REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4590 OF 2018
(Arising out of Special Leave Petition (C) No. 8368 OF 2009)

Commissioner of Income Tax,
Karnal (Haryana) .....Petitioner(s)

Versus

M/s Carpet India, Panipat (Haryana) .....Respondent(s)

WITH

CIVIL APPEAL NO. 4601 OF 2018
(Arising out of Special Leave Petition (C) No. 7331 OF 2017)

CIVIL APPEAL NO. 4602 OF 2018
(Arising out of Special Leave Petition (C) No. 9284 OF 2017)

CIVIL APPEAL NO. 4591 OF 2018
(Arising out of Special Leave Petition (C) No. 19482 OF 2010)

CIVIL APPEAL NO. 4597 OF 2018
(Arising out of Special Leave Petition (C) No. 20408 OF 2013)

CIVIL APPEAL NO. 4599 OF 2018
(Arising out of Special Leave Petition (C) No. 10542 OF 2013)

CIVIL APPEAL NO. 4592 OF 2018
(Arising out of Special Leave Petition (C) No. 20941 OF 2010)

CIVIL APPEAL NO.4593 OF 2018
(Arising out of Special Leave Petition (C) No. 23683 OF 2010)

CIVIL APPEAL NO. 4596 OF 2018
(Arising out of Special Leave Petition (C) No. 3133 OF 2012)

CIVIL APPEAL NO. 4594 OF 2018
(Arising out of Special Leave Petition (C) No. 27636 OF 2010)

CIVIL APPEAL NO. 4603 OF 2018
(Arising out of Special Leave Petition (C) No. 27635 OF 2010)

CIVIL APPEAL NO. 4595 OF 2018
(Arising out of Special Leave Petition (C) No. 29783 OF 2011)

CIVIL APPEAL NO. 4598 OF 2018
(Arising out of Special Leave Petition (C) No. 33058 OF 2012)

J U D G M E N T

R.K.Agrawal, J.

1) Leave granted.

2) The above batch of appeals is related to the interpretation of the provisions contained in Section 80HHC of the Income Tax Act, 1961 (in short 'the IT Act').

3) **SLP (C) 8368 of 2009**

(a) M/s. Carpet India (P) Ltd.-the assessee is a partnership firm deriving income from the manufacturing and sale of

carpets to M/s. IKEA Trading (India) Ltd. (Export House) as supporting manufacturer.

(b) The assessee filed a 'Nil' return for the Assessment Year (AY) 2001-2002 on 30.10.2001, *inter alia*, stating the total sales amounting to Rs. 6,49,83,432/- with total export incentives of Rs. 68,82,801/- as Duty Draw Back (DDB) and claimed deduction under Section 80HHC amounting to Rs. 1,57,68,742/- out of the total profits of Rs. 1,97,10,927/- at par with the direct exporter.

(c) On scrutiny, the Assessing Officer, vide order dated 25.02.2004, allowed the deduction under Section 80HHC to the tune of Rs. 1,08,96,505/- instead of 1,57,68,742/- as claimed by the assessee while arriving at the total income of Rs. 57,18,040/.

(d) Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) which was allowed vide order dated 12.08.2004 while holding that the assessee is entitled to the deduction of export incentives under Section 80HHC at par with the exporter.

(e) The Revenue went in appeal before the Income Tax Appellate Tribunal (in short 'the Tribunal') as well as before

the High Court but the same got dismissed vide orders dated 23.02.2007 and 13.05.2008 respectively leaving it to take recourse of this Court by way of special leave.

(f) Since a common question of law has arisen in these appeals, it will be disposed of by this common order.

4) Heard learned counsel for the parties and perused the records.

Point(s) for consideration:-

5) The short but important question of law that arises before this court is whether in the facts and circumstances of the present 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 IT Act at par with the direct exporter?

Rival contentions:-

6) At the outset, learned counsel for the Revenue submitted that the assessee deals in the manufacturing of the carpets which it usually sells to various entities including M/s IKEA Trading (India) Ltd. (Export House/Trading House) which, in turn, further exports the goods manufactured by the assessee.

While filing the return, the assessee claimed deduction at par with the direct exporter under Section 80HHC of the IT Act since it receives export incentives in the form of duty draw back (DDB) etc. It was further contended that in view of the fact that the assessee is working as a supporting manufacturer and also there is no direct export of the goods to the foreign constituents by the assessee firm, hence, it is not entitled to claim the deduction at par with the direct exporter. However, the High Court erroneously relied on the judgment of this Court, namely, ***Commissioner of Income Tax, Thiruvantanpuram*** vs. ***Baby Marine Exports*** (2007) 290 ITR 323 (SC) and held that the assessee is entitled to claim deduction at par with the direct exporter which is not sustainable in the eyes of law since the issues and facts are distinguishable from the facts and the circumstances of the instant case.

7) At this juncture, it was also pointed out that the High Court as well as the Tribunal erred in law while deciding the issue as they treated the export incentive at par with the premium paid by the export houses or trading houses to supporting manufacturer and not appreciated the fact that the

ratio of the facts and issues involved in the case of the assessee-firm are totally different from the case of ***Baby Marine Exports (supra).*** It was pointed out that the said case dealt with the issue of eligibility of export house premium for inclusion in the business profit and the turnover of the assessee firm. Hence, in no circumstances, it could be relied upon by the High Court.

8) *Per contra*, the stand of leaned counsel for the assessee was that the assessee is working as supporting manufacturer, exporting the goods to the foreign constituents through export houses, therefore, it is legitimately entitled for the deduction of export incentives in terms of the Section 80HHC of the IT Act in a similar way to the benefits available to the direct exporter. It was submitted that the High Court rightly relied on the judgment of this court in ***Baby Marine Exports (supra).*** Hence, this special leave to appeal deserves to be dismissed.

Discussion:-

9) Before examining the matter, we deem it apposite to refer to the relevant provisions of Section 80HHC of the IT Act:

> **"80HHC. Deduction in respect of profits retained for export business:-** (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there

shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise:

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereinafter 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 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.

(1B) xxx
(2) xxx
(3) xxx

(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."

(4) xxx

(4A) xxx

(4B) xxx

(4C) xxx

Explanation:- For the purposes of this section:-

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder;

(aa) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act 1962 (52 of 1962);

(b) "export turnover" means the sale proceeds received in, or brought into India by the assessee in convertible foreign exchange in accordance with clause (a) of sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962;

(ba) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs act, 1962 (52 of 1962):

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28."

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by –

(1) ninety per cent. of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;

(c) xxx

(d) xxx
(e) xxx

Clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 of IT Act read as follows:

> "28. **Profits and gains of business or profession:-** The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession:-
>
> (i) xxx
> (ii) xxx
> (iii) xxx
> (iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947);
> (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India;
> (iiic) any duty of customs or excise repaid or repayable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971;
> (iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);
> (iiie) any profit on the transfer of Duty Free Replenishment Certificate being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)."

10) The very purpose of Section 80HHC of the IT Act is to promote the export business as well as in order to keep the domestic products competitive in the global market by allowing tax deduction on export profits. Since the inception of Section 80HHC of the IT Act, these benefits were available only to the direct exporter which later on extended to the

supporting manufacturer who is selling goods or merchandise to an Export House/Trading House by inserting sub-Section (1A) and (3A) in Section 80HHC of the IT Act. The legislature divided Section 80HHC of the IT Act in two parts for the purpose of deduction, namely, direct exporter and supporting manufacturer. Direct exporter, being an Indian company or a person (other than company) resident in India, who directly exports the goods to some other country whereas supporting manufacturer, being an Indian company or a person (other than company) resident in India, who instead of direct export, supply the goods to the Export Houses who eventually export these goods. However, clauses (ba) and (baa) of the Explanation to Section 80HHC defines "total turnover" and what items are not included therein and "profits of the business" to be reduced by ninety percent of any sum referred to in clauses (iiia) to (iiie) of Section 28 of the IT Act. Clauses (iiia) to (iiie) of Section 28 specifically refers to profits on sale of import license, cash assistance received or receivable against exports, duty drawback against export (Customs & Central Excise Duty Drawback Rules), any profit on the transfer of Duty Entitlement Pass Book (Duty Remission Scheme) and

any profit on the transfer of Duty Free Replenishment Certificate.

11) It is well known fact that there can be diverse sources of income. These sources of income are clubbed together in order to find out the gross total income on which tax can be levied. However, the IT Act provides for allowing of certain deductions from the gross total income of the assessee. Broadly speaking, deductions reduce the taxable income. In the case at hand, it is evident that the total income of the assessee for the concerned Assessment Year was Rs 1,97,10,927/- out of which it claimed deduction to the tune of Rs. 1,57,68,742/- under Section 80HHC of the IT Act which was partly disallowed by the Assessing Officer and deduction was allowed only to the tune of Rs 1,08,96,505/-. However, the assessee claimed the deduction at par with the direct exporter under Section 80HHC of the IT Act which has been eventually upheld by the High Court.

12) In the instant case, the whole issue revolves around the manner of computation of deduction under section 80HHC of the IT Act, in the case of supporting manufacturer. On perusal of various provisions of the IT Act, it is clear that Section

80HHC of the IT Act provides for deduction in respect of profits retained from export business and, in particular, sub-Section (1A) and sub-Section (3A), provides for deduction in the case of supporting manufacturer. The "total turnover" has to be determined as per clause (ba) of the Explanation whereas "Profits of the business" has to be determined as per clause (baa) of the Explanation. Both these clauses provide for exclusion and reduction of 90% of certain receipts mentioned therein respectively. The computation of deduction in respect of supporting manufacturer, is contemplated by Section 80HHC (3A), whereas the effect to be given to such computed deduction is contemplated under Section 80HHC (1A) of the IT Act. In other words, the machinery to compute the deduction is provided in Section 80HHC (3A) of the IT Act and after computing such deduction, such amount of deduction is required to be deducted from the gross total income of the assessee in order to arrive at the taxable income/total income of the assessee, as contemplated by Section 80HHC (1A) of the IT Act.

13) 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.

14) 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."

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 v. 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.

15) 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:

> **"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?"**

16) Accordingly, we refer this batch of appeals to the larger Bench. Let the matters be placed before Hon'ble the Chief Justice of India for appropriate orders.

.....J.
(R.K. AGRAWAL)

.....J.
(ABHAY MANOHAR SAPRE)

NEW DELHI;
APRIL 27, 2018.