IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE **S.MANIKUMAR**
and
THE HONOURABLE MR.JUSTICE **D.KRISHNA KUMAR**

T.C.A.No.1121 of 2007

Shri.Gerard Perira .. Appellant

versus

The Income-Tax Officer,
Range XV(1), Chennai. .. Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order made in I.T.A.No.3094/Mds/2004, dated 21.09.2006.

For Appellant : Ms.Sushma Harini
for Ms.Dr.Anita Sumanth

For Respondent : Mr.J.Narayanasamy,
Standing Counsel for Income-Tax Dept.,

COMMON ORDER

(Order of the Court was made by **S.MANIKUMAR, J.**)

Tax Case Appeal is directed against the order made in I.T.A.No.3094/Mds/2004, dated 21.09.2006, on the file of the Income Tax

Appellate Tribunal, 'A' Bench, Chennai, for the assessment year 1999-2000.

2. Short facts leading to the appeal are that the appellant is engaged in the manufacture and export of fabrics. For the assessment year 1999-2000, the appellant has filed return of income on 24.12.1999, wherein, he had adjusted the gross total income of Rs.25,51,237/-, against deductions of Rs.26,01,894/- and Rs.12,000/-, under Sections 80HHC and 80L of the Income Tax Act, 1961, respectively. The claim of Rs.26,01,894/-, also included deduction, under Section 80HHC of the Act, in respect of interest income of Rs.20,58,049/-, which the appellant treated, as business income.

3. The assessing officer issued notice, under Section 148 of the Act, followed by notices, under Sections 142(1) and 143(2) of the Act and after considering the material on record, and the submissions of the appellant's representative, passed an order, dated 13.01.2004, under Section 143(3) of the Act, determining the taxable income at Rs.21,78,049/- and allowed deduction, under Section 80HHC of the Act, to an extent of Rs.4,93,188/- only. While arriving at the taxable income, the assessing officer subjected to tax, interest income of Rs.20,58,049/-, under the head, "Other Sources", and

also denied the benefit of deduction, under Section 80HHC, on the said sum.

4. Being aggrieved by the same, the appellant/assessee filed an appeal, in I.T.A.No.28/2004-05, before the Commissioner of Income-Tax (Appeal), Chennai. Contention has been made that the appellant was enjoying credit facilities towards working capital, from State Bank of India, for which, the appellant had to make certain deposits, out of realisation of sale proceeds of the exports made, and the interest earned on such deposits, which accumulated over a period of four years, had to be treated as "business income" only, and not as income from "other sources". The appellant has also contended that the Bankers would not have sanctioned any loan facility, without such deposits and therefore, income from such deposits, had a close link with the business of export activity.

5. Before the appellate authority, a further contention has also been made that when the assessing officer allowed interest expenditure on credit facilities, given by the bank, as "business expenditure", he was not correct, in taking the interest income, under the head, "other sources". Therefore, it was submitted that the assessing officer ought to have treated interest income, on

the deposits as business income, because credit facility could not have been extended to the appellant, without maintenance of such deposits, with the said Bank.

6. The appellant has further contended that a distinction has to be made between the interest earned on such deposit and interest earned on other deposits, with the bankers, which represented surplus deposits, and therefore, it has been contended that the interest income of Rs.20,58,049/-, should be added as "business income" only and not "other sources". To substantiate that the State Bank of India has extended credit facility of Rs.1.70 Crores, a letter has been produced.

7. After considering the rival submissions and taking note of the decision of this Court in **CIT v. Nizar Ahmed & Co.,** reported in **259 ITR 244** and rejecting the decision of the Special Bench (Delhi) of the ITAT in **Lalsons Enterprises v. DCIT (89 ITD 25),** relied on by the appellant, vide order, dated 20.08.2004, in I.T.A.No.28/2004-05, the Commissioner of Income Tax (Appeals)-XII, Chennai, dismissed the appeal as hereunder:

> "Further, Their Lordships have held that the Bank's decision to extend credit facilities was linked more to the business

prospects of the assessee and the confidence the bank had in the integrity and the entrepreneurial capacity of the partners who run the business. Hence, interest income, has to be excluded for the purpose of allowing special deduction u/s.80HHC. So, in view of the Madras High Court decision cited above which has been rendered in a case with simular situation which is against the appellant, it is clear that the Special Bench decision of the ITAT, Delhi relied upon by the appellant will not be applicable to his case. It may also be of significance to cite the Madras High Court decision in the case of **K.S.Subbiah Pillai & Co., (India) Pvt. Ltd., v. CIT (260 ITR 304),** wherein, it has been clearly held that interest paid and claimed as deduction in computing business income cannot be set off against interest receipt and computed as income from 'Other Sources'. In view of the categorical finding given by the Madras High Court also, it has to be held that the Special Bench decision relied upon by the appellant will not be applicable to his case.

8. Thus, the assessing officer's action of assessing the interest income from Fixed Deposits under the head, 'Other Sources' is upheld and therefore that interest income would not be eligible for any deduction, u/s. 80HHC.

In the result, the appeal is dismissed."

8. Being aggrieved by the order, the assessee has filed an appeal in

I.T.A.No.3094/Mds/2004, before the Income-Tax Appellate Tribunal, 'A' Bench, Chennai, contending inter alia, that both the assessing officer, as well as the Commissioner of Income Tax (Appeals), have failed to consider the plea putforth by them that, the interest earnings constituted "business income" and the deposit was required to be maintained, as a part of terms of sanction, for the credit facilities. In other words, contention has been made before the Tribunal that the deposits were not made voluntarily by the appellant, as investment, but it was a requirement, to carry on the business activity, and thus, "business income".

9. Before the Tribunal, a further contention has been made that the appellate authority has failed to consider the evidence adduced by the appellant that the abovesaid interest earning was on the deposits generated by withholding a portion of the export earning, over the years and such withholding was an integral part of the terms of sanction, for the credit facilities to them, by the bankers. Contention has also been made that reliance on the decision of **CIT v. Nizar Ahmed & Co.,** reported in **259 ITR 244,** was misplaced.

10. After hearing both parties, vide order, dated 21.09.2006, in I.T.A.No.3094/Mds/2004, the Income Tax Appellate Tribunal, 'A' Bench, Chennai, at Paragraphs 3 and 4, held as follows:

> "3. Before us also the assessee's counsel reiterated the same arguments. He further replying on the decision of the Hon'ble Delhi High Court in the case of **CIT v. Koshika Telecom Ltd., (2006) 203 CTR 99,** vehemently argued that this interest income accrued on margin money deposit with the bank which was inextricably linked to the furnishing of bank guarantee by the assessee and hence, it is to be treated as business income and should have been included in the business profits which will qualify for deduction u/s. 80HHC. On the other hand, the ld. DR supported the orders of the authorities below and further relied on the recent decision of the Hon'ble Madras High Court in the case of **CIT vs. Chinnapandi (2006) 282 ITR 389** and contended that any receipts including the interest receipts are applicable to the Explanation (baa) and hence, 90% of the same have to be excluded.
>
> 4. Having considered the rival submissions, we are of the view that the decision of the Hon'ble jurisdictional High Court cited by the ld. DR is squarely applicable to the facts of the

assessee's case. We therefore, see no merit in the ground urged by the assessee before us and we reject the same."

11. Aggrieved by the said decision, instant tax case appeal has been filed and record of proceedings shows that appeal has been admitted on 08.08.2007, on the following substantial question of law,

"Whether on the facts and in the circumstances of the case, the Tribunal is right in law in not holding that the interest from fixed deposits formed out of compulsory retention and transfer of export realisation is income from business liable for inclusion as business profit for computation of deduction under Section 80HHC of the Income Tax Act?"

12. Assailing the correctness of the order of the Tribunal and seeking for an answer, in favour of the assessee/appellant, on the above substantial question of law, Ms.Sushma Harini, learned counsel appearing for the appellant reiterated the submissions. Added further, she submitted that the decision rendered in **CIT v. Nizar Ahmed & Co.,** reported in **259 ITR 244,** has been misapplied by the appellate authority and that the Tribunal has also committed a mistake, in rejecting the case of the appellant/assessee, by

relying on the decision of this Court in **CIT vs. Chinnapandi** reported in **(2006) 282 ITR 389,** which according to her, is not applicable to the case on hand.

13. Harping on the letter, extending credit facilities of Rs.1.70 Crores, learned counsel for the appellant further contended that the appellant was required to make certain deposits, out of realisation of the sale proceeds of the exports, made and interest earned on such deposits, has to be treated as "business income" only, and not as income from "other sources".

14. Per contra, Mr.J.Narayanasamy, learned standing counsel for the Income-Tax Department submitted that the case of the assessee is squarely covered by the decision of this Court in **CIT v. Nizar Ahmed & Co.,** reported in **259 ITR 244.** He also submitted that similar issue has been considered by the Kerala High Court in **Ravindranathan Nair v. Deputy Commissioner of Income-Tax (Assessment)** reported in **2003 (262) ITR 669 (Ker.),** wherein, the Kerala High Court held that,

> "As already noted, the interest from short-term deposits received by the appellant therein is not the direct result of any export of any goods or merchandise. The fixed deposit was made only for the purpose of opening letter of credit and for getting other benefits which are necessary requirements to enable the appellant to make the export. From the above it is clear that the

interest income received on the short-term deposits though it can be attributed to the export business cannot be treated as income which is derived from the export business. In the above circumstances, even assuming that the bank had insisted for making short-term deposits for opening letter of credit and for other facilities, it cannot be said that the income is derived from the export business. That apart, the very question as to whether the income derived from deposits made with the bank is entitled to the relief under Section 80HHC was considered by this Court in **Nanji Topanbhai & Co. v. Asstt. CIT and Ors. [(2000) 243 ITR 192 (Ker.)], CIT v. Jose Thomas [(2002) 253 ITR 553 (Ker.)]** and also in **Abad Enterprise v. CTT [(2002) 253 ITR 319 (Ker.)],** where it was categorically held that such interest income is not entitled to the relief under Section 80HHC of the Act."

15. Learned standing counsel for the Income-Tax Department submitted that decision of the Kerala High Court in **Ravindranathan Nair's** case (cited supra), has been upheld by the Hon'ble Supreme Court in S.L.P.(C) No.9557 of 2003. Decision of this Court in **Dollar Apparels v. Income Tax Officer** reported in **2007 (294) ITR 484 (Mad.),** was also pressed into service by the Revenue, which considered the decision in **CIT v. Nizar Ahmed & Co.,** reported in **259 ITR 244.**

16. Referring to Section 80HHC of the Income Tax Act, 1961, learned standing counsel for the Income Tax Department submitted that if the Company is engaged in the business of export, income earned out of exports of any goods or merchandise, deduction to the extent of profits, referred to in sub-Section (1B) alone would be allowed, if only the income is derived by the assessee, from the export of such goods or merchandise, and not from any other source. He further submitted that on the facts and circumstances of the case, interest income has been derived, not from the export of goods or merchandise, but derived from the deposits made by the appellant and therefore, interest income, earned by the assessee, cannot be treated as "business income", liable for deduction. According to him, interest income earned from the deposits, should be treated only as "other source" and therefore, both the appellate authority, as well as the Tribunal, have rightly decided the issue, in favour of the Revenue.

17. Inviting the attention of this Court to Explanation (baa) to sub-Section 4(c) of Section 80HHC of the Income Tax Act, 1961, learned standing

counsel for the Income-Tax Department submitted that "profits of business" means, profits of the business, as computed under the head, "Profits and gains of business or profession", as stated therein. Reiterating that, in computing the total income of the assessee, deduction of the profits, referred to in sub-Section (1B) of Section 80HHC, has to be derived by the assessee only, from the export of goods or merchandise and not otherwise, he submitted that the impugned order passed in accordance with law the statutory provisions, does not warrant interference.

18. Learned standing counsel appearing for Income-Tax Department submitted that one of the conditions for allowing deduction is that the sale proceeds should be in a convertible foreign exchange and in such circumstances only, deduction can be allowed. Whereas, the assessee is trying to enlarge the scope of the Section, by bringing in interest income, earned out of deposits. He further submitted that there is no illegality or irregularity, in the order of the Tribunal, warranting interference, and for the abovesaid reasons, prayed for dismissal of the appeal.

19. By way of reply, Ms.Sushma Harini, learned counsel appearing for the appellant submitted that the question of law framed in **Chinnapandi's** case (cited supra), and the answer of this Court, is not related to deduction under Section 80HHC of the Act, on other sources and therefore, the said decision, cannot be made applicable to the case on hand. At this juncture, this Court deems it fit to extract the substantial question of law, raised in **Chinnapandi's** case (cited supra),

> "Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the assesses is eligible for full deduction under Section 80HHC **without restricting to the amount received by way of interest were incidental to the export business as fixed deposits is valid in law?"**

20. Learned counsel for the appellant further submitted that in **Nizar Ahmed's** case (cited supra), the decision of this Court rendered on the facts situation therein, was not a case of deposit made pursuant to any requirement imposed by the bank, at the time of sanctioning of facilities, whereas, in the case on hand, when the assessee had produced a letter from the State Bank of India, stating that for extention of credit facility, deposit had to be made and

when such deposit was made, from the business profits, interest income earned from such deposit, cannot be excluded from "business income" and be termed as income from "other sources". She reiterated that there is certainly a nexus between the export earning deposit a requirement for the credit facility and thus, interest income, has to be necessarily treated as "business income" and not from "other source". Decision in **Premier Enterprises v. Deputy Commissioner of Income-Tax** reported in **2015 (370) ITR 465 (MAD.),** rendered in favour of the assessee therein, on the facts that case, wherein, the assessee therein had deposited amounts for the purpose of availing credit facilities, has also been pressed into service.

Heard the learned counsel appearing for the parties and perused the materials available on record.

21. Before adverting to the rival submissions, let us have a cursory look at the provisions in the Income Tax Act, 1961. Section 28 of the said Act deals with profits and gains of business or profession, and the said Section is extracted hereunder:

> 'The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—

(*i*) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

(*ii*) any compensation or other payment due to or received by,—

(*a*) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;

(*b*) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto ;

(*c*) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto ;

(d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business ;

(*iii*) income derived by a trade, professional or similar association from specific services performed for its members ;

(*iiia*) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947) ;

(*iiib*) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India ;

(*iiic*) any duty of customs or excise re-paid or re-payable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971 ;

(*iiid*) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);

(*iiie*) any profit on the transfer of the Duty Free Replenishment Certificate, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) ;

(*iv*) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession ;

(*v*) any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm :

Provided that where any interest, salary, bonus, commission or remuneration, by whatever name called, or any part thereof has not been allowed to be deducted under clause (*b*) of Section 40, the income under this clause shall be adjusted to the extent of the amount not so allowed to be deducted ;

(*va*) any sum, whether received or receivable, in cash or kind, under an agreement for—

(*a*) not carrying out any activity in relation to any business **[***or profession***]**; or

(*b*) not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services:

Provided that sub-clause (*a*) shall not apply to—

(*i*) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business **[***or profession***]**, which is chargeable under the head "Capital gains";

(*ii*) any sum received as compensation, from the multi-lateral fund of the Montreal Protocol on Substances that Deplete the Ozone layer under the United Nations Environment

Programme, in accordance with the terms of agreement entered into with the Government of India.

Explanation.—For the purposes of this clause,—

(*i*) "agreement" includes any arrangement or understanding or action in concert,—

(*A*) whether or not such arrangement, understanding or action is formal or in writing; or

(*B*) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(*ii*) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as accounting, banking, communication, conveying of news or information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging;

(*vi*) any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

Explanation.—For the purposes of this clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in clause (*10D*) of Section 10;

(*vii*) any sum, whether received or receivable, in cash or kind, on account of any capital asset (other than land or goodwill

or financial instrument) being demolished, destroyed, discarded or transferred, if the whole of the expenditure on such capital asset has been allowed as a deduction under Section 35AD.

Explanation 1.—[*Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989.*]

Explanation 2.—Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business.'

22. Section 80HHC of the Income Tax Act, deals with deduction in respect of profits retained for export business and the same is extracted hereunder:

"(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 :***

Provided that if the assessee, being a holder of an Export

House Certificate or a Trading House Certificate (hereafter in this section referred to as an Export House or a Trading House, as the case may be,) issues a certificate referred to in clause (*b*) of sub-section (4A), that in respect of the amount of the export turnover specified therein, the deduction under this sub-section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1A) Where the assessee, being a supporting manufacturer, has during the previous year, sold goods or merchandise to any Export House or Trading House in respect of which the Export House or Trading House has issued a certificate under the proviso to sub-section (1), 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 sale of goods or merchandise to the Export House or Trading House in respect of which the certificate has been issued by the Export House or Trading House.

(1B) For the purposes of sub-sections (1) and (1A), the

extent of deduction of the profits shall be an amount equal to—

(*i*) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001;

(*ii*) seventy per cent thereof for an assessment year beginning on the 1st day of April, 2002;

(*iii*) fifty per cent thereof for an assessment year beginning on the 1st day of April, 2003;

(*iv*) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004,

and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.

(2)(*a*) This section applies to all goods or merchandise, other than those specified in clause (*b*), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer) in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation.—For the purposes of this clause, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(*b*) This section does not apply to the following goods or merchandise, namely :—

(*i*) mineral oil ; and

(*ii*) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.—The sale proceeds referred to in clause (*a*) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2.—For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

(3) For the purposes 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 :

Provided that the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiia*) (not being profits on sale of a

licence acquired from any other person), and clauses (*iiib*) and (*iiic*) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiid*) or clause (*iiie*), as the case may be, of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiid*) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(*a*) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission

Scheme; and

(*b*) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (*iiie*) of Section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(*a*) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(*b*) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, "rate of credit allowable" means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :

Provided also that in case the computation under clause (*a*) or clause (*b*) or clause (*c*) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—

(*a*) any sum referred to in clause (*iiia*) or clause (*iiib*) or clause (*iiic*), as the case may be, or

(*b*) any sum referred to in clause (*iiid*) or clause (*iiie*), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be,

the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.—For the purposes of this sub-section,—

(*a*) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods ;

(*b*) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (*b*) of sub-section (3) ;

(*c*) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(*d*) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

(*e*) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(*f*) "trading goods" means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,—

(*a*) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business ;

(*b*) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the *Explanation* below sub-section (2) of Section 288, certifying that the deduction has been correctly claimed in

accordance with the provisions of this section:

Provided that in the case of an undertaking referred to in sub-section (4C), the assessee shall also furnish along with the return of income, a certificate from the undertaking in the special economic zone containing such particulars as may be prescribed, duly certified by the auditor auditing the accounts of the undertaking in the special economic zone under the provisions of this Act or under any other law for the time being in force.

(4A) The deduction under sub-section (1A) shall not be admissible unless the supporting manufacturer furnishes in the prescribed form along with his return of income,—`

(*a*) the report of an accountant, as defined in the *Explanation* below sub-section (2) of Section 288, certifying that the deduction has been correctly claimed on the basis of the profits of the supporting manufacturer in respect of his sale of goods or merchandise to the Export House or Trading House; and

(*b*) a certificate from the Export House or Trading House containing such particulars as may be prescribed and verified in the manner prescribed that in respect of the export turnover mentioned in the certificate, the Export House or Trading House has not claimed the deduction under this section :

Provided that the certificate specified in clause (*b*) shall be duly certified by the auditor auditing the accounts of the Export House or Trading House under the provisions of this Act or under

any other law.

(4B) For the purposes of computing the total income under sub-section (1) or sub-section (1A), any income not charged to tax under this Act shall be excluded.

(4C) The provisions of this section shall apply to an assessee-

(*a*) for an assessment year beginning after the 31st day of March, 2004 and ending before the 1st day of April, 2005;

(*b*) who owns any undertaking which manufactures or produces goods or merchandise anywhere in India (outside any special economic zone) and sells the same to any undertaking situated in a special economic zone which is eligible for deduction under Section 10A and such sale shall be deemed to be export out of India for the purposes of this section.

Explanation.—For the purposes of this section,—

(*a*) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder ;

(*aa*) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) ;

(*b*) "export turnover" means the sale proceeds, received in,

or brought into, India by the assessee in convertible foreign exchange in accordance with clause (*a*) of sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962);

(*ba*) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) :

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (*iiia*), (*iiib*), (*iiic*), (*iiid*) and (*iiie*) of Section 28;

(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*), (*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 ; (*bb*) [***]

(*c*) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or Trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India;

(*d*) "supporting manufacturer" means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing) goods or merchandise and selling such goods or merchandise to an Export House or a Trading House for the purposes of export;

(*e*) "special economic zone" shall have the meaning assigned to it in clause (*viii*) of the *Explanation 2* to section 10A."

23. From the bare reading of the Section, it could be deduced that the Legislature has engrafted the provisions, as to how, the Company engaged in the business of export, out of India, of any goods or merchandise, can be allowed, to compute the total income of the assessee, deduction to the extent of profits, referred to, in sub-Section (1B), derived by the assessee, from such export of goods or merchandise, meaning thereby, that such income from the said proceeds of the goods or merchandise, should be earned in convertible foreign exchange or in otherwords, and not income generated

within the country, from other sources.

24. In **Commissioner of Income Tax v. K.K.Doshi** reported in **2001 (112) TAXMAN 503 (Bom),** the Bombay High Court has held that, "Section 80HHC clearly states that in computing the total income of the assessee, there shall be deduction of profits derived by the assessee from the export of goods. In otherwords, there should be a direct nexus between profits on one hand and the export activity, on the other hand."

25. In **Commissioner of Income Tax v. Ravi Ratna Exports (P) Ltd.,** reported in **2000 (246) ITR 443 (Bom),** the Bombay High Court has held as follows:

> "In this matter, the assessing officer has recorded a finding of fact that interest income was taxable as income from other sources. In the circumstances, such income cannot fall under the head "Profits and gains of business". Hence, such income cannot be included in business profits in the above formula. Therefore, on both counts, the appeal stands allowed. Even if it is held that interest income was a business income, the same was not includible in business profits in the above formula. On the other hand, as stated above, the assessing officer has held that the interest income

was income from other sources. If that be the case, then such an income cannot come within the ambit of Section 28 to 44D of the Income-tax Act. It cannot come under profits and gains of business."

26. In **Nanji Topanbhai v. Assistant Commissioner of Income Tax** reported in **2003 (243) ITR 192 (Ker),** the Kerala High Court held that income received by the assessee as income from fixed deposits with the bank is not business income, but only income from other sources. So also, the decision of the Kerala High Court in **Assistant Commissioner of Income Tax v. South India Produce Company** reported in **2003 (262) ITR 20 (Ker.).**

27. In **K.S.Subbiah Pillai v. Commissioner of Income Tax** reported in **2003 (179) CTR 522 (Mad) : 2003 (260) ITR 304 (Mad.),** this Court held that,

"6. Clause (baa) under the Explanation to Section 80HHC defines, profits of the business as computed under the head "Profits and gains of business or profession". The deductions to be made are from the amount of profit so computed and not from the amount computed under any other head of income of that assessee. ***The reference to "such profits" in Sub-clause (1) of Clause (baa) can only be to the profits of the business***

computed under the head "Profits and gains of business or profession". Addition of prefix "the" to "profits" in Clause (baa), while referring to the profits and gains of business or profession makes it clear that it is only the amounts already included in that computation which are now to be reduced to the extent of 90 per cent., if those items are included in Sub-clause (1) of that definition.

7. Interest paid and claimed as deduction in the computation of profits and gains for business, cannot be set off against interest received and computed under income from "other sources". What has been said about interest is equally applicable to rent and commission included in the computation under the head "Profits and gains of business or profession". The first question is answered against the assessee and in favour of the Revenue."

28. Now Let us consider the decisions relied on by the learned counsel appearing for both sides.

29. In **CIT v. Nizar Ahmed & Co.,** reported in **(2003) 259 ITR 244,** the asssessee therein, was a firm doing business in export of tanned and finished leather. It obtained credit facilities from the overseas branch of the State

Bank of India, Madras. The assessee therein, in the same bank, made deposits to the tune of Rs.139.14 lakhs, on which, it received interest, at the rate of 10%. The assessee's claimed that the interest received by it, on those deposits should be treated as part of the income from business. The same was negatived by both the assessing officer, as well as the Commissioner, but upheld by the Tribunal. Substantial question of law raised by way of appeal by the Revenue, to this Court was, "whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the interest income should not be excluded for the purpose of calculating the deduction under Section 80HHC of the Income Tax Act, 1961?"

30. In **Nizar Ahmed's** case (cited supra), the Tribunal took the view that the letter from the bank was the sufficient basis, to hold that the making of such deposit and the facilities enjoyed from the bank were inextricably linked and thus, the interest received on those deposits was required to be treated as part of the income from the business for computing the relief under Section 80HHC. The Revenue was aggrieved over the said decision and accepting the contention of the revenue, the question referred to above, was answered against the assessee and in favour of the Revenue.

31. Though Ms.Sushma Harini, learned counsel for the appellant attempted to distinguish the above judgment, we are not inclined to accept the same, in view of the categorical decision rendered in **Nizar Ahmed's** case, wherein, this Court held as follows:

> "3. When the matter was taken to the Tribunal, it took the view that the letter from the bank was sufficient basis to hold that the making of the deposit and the facilities enjoyed from the bank were inextricably linked. It also held that the interest received on those deposits was required to be treated as part of the income from the business for computing the relief under Section 80HHC.
>
> ***4. That view of the Tribunal cannot be sustained. The Commissioner has rightly pointed out that the deposits kept by the assessee in the bank in a large sum of over Rs. 130 lakhs were to the assessee's own advantage, inasmuch as they provided a return at the rate of 10 per cent. That was in the nature of an additional source of income to the assessee which was not in any way linked to the business that it was carrying on. The credit facilities enjoyed by the assessee from the bank had been extended to it by charging interest at a rate lower than the one which the assessee was receiving on its deposits.*** The assessee, therefore, had found it advantageous

to borrow money from the bank and have those borrowed funds used in the business. ***The interest income that the assessee received on its own funds kept in deposit with the bank, therefore, did not have any direct link with the business that was being carried on with the funds made available to the assessee by the bank by way of loans on which the assessee was required to pay less interest.***

5. The interest paid by the assessee to the bank was, no doubt, an item of expenditure in the computation of its business income. That, however, would not justify taking the income that the assessee received by way of interest on the deposits that it had with the bank, as part of its business income when in reality it was not. The deposit made with the bank was for the convenience and benefit of the assessee with a view to derive higher interest income. It was not a deposit made pursuant to any requirement imposed by the bank at the time of sanctioning of the facilities. The bank's decision to extend the facilities was linked more to the business prospects of the assessee and the confidence the bank had in the integrity and entrepreneurial capacity of the partners of the firm who ran the business."

32. In **Ravindranathan Nair v. Deputy Commissioner of Income-Tax (Assessment)** reported in **2003 (262) ITR 669 (Ker.),** the question that came

up for consideration, before the Kerala High Court, was whether, interest income derived by the appellant from the deposit made ***with the bank for opening letter of credit and other formalities to enable the appellant to export goods to various countries is eligible for the relief under Section 80HHC of the IT Act, 1961.*** When the appellant therein, claimed relief under Section 80HHC, the assessing officer treated the interest received on short term deposit, as income from other sources. The assessing officer also noticed that the appellant therein got a cash credit loan account with the bank for availing loan facilities for purchase of raw cashewnuts and that when imports were completed, during the loan season, the sale proceeds of the exports were deposited to the account from which interest was earned. The appellant therein contended that there is a nexus between the amount received on export sales and that there was deposit in short-term deposits and hence, the deposit was from business earnings and consequently, the interest earned was income from business. The Assessing Officer did not accept the said contention. The Commissioner of Income-Tax (Appeals), confirmed the said decision. The assessee was also unsuccessful before the Tribunal. Considering the facts and circumstances of the said case, a Hon'ble Division Bench of the

Kerala High Court, held as follows:

> ***"From the above discussion of the meaning of the word "attributable to" with reference to the expression "derived from", it can be seen that the meaning of the expression "derived from" has got only a limited import and, therefore, the expression "derived from" as used in Section 80HHC must be understood as profit directly arising from the export of the goods and not incidental to the export. As already noted, the interest from short-term deposits received by the appellant is not the direct result of any export of any goods or merchandise. The fixed deposit was made only for the purpose of opening letter of credit and for getting other benefits which are necessary requirements to enable the appellant to make the export. From the above it is clear that the interest income received on the short-term deposits though it can be attributed to the export business cannot be treated as income which is derived from the export business. In the above circumstances, even assuming that the bank had insisted for making short-term deposits for opening letter of credit and for other facilities, it cannot be said that the income is derived from the export business. That apart, the very question as to whether the income derived from deposits made with the bank is entitled to the relief under Section 80HHC was considered by this Court in Nanji Topanbhai & Co.***

v. Asstt. CIT and Ors. (supra), CIT v. Jose Thomas (supra) and also in Abad Enterprise v. CTT (supra) where it was categorically held that such interest income is not entitled to the relief under Section 80HHC of the Act.

For all these reasons we answer the two questions on which notice is issued against the appellant and in favour of the Revenue. Appeal is accordingly dismissed."

33. In **CIT vs. Chinnapandi** reported in **(2006) 282 ITR 389,** the assessee therein was engaged in the business of export of finished leather. During the assessment year 1995-96, the assessee received interest of Rs. 2,65,019/- and paid interest of Rs.9,24,967/-. The assessee claimed deduction of Rs.9,37,057/-, under Section 80HHC of the Income Tax Act, 1961, under the net interest, ie., Rs.6,59,946/- [Rs.9,24,967/- (-) Rs.2,65,019/-]. While computing deduction, under Section 80HHC, the assessing officer deducted 90% of the gross interest, without taking into account the interest paid by the assessee. On appeal, the Commissioner of Income Tax (Appeals), confirmed the order of the assessing officer. The Tribunal allowed the assessee's claim and held that the assessee was entitled to deduction, under Section 80HHC, without restricting the amounts, received by way of interest. On further

appeal, the question which came up for consideration, was, "Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessee is eligible for full deduction under Section 80HHC, without restricting to the amount received by way of interest were incidental to the export business as fixed deposits is valid in law?" After considering the decisions in **K.S.Subbiah Pillai's** case (cited supra) and **Rani Paliwal v. CIT [(2003) 185 CTR P H 333 = 2004 268 ITR 220 P&H],** this Court, at Paragraphs 6 and 7, held as follows:

> "6. The above two judgments support the case of the Revenue. The appellant in the present case had received interest of Rs. 2,65,019 and hence the receipt of interest is alone relevant and the same is to be taken into consideration for the purpose of deduction for the claim under Section 80HHC of the Act. ***No expenditure or any other deduction is permissible from the receipt of interest income. Section 80HHC stipulates a deduction in respect of export profits, Instead of enjoining the AO to compute such export profits from out of the consolidated amount of the assessee, which may involve income by way of interest, rent, commission etc., the legislature has provided a simple procedure under which 90 per cent of the receipts such as interest, rent, commission, brokerage etc. shall be excluded as profits not attributable***

to exports. The intention is therefore clear that there should be no attempt to deduct any expenditure from the receipts, howsoever, related such expenditure may be to the receipts. It is in this view of the matter that the expression "receipt by way of" has been used in the section and not "income" of that nature.

7. In view of the above, we are of the view that 90 per cent of the interest that is deductible for the claim under Section 80HHC of the Act is from the gross interest received by the assessee and that the amount of interest paid by the assessee should not be deducted therefrom and hence, we answer the above question in favour of the Revenue and against the assessee and allow the tax case filed by the Revenue, No costs."

34. Though the learned counsel for the appellant submitted that **Chinnapandi's** case (cited supra), is inapposite to the facts of this case, reading of the same shows that the latter part of the substantial question of law framed and answered, has relevance to the case on hand.

35. In **Dollar Apparels v. Income Tax Officer** reported in **2007 (294) ITR 484 (Mad.), t**he assessee therein made deposits with a Bank, out of export proceeds received from outside India. According to the assessee, the amounts

deposited were not made out of surplus funds and the interest income earned from the funds has direct nexus with the export business and hence, should be treated as income from business. However, as against the claim of the assessee, the assessing officer has treated the income earned from the deposits, as income from other sources. The Commissioner of Income-Tax (Appeals) confirmed the same. On further appeal by the assessee therein, the Tribunal held that there was no mutual agreement between the bank and the assessee and that the income derived from the export business alone is eligible for deduction under Section 80HHC and not the incidental income from export proceeds. The Tribunal, while holding that the deposits made with the Bank are for the convenience and benefit of the assessee with a view to derive higher income, concluded that the assessee is not entitled to deduction under Section 80HHC on the interest income. In the above said circumstances, the assessee approached this Court, raising the following substantial questions of law,

> "(1) Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in overlooking the concept of mutuality ?
>
> (2) Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in law in overlooking the fact that in

the absence of any "real income" is it permissible to contend that the interest credited is to be set off against interest paid, what is contemplated in Explanation (baa) is, "any other interest/ commission income which are otherwise taxable as "business income" like interest earned from money-lending business etc., and not the interests from these fixed deposits ?

(3) Whether on a correct and proper interpretation of Section 80HHC of the Income Tax Act, 1961 and application thereof to the facts and circumstances of the case, was the Tribunal legally right in holding that the claim for deduction in respect of income from F.D. was not sustainable despite contrary and consistent view having been expressed by the Bombay High Court in the case of **C.I.T. v. Paramount Premises (P) Ltd., (190 ITR 259)** and **C.I.T. v. Nagpur Engineering Co. Ltd., (245 ITR 806)** against which the S.L.P. of the Department/Revenue stood dismissed as reported in **C.I.T. v. Nagpur Engineering Co. Ltd., (244) ITR (St.) 54)** ?"

After considering **K.S.Subbiah Pillai's** case (cited supra) and **Nizar Ahmed's** case (cited supra), the Hon'ble Division Bench of this Court held as follows:

"5. In the instant case, the Tribunal held that the deposits made by the assessee with the bank have no direct link to the sanctioning limit by the bank. Even assuming that the deposits were made as a pre-condition of the bank for sanctioning the limit, it cannot be considered as income from export earnings, as

there is no nexus between export earnings and interest income and the interest income was earned from the deposits and not from the export business. Hence, following the ratio laid down by this Court in **K.S.Subbiah Pillai & Co., (India) Pvt. Ltd., v. CIT** [(2003) 260 I.T.R. 304] and in **CIT v. Nizar Ahmed & Co.,** [(2003) 259 I.T.R. 244], we hold that the Tribunal was justified in deciding the issues in favour of the Revenue and we do not see any reason to interfere with the findings rendered by the Tribunal with regard to the issues raised in the questions of law referred to above earlier."

36. Though Ms.Sushma Harini, learned counsel appearing for the appellant, submitted that the ultimate conclusion of this Court in **Dollar Apparels'** case (cited supra), can only be considered, as obiter dicta and not a ratio decdenti, this Court is not inclined to accept the said contention, for the reason that this Court has held that even if deposits were made as a pre-condition for the Bank for sanctioning credit facility, it cannot be considered as income from export business.

37. On the contention of the learned counsel for the appellant that the decision in **Dollar Apparel's** case, is only an obiter dicta, let us consider

what, "obiter dicta" means. Rupert Cross and J.W.Harris in “Precedent in English Law”(4th Edition - page 41) say thus:-

> “There are undoubtedly good grounds for the importance attached to the distinction between ratio decidendi and obiter dictum. In this context an obiter dictum means a statement by the way, and the probabilities are that such a statement has received less serious consideration than that devoted to a proposition of law put forward as a reason for the decision. It is not even every proposition of this nature that forms part of the ratio decidendi."

38. Distinction between an obiter dictum and a ratio decidendi has been explained by the Supreme Court in **Director of Settlements, A.P. v. M.R.Apparao** reported in **AIR 2002 SC 1598,**

> “So far as the first question is concerned. Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle

found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or

a subordinate Court to follow the decision of the Supreme Court."

39. In **Arun Kumar Aggarwal v. State of Madhya Pradesh** reported in **AIR 2011 SC 3056,** the Supreme Court explained "obiter dicta", as follows:

"21. .....The expression obiter dicta or dicta has been discussed in American Jurisprudence 2d, Vol. 20, at pg. 437 as thus:

"74. -Dicta Ordinarily, a court will decide only the questions necessary for determining the particular case presented. But once a court acquires jurisdiction, all material questions are open for its decision; it may properly decided all questions so involved, even though it is not absolutely essential to the result that all should be decided. It may, for instance, determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the case, if the issue of constitutionality is involved in the suit and its settlement is of public importance. An expression in an opinion which is not necessary to support the decision reached by the court is dictum or obiter dictum.

"Dictum" or "obiter dictum: is distinguished from the "holding of the court in that the so- called "law of the case" does not extend to mere dicta, and mere dicta are not binding under the doctrine of stare decisis, As applied to a particular opinion, the question of

whether or not a certain part thereof is or is not a mere dictum is sometimes a matter of argument. And while the terms "dictum" and "obiter dictum" are generally used synonymously with regard to expressions in an opinion which are not necessary to support the decision, in connection with the doctrine of stare decisis, a distinction has been drawn between mere obiter and "judicial dicta," the latter being an expression of opinion on a point deliberately passed upon by the court." Further at pg. 525 and 526, the effect of dictum has been discussed:

"190. Decision on legal point; effect of dictum ... In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said to be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases. Nevertheless courts have sometimes given dicta the same effect as holdings, particularly where "judicial dicta" as distinguished from "obiter dicta" are involved."

22.....

23. The Wharton's Law Lexicon (14th Ed. 1993) defines term "obiter dictum" as an opinion not necessary to a judgment;

an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect; often called as obiter dictum, ; a remark by the way.

24. The Blacks Law Dictionary, (9th ed, 2009) defines term "obiter dictum' as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). -- Often shortened to dictum or, less commonly, obiter. "Strictly speaking an "obiter dictum" is a remark made or opinion expressed by a judge, in his decision upon a cause, `by the way' -- that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as `dicta,' or `obiter dicta,' these two terms being used interchangeably."

25. The Word and Phrases, Permanent Edition, Vol. 29 defines the expression "obiter dicta" or "dicta" thus:

"Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself; obiter dicta are

opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects; It is mere observation by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him; "Obiter dictum" is made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them; Discussion in an opinion of principles of law which are not pertinent, relevant, or essential to determination of issues before court is "obiter dictum".

26. The concept of "Dicta" has also been considered in Corpus Juris Secundum, Vol. 21, at pg. 309-12 as thus:

"190. Dicta a. In General A Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a judge on a point not necessarily arising in the case; a statement or holding in an opinion not responsive to any issue and not necessary to the decision of the case; an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties; or an opinion of a judge which does not embody the resolution or

determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge himself. The term "dictum" is generally used as an abbreviation of "obiter dictum" which means a remark or opinion uttered by the way.

Such an expression or opinion, as a general rule, is not binding as authority or precedent within the stare decisis rule, even on courts inferior to the court from which such expression emanated, no matter how often it may be repeated. This general rule is particularly applicable where there are prior decisions to the contrary of the statement regarded as dictum; where the statement is declared, on rehearing, to be dictum; where the dictum is on a question which the court expressly states that it does not decide; or where it is contrary to statute and would produce an inequitable result. It has also been held that a dictum is not the "law of the case," nor res judicata."

27. The concept of "Dicta" has been discussed in Halsbury's Laws of England, Fourth Edition (Reissue), Vol. 26, para. 574 as thus:

"574. Dicta. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose in hand are generally termed "dicta". They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of

a judge are known as "obiter dicta", whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed "judicial dicta". A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported.

... Practice notes, being directions given without argument, do not have binding judicial effect. Interlocutory observations by members of a court during argument, while of persuasive weight, are not judicial pronouncements and do not decide anything."

28. In **Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101 and Divisional Controller, KSRTC v. Mahadeva Shetty, (2003) 7 SCC 197,** this Court has observed that, "Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

29. In **State of Haryana v. Ranbir, (2006) 5 SCC 167,** this Court has discussed the concept of the obiter dictum thus:

"A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla. It is also well

settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See **Divisional Controller, KSRTC v. Mahadeva Shetty)"**

30. In **Girnar Traders v. State of Maharashtra, (2007) 7 SCC 555,** this Court has held:

"Thus, observations of the Court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the Court, is not of much avail to the respondents."

31. In view of above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment."

40. In the light of the above discussion and decisions, we are not inclined to accept the contention of the learned counsel for the appellant that **Dollar Apparels'** case (cited supra), is only an obiter dicta.

41. Reliance has been made by the learned counsel for the appellant in **Premier Enterprises v. Deputy Commissioner of Income-Tax** reported in **2015 (370) ITR 465 (MAD.),** to contend that there was absolute necessity for the appellant/assessee to make term deposit, for the purpose of availing credit facility and that the same was for business purpose and taking note of the same, this Court in **Premier Enterprises'** case (cited supra), directed the Tribunal to consider the same and in such circumstances, the said decision can be made applicable to the case on hand.

42. Rebutting the said contention, Mr.J.Narayanasamy, learned standing counsel for the Income-Tax Department submitted that in **Premier Enterprises'** case (cited supra), the assessing officer treated the interest income, under the head, "income from other sources". The Commissioner of

Income Tax (Appeals), allowed the appeal of the assessee, by treating the interest component as, "business income". The Department was on appeal before the Income Tax Appellate Tribunal. As the assessee did not appear. The Tribunal, by holding that there was no record to show that the deposit was made for the purpose of availing credit facilities nor there was compulsion for making such deposit, allowed the appeal filed by the revenue. In such circumstances, the assessee preferred this Tax Case Appeal before this Court and placed reliance on Condition No.6, imposed by the Bank.

43. Distinguishing **Premier Enterprises'** case (cited supra), learned standing counsel appearing for the Income Tax Department submitted that in the case on hand, both the authorities and the Tribunal have considered the letter of the Bank, produced by the assessee and thereafter, held that interest income earned on deposits, made by the assessee for availing credit facilities, is not deductible, as it is income earned from other sources. He also pointed out that **Premier Enterprises'** case (cited supra), is only an remand and at any stretch of imagination, it can be said to be a decision rendered by this Court, on the substantial question of law, raised in the instant appeal. Going through

the abovesaid judgment, we are in agreement with the submission of the learned standing counsel for the Income Tax Department.

44. In the light of our discussions and the decisions considered, we are of the considered view that the contention of the Revenue is fortified by the decisions of this Court in **Nizar Ahmed's** case (cited supra) and **Dollar Apparels'** case (cited supra) and the judgment of the Hon'ble Apex Court in **Ravindranathan Nair's** case (cited supra). The substantial question of law framed by this Court, is answered against the assessee and in favour of the Revenue.

44. In the result, the Tax Case Appeal is dismissed. No costs.

(S.M.K., J.) (D.K.K., J.)
30.08.2016

Index: Yes
Internet: Yes
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To

The Income Tax Appellate Tribunal,
'A' Bench, Chennai.

S. MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.

skm

T.C.A.No.1121 of 2007

30.08.2016