* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 789/2005

Date of Decision: December 08, 2005

\# SH. SANJEEV MALHOTRA ..... Petitioners
! Through Mr. T.R. Talvar, Adv.

versus

$ THE COMMISSIONER OF INCOME TAX..Respondents
^ Through : Mr. Sanjeev Sabharwal, Adv.

%

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether reporters of local papers may be allowed to see the judgment? } yes
2. To be referred to the Reporter or not? } yes
3. Whether the judgment should be reported in the Digest? } yes

: **T.S. THAKUR, J.**

This appeal under Section 260(A) of the Income-tax Act, 1961 arises in the following circumstances :-

2. For the Assessment Year 1998-99, the appellant assessee filed a return declaring an income of Rs.11,56,780/- after claiming a deduction of Rs.31,97,357/- under Section 80HHC. The assessee had for that year shown export sales of Rs.24,822/-

and profit on sale of import entitlements of Rs.35,46,150/-. The Assessing Officer examined the claim for deduction made by the assessee and came to the conclusion that no exports had been made by the assessee in the Assessment Year 1996-97 or 1997-98. It also found that the import entitlement sold by the assessee related to exports made in the Assessment Year 1995-96. As regard the export sale of Rs.24,822/-, the Assessing Officer held that the same represented the price of gift samples and not trade samples as contended by the assessee. The Assessing Officer accordingly held that the assessee was not engaged in the business of exports and that there was no export sale during the year under consideration nor any evidence to prove any custom clearance. The assessee's story regarding making of exports was held by the Assessing Officer to be fabricated and the claim for deduction under Section 80HHC disallowed by him.

3. Aggrieved by the order passed by the Assessing Officer, the assessee appealed to the CIT(Appeals) who affirmed the said order. The assessee then took a further appeal to the Income Tax Appellate Tribunal to challenge the findings recorded by the Assessing Officer and the CIT (Appeals). The Tribunal gave a split decision in which the Accountant Member held that the assessee was indeed engaged in the business of export and that the

if no such exports had been made, the assessee was entitled to a deduction under Section 80HHC in respect of the profits earned on the sale of import entitlements. The Judicial Member of the Tribunal, however, took a contrary view and held that the assessee was not entitled to any deduction under Section 80 HHC as no such deduction could be allowed unless there was an export during the year under consideration which fact the assessee had failed to establish. The Judicial Member further held that the assessee was not engaged in the business of export which was a condition precedent for claiming the deduction under Section 80 HHC. Consequent upon the difference of opinion between the two Members, the President of the Tribunal framed and referred to a third Member the following question under Section 255(4) of the Income-tax Act, 1961.

> "Whether, on the facts and in the circumstances of the case, the appellant during the relevant year was engaged in the business of export out of India or any goods or merchandise, so as to entitle it the deduction under Section 80 HHC of the Income-tax Act, 1961?"

4. When the matter was taken up by the third Member. Learned counsel for the parties appear to have agreed to the reframing of the question in order to cover the entire controversy relating to the admissibility of the deduction under Section 80

> "Whether on the facts and circumstances of the case and in law, the assessee is entitled to deduction under Section 80 HHC?"

5. The third Member then examined the matter and recorded a finding of fact to the effect that the assessee had not made any export of goods during the year under consideration. The third Member thus agreed with the view taken by the Judicial Member of the Tribunal on the aspect of actual export of goods by the assessee during the relevant period. The third Member's conclusion on appreciation of the material relied upon by the assessee is recorded in the following words :-

> "Rival submissions of the parties have been considered carefully in the light of materials placed before me. Before adverting to the legal position, it would be appropriate first to adjudicate whether there was actual export of goods by the assessee in the year under consideration. The materials/ evidence produced by the assessee are (i) copy of purchase bills; (ii) invoice of export sale; and (iii) copy of the certificate of foreign inward remittance. Admittedly, there is neither any evidence for transportation of goods from India to foreign country nor any evidence in the form of custom clearance. The only submission of assessee's counsel is that goods were sent through some passenger going abroad. However, this plea is not supported or substantiated by any material or evidence. There is no airway bill or shipping document. In my considered view, no goods can be said to be actually exported unless there is custom clearance by the concerned authorities. No goods can either leave/enter the country without custom

7

> India. Therefore, in the absence of such evidence, it has to be held that there was no export of goods by the assessee as claimed by him. Mere purchase/sale invoice coupled with foreign remittance is not enough to prove the actual export. It is not necessary for me to adjudicate whether such evidence as furnished by assessee were fabricated or not. Be that as it may, the assessee has failed to discharge his onus of proving the factum of actual export. Hence, I am inclined to agree with the view of learned JM on this aspect of the issue."

6. The third Member then examined the question whether the assessee was entitled to deduction under Section 80 HHC assuming that the assessee was otherwise engaged in the business of exports. The third Member was of the view that since actual export of goods was a condition precedent for claiming the deduction under Section 80 HHC, what was important was whether goods had been actually exported. The third Member concurred with the Judicial Member's view that no deduction under Section 80 HHC was permissible unless there was actual export in the year under consideration. The third Member observed :

> "So the entire scheme of Section 80HHC reveals that no deduction can be allowed unless there is actual export. In view of the above discussion, the decision of the Special Bench n the case of Lalson Enterprises (supra) would not help the assessee as there is no export made by the assessee in the year under consideration and the computation provision

> I am inclined to agree with the view expressed by the learned JM that no deduction can be allowed u/s 80HHC unless there is actual export in the year under consideration."

7. The Tribunal then passed the impugned order dated 24th September, 2004 holding by majority that the disallowance of deduction claimed by the assessee under Section 80 HHC was justified. The present appeal assails the correctness of the said order.

8. Mr. Sharma, learned senior counsel, appearing for the assessee made a two-fold submission before us. In the first place, he argued that the question referred to the third Member of the Tribunal could not have been reframed and the issue had to be examined only by reference to the question referred to the third Member without enlarging its scope. Secondly, he contended that the findings recorded by the Tribunal that there was no actual export of goods during the year under consideration was perverse in as much as the material produced by the assessee substantially discharged the onus of proving that such export had in fact taken place. There is, in our view, no merit in either of these submissions. The question referred to the third Member of the Tribunal was limited to whether the assessee was "engaged in the business of export out of India" so as to entitle it to deduction under Section 80 HHC. The emphasis was more on whether the

assessee was engaged in the business of export than on the question whether the assessee had actually made an export during the relevant period so as to earn a deduction under the said provision. The third Member, therefore, rightly reframed the question so as to cut short the controversy by examining the precise issue whether deduction under Section 80 HHC was admissible in the facts and circumstances of the case. What is significant is that parties had both consented to the reframing of the question by the third Member. Having done so, it is difficult to countenance any objection to either the reframing of the question or the consequent enlargement of the scope of examination by the Tribunal. A party who consents to a particular course of action hoping to get a favourable decision cannot be allowed to turn around and argue that his consent notwithstanding the procedure followed was not legally sanctioned. Principles of estoppel would prevent the party from advancing any such argument. Even otherwise, there was nothing improper or illegal in the reframing of the question to bring into focus the true controversy between the parties. The parties had rightly conceded that the issue was not whether the assessee was engaged in the business of export but whether he was entitled to the benefit of deduction under Section 80 HHC

doubtful. The third Member, therefore, was justified in approaching the issue from the correct perspective after the question was reframed and determining whether any exports had in fact been made during the year under consideration. The first limb of the argument of Mr. Sharma, therefore, fails and is hereby rejected.

9. Coming then to the second limb of the appellant's grievance, we find that the authorities below, namely, the Assessing Officer, the CIT (Appeals), and the Tribunal have concurrently held on facts that the assessee had failed to establish the actual making of the exports during the year under consideration. That finding cannot be assailed in an appeal under Section 260(A) of the Act except on the ground of perversity which indeed was the ground urged by Mr. Sharma also. We are, however, of the view that there is no perversity in the finding recorded by the Tribunal. The onus to prove that an export had indeed taken place during the year under consideration lay upon the appellant assessee. It was up to the appellants to adduce all such evidence as would prove the factum of export. The authorities below have upon evaluation of that evidence held that the burden of proving the actual exports had not been discharged by the assessee, not only because there was

foreign country but also because there was no evidence to show the custom clearance of such goods. The assessee's claim that goods were sent through some passenger going abroad was disbelieved by the Tribunal and in our view rightly so in the absence of any particulars about who that passenger was and how and when he was entrusted with the goods for transportation to their destination. The absence of any airway bill or shipping document was also noticed by the Tribunal who held that mere purchase/sale invoice coupled with foreign remittance was not enough to prove actual export. Even assuming that a second opinion is possible on the material adduced by the assessee, the same would not constitute a good ground for interference in the present appeal nor demonstrate that the view taken by the Tribunal was perverse. We have, therefore, no hesitation in repelling the contention of Mr. Sharma that the finding regarding absence of actual export was perverse. In fairness to Mr. Sharma, we must mention that he did not dispute the proposition that a deduction under Section 80 HHC was allowable only if actual export of merchandise was proved. That requirement having failed in the present case, there was no escape from the conclusion that the deduction could not be granted.

10. Keeping in view the above and also the fact that no substantial question of law arises for consideration, this appeal fails and is hereby dismissed.

T.S. THAKUR, J.

B.N. CHATURVEDI, J.

December 8, 2005
Manish