

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 10TH DAY OF JANUARY 2018 / 20TH POUSHA, 1939

ITA.No. 55 of 2007

AGAINST THE ORDER/JUDGMENT IN ITA 717/COCH/2005 of I.T.A.TRIBUNAL, COCHIN
BENCH DATED 14-07-2006

APPELLANT(S) /APPELLANT:

THE COMMISSIONER OF INCOME TAX,
TRIVANDRUM.

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

RESPONDENT(S) /RESPONDENT:

JAMEELA, J.S.CASHEW EXPORTERS,
AYATHIL, KOLLAM.

R BY SR.ADV. SRI.E.K.NANDAKUMAR

R BY ADV. SRI.ANIL D. NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 10-01-2018, ALONG
WITH ITA 89/2008, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ITA.No. 55 of 2007

APPENDIX

APPELLANT(S) ' ANNEXURES :

ANNEXURE A: COPY OF THE ORDER OF THE ASSESSING OFFICER DATED
16-02-2004.

ANNEXURE B: COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX
(APPEALS) DATED 21-02-2005.

ANNEXURE C: COPY OF THE ORDER OF THE APPELLATE TRIBUNAL DATED
14-07-2006.

RESPONDENT(S) ' ANNEXURES :

NIL

/TRUE COPY/

PA TO JUDGE

dkr

K.VINOD CHANDRAN & ASHOK MENON, JJ.

I.T.A. No. 55 of 2007

and

I.T.A. No. 89 of 2008

Dated this the 10th day of January, 2018

J U D G M E N T

Vinod Chandran, J.

The appeals by the Department as against two independent assesseees raise the following similar questions of law:

1. *Whether, on the facts and in the circumstances of the case the assessee having incurred a loss in export business is eligible for a deduction under section 80HHC ?*
2. *Whether, on the facts and in the circumstances of the case and considering the facts and the question of law involved in 257 ITR 41 the Tribunal is justified in relying on the same ?*

Both the assesseees were cashew exporters, who were engaged in export as also domestic business. The claim under Section 80HHC was declined by the Assessing Officer, finding that the assessee had effected high sea sales and earned substantial profit from such sale

on import and the same is not includable in the business profits for permitting the deduction envisaged under Section 80HHC. The Assessing Officer specifically referred to the provision in Section 80HHC(1) to find that the eligibility is only “to the extent of profits derived by the assessee from the export of such goods or merchandise”. On the same being disallowed, the entire deduction claimed by the independent assessees, were disallowed.

2. The first appellate authority found that what can be excluded is 90% of the income, as indicated in clause (baa) of sub-section (4C) of Section 80HHC and any other income would be includable. The first appellate authority directed the profit from high sea sales to be included to the total business profits and the turnover of high sea sales to the total turnover. The Tribunal concurred with the first appellate authority's finding and directed inclusion of the profit derived from high sea sales also for computing the deduction.

3. Shri Ravindranatha Menon, learned Senior Counsel appearing for the Revenue, would impugn the decision of the Tribunal placing reliance on *[2002] 257 ITR 41 (Ker.)*,

Commissioner of Income Tax v. Parry Agro Industries Ltd., which according to him, is not applicable. It is urged that the assesseees are entitled to such deduction, only to the extent of profits derived from the exports of high sea sales. The profit derived in the course of import of products, which the high sea sales obviously is, cannot be included in the computation of profits eligible for exemption under Section 80HHC. The learned Senior Counsel would rely on ***Commissioner of Income Tax v. K.Raveendranathan Nair, [2007] 295 ITR 228 (SC)***, to contend that when there is a loss occasioned in the export business, there could be no claim raised for deduction under Section 80HHC, especially since the benefit is one specifically conferred for the foreign exchange brought into the Country. The assessee's having suffered loss in the export business, cannot claim the benefit under the incentive clause, as it has been termed by the Honourable Supreme Court, is the compelling argument raised.

4. The learned Counsel appearing for the respondents- assesseees, Shri Gopinath Menon, would argue that the reliance placed on ***Parry Agro Industries Ltd.*** is perfectly in order. There were two types of businesses, which is contemplated under

Section 80HHC, one an exclusive business in export and the other a business both in export and domestic market. The profits derived from the export has to be determined under the provision of sub-section (3) of Section 80HHC, which mandates inclusion of the entire business profits of the assessee. The learned Counsel would also place reliance on *K.Raveendranathan Nair* to contend that the Honourable Supreme Court has specifically noticed that exclusion under business profits, as held by the Commissioner (Appeals) can only be of those enumerated in clause (baa) of Section 80HHC (4C). The income/profit derived from high sea sales, though not one derived from export business, has to be included in the total business profit to compute the exemption available under Section 80HHC.

5. *Parry Agro Industries Ltd.* was a case in which the assessee was engaged in both domestic and export businesses. The assessee claimed that its estates in Assam catered exclusively to the export business and separate accounts were maintained. It was the claim put forth by the assessee that, the benefit under Section 80HHC should be computed under clause (a) of sub-section

(3) of Section 80HHC. A Division Bench of this Court, examining Section 80HHC as existing at that point of time (which, even now has not substantially changed), found that there are only two categories of assessees contemplated under Section 80HHC,— (i) one exclusively engaged in the business of export, who would be entitled to computation under clause (a) or (b) of sub-section (3), depending upon whether it is a manufacture or production or a trading; and (ii) one engaged in domestic & export business, on which the benefit would be computed under clause (c) of sub-section (3), which takes in the processed and manufactured goods in clause (i) and trading goods in clause (ii). The contention raised by the assessee was specifically negated by the Court, holding that if it is accepted, that would result in the Court reading into the provision a third category, which is an assessee, who maintains separate accounts for the export business. There being no such category available as per the provisions, the Court found that it cannot redraw or rewrite the Section.

6. ***K.Raveendranathan Nair*** was a case in which the assessee having business in export and processing of cashew nuts,

claimed benefit under Section 80HHC. The assessee for computation, included the processing charges, a receipt of the domestic business, in the business profits, but excluding it from the total turnover. The assessee contended that the processing charges were includable in the business profits, but being income generated out of domestic business, was not includable in the total turnover. The Hon'ble Supreme Court held that it cannot be so and what is entitled to be excluded from the profits of business, is only 90% of the various receipts as found in clause (baa) of Section 80HHC(4C). The processing charges were found to be includable in the total turnover.

7. Shri Ravindranatha Menon would contend that, in the case of loss, the Hon'ble Supreme Court has specifically stated that there would be no entitlement under Section 80HHC, if there is a loss in the export business. In the assessee's case, since the export business showed a loss; the business profits, declared was only by inclusion of the profits earned in domestic business, and the same being not derived out of export, there could be no claim raised under Section 80HHC. The specific ground raised by the learned

Counsel is on the following extract, from ***A.M.Moosa v. CIT, [2007]***

294 ITR 1:

“A plain reading of section 80HHC makes it clear that in arriving at the profits earned from export of both self-manufactured goods and trading goods, the profits and losses in both the trades have to be taken into consideration. If after such adjustments there is a positive profit, the assessee would be entitled to deduction under section 80HHC(1). If there is a loss he will not be entitled to any deduction.”

We do not think that the Court, in the above extract intended that export alone should be considered, and if it is a loss, the benefit under Section 80HHC should be declined. If there was no business profit at all, there could be no exemption claimed. The dictum from the above extract is only to the extent that in calculating the total profits, the profits and losses of both the manufacturing and trading business should be taken together.

8. We agree with the learned Senior Counsel’s argument that the incentive is for earning foreign exchange by way of indulging in export business. But, merely because an assessee is engaged in both export and domestic businesses and suffers a loss

in export business, it cannot be said that the earnings by foreign exchange was inconsequential. The benefit of earnings in foreign exchange in the national perspective, occurs, irrespective of whether the exporter derived a profit from his export business or not. There cannot be any dispute that the export business, brings in foreign exchange into the Country; which is sought to be given an incentive. An assessee having both domestic and export business is also entitled to the benefit under Section 80HHC. This is precisely why the provision under sub-section (3) provides for the computation of the benefit at a proportion of the total profits from business, equivalent to the proportion the export turnover bears to the total turnover.

9. ***Parry Agro Industries Ltd.*** found that the profits of the export business, separately maintained of an assessee having domestic business also, cannot be separately taken for computation under Section 80HHC. As a corollary, there can also be no separate treatment of loss from an export business. We are also conscious of the fact that the Honourable Supreme Court in ***K.Raveendranathan Nair*** looked at the changes in the marginal

heading when examining the history of the amendment of the provisions and found that earlier it read as “deduction in respect of export turnover”, while later, as it even now exists, “it is deduction in respect of profits retained for export business”. This, however, does not lead to a necessary conclusion that only the profits for export business would be available for deduction under Section 80HHC. It is trite that a decision is an authority for the law it lays down and not every observation made in it.

10. Reading the provision under sub-section (1), we notice that the incentive, is insofar as a deduction, while computing the total income of the assessee, to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise. As has been held in *Parry Agro Industries Ltd.*, in computing the profit so derived from export, available for deduction, one has to take recourse to sub-section (3) of Section 80HHC.

11. We extract here under the provisions under Section 80HHC(1) and that under sub-section (3):

“(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:

xx xx

(3) For the purpose of sub-section (1),–

- (a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;
- (b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;
- (c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from

such export shall,–

- (i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee; and
- (ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods.”

12. ***K.Raveendranathan Nair*** succinctly stated the formula to be employed as:

$$\frac{\text{Export turnover}}{\text{Total turnover}} \times \text{Business profits}$$

The computation of profits derived from export, for an assessee doing both export and domestic business, has to be made by resorting to the said formula as available under sub-section (3C) of Section 80HHC. The proportion, which the export turnover bears to the total turnover, has to be applied to the business profits to elicit the exact amount eligible for exemption under Section 80HHC, as

profits derived from export. As rightly held by the first appellate authority, the business profits include those derived in the domestic market; that of high sea sales of imported goods, the turnover of which has to be included in the total turnover. This is the incentive permitted by the legislature, for earnings in foreign exchange, whether the export business generated profit or not.

13. We, hence, answer the first question against the Revenue and hold that in computing the deduction under Section 80HHC, the loss incurred in the export business would be of no consequence, since the formula as applied above, would take in the total turnover, the export turnover and the total business profit. Reliance placed on *Parry Agro Industries Ltd.* by the Tribunal, is perfectly in order and we answer the said question also in favour of the assessee and against the Revenue. We, hence, reject the Appeals, leaving the parties to suffer their respective costs.

Sd/-
K.VINOD CHANDRAN
Judge

Sd/-
ASHOK MENON
Judge

dkr