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

Decided on 7th April, 2015

\+ ITA 69/2001

COMMISSIONER OF INCOME TAX, DELHI ..... Appellant
Through Mr. Rohit Madan, Mr. Ruchir Bhatia and Mr. Akash Vajpai, Advs.

versus

COMMER. AND ASSOCIATES P. LTD. ..... Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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1. The following question of law arises :

"Whether the ITAT has rightly interpreted the provisions of Section 80-HHC of the Income Tax Act, 1961 and whether ITAT is right in holding that commission received from Indian parties on transfer of export orders is entitled to deduction u/s 80-HHC of the Income Tax Act, 1961?"

2. At the outset this Court notices that the impugned order has relied upon a special bench decision of the ITAT – *International Research Park Laboratories Ltd. V. Assistant Commissioner of Income Tax* (1995) 212 ITR (AT) 1. The view expressed in that order of the Tribunal by the special bench was that the income derived by the assessee towards commission/brokerage for procuring export orders for others is eligible for

benefit under Section 80HHC(3) of the Income Tax Act. The said view has been in effect approved by the judgment of the Supreme Court in *P.R. Prabhakar V. CIT* (2006) 284 ITR 548 SC. Facts before the Supreme Court in *P. R. Prabhakar* are extracted below :

> *"3. By reason of the impugned judgment, the High Court opined that income derived by the appellant towards commission/brokerage for procuring orders of export for others is not eligible to exemption from tax under section 80HHC of the Act. Referring to the circulars issued by the Central Board of Direct Taxes (CBDT), the High Court held that although the said provision was amended with effect from April 1, 1992, by inserting an Explanation whereby and whereunder the profit derived out of such commission/brokerage was confined to 10 per cent. of the income, the same, being clarificatory in nature, would have retrospective effect. On the said findings, answers to both the questions were rendered in the negative and in favour of the Revenue."*

3. The Supreme Court took note of the plain meaning of the expression "business of export" and held that it includes "trading of goods". The Court also relied on the circular of Central Board of Direct Taxes i.e. No.621 dated 19.12.1991, as well as the amendment which was brought into force from 1.4.1992. The Court expressed its conclusions in para 12 and 13 of the said judgment and in para 17, the Supreme Court in fact extracted and approved the order of the special bench in *International Research Park Laboratories* (supra). The said passage of the Supreme Court is as follows:

> *"17. Indeed the question as to whether earning of income by way of commission/brokerage would attract section 80HHC of the Act or not, precisely came up for consideration before a Special Bench of the Income-tax Appellate Tribunal, Delhi*

Bench in International Research Park Laboratories Ltd. v. Asst. CIT [1995] 212 ITR (AT) 1, wherein interpreting the Central Board of Direct Taxes circular it was stated (at page 48) :

> *"Now, we come to whether the commission received could form part of export profits. Here again, we are unable to see it differently. It is no doubt true that this commission is not turnover but it is a profit relatable to exports. Coming back to section 80HHC(1), if the assessee is an exclusive exporter without having any local sales, then the profit on commission is admittedly includible as profit of the business computed under the head 'Profits and gains of business or profession' and the whole of it would be eligible for exemption under clause (a) of sub-section (3) of section 80HHC. When such commission could be regarded as profit derived from export for the purpose of clause (a), how can the same be excluded for the purpose of clause (b) unless it amounted to discrimination. The interpretation of clauses (a) and (b) must be harmonious and not discriminatory, cutting against each other. What is sauce for the goose is also sauce for the gander. Secondly, we have just mentioned that this profit is profit derived from export and export is the basis or the foundation or the nexus. The argument of Shri B. B. Ahuja and all his effort to show to us that it has no reference to the export is, therefore, unacceptable to us. In our opinion, the argument advanced by Shri Ahuja overlooks the fact that the commission would not have come to the assessee had he not been engaged in the export business. He sought to justify his argument by referring to subsequent amendments made from April 1, 1992, whereunder as we have pointed out above by adding clause (baa) to the Explanation at the end of sub-section (4A) with effect from April 1, 1992, 90 per cent. of this commission, etc., is not to be regarded as profits derived from export business and this amendment as explained in the Memorandum of Bill was only to clarify the position."*

> *18. It is stated at the Bar that the Revenue did not prefer any appeal thereagainst. We, for the reasons stated hereinbefore agree with the law laid down by the Tribunal.*
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> *19. For the views, we have taken, the judgment of the High Court cannot be sustained. It is set aside accordingly. The appeal is, accordingly, allowed. The parties shall, however, pay and bear their own costs.*

4. This Court also notices that view expressed in *P.R. Prabhakar* (supra) and *International Research Park Laboratories* (supra) has been noticed and approved subsequently in two Division Bench judgments – *Lotus Trans Travels Pvt. Ltd. V. CIT* (2011) 332 ITR 463 and *CIT V. Anil Chanana* (2013) 350 ITR 47. For the above mentioned reasons the appeal is answered against the revenue and in favour of the assessee.

5. The appeal is therefore dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

APRIL 07, 2015
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