REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4590 OF 2018

COMMISSIONER OF INCOME TAX, KARNAL (HARYANA) Appellant(s)

VERSUS

M/S CARPET INDIA, PANIPAT (HARYANA) Respondent(s)

WITH

CIVIL APPEAL NO. 4591 OF 2018

CIVIL APPEAL NO. 4592 OF 2018

CIVIL APPEAL NO. 4593 OF 2018

CIVIL APPEAL NO. 4594 OF 2018

CIVIL APPEAL NO. 4595 OF 2018

CIVIL APPEAL NO. 4596 OF 2018

CIVIL APPEAL NO. 4597 OF 2018

CIVIL APPEAL NO. 4598 OF 2018

CIVIL APPEAL NO. 4599 OF 2018

CIVIL APPEAL NO. 4603 OF 2018

J U D G M E N T

R.F. Nariman, J.

Civil Appeal Nos. 4590, 4591, 4592 and 4603 of 2018:

1) This batch of appeals arises from a judgment passed by the High Court of Punjab and Haryana at Chandigarh in which the Appeals preferred by the Revenue have been dismissed relying upon *Commissioner of Income Tax, Thiruvananthapuram* vs. *Baby Marine Exports, Kollam* (2007) 4

SCC 555 in order to arrive at a conclusion that the supporting manufacturer is at par with the actual direct exporter of goods when it comes to deductions that are available under Section 80HHC of the Income Tax Act, 1961 (in short 'the Act').

2) It is unnecessary to go into the facts of each of these cases as it is undisputed that the assessee in each of these cases is a supporting manufacturer. The scheme insofar as Section 80HHC of the Act is concerned is crystal clear. The marginal note to Section 80HHC reads - *Deduction in respect of profits retained for export business*.

> **"80HHC. (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise:**
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> **Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in clause (b) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the**

total export turnover of the assessee in respect of such trading goods.

(1A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any Export House or Trading House in respect of which the Export House or Trading House has issued a certificate under the proviso to sub-section (1), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the sale of goods or merchandise to the Export House or Trading House in respect of which the certificate has been issued by the Export House or Trading House.

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

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

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,—

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods:

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

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

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

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may

be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

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

Provided also that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—

(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or

(b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,

the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.—For the purposes of this sub-section,—

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the

manner provided in clause (b) of sub-section (3);

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods;

(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods;

(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover;

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

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be, —

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee."

3) It will be noticed on an analysis of Section 80HHC(1) that where the assessee has engaged in the business of export out of India of any goods or merchandise to which this section applies, what shall be allowed in computing the total income of the assessee, is a deduction to the extent of profits, referred to in sub-section (1B), and derived by the assessee from the export of such goods or

merchandise. So far as "supporting manufacturers" are concerned, under Section 80HHC(1A), where any Export House or Trading House has issued a certificate that the supporting manufacturer has, in fact, supplied such goods or merchandise for export, they shall also be allowed a deduction to the extent of profits referred to derived by the assessee from the sale of goods or merchandise to the Export House or Trading House. The manner of deduction, insofar as the exporter is concerned, is laid down in sub-section (3) which when read together with its provisos make it clear that profits that are derived from such export shall be further increased in the manner provided by the first proviso; and where export turnover does not exceed rupees ten crores, in the manner provided by the second proviso; and where the export turnover exceeds rupees ten crores, in the manner provided by the third proviso. What is conspicuous by their absence is any of the provisos in sub-section (3) insofar as sub-section (3A) is concerned, which makes it clear that the profits derived by a supporting manufacturer shall be strictly in accordance with the provisions contained in Section 80HHC (3A) read with the explanation to the section, which then defines "Profits of the business" under explanation (baa) as follows:

> **"profits of business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-**

> (1) **ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and**
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> (2) **the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India."**

4) Given this statutory scheme, it is clear that the exporter stands on a completely different footing from the supporting manufacturer as the parameters and scheme for claiming deduction relatable to exporters under 80HHC(1) read with (3) is completely different from that of supporting manufacturers under Section 80HHC (1A) read with (3A) thereof.

5) We may mention in passing that this matter has been placed before a bench of three judges by the judgment in *Commissioner of Income Tax, Karnal (Haryana)* vs. *Carpet India, Panipat (Haryana)* (2018) 6 SCC 620, where this Court analysed the provisions of Section 80HHC (3A) and thereafter adverted to the decision in Baby Marine Exports (supra) as follows:-

> **"15) In Baby Marine Exports (supra), the question of law involved was "*whether the export house premium received by the assessee is includible in the "profits of the business" of the assessee while computing the deduction under Section 80HHC of the Income Tax Act, 1961?*". The said case mainly dealt with the issue related with the eligibility of export house premium for inclusion in the business profit for the purpose of deduction under Section 80HHC of the IT Act. Whereas in the**

instant case, the main point of consideration is whether the assessee-firm, being a supporting manufacturer, is to be treated at par with the direct exporter for the purpose of deduction of export incentives under Section 80HHC of the IT Act, after having regards to the peculiar facts of the instant case.

16) While deciding the issue in Baby Marine Exports (supra), a two Judge Bench of this Court held as under:

"39. On plain construction of Section 80HHC (1-A), 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."

17. The aforesaid decision has been followed by another Bench of two Judges of this Court in Special Leave to Appeal (Civil) No. 7615 of 2009, Civil Appeal No. 6437 of 2012 and Others, Commissioner of Income Tax Karnal vs. Sushil Kumar Gupta decided on September 12, 2012. The question considered in the aforesaid case is reproduced below:

"3. In these civil appeals the common question which arises for determination is as follows:

"Whether 90% of export benefits disclaimed in favour of a supporting manufacturer (assessee herein) have to be reduced in terms of Explanation (baa) of Section 80HHC of the Income Tax Act, 1961, while computing deduction admissible to such supporting manufacturer under Section 80HHC (3A) of the Act?"

4. This question has been answered in favour of the assessee and against the Department in the case of CIT vs. Baby Marine Exports [2007] 290 ITR 323/160 Taxman 160.

5. The civil appeals filed by the Department are, accordingly, dismissed."

Broadly speaking, we are of the view that both these cases are not identical and cannot be

> **related with the deduction of export incentives by the supporting manufacturer under Section 80HHC of the IT Act.**
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> **18) However, we are not in the agreement with these decisions and as Explanation (baa) of Section 80HHC specifically reduces deduction of 90% of the amount referable to Section 28 (iiia) to (iiie) of the IT Act, hence, we are of the view that these decisions require re-consideration by a larger Bench since this issue has larger implication in terms of monetary benefits for both the parties. After giving our thoughtful consideration, the following substantial question of law of general importance arises for re-consideration by this Court:**
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> **"Whether in the light of peculiar facts and circumstances of the instant case, supporting manufacturer who receives export incentives in the form of duty draw back (DDB), Duty Entitlement Pass Book (DEPB) etc. is entitled for deduction under Section 80HHC of the Income Tax Act, 1961?"**

6) We agree with the reasoning and analysis of the referring judgment, namely, that *Baby Marine Exports (supra)* dealt with an issue related to the eligibility of export house premium for inclusion in business profit for the purpose of deduction under Section 80HHC of the Act. Whereas in the present appeals, the point for consideration is completely different, being as to whether the assessees being supporting manufacturers, are to be treated on par with the direct exporter for the purpose of deduction of export incentives under Section 80HHC of the Act. We, therefore, answer the question referred to us by stating that *Baby Marine Exports (supra)* deals with an entirely different question and cannot be relied upon to arrive at

the conclusion that the supporting manufacturers are to be treated on par with the direct exporter for the purpose of deduction under Section 80HHC of the Act, as has been pointed out by us herein above. Consequently, the decision in *C.I.T.* vs. *Satish Kumar Gupta* (C.A. No. 6437/2012) decided on 12.09.2012 is over ruled.

7) This being the case, we allow these appeals in favour of the Revenue and set aside the impugned judgment(s).

Civil Appeal Nos. 4593, 4594, 4595, 4596, 4597, 4598 and 4599 of 2018:

8) In these appeals also the impugned judgments are set aside. However, it will be open for the respondent in the above cases to show, by adducing the necessary facts, that they are direct exporters as well and can therefore avail of the deduction available under Section 80HHC (1) read with (3). For this purpose, these matters stand remanded to the Appellate Tribunal. Accordingly, these appeals stand disposed of.

..... J.
(ROHINTON FALI NARIMAN)

..... J.
(R. SUBHASH REDDY)

..... J.
(SURYA KANT)

New Delhi;
August 27, 2019.