exchange. *Per contra*, it has been contended on behalf of revenue, with reference to the Constitution Bench decision in ***Dilip Kumar & Co.*** (supra), that the taxing statutes are subject to the rule of strict interpretation, and the benefit of ambiguity in case of an exemption notification or an exemption clause must go in favour of the revenue; and the same principles would apply in relation to Section 80-O of the Act.

15.1. So far the decision in the case of ***B. Suresh*** (supra) is concerned, it does not appear necessary to dilate on the same because the question involved therein was entirely different that is, as to whether the foreign exchange earned by transferring the right of exploitation of films outside India by way of lease was admissible for deduction under Section 80HHC of the Act, where the department attempted to contend that movies/films were

not goods. However, having regard to the submissions made, we may look at the ratio from the other cited decisions in requisite details.

Baby Marine Exports

16. The question that came up for determination before this Court in the case of ***Baby Marine Exports*** (supra) was as to whether the export house premium received by assessee was includible in 'profits of business' while computing deduction under Section 80HHC?

16.1. The assessee in the case of ***Baby Marine Exports*** was engaged in the business of selling marine products both in domestic market and was also exporting it to direct buyers as also through export houses. Contracts with export houses were entered into where assessee received entire FOB value of exports plus export house premium of 2.25% of FOB value. While claiming deduction under Section 80HHC of the Act, this export house premium was also shown as part of total turnover, as being part of sale consideration and not commission or service charge; and deduction was claimed accordingly. The AO rejected such claim for deduction with reference to clause 12 of the agreement and with the observation that such premium was clearly a commission or service charge. The Appellate Authority held that what the assessee received was only reimbursement of certain expenses or payments towards commission or brokerage, falling within the ambit of clause 1 of *Explanation* (baa) to Section 80HHC. However, the ITAT allowed the appeal of the assessee by accepting the stand that the export house premium was includible in 'profits of business'

while computing deduction under Section 80HHC and that export house premium was nothing but an integral part of sale price realised by assessee and could not have been taken as either commission or brokerage. The appeal by revenue was dismissed by the High Court while following its earlier decision on the same point.

16.2. In further appeal by revenue, this Court observed, *inter alia*, with reference to other decisions in ***Sea Pearl Industries v. CIT Cochin***: **2001(127) ELT649(SC)** and ***IPCA Laboratory Ltd. v. Dy. Commissioner of Income Tax, Mumbai:*** **(2004) 266 ITR521(SC)** that Section 80HHC was incorporated with the object of granting incentive to earners of foreign exchange and this section must receive liberal interpretation. This Court also observed with reference to the decision in ***Bajaj Tempo Ltd. v. Commissioner of Income Tax, Bombay:*** **(1992) 196 ITR188(SC)** that we *'must always keep the object of the Act in view while interpreting the Section. The legislative intention must be the foundation of the court's interpretation'***.** 16.3. However, noticeable it is that in ***Baby Marine Exports***, ultimately this Court upheld the claim of assessee for deduction under Section 80HHC of the Act not by way of any liberal or extended meaning to the provision, but only on its plain construction with reference to the definition of the term "supporting manufacturer" in that provision and its direct application to the facts of the case as would distinctly appear from the following passages (at pp. 334-335 of ITR):-

> "According to section 80HHC(1), the export house in computing its total income is entitled to deduction to the

extent of the profit derived by the assessee from the export of the goods or merchandise. Whereas, according to section 80HHC(1A), the supporting manufacturer shall be entitled to a deduction of profit derived by the assessee from the sale of goods or merchandise. The term "supporting manufacturer" has been defined in this section and it reads as under:

> " 'supporting manufacturer' means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing), goods or merchandise and selling such goods or merchandise to an Export House or a Trading House for the purposes of export": According to the said definition, the respondent clearly comes within the purview of supporting manufacturer. **On plain construction of section 80HHC(1A) the assessee being supporting as manufacturer shall be entitled to a deduction of the profit derived by the assessee from the sale of goods or merchandise.**

The respondent - a supporting manufacturer sold the goods or merchandise to the export house and received the entire FOB value of the goods plus the export house premium of 2.25 per cent. of the FOB value. The relevant clause 12 of the agreement has already been extracted in the earlier part of the judgment and according to the said clause, the export house is under obligation to pay to the supporting manufacturer an incentive of 2.25 per cent. on the F.O.B. value according to the terms of the agreement. The respondent, a supporting manufacturer, admittedly sold the goods to the export house in respect of which the export house has issued a certificate under proviso to sub-section (1). According to the section, the respondent - assessee, in computing the total income be allowed a deduction to the extent of profits referred to in sub-section (1B) derived by the assessee from the sale of goods to the export house.

The Appellate Tribunal has arrived at the definite conclusion that the Export House premium is nothing but an integral part of sale price realized by the assessee - a supporting manufacturer from the Export House. The Tribunal further held that the Export House premium cannot possibly be considered to be either commission or brokerage, as a person cannot earn commission or brokerage for himself.

The High Court has upheld the findings of the Tribunal. In our considered view, the order of the Appellate Tribunal is based on proper construction of section 80HHC(1A) of the

Income-tax Act that the Export House premium is an integral part of the sale price realized by the assessee from the export house.

*** *** ***

The submission of the appellant that the premium earned by the respondent assessee is totally unrelated to export is fallacious and devoid of any merit. This submission of the appellant is also contrary to the specific terms of the agreement between the appellant and the respondent.

On a plain construction of section 80HHC(1A), the respondent is clearly entitled to claim deduction of the premium amount received from the export house in computing the total income. The export house premium can be included in the business profit because it is an integral part of business operation of the respondent which consists of sale of goods by the respondent to the export house."

(emphasis in bold supplied)

Dilip Kumar & Co.

17. The core question referred for authoritative pronouncement to the Constitution Bench in the case of ***Dilip Kumar & Co.*** (supra) was as to what interpretative rule should be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax? The reference to the Constitution Bench was necessitated essentially for the reason that in a few decisions, one of them by a 3-Judge Bench of this Court in the case of ***Sun Export Corpn. v. Collector of Customs: (1997) 6 SCC 564***, the proposition came to be stated that any ambiguity in a tax provision/notification must be interpreted in favour of the assessee who is claiming benefit thereunder.[14]

14 In ***Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564*** the Court had stated the law as follows (at page 568) :

"Even assuming that there are two views possible, it is well settled that one favourable to the assessee in matters of taxation has to be preferred."

17.1. In ***Dilip Kumar & Co.***, the Constitution Bench of this Court examined several of the past decisions including that by another Constitution Bench in ***CCE v. Hari Chand Shri Gopal*****: (2011) 1 SCC 236** as also that by a Division Bench of this Court in the case of ***UOI v. Wood Papers Ltd.:*** **(1990) 4 SCC 256** wherein, the principles were stated in clear terms that the question as to whether a subject falls in the notification or in the exemption clause has to be strictly construed; and once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the exemption clause liberally. This Court found that in ***Wood Papers Ltd.*** (supra)***,*** some of the observations in an earlier decision in the case of ***CCE v. Parle Exports (P) Ltd.:*** **(1989) 1 SCC 345** were also explained with all clarity. This Court noted the enunciations in ***Wood Paper Ltd.*** with total approval as could be noticed in the following:-

> **"46.** In the judgment of the two learned Judges in *Union of India* v. *Wood Papers Ltd.*: (1990) 4 SCC 256 (hereinafter referred to as "*Wood Papers Ltd. case*", for brevity), a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in *CCE* v. *Parle Exports (P) Ltd. :* (1989) 1 SCC 345, it was held: (*Wood Papers Ltd. case*, SCC p. 262, para 6)
>
> > "*6*. … Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally."
>
> The reasoning for arriving at such conclusion is found in *para 4* of *Wood Papers Ltd. case*, which reads: (SCC p. 260)
>
> > "*4*. … Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be

tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. *Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction*."

(emphasis supplied)

*** *** ***

58. In the above passage, no doubt this Court observed that: (*Parle Exports case*, SCC p. 357, para 17)

"*17*. when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment."

This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in *Wood Papers Ltd. case*. In para 6, it was observed as follows: (SCC p. 262)

"*6*. … In *CCE* v. *Parle Exports (P) Ltd.*, this Court while accepting that exemption clause should be construed liberally applied rigorous test for determining if expensive items like Gold Spot base or Limca base or Thums Up base were covered in the expression food products and food preparations used in Item No. 68 of First Schedule of Central Excises and Salt Act and held 'that it should not be in consonance with spirit and the reason of law to give exemption for non-alcoholic beverage basis under the notification in question'. Rationale or ratio is same. Do not extend or widen the

ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the respondent did not fall in the first clause of the notification there was no question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

59. The above decision, which is also a decision of a two-Judge Bench of this Court, for the first time took a view that liberal and strict construction of exemption provisions are to be invoked at different stages of interpreting it. **The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction**. The ratio of *Parle Exports case* deduced as follows: (*Wood Papers Ltd. case*, SCC p. 262, para 6)

"*6*. … Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally."

60. We do not find any strong and compelling reasons to differ, taking a *contra* view, from this. **We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in *Hari Chand case***."

(emphasis in bold supplied)

17.2. The Constitution Bench decision in ***Hari Chand Shri Gopal*** (supra) was also taken note of, *inter alia*, in the following:-

"50. We will now consider another Constitution Bench decision in *CCE* v. *Hari Chand Shri Gopal* (hereinafter referred as "*Hari Chand case*", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records

kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in *Hansraj Gordhandas case*, to reiterate the law on the aspect of interpretation of exemption clause in *para 29* as follows: (*Hari Chand case*, SCC p. 247)

> "*29*. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. **A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature**, the non-compliance of which would not affect the essence or substance of the notification granting exemption.
>
> ******* ******* *****"**
>
> (emphasis in bold supplied)

17.3. In view of above and with reference to several other decisions, in ***Dilip Kumar & Co.***, the Constitution Bench summed up the principles as follows:-

> **"66.** To sum up, we answer the reference holding as under:

> **66.1. Exemption notification should be interpreted strictly**; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
>
> **66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.**
>
> **66.3. The ratio in *Sun Export case* is not correct and all the decisions which took similar view as in *Sun Export case* stand overruled**."
>
> (emphasis in bold supplied)

17.4. Obviously, the generalised, rather sweeping, proposition stated in the case of ***Sun Export Corporation*** (supra) as also in other cases that in the matters of taxation, when two views are possible, the one favourable to assessee has to be preferred, stands specifically disapproved by the Constitution Bench in ***Dilip Kumar & Co.*** (supra). It has been laid down by the Constitution Bench in no uncertain terms that exemption notification has to be interpreted strictly; the burden of proving its applicability is on the assessee; and in case of any ambiguity, the benefit thereof cannot be claimed by the subject/assessee, rather it would be interpreted in favour of the revenue.

18. It has been repeatedly emphasised on behalf of the appellant that Section 80-O of the Act is essentially an incentive provision and, therefore, needs to be interpreted and applied liberally. In this regard, we may observe that deductions, exemptions, rebates *et cetera* are the different species of incentives extended by the Act of 1961[15]. In other words, incentive is a

15 As tersely put by this Court in ***Liberty India v. CIT: (2009) 9 SCC 328*****,** the Act of 1961 *broadly provides for two types of tax incentives, namely, investment-linked incentives and profit-linked incentives. Chapter VI-A which provides for incentives in the form of tax deductions essentially*

generic term and ‘deduction’ is one of its species; ‘exemption’ is another. Furthermore, Section 80-O is only one of the provisions in the Act of 1961 dealing with incentive; and even as regards the incentive for earning or saving foreign exchange, there are other provisions in the Act, including Section 80HHC, whereunder the appellant was indeed taking benefit before the assessment year 1993–94.

19. Without expanding unnecessarily on variegated provisions dealing with different incentives, suffice would be to notice that the proposition that incentive provisions must receive “*liberal interpretation*” or to say, leaning in favour of grant of relief to the assessee is not an approach countenanced by this Court. The law declared by the Constitution Bench in relation to exemption notification, *proprio vigore*, would apply to the interpretation and application of any akin proposition in the taxing statutes for exemption, deduction, rebate *et al.*, which all are essentially the form of tax incentives given by the Government to incite or encourage or support any particular activity[16].

20. The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the

belong to the category of “profit-linked incentives” (at p. 339).

16 Of course, there may be other objectives also like supporting any particular class of persons e.g., those contained in Section 80TTB of the Act (for deduction in respect of interest on deposits in case of senior citizen) or Section 80U of the Act (for deduction in case of differently abled person).

assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in ***Dilip Kumar & Co.*** (supra), the generalised observations in ***Baby Marine Exports*** (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in ***Wood Papers Ltd.*** (supra), which have been precisely approved by the Constitution Bench. Thus, at and until the stage of finding out eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature.

21. As noticed, Section 80-O of the Act has a unique purpose and hence, peculiarities of its own. Applying the aforesaid principles to an enquiry for the purpose of a claim of deduction under Section 80-O of the Act as applicable to the present case, evident it is that for the purpose of eligibility, the service or activity has to precisely conform to what has been envisaged by the provision read with its explanation; and the other requirements of receiving convertible foreign exchange etc., are also to be fulfilled. It is only after that stage is crossed and a particular activity falls within the ambit of Section 80-O, this provision will apply with full force and may be given liberal application. The basic question, therefore, would

remain as to whether the suggested activity of appellant had been of rendering such service from India to its principals in foreign country which answers to the description provided by the provision. As regards this enquiry, nothing of any liberal approach is envisaged. The activity must strictly conform to the requirements of Section 80-O of the Act.

22. At this juncture, we are impelled to deal with a segment of submissions on behalf of the appellant with reference to the decision in the case of ***Abhiram Singh*** (supra). It has been argued that this Court has cautioned against making 'a fortress out of the dictionary' but the High Court has relied heavily on text and dictionary rather than the object of the provision. In our view, this part of criticism on behalf of the appellant on the approach of the High Court is entirely inapt and rather unnecessary. The referred observations in the majority view in ***Abhiram Singh's*** case occurred in relation to the interpretation of Section 123(3) of the Representation of People Act, 1951, which is aimed at curbing the unwarranted tendencies of communalism during election campaign and operates in entirely different fields of social welfare and ethos of democracy.

22.1. It remains trite that any process of construction of a written text primarily begins with comprehension of the plain language used. In such process of comprehension of a statutory provision, the meaning of any word or phrase used therein has to be understood in its natural, ordinary or grammatical meaning unless that leads to some absurdity or unless the

object of the statute suggests to the contrary.[17] In the context of taxing statute, the requirement of looking plainly at the language is more pronounced with no room for intendment or presumption.[18] In this process, if natural, ordinary or grammatical meaning of any word or phrase is available unquestionably and fits in the scheme and object of the statute, the same could be, rather need to be, applied. The other guiding rules of interpretation would be the internal aides like definition or interpretation clauses in the statute itself. Yet further, if internal aides do not complete the comprehension, recourse to external aides like those of judicial decisions expounding the meaning of the words used in construing the statutes in *pari materi,* or effect of usage and practice etc., is not unknown; and in this very sequence, it is an accepted principle that when a word is not defined in the enactment itself, it is permissible to refer to the dictionaries to find out the general sense in which the word is understood in common parlance. In

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17 In Principles of Statutory Interpretation by Justice G.P. Singh (14th edn.at p. 91) this elementary rule of literal construction has been stated with reference to scores of decisions, including that in ***Crawford v. Spooner :*** **(1846) 4 MIA 179** as follows:

> "The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary."

18 Apart from the principles already noticed hereinbefore, profitable it would be to point out that the basic principles of interpretation of taxing statutes have been re-condensed by this Court in ***CIT v. Yokogawa India Ltd.:*** **(2017) 391 ITR 274 (SC)** as follows :

> **"**The cardinal principles of interpretation of taxing statutes centres around the opinion of Rowlatt, J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* which has virtually become the locus classicus. The above would dispense with the necessity of any further elaboration of the subject notwithstanding the numerous precedents available inasmuch as the evolution of all such principles are within the four corners of the following opinion of Rowlatt, J.: (*Cape Brandy case*, KB p. 71)
>
> > "… in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

fact, for the purpose of gathering ordinary meaning of any expression, recourse to its dictionary meaning is rather interlaced in the literal rule of interpretation. This aspect was amply highlighted and expounded by the Constitution Bench of this Court in the case of ***Commissioner of Wealth-Tax, Andhra Pradesh v. Officer-in-Charge (Court of Wards), Paigah:*** **(1976) 105 ITR 133** as follows (at p.137 of ITR) :

> "8 . It is true that in *Raja Benoy Kumar Sahas Roy*'s case: *[1957] 32 ITR 466(SC)* this court pointed out that meanings of words used in Acts of Parliament are not necessarily to be gathered from dictionaries which are not authorities on what Parliament must have meant. Nevertheless, it was also indicated there that where there is nothing better to rely upon, dictionaries may be used as an aid to resolve an ambiguity. **The ordinary dictionary meaning cannot be discarded simply because it is given in a dictionary. To do that would be to destroy the literal rule of interpretation.** This is a basic rule relying upon the ordinary dictionary meaning which, in the absence of some overriding or special reasons to justify a departure, must prevail. ……."
>
> (emphasis in bold supplied)

22.2. In the setup of the present case, for a proper comprehension of the contents and text of the relevant provision of Section 80-O and *Explanation* (iii), which are carrying even the minute distinction of the expressions "from India" and "in India", recourse to lexical semantics has been inevitable. However, in all fairness, the High Court has not only discussed semantics and dictionary meanings but, has equally looked at the object and purpose of Section 80-O of the Act. Hence, without further expanding on this issue, suffice it to say for the present purpose that the submissions against the approach of High Court with reference to the decision in ***Abhiram Singh*** (supra) does not advance the cause of the appellant.

Interpretation and application of Section 80-O of the Act of 1961 in the referred decisions

23. Having thus taken note of the provision applicable as also the principles for its interpretation, we may now take note of the relevant decisions wherein the claim for deduction under Section 80-O of the Act has been dealt with by the Courts in the given fact situations and in the particular set of circumstances.

J.B. Boda & Co.

24. The decision of this Court in ***J.B. Boda & Co.*** (supra) has been rather the mainstay of the contentions urged on behalf of the appellant.

24.1. In the case of ***J.B. Boda & Co.***, the appellant was engaged in brokerage business as reinsurance broker. The appellant had been arranging for reinsurance of a portion of risk with various reinsurance companies either directly or through foreign brokers against which, it was receiving a percentage of premium received by the foreign companies as its share of brokerage. With respect to reinsurance business, appellant contacted M/s Sedgwick Offshore Resources Ltd. (London brokers) and furnished all details about the risk involved etc., and confirmation about the assignment was informed to the appellant. Following this, the Indian ceding company handed over the premium to be paid by it to the foreign reinsurance company to the appellant for onward transmission. Appellant approached the RBI showing the amount payable after deducting its brokerage amount; and this amount of brokerage was claimed to be a receipt of convertible foreign exchange without a corresponding foreign

remittance with reference to the provision contained in Section 9 of the Foreign Exchange Regulation Act. However, the respondent revenue took the stand that the agreements of the appellant could not be approved for the purpose of Section 80-O of the Act, for the income having been generated in India and not received in foreign currency. This was unsuccessfully challenged by the assessee before the High Court and hence, the matter was in appeal before this Court.

24.2. It is at once clear that in ***J. B. Boda & Co.***, the question, as to whether the foreign exchange received by the assessee in lieu of services to the foreign company was eligible for deduction under Section 80-O of the Act or not, did not even arise. This was because of the fact that the activity of assessee was, in fact, accepted by CBDT to be eligible for deduction under Section 80-O of the Act in its Circular No. 731 dated 20.12.1995 and the only issue sought to be raised against the assessee by the revenue related to the method of receiving the amount by the assessee. In the said Circular, it was provided by the revenue that '*receipt of brokerage by a reinsurance agent in India from the gross premia before remittance to is foreign principals will also be entitled to the deduction under Section 80-O of the Act*'. This Court noted the contents of the said Circular dated 20.04.1995; and two paragraphs therein with the emphasis supplied by this Court could be usefully reproduced as under (at p. 280 of ITR):-

"CIRCULAR NO. 731 DATED 20-12-1995

*** *** ***

> 2. Reinsurance brokers, operating in India on behalf of principals aboard are required to collect the reinsurance premia from ceding insurance companies in India and remit the same to their principals. In such cases, brokerage can be paid either by allowing the brokers to deduct their brokerage out of the gross premia collected from Indian insurance companies and remit the *net premia overseas* or they could simply remit the *gross premia* and get back their brokerage in the form of remittance through banking channels.
>
> *** *** ***
>
> 4. The matter has been examined. The condition for deduction under section 80-O is that the receipt should be in convertible foreign exchange. When the commission is remitted aboard, it should be in a currency that is regarded as convertible foreign exchange according to FERA. The Board are of the view that in such cases the *receipt of brokerage by a reinsurance agent in India from the gross premia before remittance to* his foreign principals will also be entitled to *the deduction under section 80-O* of the Act."
>
> (emphasis in italics in original)

24.2.1. This Court found the said Circular binding on revenue and also found meaningless the insistence of revenue on a formal remittance to foreign reinsurer and receiving commission from them. This Court observed that such "two way traffic" was unnecessary because in the end result, the income was generated in India in foreign exchange in a lawful and permissible manner. Hence, this Court concluded on the matter while disapproving the stand of the revenue as follows (at p. 281 of ITR):-

> "The facts brought out in this case are clear as to how the remittance to the foreign reinsurance company is made through the Reserve Bank of India in conformity with the agreement between the appellant and the foreign reinsurers, and that the remittance statement filed along with annexure "A" which evidences that the amount due to the foreign reinsurers as also the brokerage due to the appellant and the balance due to the foreign reinsurers is remitted (and expressed so) in dollars. It is common ground that the entire transaction effected through the medium of the Reserve Bank

> of India is expressed in foreign exchange and in effect the retention of the fee due to the appellant is in dollars for the services rendered. This, according to us, is receipt of income in convertible foreign exchange. It seems to us that a "two way traffic" is unnecessary. To insist on a formal remittance to the foreign reinsurers first and thereafter to receive the commission from the foreign reinsurer, will be an empty formality and a meaningless ritual, on the facts of this case. On a perusal of the nature of the transaction and in particular the statement of remittance filed in the Reserve Bank of India regarding the transaction, we are unable to uphold the view of the respondent that the income under the agreement is generated in India or that the amount is one not received in convertible foreign exchange. We are of the view that the income is received in India in convertible foreign exchange, in a lawful and permissible manner through the premier institution concerned with the subject-matter--the Reserve Bank of India. In this view, we hold that the proceedings of the Central Board of Direct Taxes dated March 11, 1986, declining to approve the agreements of the appellant with Sedgwick Offshore Resources Ltd., London, for the purposes of section 80-O of the Income-tax Act, are improper and illegal. We declare so. We direct the respondent to process the agreements in the light of the principles laid down by us hereinabove. The appeal is allowed. There shall be no order as to costs."

24.3. Though it has been painstakingly contended on behalf of the appellant that the decision in ***J.B. Boda & Co.*** should be decisive of the matter because even the brokerage of a reinsurance broker was held eligible for deduction under Section 80-O of the Act but, we are afraid, the said decision has no relevance whatsoever to the question at hand. The eligibility of the concerned services of reinsurance broker for the purpose of Section 80-O was not even a question involved therein. Needless to observe that the business of insurance carries its own peculiarities where the factor of risk involved is of unique significance; and any information and assessment of risk involved is itself a specialised task related with the

business of insurance. In the fact sheet of the case in ***J.B. Boda & Co.***, in the every opening paragraph of judgment, it has been distinctively recorded that in respect of the insurance risk covered by Indian or foreign insurance companies, the appellant had been arranging for the reinsurance of a portion of risk with various reinsurance companies either directly or through foreign brokers. As regards, the services of the appellant with a broker in London, the Court noted, *inter alia,* that the appellant '*furnished all the details about the risk involved, the premium payable, the period of coverage and the portion of the risk which is sought to be reinsured*'. Without entering into further details of the activities of the said assessee, suffice it to say for the present purpose that the submissions on behalf of the appellant, as if the task of a broker of reinsurance is not technical in nature, could only be rejected as being not in conformity with the peculiarities of insurance business. In any case, as observed hereinbefore, this aspect does not require further elaboration because of entirely different question involved and decided by this Court in ***J.B. Boda & Co.***

E.P.W. Da Costa

25. Apart from the case of ***J.B. Boda & Co.***, much sustenance is sought on behalf of the appellant with reference to the decision in ***E.P.W. Da Costa*** (supra), which was a decision rendered by the Delhi High Court and was, admittedly, not appealed against.

25.1. Facts of the case of ***E.P.W. Da Costa*** (supra) had been that the British Broadcasting Corporation ('BBC') was interested in knowing how its

broadcasts were received by listeners in India and hence, engaged the services of petitioner for conducting a public opinion survey so that after gathering information from petitioner, it would make modifications in its programmes. An agreement was entered by the petitioner with BBC for conducting specialised economic and public opinion research on all-India basis to assess the attitudes of a wide range of political, social and economic subjects etc. Approval of this agreement for the purpose of Section 80-O of the Act was refused by CBDT, essentially on the ground that the service (of audience research study in Hindi speaking areas to assess the radio listening habits) was rendered in India and information supplied to the foreign party was not the type contemplated by Section 80-O.

25.2. In the said decision, of course, the question of nature of services for the purpose of Section 80-O was involved but, the High Court precisely found the activity of the assessee to be that of imparting scientific knowledge after proper analysis of the voluminous data collected. While rejecting the contention on behalf of the revenue, the Court observed as under (at p. 755 of ITR):-

> "Mr. Kirpal further contends that the information communicated by the petitioner to the BBC is only data and not scientific or commercial knowledge. Perhaps data may be distinguished from knowledge inasmuch as data may be mere masses of information which is not properly analysed and made intelligible, while knowledge is analysed and presented for understanding. The information supplied by the petitioner to the BBC must fall in the second category or else the BBC would not have entered into an agreement with the

> petitioner for the supply of the information. A mere mass of information without analysis and without being understandable would not be of use to the BBC. **The information is not, therefore, mere data but scientific knowledge**."
>
> (emphasis in bold supplied)

25.3. Reference to this decision in the case of ***E.P.W. Da Costa*** also suffers from the same shortcomings as we have commented in relation to the decision in ***J.B. Boda & Co.*** The appellant would suggest that the assessee in the case of ***E.P.W. Da Costa*** was merely compiling data and forwarding it to BBC. The Court has precisely pointed out that it was not merely the collection of data but it was analysis thereof that was the root of agreement between the principal and the assessee. Again, statistics and statistical analysis is a matter of specific branch of science. In an elaborate discussion as regards the science of statistics with reference to the activity of the assessee, the Court, *inter alia,* observed as under (at pp. 754-755 of ITR)*:*-

> "The petitioner issues questionnaire to the listeners and the information gathered from the answers to the questionnaire is compiled in the form of various statistical tables. **According to *Webster's New International Dictionary*, Vol. III, statistics is a science dealing with the collection, analysis, interpretation and presentation of masses of numerical data and that it is a branch of mathematics.** It would appear, therefore, that the statistical tables compiled by the petitioner after analysing masses of numerical data are commercial or scientific knowledge which is made available to the BBC. For, the word " science " is also a very general word. Since statistics is a science according to *Webster's*, even in a more particular sense, the statistical information may be said to be scientific knowledge within the meaning of s. 80-O…….If commercial or scientific knowledge is confined to mean the abstract exposition of commercial or scientific theories then only a

> book on commercial or scientific subject may be regarded as scientific knowledge. But knowledge may be general or particular. Such knowledge as was compiled, classified and made useful for the use of the BBC may also be said to be commercial or scientific knowledge. BBC is a commercial corporation. Its function may be to disseminate information, but in the discharge of this function it requires commercial or scientific knowledge as to the way its broadcasts are received in different countries. Such a highly organized concern as BBC would not be content with the general information as to the receipt of its broadcast in India. The information would have to be specific, particular and analysed according to the languages in which the broadcasts are made and according to the classes of the public who listen to such broadcasts. In view of the trend to give a wider meaning to the words " science and scientific knowledge ", it would not be possible to restrict the connotation of these words too narrowly. **In our view they would include the statistical tables compiled by the petitioner for the use of the BBC inasmuch as statistics itself has been recognised as a science**."
>
> (emphasis in bold supplied)

25.4 The decision in ***E.P.W. Da Costa***, again, does not make out any case in favour of the appellant.

B. L. Passi

26. In counter to the contentions on behalf of appellant, the decision by Coordinate Bench of this Court in the case of ***B.L. Passi*** (supra) has been strongly relied upon by the revenue but is sought to be distinguished on behalf of the appellant with the submissions that therein, no material at all was produced by the assessee. We may examine this case also with the necessary specifics.

26.1. The relevant facts of the case in ***B.L. Passi*** had been that a Japanese enterprise, Sumitomo Corporation, Japan, was interested in supplying dies for manufacturing of body parts to Indian automobile

manufacturers and an agreement was entered with the appellant (who claimed having vast experience in the Indian automobile industry) whereunder, the appellant was to provide services which involved passing of industrial and commercial knowledge, information about market conditions and Indian manufacturers of automobiles and also technical assistance as required, so as to assist the principal in establishing its business in the Indian automobile industry. The appellant claimed deduction under Section 80-O of the Act with reference to remuneration received on account of such services rendered to the foreign enterprise. The AO disallowed the claim of the appellant for deduction with the finding that the services in question do not qualify for deduction. However, the Appellate Authority ruled in favour of the appellant but ITAT reversed the order of the Appellate Authority and the decision of ITAT was upheld by the High Court.

26.2. In further appeal, this Court briefly took note of the background of insertion of Section 80-O in the Act of 1961 in place of the former Section 85-C with the object of giving fiscal encouragement to Indian industries to provide technical know-how and technical services to newly developing countries and foreign companies to augment the foreign exchange of our country and to establish the reputation of Indian technical know-how for foreign countries. Examining the facts of the case relating to the assessment year 1997-98, this Court found that though the appellant had exchanged several letters with its principal, but the information was in the form of some blueprints and there was nothing on record to show as to how

the blueprints were obtained and dispatched; and such blueprints were not produced by the assessee on record. This Court also found that the said assessee was to receive service charges at the rate of five per cent. of the contributable amount from sale of the principal's products to its customers in India but again, there was nothing on record to prove that any product was developed on the basis of the blueprints supplied by the assessee or that the principal was able to sell any product developed by it by using the information supplied by the assessee. Thus, this Court found that there was no material on record to prove that the sales in question were of any product developed with the assistance of the information by the assessee and equally, there was no material on record to show as to how the service charges payable to the assessee were computed. This Court, *inter alia,* observed and found as under (at pp 26-28 of ITR) :-

> "Now coming to the facts of the case at hand, it is evident from record that the major information sent by the appellant to the Sumitomo Corporation was in the form of blueprints for the manufacture of dies for stamping of doors. Several letters were exchanged between the parties but there is nothing on record as to how this blueprint was obtained and dispatched to the aforesaid company. It is also evident on record that the appellant has not furnished the copy of the blueprint which was sent to the Sumitomo Corporation neither before the Assessing Officer nor before the appellate authority nor before the Tribunal. The provisions of section 80-O of the Income-tax Act mandate the production of document in respect of which relief has been sought. We, therefore, have to examine whether the services rendered in the form of blueprints and information provided by the appellant fall within the ambit of section 80-O of the Income-tax Act or any of the conditions stipulated therein in order to entitle the assessee to claim deduction.
>
> *** *** ***

The blueprints made available by the appellant to the Corporation can be considered as technical assistance provided by the appellant to the Corporation in the circumstances if the description of the blueprints is available on record. The said blueprints were not even produced before the lower authorities. In such scenario, when the claim of the appellant is solely relying upon the technical assistance rendered to the Corporation in the form of blueprints, its unavailability creates a doubt and burden of proof is on the appellant to prove that on the basis of those blueprints, the Corporation was able to start up their business in India and he was paid the amount as service charge.

Further, with regard to the remuneration to be paid to the appellant for the services rendered, in terms of the letter dated January 25, 1995, it has been specifically referred that the remuneration would be payable for the commercial and industrial information supplied only if the business plans prepared by the appellant results positively. Sumitomo Corporation will pay to PASCO International service charges equivalent to 5 per cent. of the contractual amount between Sumitomo and its customers in India on sales of its products so developed. From a perusal of the above, it is clear that the appellant was entitled to service charges at the rate of 5 per cent. of the contractual amount between Sumitomo Corporation and its customers in India on sales of its products so developed **but there is nothing on record to prove that any product was so developed by the Sumitomo Corporation on the basis of the blueprints supplied by the appellant as also that the Sumitomo Corporation was able to sell any product developed by it by using the information supplied by the appellant. Meaning thereby, there is no material on record to prove the sales effected by Sumitomo Corporation to its customers in India in respect of any product developed with the assistance of the appellant's information and also on as to how the service charges payable to appellant were computed**.

In view of the foregoing discussion, we are of the considered opinion that in the present facts and circumstances of the case, the services of managing agent, i.e., the appellant, rendered to a foreign company, are not technical services within the meaning of section 80-O of the Income-tax Act. **The appellant failed to prove that he rendered technical**

> **services to the Sumitomo Corporation and also the relevant documents to prove the basis for alleged payment by the Corporation to him**. The letters exchanged between the parties cannot be claimed for getting deduction under section 80-O of the Income-tax Act."
>
> (emphasis in bold supplied)

26.3. The case of ***B.L. Passi*** (supra) had not been a matter where nothing at all was on record. Indeed the letters exchanged by the assessee with the principal were on record, but the core of information that was allegedly supplied by the assessee to the foreign company, was not furnished, nor it was shown as to how that information was utilized by the foreign company and further, it was also not shown as to how the service charges payable to the assessee were computed when it was to get the payment on the basis of sale to be made by the foreign company. These crucial facts and factors directly co-relate with the requirements of Section 80-O of the Act; and upon the assessee failing to meet with such requirements, the claim for deduction under Section 80-O failed.

Thomas Kurian

27. ***Thomas Kurian*** (supra) had been another case where, for want of any specific material to connect the activity/service of the assessee with Section 80-O, the assessee was held to be merely an inspector or a certifier for the purpose of export as follows:-

> "6. On a reading of the above provisions what we notice is that assessees service is certainly professional services which are covered by the provisions of the Act. However, two conditions have to be satisfied for eligibility for deduction under Section 80-O, the first is that the service should be rendered outside India and the second one is that payment for such services should be received in convertible foreign

> exchange in India. In this case only one condition is satisfied, ie, receipt of consideration in convertible foreign exchange and so far as rendering of service is concerned, the entire service is rendered by the assessee in India and no services is rendered outside India. Exporter ships the goods only with assessee's certificate of fitnesses so that foreign buyer cannot reject the goods. Assessee's communication with foreign buyers in our view does not amount to rendering of service outside India."

Continental *Construction Ltd.*

28. As noticed, in the present case, in the very first place, the Assessing Officer, while dealing with the assessment in question, raised the queries and sought clarifications from the appellant with reference to the enunciations in the decision of this Court in the case of ***Continental Construction*** (supra)***.*** Then, the High Court has also noticed in its impugned judgment that this was one of the decisions relied upon by the learned counsel for the assessee. A comment has been made in the reply submissions on behalf of the revenue before us that the appellant has given up reliance on this decision for the reasons that the ratio essentially operates against the appellant. The response on behalf of the appellant has been that reference to this decision by revenue was entirely unnecessary for the same not being relied upon. Needless to observe that it being a decision of this Court, the ratio and the principle emanating therefrom cannot be ignored, whether relied upon by the appellant or not. Moreover, the said decision has been rendered by a 3-Judge Bench of this Court and has the force of a binding precedent. Having regard to the submissions

made and the questions raised, reference to the decision of this Court in the case of ***Continental Construction*** (supra) is indispensable.

28.1 Briefly put, the relevant factual aspects of the matter in ***Continental Construction*** had been that the assessee was a civil construction company that had executed a large number of projects overseas and in India. The assessee entered into eight contracts for the construction, *inter alia,* of a dam and irrigation project in Libya, a fibre-board factory at Abu Sukhair in Iraq and the huge Karkh Water Supply Project in Baghdad. For these contracts, the assessee obtained the approval of CBDT in terms of Section 80-O. In its claim for deduction, various issues related with different assessment years were raised, which included the applicability of the CBDT's approval and the nature of activities of the assessee, as also the question as to whether the assessee was entitled to claim deduction only under Section 80HHB of the Act and not under Section 80-O of the Act? A wide range of issues raised in the matter were dealt with by this Court, all of which are not necessary to be dilated upon.

28.2. The relevant aspect of the matter is that regarding the eligibility for deduction under Section 80-O of the Act, in ***Continental Construction***, this Court said that eligibility of an item to tax or tax deduction could hardly be made dependent on the label given to it by the parties. Thus, the assessee was not entitled to claim deduction under Section 80-O regarding certain receipts merely because they were described as royalty, fees or commission; and at the same time, absence of any specific label to the item

was not destructive of the right of the assessee to claim deduction. This Court pointed out that the contracts of the type envisaged by Section 80-O are usually very complex and cover a multitude of obligations and response; and it is not always possible for the parties to dissect the consideration and apportion it to various ingredients or elements. This Court, however, pointed out that consolidated receipts and responses were always apportionable. In the context, as regards the activities of the said assessee and entitlement under Section 80-O of the Act, this Court observed that the contracts in question obliged the assessee to make available information and render services to the foreign Government of the nature outlined under Section 80-O and therefore, it was the duty of the revenue and right of the assessee to see that the consideration legitimately attributable to such information and services is apportioned and the assessee is given the benefit of deduction under Section 80-O to the extent of such consideration. This aspect of the matter, extensively dealt with by this Court, could be usefully extracted as under (at p. 119 of ITR): -

> "In our view, neither of the propositions contended for by Sri Ahuja can be accepted as correct. So far as the first proposition is concerned, it is sufficient for us to point out that it is a well-settled principle that eligibility of an item to tax or tax deduction can hardly be made to depend on the label given to it by the parties. As assessee cannot claim deduction under section 80-O in respect of certain receipts merely on the basis that they are described as royalty, fee or commission in the contract between the parties. By the same token, the absence of a specific label cannot be destructive of the right of an assessee to claim a deduction, if, in fact, the consideration for the receipts can be attributed to the sources indicated in the section. The second proposition is equally untenable. Contracts of the type envisaged by section 80-O

> are usually very complex ones and cover a multitude of obligations and responsibilities. It is not always possible or worthwhile for the parties to dissect the consideration and apportion it to the various ingredients or elements comprised in the contract. The cases referred to by the Tribunal and Sri Ahuja as to the indivisibility of a contract arose in an entirely different context. For purposes of income-tax, a principle of apportionment has always been applied in different contexts. Consolidated receipts and expenses have always been considered apportionable in the contexts: (a) of the capital and revenue constituents comprised in them; (b) portions of expenditure attributable to business and non-business purposes; (c) of places of accrual or arisal; and (d) of agricultural and non-agricultural elements in such receipts or payments. This is a point that does not need much elaboration and it is sufficient to refer to decided cases cited under the passages on this topic at pp. 47, 137, 264, 621 and 677 of *Kanga and Palkhivala's The Law and Practice of Income Tax* (Volumne I, eighth edition). We are, therefore, of the opinion that, if, as we have held, the contracts in the present case oblige the assessee to make available information and render services to the foreign Government of the nature outlined in section 80-O, **it is the duty of the Revenue and the right of the assessee to see that the consideration paid under the contract legitimately attributable to such information and services is apportioned and the assessee given the benefit of the deduction available under the section to the extent of such consideration**."
>
> (emphasis in bold supplied)

28.3. It is also significant to notice that in ***Continental Construction,*** this Court took note of the aforesaid circulars of CBDT dated 23.12.1975 and 30.04.1979 and delineated the functions of the Assessing Officer with reference to the claim for deductions under Section 80-O even when approval had been granted by the Board in the following passage (at p. 133 of ITR) :-

> "We should, however, make it clear that our conclusion does not mean the deprivation of all functions of the Assessing Officer while making the assessment on the

applicant. The Officer has to satisfy himself (i) that the amounts in respect of which the relief is claimed are amounts arrived at in accordance with the formula, principle or basis explained in the assessee's application and approved by the Board; (ii) that the deduction claimed in the relevant assessment year relates to the items, and is referable to the basis, on which the application for exemption was asked for and granted by the Board; (iii) that the receipts (before the 1975 amendment) were duly certified by an accountant or that, thereafter, the amounts have been received in or brought into India in convertible foreign exchange within the specified period. The second of these functions is, particularly, important as the approval for exemption granted in principle has to be translated into concrete figures for the purposes of each assessment. Neither the introduction of the words "in accordance with and subject to the provisions of these sections" nor the various "conditions" outlined in the letter of approval add anything to or detract anything from the scope of the approval."

28.4. A few aspects at once emerge from the said decision in ***Continental Construction*** that even under the provisions of Section 80-O of the Act as then existing, whereunder prior approval of CBDT was required to claim deduction, this Court underscored that deduction would be available only in relation to the consideration attributable to the information and services envisaged by Section 80-O and deduction would be granted to the extent of such consideration; and all these aspects were to be examined by the Assessing Officer while making the assessment.

Khursheed Anwar

29. In the impugned judgment, the decision of High Court of Madras in the case of ***Khursheed Anwar*** (supra) has also been taken note of. Therein too, the claim for deduction under Section 80-O of the Act was declined for want of necessary material while observing that the benefit of

Section 80-O cannot be claimed by merely asking for the same; it has to be substantiated with the requisite record. In the said case, on the query of the Assessing Officer, the assessee had submitted its reply but could not furnish the material so as to bring the case within the four corners of Section 80-O of the Act. The High Court, *inter alia,* observed as under (at p. 474 of ITR):

> "Having regard to the above discussions, in our view, as the assessee has not established his claim for deduction by producing the relevant records, the Tribunal has erred in reversing the finding of the Commissioner of Income-tax (Appeals) rendered on the basis that the assessee was not entitled to the benefit in view of the fact that the commission received by the assessee was not for any of the activities mentioned in paragraph 4.1 of the order of the Commissioner of Income-tax (Appeals). There is absolutely no reason adduced by the Tribunal to reverse the said finding. We must also mention here that during the course of arguments, as we found that there were no supporting materials for the claim, we directed the assessee's counsel to produce the materials, if any, available for our perusal. The learned counsel for the assessee, though had produced the explanation of the assessee dated March 28, 1998, he was unable to produce any materials to sustain any of the contentions made in the said letter. In the absence of any materials to show that what was passed on to the foreign enterprise was the information concerning with commercial or technical or scientific aid, merely because an agreement is entered into between the assessee and the foreign enterprise, we are not inclined to accept the claim of deduction under section 80-O of the Act. Accordingly, the second substantial question of law is answered in favour of the revenue and against the assessee. The tax case appeal is allowed in part. No costs."

30. From the decisions aforesaid, it could be immediately culled out that for bringing any particular foreign exchange receipt within the ambit of Section 80-O for deduction, it must be a consideration attributable to information and service contemplated by Section 80-O; and in case of a

contract involving multiple or manifold activities and obligations, every consideration received therein in foreign exchange will not *ipso facto* fall within the ambit of Section 80-O. It has to be attributable to the information or service contemplated by the provision and only that part of foreign exchange receipt, which is so attributable to the activity contemplated by Section 80-O, would qualify for claiming deduction. Such enquiry is required to be made by the Assessing Officer; and for the purpose of this imperative enquiry, requisite material ought to be placed by the assessee to co-relate the foreign exchange receipt with information/service referable to Section 80-O. Evidently, such an enquiry by the Assessing Officer could be made only if concrete material is placed on record to show the requisite co-relation.

Whether the appellant is entitled claim deduction under S. 80-O

31. Coming to the facts of the present case, the agreements of the appellant with the foreign entities primarily show that the appellant was to locate the source of supply of the referred merchandise and inform the principals; to keep liaison with the agencies carrying out organoleptic/bacteriological analysis and communicate the result of inspection; to make available to the foreign principals the analysis of seafood supply situation and prices; and to keep the foreign principals informed of the latest trends in the market and also to negotiate and finalise the prices. As per the agreements, in lieu of such services, the appellant was to receive the agreed commission on the invoice amounts.

32. In contrast to what has been observed in the cases of ***J.B. Boda & Co.*** (advising on the risk factor related to the proposed insurance/reinsurance) and ***E.P.W. Da Costa*** (dealing with statistical analysis of data collected), what turns out as regards the activities/services of the appellant is that the appellant was essentially to ensure supply of enough quantity of good quality merchandise in proper packing and at competitive prices to the satisfaction of the principals. This has essentially been the job of a procuring agent. Though the expressions “expert information and advice”, “analysis”, “technical guidance” etc., have been used in the agreements but, these expressions cannot be read out of context and *de hors* the purpose of the agreement. All the clauses of the agreements read together make it absolutely clear that the appellant was merely a procuring agent and it was his responsibility to ensure that proper goods are supplied in proper packing to the satisfaction of the principal. All other services or activities mentioned in the agreements were only incidental to its main functioning as agent. Significantly, the payment to the appellant, whatever label it might have carried, was only on the basis of the amount of invoice pertaining to the goods. There had not been any provision for any specific payment referable to the so-called analysis or technical guidance or advice. Viewed from any angle, the services of the appellant were nothing but of an agent, who was procuring the merchandise for its principals; and such services by the appellant, as agent, were rendered in India. Even if certain information was sent by the assessee to

the principals, the information did not fall in the category of such professional services or information which could justify its claim for deduction under Section 80-O of the Act. In other words, in the holistic view of the terms of the agreements, we have not an iota of doubt that the appellant was only a procuring agent, as rightly described by the High Court.

33. If at all any doubt yet remains about the nature of services of the appellant, the same is effectively quelled by the default clauses in the agreements in question. We may recapitulate the default clauses in the referred agreements, which read as under:-

> The agreement with HOKO
>
> "Article 4: HOKO pays to RC-CN 0.7% of the invoice amount on the C & F basis and US$ 2,000.00 per month as commission. When the quality of goods is found to be unsatisfactory to HOKO after inspection in in Japan, HOKO shall have no responsibility to pay the agent fee."
>
> The agreement with GELAZUR
>
> "When the quality and the packaging of the goods are found to be unsatisfactory to 'GELAZUR" after inspection in FRANCE, GELAZURE, shall have no responsibility regarding the payment of the Agent's fee."

33.1. In both the agreements, the default clauses make it more than clear that if the quality of goods was found to be unsatisfactory to the principals after inspection in their respective countries, they shall have no responsibility to pay the agent's fees. If at all it had been a matter of the appellant furnishing some technical or material information which served the foreign enterprises in making the decision for procurement, in the ordinary circumstances, after completion of such service and its utilization

by the foreign enterprises, the appellant was likely to receive the professional service charges for furnishing such information but, contrary and converse to it, the agreements provide for no payment to the appellant in case of principal being dissatisfied with goods. These default clauses effectively demolish the case of the appellant and fortify the submissions of the revenue that the appellant was merely a procuring agent and nothing more.

34. The matter can be viewed from yet another angle, as indicated by the High Court in the last paragraph of its judgment. If at all it be assumed that out of various tasks mentioned in the agreements, some of them involved such services which answered to the requirements of Section 80-O, it was definitely required of the appellant to establish as to what had been such information of special nature or of expertise that was given by it and how the same was utilised, if at all, by the foreign enterprises; and how much of the foreign exchange receipt was attributable to such special service. Obviously, the appellant did not supply such particulars. As noticed, the High Court posed a pointed query to the learned counsel appearing for the appellant as to whether all the services mentioned in the agreement would come within the purview of Section 80-O. The cryptic response to this query on behalf to the appellant had been that '*if the recipient of services is situated outside, all the services rendered by the assessee in terms of the agreement come within the sweep of the provision'.* It was specifically contended on behalf of the appellant that

establishing *'which of its services qualifies for the deduction is of no consequence, rather unnecessary'*. In our view, this response was not in conformity with the requirements of Section 80-O of the Act, as explained and applied by this Court in ***Continental Construction*** and in ***B. L. Passi*** (supra) as also as applied by Madras High Court in ***Khursheed Anwar*** (supra). Rather, this stand, in our view, puts the final curtain on the appellant's case because most of the services in the agreements in question were those of an agent ensuring supply; and if any part of the services co-related with Section 80-O, the particulars were of utmost significance and were fundamentally necessary which the appellant had never supplied. Merely for having a contract with a foreign enterprise and mere earning foreign exchange does not *ipso facto* lead to the application of Section 80-O of the Act.

35. The effect of Circular No.700 dated 23.03.1995 is only to the extent that once the service is rendered 'from India', even if its ultimate use by the foreign enterprise occurs in India, the matter may not go out of Section 80-O of the Act. This clarification is in tune with the nature of this provision meant for extending incentive but it does not do away with the basic requirements that to qualify for deduction under Section 80-O, the service must be rendered from India to foreign enterprise and the nature of service ought to be as delineated in Section 80-O. Ultimate use of the service could be in India, as illustrated by the case of ***E.P.W. Da Costa*** (supra) and by the cases of ***Li & Fung*** and ***Chakiath Agencies*** (supra) that were cited before

the High Court. However, the claim of the appellant fails at the threshold for the reasons foregoing. Circular No.700 dated 23.03.1995 is neither of any application to this case nor of any assistance to the appellant. The appellant is not entitled to claim deduction under Section 80-O of the Act.

36. For what we have discussed hereinabove, it is also apparent that the Appellate Authority as also the ITAT had viewed the present case from an altogether wrong angle. As noticed, the Appellate Authority even did not comprehend the observations in ***E.P.W. Da Costa*** (supra) and assumed that every information is scientific knowledge. On facts, the Appellate Authority observed that even if acting as agent of the foreign enterprises, the appellant was locating the sources of frozen seafoods, bringing the foreign enterprises in contact with the manufacturers or processors of seafood, and negotiating with the local packers; and these activities, though carried out in India, had been on behalf of the foreign enterprises. The ITAT, though took note of different services contemplated by the agreements in question and even observed that the clauses like those requiring the appellant to settle the claim with manufacturers might be the services rendered in India but then, proceeded to assume, without any cogent material on record, that other services were rendered from India and on that basis, the foreign party took its decision. Even in this regard, the questions relevant and germane to the enquiry were not even gone into inasmuch as, it was not examined as to what and which part of the consideration was attributable to the services envisaged by Section 80-O of the Act, which

were rendered from India. Therefore, the findings of the Appellate Authority and ITAT, being based on irrelevant considerations while ignoring the relevant aspects, were neither of binding nature nor could have been decisive of the matter. Hence, neither anything turns upon the submissions made on behalf of the appellant with reference to the decision in ***K. Ravindranathan Nair*** (supra) nor this aspect requires any further discussion.

37. In our view, the High Court has rightly analysed the entire matter with reference to the relevant questions and has rightly proceeded on the law applicable to the case. The impugned judgment calls for no interference.

The appellant M/s Laxmi Agencies - the appeal arising out of SLP (Civil) No.23699 of 2016.

38. This appeal involves similar claim of the other assessee firm M/s Laxmi Agencies, said to be engaged in similar business of rendering services to foreign buyers of Indian marine products. For the assessment year 1997-98, this assessee firm, while declaring total income of Rs. 31,81,180/-, claimed deduction under Section 80-O to the tune of Rs.21,84,302/-, being 50% of the net income of Rs. 43,68,604/- towards the service charges received from such foreign buyers.

38.1. In the assessment order dated 31.01.2000, the AO noted the explanation of this appellant regarding the services rendered in the following:

"…..As per the detailed letter dated 22.11.1999 filed by the assessee the services rendered by it to the foreign enterprises are by way of :

1. To impact commercial and technical knowledge, experience and skill in the field of Frozen Food/Marine products to enable them to formulate their policies and take decision for import thereof from India;

2. To locate reliable sources of quality and assured supply of Frozen Seafood/Marine products and communicate the assessee's expert opinion and advise to them to enable them to take decisions for import from India;

3. To keep close liaison with agencies such as EIA/Llyods/ SGS especially for organoleptic/bacteriological analysis and communicate the results of inspection along with assessee's expert comments and advice. This also enables the foreign enterprises to take decisions for import from various sources from several countries available to them.

4. Making available full and detailed analysis of the seafood situation and prices for the above purpose.

5. To advise and keep informed the foreign buyers of the latest trends/process applications in manufacturing and all valuable commercial and economic information which will directly and indirectly assist them to organize, develop, control on regulate their import business from India.

6. To assist foreign buyers in negotiating and finalizing prices for Indian marine products and advise them of all rules and regulations and other related information for such import."

In the case of this appellant, again, the AO was of the view that the services were rendered in India and the service charges received from the foreign enterprises in respect of such services did not qualify for deduction under Section 80-O.

38.2. In the case of this appellant, the Appellate Authority examined the terms of agreements with the foreign enterprises in detail and noted the contents thereof in the following paragraphs:-

"2.The appellant had entered into agreement with various foreign enterprises for render the following services. Article 2 of the agreement entered into with Neptune Fisheries Ind. USA reads as under:-

(a) Locating reliable source of quality and assured supply of frozen sea-foods/marine products for the purpose of import by "NEPTUNE" and communicate its expert opinion and advice to the NEPTUNE;

(b) In addition to the above services rendered by 'Laxmi' it will also keep a close liason with agencies such as ELA/LLOYDS/SGS especially for organolotic/acteriological analysis and communicate the result of the inspection along with its expert comments and advice.

(c) Making available full and detailed analysis of the sea food supply situation and prices;

(d) To advise NEPTUNE and keep them informed of the latest trends/processes applications in manufacturing and of all valuable commercial and economic information about the markets, Government Policies, exchange fluctuations, banking laws which will directly or indirectly assist "NEPTUNE" to organize, develop control or regulate their import business from India.

e) To negotiate and finalise the prices for India Exporters of frozen marine products and to communicate such and other related information to "NEPTUNE".

Article 4 of the agreement states:

"LAXMI" shall also do everything that is required to ensure highest standards of quality hygiene and freshness of products including supervision at various stages."

3. The agreement made with other principles *(sic- principals)* are also on similar lines."

38.3. In this case, of course, the Appellate Authority took note of various activities of the appellant with and for the buyer concerned and, while disallowing 20% of the service charges received from foreign enterprises towards the services rendered in India, allowed deduction under Section 80-O to the extent of the net income arising out of 80% of such charges received from foreign enterprises.

38.4. The order so passed by the Appellate Authority was challenged both by the appellant and by the revenue before ITAT in ITA No. 580/Coch/2004 and ITA No. 618/Coch/2004 respectively. The ITAT referred to its earlier decision in the case of the other assessee Ramnath & Co. (as referred to hereinabove) and following the same, allowed the appeal of the appellant and dismissed that of the revenue and thereby, allowed the claim of appellant for deduction *in toto*.

38.5. Although, from the fact sheet of this case, it does not appear if the agreements of this appellant also carried the default clauses as we have noticed in the lead case but, on all other major features, the agreements had been of the same nature and again, this appellant has also failed to bring any material on record to show if it had received any specific consideration referable to the activities envisaged by Section 80-O of the Act. In the given set of facts and circumstances, this appellant also turns out to be only a procuring agent and not beyond. Hence, this appeal also deserves to be dismissed.

Conclusion

39. For what has been discussed and held hereinabove, these appeals fail and are, therefore, dismissed. No costs.

……J.
(A.M.KHANWILKAR)

……J.
(DINESH MAHESHWARI)

New Delhi,
Dated: 5th June, 2020.