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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20th November, 2012
% *Date of Decision: 5th December, 2012*

\+ **ITA 207 of 2009**
\+ **ITA 228 of 2009**
\+ **ITA 419 of 2009**

COMMISSIONER OF INCOME TAX . Appellant
Through: Mr N.P. Sahni, Senior Standing Counsel with Mr. Ruchesh Sinha, Advocate.

Versus

M/S K.R B.L. LIMITED ... ..Respondent
Through Mr. S. K Aggarwal, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

For orders see ITA No 201/2009.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

DECEMBER 05, 2012
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20th November, 2012
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\+ **ITA 201 of 2009**

COMMISSIONER OF INCOME TAX- CENTRAL-III .Appellant

Through Mr N.P. Sahni, Senior Standing Counsel with Mr Ruchesh Sinha, Advocate.

Versus

M/S K.R B L LIMITED . . Respondent

Through. Mr S. K Aggarwal, Advocate.

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CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

These are appeals filed under Section 260A of the Income Tax Act, 1961 ('Act') by the Revenue On 28th September 2010, the following substantial question of law, common to all the appeals, was framed:

> "*Whether the Tribunal was justified in law in holding that the assessee would be entitled to deduction under Section 80 HHC by holding that the said DEBP credit utilized by the assessee itself, amounting to ₹5,79,74,883 fell under Section 28 (iiic) of the Income Tax Act, 1961?*"

2. We have extracted the above question of law framed in respect of ITA No 201 of 2009 The question framed in the other appeals is the same, but for the variation in the amount mentioned in the question. Subsequently, on 7th March 2012, when the appeals were listed for hearing, it was pointed out on behalf of the Revenue that the question should refer to both DEPB credit as well as moneys received on sale of Special Import License ('SIL')

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Accordingly, theses appeals are disposed of taking the questions to include both DEPB credit and moneys received on sale of SIL. The modified question, common for all the appeals, will be as follows:

> *"Whether the Tribunal was justified in law in holding that the assessee would be entitled to the deduction under Section 80 HHC on the DEPB utizised by itself and on the sale of 'special import license'?"*

3 So far as the DEPB credit is concerned, the issue now stands covered by the judgment of the Supreme Court in ***Topman Exports v. Commissioner of Income-Tax (2012) 342 ITR 79***. In this judgment it was held that since the objective of DEBP scheme is to neutralize the incidence of customs duty on the import of content of the export products, it has direct nexus with the cost of imports made by an exporter for manufacturing the export products The neutralization shown of the cost of custom duty under the scheme, however, is by granting a duty credit against the export product and this credit can be utilized for paying customs duty on any item which is freely importable The DEPB credit is transferable by the exporter It was held that the DEPB credit is "cash assistance" receivable by a person against exports under the scheme of Government of India and falls under clause (iiib) of Section 28 of the Act and is chargeable to tax under the head "Profits and gains of business or profession" even before it is transferred by the assessee. Once it is transferred, the surplus or profit received by the assessee is chargeable to tax under Clause (iiid) of Section 28 of the Act, again under the same head as an item separate from cash assistance under clause (iiib) It was further held in the judgment that for the purposes of Section 80 HHC (3)(a) of the Act, read with Explanation (baa), 90% of any sum referred to in clauses (iiia) to (iiie) of Section 28, has to be reduced from the assessed profits of the business Accordingly, 90% of the DEPB

credit which represents cash assistant under clause (iiib) of Section 28 will be excluded from the assessed profits. If during the same year the DEPB is transferred, the surplus arising on the transfer will represent the profit and will be covered by clause (iiid) of Section 28 of the Act and 90% thereof will get reduced from the assessed profits

4 We are not concerned in the present appeals with the transfer of DEPB credit. The substantial question of law itself refers to the fact that DEPB credit was utilized by the assessee. Accordingly, the only question that arises, so far as the present appeals are concerned, with regard to Section 80 HHC read with Explanation (baa), is whether 90% of the DEPB credit can be excluded from the assessed profits of the business. Since DEPB credit is accessible as profit of the business under Clause (iiib) of Section 28 as held by the Supreme Court in ***Topman Exports*** (supra), 90% of the credit will stand excluded from the assessed profits of the business. Having been excluded, it will come back for consideration under the provisos to Section 80 HHC (3) Under the first proviso, 90% of the DEPB credit will be added back to the profits of the business in the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee Having referred to the fact that the DEPB credit was utilized by the assessee itself in its business and was not transferred by it, the provisions of clause (iiid) are not attracted and, therefore, the second, third and fourth provisos to Section 80 HHC (3) are not attracted to the assessee's case. The Assessing Officer is, accordingly, directed to re-compute the deductions under Section 80HHC, in so far as the DEPB credit is concerned, in accordance with the law as held by the Supreme Court in the judgment ***Topman Exports*** (supra).

5 We now turn to the second part of the substantial question of law that relates to deduction under Section 80 HHC in respect of the moneys received on sale of SIL The contention of the revenue before us was that SIL did not fall under any of the clauses of Section 28 enumerated in Explanation (baa), but the argument was that it would fall under the residuary provisions in clause (1) of the said Explanation as "any other receipt of a similar nature included in such profits" We are afraid that this is not the proper manner of interpreting the clause The Explanation is reproduced below

> *"(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), and (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."*

The argument of the Revenue splits clause (1) into three parts; (i) 90% of the sum referred in clauses (iiia) to (iiie) of Section 28; (ii) 90% of any receipts by way of brokerage, commission, interest, rent, charges; and (iii) 90% of any other receipt of a similar nature included in such profits. The further argument is that the last part of the clause should be read 'ejusdem generis' with the first part which refers to various clauses of Section 28 and the contention is that the receipt by way of proceeds of SIL being of a similar nature to the receipts enumerated in the first part of the clause under the various clauses of Section 28, 90% of such proceeds is also to be excluded from the assessed profits When it comes to the adding back under the

proviso to Section 80 HHC (3), it is the contention of the Revenue is that since the proceeds of sale of SIL do not specifically fall under any of the five enumerated clauses of Section 28, the excluded profit cannot be added back to the profits under the provisos The net effect of the contention of the Revenue is that 90% of the profits of sale of SIL would stand excluded from the assessed profits for the purposes of computing the deduction under Section 80 HHC

7 We are afraid that this is not the proper way of interpreting the Explanation The Explanation cannot be split into three parts as contended by the Revenue It has only two parts, which are as follows. (i) 90% of any sum referred to in the enumerated clauses of Section 28; and (ii) 90% of any receipt by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits. The reason why the words "or any other receipts of a similar nature included in such profits" cannot refer to the first part of the clause which contains references to various clauses of Section 28 is two-fold. Firstly, if the words "or any other receipt of a similar nature include any such profits" are to be treated separately, the actual words ought to have been used would be "or of any other receipt of a similar nature included in such profits"; the word "of" would have been added therein to signify 90% of such similar receipt Secondly, in the quoted words, the word "receipt" would not have been used, and the word "sum" would have been used so as to accord with the words used in the first part of the clause containing references to various clauses of Section 28, which are referred to as "any sum". Moreover, in the absence of the word "of" preceding the word "any other receipt of a similar nature included in such profits", the receipts talked about should be taken to be brokerage, commission, interest, rent and charges. The words "any other

receipt" cannot jump the specific receipts mentioned immediately before them and go back to the first part of the clause which contains references to various clauses of Section 28. In other words, we have to read the entire group of words "or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipts of a similar nature included in such profits" contiguously with the result that the "other receipt" from which 90% thereof can be reduced would only refer to receipts of a nature similar to receipts by way of brokerage, commission, interest, rent and charges That this was how the Explanation was understood even by the Revenue is reinforced by the CBDT Circular No 621 dated 19 12 1991 explaining the Finance (No.2) Act, 1991, which inserted the Explanation [pl. see (1992) 195 ITR (St.) 154 @ 178]:

> *"The existing formula often gives a distorted figure of export profits when receipts like interest, commission, etc., which do not have an element of turnover are included in the profit and loss account.*
>
> *It has, therefore, clarified that "profits of the business" for the purpose of section 80HHC will not include receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature. As some expenditure might be incurred in earning these incomes, which in the generality of cases is part of common expenses, ad hoc 10 per cent, deduction from such incomes to account for these expenses."*

8. If this is the proper way of interpreting Explanation (baa), the profits of the sale of SIL cannot be reduced from the profits of the business to the extent of 90% If it cannot be so excluded, since it does not fall under the various clauses of Section 28 enumerated in such Explanation, which is also the case of the Revenue as canvassed before us; then there will neither be an

exclusion nor adding back under various provisos of sub-section (3) of Section 80 HHC

9 There is one more way of looking at the controversy The SIL scheme was undisputedly notified under the Foreign Trade (Development and Regulation) Act 1992. Section 28 (iiia) brings the profits of sale of license granted under the Imports (Control) Order, 1995, made under the Imports and Exports (Control) Act, 1947, to charge under the head "business" The Imports and Exports Control Act, 1947 stood repealed on the enactment of Foreign Trade (Development and Regulation) Act of 1992 Under Section 8 of the General Clauses Act, 1897 where any Central Act made after the commencement of the General Clauses Act, repeals and re-enacts, with or without modification, any provision of the former enactment, then references in any enactment or in any instrument to the provisions, so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted.

10. The effect of this is that under Clause (iiia) of Section 28, a reference to Imports and Exports (Control) Act, 1947 should be taken to be a reference to Foreign Trade (Development and Regulation) Act and the scheme for SIL having been notified under the latter Act, which must be read into Section 28(iiia), the profits of sale of SIL would fall to be assessed under Section 28 (iiia) If that is so, the profits of sale of SIL would be assessed as business profits; then 90% thereof would be excluded from the business profits and, thereafter, the excluded profits would be added back under the first proviso to Section 80 HHC (3) in the same proportion as the export turnover bears to the turnover of the business carried on by the assessee. This is another way to look at the controversy and resolve it

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11. We note that a similar logic and reasoning had appealed to the Central Board of Direct Taxes (CBDT) in its circular No 5 of 2006 dated 15th May 2006, while directing the Assessing Officers not to deny the benefit of Section 80 HHC to an assessee claiming refund of the duty drawback under the Duty Drawback Rules, 1995, for the purposes of Section 28(iiie) of the Act. In that provision, the reference was to the repealed Drawback Rules of 1971. The Duty Drawback Rules of 1995 repealed the 1971 Rules but provided for savings The CBDT invoked Section 8 of the General Clauses Act and directed the Assessing Officers not to deny the benefits of Section 80 HHC to the assessees on the ground that the customs or excise repaid to the assesses were not so repaid under the 1971 Rules

12 For the foregoing reasons, we answer the substantial question of law in the affirmative and in favour of the assessee, both with regard to DEPB credit and sale of SIL. The Assessing Officer will re-compute the deduction accordingly. All the appeals of the Revenue are dismissed, but in the circumstances with no order as to costs

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

DECEMBER 05, 2012
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