IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 14TH DAY OF MARCH 2018 / 23RD PHALGUNA, 1939

ITA.No. 1053 of 2009

AGAINST THE ORDER/JUDGMENT 31-01-2008 IN ITA 19/2005 of I.T.A.TRIBUNAL,COCHIN BENCH

APPELANT/RESPONDENT

THE COMMISSIONER OF INCOME TAX,
COCHIN,

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL,
GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/APPELLANT:

PARRY AGRO INDUSTRIES LTD.,
BRISTOW ROAD, WILLINGTON ISLAND, KOCHI-3.

BY ADV. SRI.P.BENNY THOMAS
BY ADV. SRI.K.JOHN MATHAI
BY ADV. SRI.E.K.NANDAKUMAR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 14-03-2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SKV

K. VINOD CHANDRAN & ASHOK MENON, JJ

I.T APPEAL No. 1053 of 2009

Dated this the 14th day of March, 2018

JUDGMENT

The only question arising from the order of the Tribunal in the above appeal, as available in the Memorandum, is extracted here under:

> *"Whether on the facts and in the circumstances of the case and in view of the fact that the Commission portion of the export proceeds were not brought to India in convertible foreign exchange,*
>
> *i. the assessee is entitled to claim the benefit of Section 80HHC?*
>
> *ii. An amount equivalent to it was includible in the export turnover?"*

2. We are only concerned with the claim under Section 80HHC, of the Income Tax Act, 1961 (for brevity "the Act") and the deletion made from the export turnover, by the Assessing Officer. We see from the assessment order that the assesse, in its export turnover, had included a commission on sales, coming to Rs.37,54,026/- paid to M/s. Parry Agro Industries Ltd., an agency outside India. The commission was deducted in the sale invoice itself and the balance consideration alone was brought into India as convertible foreign exchange. The Assessing Officer found that the said commission cannot be included in the export turnover to

compute the export profit and hence deleted the same from the export turn over.

3. The first appellate authority concurred with the finding of the Assessing Officer based on the provisions of Explanation to Section 80HHC(2)(a). The export turnover is the sale proceeds brought into India by the assessee in convertible foreign exchange in accordance with the provisions of Section 80HHC(2)(a). The Tribunal, however, reversed the concurrent decisions, on the reasoning that there were two options available for payment of agency commission and the assessee having taken the easier mode, cannot be disentitled from making the claim.

4. We are unable to countenance such reasoning of the Tribunal. The Tribunal has found that there is a clear nexus between the commission payment and the exports made by the assessee as also a live connection between

the commission and export sale. There is also no difficulty in the assessee resorting to either of the two options, ie: paying commission directly in foreign exchange to the foreign agency or in bringing it back into the country and then paying it in foreign exchange. However, if the assessee takes the easier mode as found by the Tribunal, the assessee would be disentitled in including the said component in the export turnover. Section 80HHC, as per Sub Section (2)(a) applies only if the sale proceeds of goods or merchandise exported out of India are received in or brought into India, by the assessee in convertible foreign exchange, within a period of six months from the end of a previous year or within such further period as the competent authority may allow in this behalf. The condition having been not complied with, the commission deducted by the foreign agent from the sale consideration cannot enjoy the benefit of Section 80HHC. We have no hesitation in setting aside the order of the Tribunal and we answer the questions of law in favour of the Revenue and against the assessee.

The appeal stands allowed. No Costs.

Sd/-
K. VINOD CHANDRAN, JUDGE

Sd/-

ASHOK MENON, JUDGE

SKV