IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 75 OF 1998

Reliance Infrastructure Ltd. .. Applicant

v/s.

Commissioner of Income Tax,
City-VI, Mumbai .. Respondent

Mr. R. Muralidhar a/w Mr. Rajesh Poojary i/b Mulla & Mulla and C.B.&C for the applicant.
Mr. A.R. Malhotra a/w Mr. N.A. Kazi for the respondent.

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

RESERVED ON : 13th DECEMBER, 2016.

PRONOUNCED ON : 20th DECEMBER, 2016

JUDGEMENT :- (Per M.S. Sanklecha, J)

1. By this Reference under Section 256(1) of the Income Tax Act, 1961 (the Act), the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following substantial questions of law :-

> *(i) (a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in restricting the assessee's claim for deduction under Section 80HHB in the sum of Rs.48 lakhs contributed to the Foreign Project Reserve Account during the previous year; and*

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(b) whether the Tribunal further erred in holding that the further sum of Rs.50 lakhs transferred from the General Reserve to the Foreign Project Reserve during the pendency of the appeal should not be considered for computing the deduction under Section 80HHB ?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the sum of Rs.47,30,951/- (being the amount deducted under 80HHB) and Rs.5,59,919/- (being the weighted deduction allowed under Section 35B) were to be excluded in arriving at the figure of doubly taxed income for the purpose of computing the DIT relief under Section 91?

(iii) (a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the tax paid in Saudi Arabia on which no DIT relief could be claimed was not allowable as deduction in computing the income under the provisions of the Income-Tax Act; and

(b) whether the Tribunal erred in not following its decision in the assessee's own case for the assessment year 1979-80.

2. This Reference relates to Assessment Year 1983-84.

Regarding question (i) :-

(a) The applicant-assessee during the previous year relevant to the

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assessment year 1983-84 executed some projects in Saudi Arabia. Consequent to the above, on the profits and gains earned by executing its projects in Saudi Arabia(outside India), applicant-assessee claimed deduction under Section 80HHB of the Act. The deduction under Section 80 HHB of the Act was available only on the profits and gains derived from the business of executing foreign projects and satisfying the various conditions specified therein.

(b) In the previous year relevant to the subject assessment year, the applicant-assessee had in respect of its profits and gains derived on execution of foreign projects complied with all the conditions specified in Section 80HHB of the Act to the extent of Rs.48lakhs. Thus the Assessing Officer by Assessment order dated 20 January, 1986 allowed deduction under Section 80HHB of the Act to the extent of Rs.48 lakhs.

(c) In appeal before the Commissioner of Income Tax(Appeals) ('CIT(A)') the applicant-assessee contended that to avail of deduction under Section 80HHB of the Act, the condition of creating a Reserve called the *'Foreign Projects Reserve Account'* from the profits and gains of its foreign projects is not a necessary condition. Thus, sought deduction on the profits and gains of Saudi Arabian projects even when Foreign Project Reserve Account is not created. By an order dated 24 July 1986 the CIT(A) negatived the above contention and held that

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deduction under Section 80HHB of the Act is available only on crediting the entire amount of which deduction is sought to 'Foreign Projects Reserve Account'.

(d) Being aggrieved the applicant-assessee filed an appeal to the Tribunal. During the pendency of its appeal before the Tribunal, the applicant assessee in the year 1991-92 had credited an further amount of Rs.50 lakhs in the Foreign Projects Reserve Account by transferring it from the General Reserve Account. This amount of Rs. 50 lakhs had been credited to its General Reserve Account from its profits and gains of foreign projects for the previous year relevant to the Assessment year 1982-83. The delay in crediting the above amount of Rs.50 lakhs to the Foreign Projects Reserve Account of applicant assessee was sought to be explained by stating that for the subject assessment year, and up to the date of the assessment order passed on 20 January 1986, its application for relief / deduction under Section 80-O of the Act was pending with the Central Board of Direct Taxes (CBDT). The application for deduction under Section 80-0 of the Act was rejected by the CBDT only in March 1986. Therefore during the pendency of its appeal before the Tribunal, the applicant-assessee transferred a sum of Rs.50 lakhs from its General Reserve Account to the Foreign Project Reserve Account. The Tribunal by the impugned order dated 11th November, 1996

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dismissed the appeal of the applicant- assessee holding that on reading of Section 80HHB of the Act, it is clear that deduction is allowable in terms of clause 3 thereof only on the assessee satisfying the conditions set out therein. One of the conditions specified in clause 3(ii) of Section 80 HHB of the Act requires crediting its profits to the Foreign Project Reserve Account which can be utilized for a period of five years next only for purposes of its business other than for distribution by way of dividends or profits. Therefore the creation of Reserve after the expiry of five years period provided in Section 80HHB of the Act does not amount to satisfaction of the conditions specified therein.

(e) Consequent to the above, on an application of the applicant assessee the question no. 1 as formulated herein above, is referred to us by the Tribunal.

(f) Mr. Murlidhar, learned Counsel appearing for the applicant assessee in support submits that the applicant could not create a Foreign Projects Reserve Account to the extent of Rs.50lakhs in the previous year relevant to the subject assessment year as on that very amount it had sought benefit of deduction under Section 80-O of the Act by making an application to the Central Board of Direct Taxes(CBDT). The assessment order was passed in January, 1986 while the order of CBDT rejecting the applicant's application under Section

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80-O of the Act was only in March, 1986. Thus, creation of Foreign Projects Reserve Account in the year 1991-92 by transferring the amount from General Reserve Account in the year 1991-92 should be considered as sufficient compliance with conditions of Section 80HHB of the Act. This on the ground that an appeal is a continuation of the original assessment proceedings. Secondly, in any case the amount of Rs.50 lakhs was a part of the amount transferred in the previous year relevant to the subject assessment year from its profit and loss account to its General Reserve Account from the profits of the subject assessment year and the same is now being transferred from the General Reserve Account to the Foreign Projects Reserve Account. This is only a change in nomenclature and therefore, deduction under Section 80HHB should be allowed. Lastly attention is invited to Section 80HHC of the Act to contend that a similar provision therein providing for deduction of a percentage of profits for export business conditional upon crediting the deduction claimed to a reserve account from the profits of the business of export has been liberally construed. It is pointed out that this Court in ***Karimjee Pvt. Ltd. Vs. DCIT, 246 ITR 546*** has observed that deduction under Section 80HHC of the Act can be claimed only after the Assessing Officer has determined the profits of the assessee.

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(g) On the other hand, Mr. Malhotra, learned Counsel appearing for the Revenue submits that the applicant assessee during the assessment proceedings had not given up its claim for deduction under Section 80-O of the Act or even made any alternative claim under Section 80 HHB of the Act. Secondly, the benefit of Section 80HHB of the Act is available only on satisfying the conditions prescribed therein viz. creation of Foreign Projects Reserve Account during the previous year relevant to subject assessment year and utilization of the same during the period of 5 years next only for the purposes of business other than for distribution by way of dividend or profits. This condition is admittedly not satisfied. Lastly it is submitted that the scope of deduction available under Section 80HHB as evidenced by its language is completely different from the scope of deduction available under Section 80HHC of the Act. Both the sections being differently worded, no assistance can be taken from Section 80HHC of the Act to interpret / understand Section 80HHB of the Act.

(h) For considering the rival contentions it would be necessary to reproduce the relevant extracts of Section 80HHB and 80HHC of the Act as in force during the relevant period as under:-

> *"**Section 80HHB :-***
> *(1) Where the gross total income of an assessee being an Indian company or a person (other than a company) who is*

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resident in India includes any profits and gains derived from the business of –
(a) the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him, or
(b) the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person,
with the Government of a foreign State or any statutory, or a foreign enterprise, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty-five per cent thereof :
Provided that the consideration for the execution of such project or, as the case may be, of such work is payable in convertible foreign exchange.

(2) for the purposes of this section
(a) ……
(b) ……

(3) The deduction under this section shall be allowed only if the following conditions are fulfilled, namely :-
(i) ……
(ii) an amount equal to twenty-five per cent of the profits and gains referred to in sub-section (1) is debited to the profit and loss account of the previous year in respect of which the deduction under this section is to be allowed and credited to a reserve account (to be called the "Foreign Projects Reserve Account") to be utilised by the assessee during a period of five years next following for the purposes of his business other than for distribution by way of dividends or profits;

(iii) …….

(4) …….
(5) …….

<u>Section 80HHC :-</u>
(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the

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business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, [deduction equal to the aggregate of –

(a) four per cent of the net foreign exchange realisation; and

(b) fifty per cent of so much of the profits derived by the assessee from the export of such goods or merchandise as exceeds the amount referred to in clause (a):

Provided that the deduction under this sub-section shall not exceed the profits derived by the assessee from the export of such goods or merchandise:

Provided further that an amount equal to the amount of the deduction claimed under this sub-section is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee.

(2)(a) ……..

(3) ……..

(4) ……..

(i) We have considered the rival submissions. It is a settled position in law that a party which claims an exemption / deduction under the fiscal statute is required to strictly comply with the requirements of the mandatory conditions mentioned therein, as held by the Apex Court in ***State of Jharkhand v. Ambay Cement 2005(1) SCC 368***. It is clear that the conditions stipulated in sub-section (3) of Section 80HHB of the Act are conditions to be mandatorily satisfied for availing of its benefit. This is self evident as it states that the deduction under this Section (80HHB) will be allowed “only” if the conditions provided

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therein are satisfied. It is undisputed that the amount of Rs.50 lakhs of which deduction is now claimed under Section 80HHB of the Act had not been transferred to the Foreign Projects Reserve Account during the previous year relevant to the subject assessment year from the profits of its projects outside India. Thus, not satisfying the requirement under section 80HHB(3) of the Act. The amount of Rs.50 lakhs was transferred into the Foreign Projects Reserve Account from the General Reserve Account only in the year 1991-92, thus, at that time the conditions to be complied with for availing of the benefit of Section 80HHB of the Act viz. the amount credited to the Foreign Projects Reserve Account from its profits of exports and utilizing the same during the period of 5 years next of the previous year relevant to the subject Assessment Year only for the purposes of business other than for distribution by way of dividend or profits. In this case, undisputedly the transfer of the amount from the General Reserve Account to the Foreign Projects Reserve Account took place in the year 1991-92 i.e. after the expiry of 5 years i.e. after the period of restriction on the manner of utilization of the amounts credited to Foreign Projects Reserve Account provided in sub-section 3(ii) of Section 80HHB of the Act. Thus, the condition specified in sub-section 3(ii) of Section 80HHB of the Act is admittedly not satisfied. Consequently, the benefit of

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Section 80HHB of the Act cannot be extended to the applicant assessee to the extent of Rs.50 lakhs, which were transferred not in the previous year relating to the subject Assessment Year but only in the year 1991-92 from the General Reserve Account to the Foreign Projects Reserve Account.

(j) In view of the clear requirement of Section 80HHB of the Act to satisfy the requirements of Sub-section (3) thereof to claim the deduction there under, the reason for non-satisfaction urged by the Applicant viz. application under Section 80-0 of the Act was pending, becomes academic. The non-satisfaction of the conditions to be satisfied to avail of Section 80HHB of the Act cannot be relaxed in the absence of the statute itself providing for it. The non-satisfaction of the conditions necessary to be fulfilled to avail of the benefit of Section 80HHB of the Act would dis-entitle a party from claiming its benefit. Accepting the submissions on behalf of the applicant would mean ignoring the conditions specified in sub-section (3) of Section 80HHB of the Act, which the Court cannot do. The further reliance on the part of the applicant on Section 80HHC of the Act to bolster its case, is not of any assistance. This is so, as the conditions required to be satisfied to avail of the benefit of Section 80HHB of the Act is different from that to be satisfied for the purposes of Section 80HHC of the Act. Therefore,

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the manner in which the Courts construe Section 80HHC of the Act would be of no assistance to construe Section 80HHB of the Act as the wordings of the conditions to be satisfied in both the sections are entirely different. In fact, there is no obligation under Section 80HHC of the Act to create a separate fund as in the case of Section 80HHB of the Act. Therefore the reliance upon the decision of this Court in *Karimjee Pvt. Ltd.* (supra) is not of any assistance to the applicant as it was rendered in the context of different provision of law, differently worded.

(k) In the above view, question (i)(a) is answered in the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee and question (i)(b) is answered in the negative i.e. in favour of the respondent Revenue and against the applicant assessee.

3. <u>Regarding question (ii) :-</u>

(a) The applicant assessee had in the previous year relevant to the assessment year 1983-84 executed projects in Saudi Arabia. The income earned in Saudi Arabia had been subjected to tax in Saudi Arabia. Therefore, while determining the tax payable under the Indian law, the applicant assessee sought benefit of Section 91 of the Act, which gives relief from double taxation on the same income.

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(b) During the assessment proceedings, the applicant assessee claimed the benefit of double taxation relief on the sums of Rs.47.30lakhs being the amount deducted under Section 80HHB of the Act and Rs.5.59 lakhs being the amount on which weighted deduction was claimed under Section 35B of the Act. The Assessing Officer, by an order dated 20th January, 1986 negatived the applicant's claim for relief under Section 91 of the Act on the ground that it would only apply / be available when the amount of tax paid under foreign income is again included in the taxable income earned in India i.e. the same income must be taxed in both the countries.

(c) Being aggrieved, the applicant assessee carried the issue in Appeal to the CIT(A). By order dated 24 July, 1986, the CIT(A), dismissed the applicant's appeal upholding the view of the Assessing Officer that the benefit of Section 91 of the Act can only be given if the very income has suffered tax in both the countries i.e. where the project is executed and also in India. In the present case, the amount claimed by way of deduction under Section 80HHB and Section 35B of the Act is not suffering any tax in India for the purposes of Section 91 of the Act.

(d) Being aggrieved, the applicant assessee carried the issue in appeal to the Tribunal. The Tribunal by its order dated 11th November,

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1996 dismissed the applicant's appeal by holding that the issue stands concluded against the applicant and in favour of the Revenue by the decision of the Andhra Pradesh High Court in ***Commissioner of Income Tax Vs. C.S. Murthy, 169 ITR 686***. Thus, dismissing the applicant's appeal.

(e) Consequent to the above, the applicant assessee moved the Tribunal and the question no. 2 as formulated hereinabove has been referred to us by the Tribunal for our opinion.

(f) Mr. Murlidhar, learned Counsel for the applicant assessee in support of the Reference submits that interpretation of Section 91(1) of the Act would mean that all income which is included in the total income in both the countries are to be excluded. The quantum of deductions available under the various sections would not make it any less, an amount which is includable in the total income. Therefore the amount on which deduction is claimed is part of the doubly taxed income. In support, reliance is placed upon the decision of the Apex Court in ***K.V.AL.M. Ramanathan Chettiar Vs. Commissioner of Income Tax, 88 ITR 169***. Secondly, he submits the reliance by the Tribunal upon the decision of the Andhra Pradesh High Court in C.S. Murthy (supra) is inapplicable to the present facts as it had not properly understood and applied the decision of the Apex Court in

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K.V.AL.M Ramanathan Chettiar (supra). Lastly reliance is placed upon the decision of Karnataka High Court in ***Income Tax Officer Vs. Stumpp Schuele & Somappa Pvt. Ltd. 106 ITR 399,*** approved by the Apex Court in 187 ITR 108 which was rendered in the context of the Companies (profits) Sur Tax Act, 1964. Reliance was also placed on the decision of the ***Karnataka High Court in Wipro Ltd. Vs. Dy. Commissioner of Income Tax, 382 ITR 179,*** to contend that a deduction under Section 10A of the Act was held to be entitled to the benefit of double taxation relief under Section 91 of the Act therein.

(g) As against the above, Mr. Malhotra, learned Counsel appearing for the Revenue submits that doubly taxed income in terms of bare reading of Section 91 of the Act would mean income which is being taxed twice that is once abroad and again in India. Therefore, the deductions allowed under Section 80HHB and 35B of the Act would not qualify for relief under Section 91 of the Act. The reliance upon the decision of the Karnataka High Court in *Stumpp, Schuele & Somappa (P) Ltd. (supra)* as approved by the Apex Court was in the context of Sur Tax Act and can have no application to the present facts as they did not have occasion to consider the words *"such doubly taxed income"* which are found in Section 91 of the Act. The entire controversy stands settled by the decision of the Andhra Pradesh High Court in C.S.

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Murthy (supra), which in turn has relied upon decision of the Apex Court in K.V.AL.M. Ramanathan Chettiar (supra) and in ***Distributors (Baroda Pvt. Ltd.) Vs. Union of India, 155 ITR 120.*** In fact, the view taken by the A.P High Court in C.S. Murthy (supra) besides relying upon KVALM Ramnathan Chettiar (supra) also relies upon the decision of the Apex Court in Distributors Baroda (supra). The later decision was rendered in the context of deduction to be allowed under Section 80M of the Act viz. relief in case of inter corporate dividend should be computed with reference to the gross amount of or with reference to only on the actual amount of dividend received which is actually subjected to tax. The Court held that the relief would be available only of the net amount of dividend received which is subjected to tax. It is submitted that the same principle would apply while construing the words *"such doubly taxed income"* as found in Section 91 of the Act.

(h) We have considered the rival submissions. It cannot be denied that the amount of deduction claimed under Section 80HHB and Section 35B of the Act is not subjected to Indian Income Tax. It certainly forms a part of the total income received by the applicant. However, the same does not bear any tax in India. In fact, the decision of the Apex Court in Ramanathan Chettiar (supra) has been correctly understood by the Andhra Pradesh High Court in C.S. Murthy (supra).

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The Apex Court has in fact emphasized that the relief to which an assessee would be entitled under Section 49D of the Indian Income Tax Act 1922 (identically worded to Section 91 (1) of the Act) would be the amount of tax paid on the foreign income which by its inclusion in the total income once again bears tax under the Indian Act. Therefore, according to us, the word 'bears' is a verb which means carrying the burden of tax. In fact, Black's Law Dictionary 8th Edition states the meaning of 'bear' as under:-

"1. To support or carry <bear a heavy load>

2. To produce as yield < bear interest>"

It is only when the Income has paid tax abroad and also bears the burden of discharging tax thereon under the Indian Act that it would become such doubly taxed income. The appeal before the Apex Court in KVALM Ramanathan Chettiar (supra) arose out of the decision of the Madras High Court holding that for the benefit of relief under the erstwhile Section 49D of the Income Tax Act, 1922 was that, income to which the double tax relief is available, must necessarily arise from the same head of income or source. This view of the Madras High Court was not accepted by the Apex Court. In fact, the Supreme Court held that it was not necessary that the income should arise under the same head or from the same source, for the benefit of the

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double tax relief being available. However, the Apex Court emphasized that the foreign income which has been subjected to tax must also be the same income which is subjected to tax under the Indian Act. The amounts claimed as deduction under Section 80HHB and Section 35B of the Act admittedly do not bear any tax in India, therefore, no relief can be granted under Section 91 of the Act to the deduction claimed of Rs.47.30 lakhs under Section 80HHB and Rs.5.59 lakhs claimed under Section 35B of the Act.

(i) We find substance in the submissions on behalf of the Revenue that the decisions of Karnataka High Court in Stumpp, Schuele & Somappa(P) Ltd.(supra) as approved by the Apex Court relied upon by the applicant were rendered under the Sur Tax Act and can have no application while construing Section 91 of the Act. The words *"such doubly taxed income"* as found in Section 91 of the Act which arises for consideration was not a subject matter of consideration while considering the provisions of Sur Tax Act. Similarly, reliance upon the decision of the Karnataka High Court in Wipro Ltd. (supra) dealing with the manner in which the benefit under Section 10A of the Act is to be treated under Section 90 of the Act. We find that the question of law framed for consideration before the Karnataka High Court was only with regard to application of Section 90 of the Act i.e. cases where

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there were Double Taxation Avoidance Agreement (DTAA). In the circumstances, even though there may be certain observations with regard to Section 91 of the Act, the same are in the nature of obiter, as it was not at all necessary for the Karnataka High Court to deal with Section 91 of the Act, when the question posed for its consideration was the entitlement for the relief under Section 90 of the Act.

(j) In the above view, question (ii) is answered in the affirmative i.e. against the applicant assessee and in favour of the respondent Revenue.

4. <u>Regarding question (iii) :-</u>

(a) The applicant assessee claimed that it should be allowed a deduction of the tax paid in Saudi Arabia, if it is held that the benefit of Section 91 of the Act is not available. This deduction is claimed only to the extent tax has been paid in Saudi Arabia on the income which has accrued / arisen in India. This claim was made on the basis of Real Income Theory.

(b) The applicant assessee illustrated its claim by a hypothetical illustration, which is as under :-

(i) In respect of the project in Saudi Arabia, Income which is taxable is Rs.1000/-. The tax payable in Saudi Arabia is 10% of income. This amount of Rs.1000/- includes an amount of

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Rs.150/- which has accrued in India and, therefore, outside the scope of doubly taxed income for the benefit of Section 91 of the Act.

(ii) Nevertheless, the assessee paid the tax on Rs.1,000/- in Saudi Arabia @ 10% i.e. Rs.100/-. The credit which would be given to the assessee under Section 91 of the Act is to extent of Rs.85/- i.e. doubly taxed income amounting to Rs.850/-. However, as no credit is given for the tax of Rs.15/- paid in Saudi Arabia on income which is accrued in India, the deduction of Rs.15/- should be given as an expenditure from the income of Rs.150/- which has accrued / arising of in India.

(c) The aforesaid issue was not raised before the Assessing Officer nor decided by the CIT(A). However, before the Tribunal, the applicant urged that the CIT(A) ought to have held that in respect of such percentage of income which was deemed to accrue in India and on which the benefit of Section 91 of the Act is not available then, the tax paid in Saudi Arabia should be treated as an expenditure incurred in earning income which is deemed to have accrued / arisen in India and reduced therefrom. In fact, the applicant pointed out before the Tribunal that such a deduction was allowed for an earlier assessment year namely A.Y. 1979-80.

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(d) The Tribunal by its order dated 11th November, 1996 negatived the contention of the applicant. This was on two grounds, one this was not an issue raised before the CIT(A) and therefore could not be urged before the Tribunal and second the issue is covered by the decision of this Court in ***Inder Singh Gill v/s. CIT, 47 ITR 284.*** In the above case, this Court held that the tax paid by an assessee in a foreign country cannot be deducted in computing income under the Indian Income Tax Act, 1922.

(e) Thereafter, the applicant-assessee moved the Tribunal and question No.3 as formulated herein above, has been posed to us for our opinion. It raises two issues. The first is claim for deduction of the tax paid in Saudi Arabia (on which no double income tax relief is available) to compute income under the Act. The second is the Tribunal erred in not following its order for A.Y. 1979-80.

(f) Mr. Murlidhar, learned Counsel for the applicant assessee submits that the principle of consistency would require the Tribunal to adopt the same view in this Assessment Year as it did in Assessment Year 1979-80. Explanation-1 added to Section 40(ii) of the Act clarifies that tax paid abroad, entitled to a deduction under Section 91 of the Act,

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would alone be governed by Section 40(ii) of the Act. In this case, if it is held that Section 91 of the Act is not applicable, then the bar of claiming deduction to the extent of the tax paid abroad will not apply. Explanation to Section 40(ii) which has been inserted w.e.f. 1st April, 2006 is clarificatory in nature and would apply to the period with which we are concerned. This is evident from the explanation itself which begins with the words *"For removal of doubts..."*. Therefore, it shall be deemed to have always been there even to govern the subject assessment year. Therefore, the decision of this Court in Inder Singh Gill (supra) would not apply. Thus, the tax paid in Saudi Arabia on the income accrued / arising in India is to be allowed as a deduction to arrive at the real profits, which are chargeable to tax in India. In support, reliance is also placed upon *"Law and Practice of Income Tax"* by Kanga & Palkhivala, 8th Edition, wherein reference is made to the decision of this Court in ***CIT Vs. South East Asia Shipping Co.*** (ITA No. 123 of 1976) and ***CIT Vs. Tata Sons Ltd.*** (ITA No. 209 of 2001) wherein it has been held that foreign tax does not fall within Section 40(a)(ii) of the Act and the assessee's net income after deduction / reduction of foreign taxes is his real income for the purposes of this Act.

(g) As against the above, Mr. Malhotra, learned Counsel for the

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Revenue submits that the issue stands concluded against the applicant by the decision of the Bombay High Court in Inder Singh Gill (supra) rendered in Reference. The decision of this Court in South Asia Shipping Co. (supra) and Tata Sons Ltd. (supra) were rendered while rejecting the applications for reference and an appeal at the stage of admission. Moreover, it is submitted that real income theory is inapplicable in view of specific provision found in Section 40 (a) (ii) of the Act which prohibits / bars deduction of any tax paid. It is submitted that in terms of the main provision in Section 40(a)(ii) of the Act, any sum paid on account of any tax on the profits and gains of business or profession will not be allowed as a deduction. The Explanation inserted w.e.f. 2006 only reiterates that any sum entitled to tax relief under Section 91 of the Act would be covered by the main part of Section 40(a)(ii) of the Act. The Explanation, he submits does not take away the taxes not covered by it out of the ambit of the main part of Section 40(a)(ii) of the Act.

(h) Before dealing with the rival contentions, it would be useful to reproduce the statutory provision arising for our consideration to decide this issue.

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"Definitions

2. In this Act, unless the context otherwise requires, –

(1) to (42) …..

43. "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under Section 115WA]

"Amounts not deductible

40. Notwithstanding anything to the contrary in Section 30 to the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession".

(a) In the case of any assessee –

(i) …….

(ia) (ib) (ic) ……..

(ii) Any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits and gains.

[Explanation 1. – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under Section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2. – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under Section 90A.]"

(i) We have considered the rival submissions. So far as the question relating to the Tribunal not following its order in the case of the applicant itself for A.Y. 1979-80, we find that there is a justification for

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the same. This is so as the decision of this Court in Inder Singh Gill (supra) was noted by the Tribunal on an identical issue while passing the order for the subject assessment year. Thus, the Tribunal had not erred in not following its order for A.Y. 1979-80. In fact, the decisions of this Court in South East Asia Shipping Co.(supra) and Tata Sons Ltd. (supra), which are being relied upon in preference to Inder Singh Gill (supra) cannot be accepted as both the orders being relied upon by the applicant was rendered not at the final hearing but on applications under Section 256(2) of the Act and at the stage of admission under Section 260A of the Act. This unlike the judgment rendered in a Reference by this Court in Inder Singh Gill (supra). Moreover, the decision in South East Asia Shipping Co. (supra) is not available in its entirety. Therefore, it would not be safe to rely upon it as all facts and on what consideration of law, it was rendered is not known. Similarly, the decision of this Court in Tata Sons (supra) being Income Tax Appeal No.209 of 2001 produced before us, dismissed the appeal of the Revenue by order dated 2nd April, 2004 by merely following its order dated 23rd March, 1993 rejecting the Revenue's application for Reference under Section 256(2) of the Act. Thus, it also cannot be relied upon to decide the controversy. Moreover, the order of this Court in Tata Sons Ltd. (supra) as produced before us for Assessment Year

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1985-86 had not noticed the decision of this Court in Inder Singh Gill (supra) on a Reference. Therefore, it is rendered *per incuriam*.

(j) This Court in Inder Singh Gill (supra) was required to answer the question whether for the purpose of computing total world income of the assessee as defined in Section 2(15) of the I. T. Act, the income accruing in Uganda has to be reduced by the tax paid to the Uganda Government in respect of such income? The Court while answering the question in the negative observed that it is not aware of any commercial principle / practice which lays down that the tax paid by one on one's income is allowed as a deduction in determining the income for the purposes of taxation.

(k) It is axiomatic that income tax is a charge on the profits/ income. The payment of income tax is not a payment made / incurred to earn profits and gains of business. Therefore, it cannot be allowed an as expenditure to determine the profits of the business. Taxes such as Excise Duty, Customs Duty, Octroi etc., are incurred for the purpose of doing business and earning profits and/or gains from business or profession. Therefore, such expenditure is allowable as a deduction to determine the profits of the business. It is only after deducting all

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expenses incurred for the purpose of business from the total receipts that profits and/or gains of business/ profession are determined. It is this determined profits or gains of business/profession which are subject to tax as income tax under the Act. The main part of Section 40(a)(ii) of the Act does not allow deduction in computing the income i.e. profits and gains of business chargeable to tax to the extent, the tax is levied/ paid on the profits/ gains of business. Therefore, it was on the aforesaid general principle, universally accepted, that this Court answered the question posed to it in Inder Singh Gill (supra) in favour of the Revenue.

(l) We would have answered the question posed for our consideration by following the decision of this Court in Inder Singh Gill (supra). However, we notice that the decision of this Court in Inder Singh Gill (supra) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922 contains no definition of *"tax"* as provided in Section 2(43) of the Act. Consequently, the tax paid on income / profits and gains of

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business / profession anywhere in the world would not be allowed as deduction for determining the profits / gains of the business under Section 10(4) of the Indian Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in Inder Singh Gill (supra) would be unexceptionable.

However, the ratio of the aforesaid decision in Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act defines *"tax"* as income tax chargeable under the provisions of this Act. Thus, by definition, the tax which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act.

(m) It therefore, follows that the tax which has been paid abroad would not be covered with in the meaning of Section 40(a) (ii) of the Act in view of the definition of the word '*tax*' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word *"In this Act, unless the context otherwise requires"* the meaning of the word '*tax*' as found in Section 2

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(43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(n) However, to the extent tax is paid abroad, the Explanation to Section 40(a)(ii) of the Act provides / clarifies that whenever an Assessee is otherwise entitled to the benefit of double income tax relief under Sections 90 or 91 of the Act, then the tax paid abroad would be governed by Section 40(a)(ii) of the Act. The occasion to insert the Explanation to Section 40(a)(ii) of the Act arose as Assessee was claiming to be entitled to obtain necessary credit to the extent of the tax paid abroad under Sections 90 or 91 of the Act and also claim the benefit of tax paid abroad as expenditure on account of not being covered by Section 40(a)(ii) of the Act. This is evident from the Explanatory notes to the Finance Act, 2006 as recorded in Circular No.14 of 2006 dated 28th December, 2006 issued by the CBDT. The above circular *inter alia,* records the fact that some of the assessee who are eligible for credit against the tax payable in India on the global income to the extent the tax has been paid outside India under Sections 90 or 91 of the Act, were also claiming deduction of the tax paid

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abroad as it was not tax under the Act. In view of the above, Explanation inserted in 2006 to Section 40(a)(ii) of the Act, would require in the context thereof that the definition of the word "tax" under the Act to mean also the tax which is eligible to the benefit of Sections 90 and 91 of the Act. However, this departure from the meaning of the word "tax" as defined in the Act is only restricted to the above and gives no license to widen the meaning of the word "tax" as defined in the Act to include all taxes on income / profits paid abroad.

(o) Therefore, on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and / or arisen in India is not eligible to deduction under Section 91 of the Act. Therefore, not hit by Section 40(a)(ii) of the Act. Section 91 of the Act, itself excludes income which is deemed to accrue or arise in India. Thus, the benefit of the Explanation would now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India would be reduced for the purposes of computing the income on which tax is payable in India.

(p) It is not disputed before us that some part of the income on

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which the tax has been paid abroad is on the income accrued or arisen in India. Therefore, to the extent, the tax is paid abroad on income which has accrued and/or arisen in India, the benefit of Section 91 of the Act is not available. In such a case, an Assessee such as the applicant assessee is entitled to a deduction under Section 40(a)(ii) of the Act. This is so as it is a tax which has been paid abroad for the purpose of arriving global income on which the tax payable in India. Therefore, to the extent the payment of tax in Saudi Arabia on income which has arisen / accrued in India has to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act.

(q) The Explanation to Section 40(a)(ii) of the Act was inserted into the Act by Finance Act, 2006. However, the use of the words *"for removal of dobuts"* it is hereby declared *"....."* in the Explanation inserted in Section 40(a)(ii) of the Act, makes it clear that it is declaratory in nature and would have retrospective effect. This is not even disputed by the Revenue before us as the issue of the nature of such declaratory statutes stands considered by the decision of the Supreme Court in ***CIT Vs. Vatika Township (P) Ltd. 367 ITR 466*** and ***CIT Vs. Gold Coin Health Foods (P) Ltd. 304 ITR 308***.

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(r) In the above facts and circumstances, question (iii)(a) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee. Question (iii)(b) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee.

5. We, therefore, answer the substantial question of law as posed to us by the Tribunal as under :-

Q.(i)(a) In the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee;

(i)(b) In the negative i.e. in favour of the respondent Revenue and against the applicant assessee;

Q.(ii) - In the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee;

Q.(iii)(a) - In the negative i.e. in favour of the applicant assessee and against the respondent Revenue.

Q.(iii)(b) - In the negative i.e. in favour of the the applicant – assessee and against the respondent Revenue.

6. The Reference is disposed of in the above terms. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**

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