

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 9273/2013

(Arising out of impugned final judgment and order dated 02/07/2012 in SCA No. 7926/2006 passed by the High Court Of Gujarat At Ahmedabad)

C.I.T. -5 & ANR.

Petitioner(s)

VERSUS

M/S AVANI EXPORTS & ANR.

Respondent(s)

(with interim relief and office report)

WITH

SLP(C) No. 9578-9579/2013

(With Interim Relief and Office Report)

SLP(C) No. 9619-9620/2013

(With Interim Relief and Office Report)

SLP(C) No. 11946/2013

(With Office Report)

SLP(C) No. 18021/2013

(With Office Report)

SLP(C) No. 18022/2013

(With Office Report)

SLP(C) No. 21382/2013

(With Office Report)

SLP(C) No. 22194/2013

(With Office Report)

SLP(C) No. 31196-31210/2013

(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 31211-31225/2013

(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 32320-32334/2013

(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 32550-32564/2013

(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 32566-32570/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 32600-32615/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 34322-34336/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 34337-34351/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 34355-34369/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 34371-34385/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 34387-34400/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 36356-36370/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 36371-36385/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 36386-36400/2013
(With appln. for c/d in filing SLP and Office Report)

SLP(C) No. 36401-36415/2013
(With appln.(s) for c/delay in filing SLP and Office Report)

SLP(C) No. 36416-36430/2013
(With appln.(s) for c/delay in filing SLP and Office Report)

SLP(C) No. 39038/2013
(With Office Report)

SLP(C) No. 39039/2013
(With Office Report)

SLP(C) No. 149/2014
(With Interim Relief and Office Report)

SLP(C) No. 4871/2014
(With appln. for c/d in filing/refiling SLP and Office Report)

SLP(C) No. 18918/2014
(With Office Report)

SLP(C) No. 23622/2014
(With Office Report)

SLP(C) No. 24883/2014
(With Office Report)

SLP(C) No. 28834-28848/2014
(With appln.(s) for c/delay in filing SLP and appln.(s) for c/delay
in refiling SLP and Office Report)

SLP(C) No. 28818-28832/2014
(With appln.(s) for c/delay in refiling SLP and appln.(s) for
c/delay in filing SLP and Office Report)

SLP(C) No. 29806/2014
(With Office Report)

SLP(C) No. 34489/2014
(With Office Report)

SLP(C) No. 2804/2015
(With Office Report)

SLP(C) No. 4712/2015

SLP(C) No. 6735/2015
(With Office Report)

SLP(C) No. 6734/2015
(With Office Report)

Date : 30/03/2015 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For the appearing parties:

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UPON hearing the counsel the Court made the following
O R D E R

Amendment to Section 80HHC(3) of the Income Tax Act, 1961 (in short 'the Act') was made by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect i.e. with effect from 1st April, 1992. By this amendment certain benefits were in fact extended to the exporters who are entitled to claim according to Sec.80HHC of the Act. However at the same time, the amendment also carved out two categories of exporters, namely, those whose export is less than Rs. 10 crores per year and those exporters whose exports turn over is more than Rs.10 crores per annum. Insofar as entitlement of these benefits to the exporter having turn over of more than Rs.10 crores p.a. is concerned, two conditions contained in third and fourth

proviso to the said amendment were to be satisfied for claiming the benefits. Those were:

(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 Duty Remission Scheme.

All the respondents in these SLPs, who are the exporters, belong to the second category. They filed the writ petitions challenging conditions mentioned in third and fourth proviso to Section 80 HHC(3). In fact it was their precise contention that these conditions are severable and therefore these two conditions should be declared ultra vires and severed. The rationale behind seeking such a prayer was obvious inasmuch as the writ petitioners did not want entire Notification to be declared ultra vires which was to their advantage. What they wanted was that the benefit of amended provision be accorded, without insisting on the aforesaid conditions.

The High Court vide impugned judgment has decided the issue in favour of the writ petitioners by concluding as under:

"26. On consideration of the entire materials on record, we, therefore, find substance in the contention of the learned

counsel for the petitioners that the impugned amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assesseees whose assessments were still pending although such benefit will be available to the assesseees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assesseees.

27. We, accordingly, quash the impugned amendment only to this extent that the operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assesseees whose export turnover is above Rs.10 crore. In other words, the retrospective amendment should not be detrimental to any of the assesseees."

Against the High Court judgment these SLPs are filed by the Union of India. Mr. Mukul Rohtagi, learned Attorney General for India submits that once the prayer made was to sever the aforesaid two conditions as onerous and ultra vires, the High Court should have couched the reliefs in terms of that prayer only, instead of stating that the operation of the Section would be given effect to prospectively only and these conditions would not operate retrospectively. At the same time, he accepts that the legal position would be that those exporters with turnover of rupees less than Rs. 10 crores and other like the respondents with turn over of more than Rs.10 crores would be at par and both would be entitled to the benefits.

We find that in essence the High Court has quashed the severable part of third and fourth proviso to Sec.80HHC (3) and it becomes clear therefrom that challenge which was laid to the conditions contained in the said provisos by the respondent has succeeded. However, to make the position crystal clear, we substitute the direction of the High Court with the following direction:

"Having seen the twin conditions and since 80HHC benefit is not available after 1.4.05, we are satisfied that cases of exporters having a turnover below and those above 10 cr. Should be treated similarly. This order is in substitution of the judgment in Appeal.

With the aforesaid clarification all these SLPs including that of assessee filed against the judgment of M.P.High Court are disposed of.

(SUMAN WADHWA)
AR-cum-PS

(SUMAN JAIN)
COURT MASTER