IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-Tax)
(Original Side)

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.328 of 2004

EIH Limited
Versus
Commissioner of Income-Tax, Kolkata-III

For the Appellant: Mr. R. N. Bajoria,
Mr. Anirban Ghosh.

For the Respondent: Mr. D. K. Shome,
Mr. R. K. Choudhury.

Heard on. 09.06.2011 and 24.06. 2011.

Judgment on: August 12, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax ("Act"), 1961 is at the instance of an assessee and is directed against an order dated 26th February, 2004 passed by the Income-tax Appellate Tribunal, "B" Bench, Kolkata, in ITA No.1479/Kol/2002 for the Assessment Year 1998-99.

Being dissatisfied, the assessee has come up with the present appeal.

The facts giving rise to filing of this appeal may be summed up thus:

a) The assessee is engaged, *inter alia*, in the business of hotelier and runs and maintains several hotels of international standard in India. The assessee is also engaged in the business of export of foods etc. to international airlines at Mumbai and New Delhi. The assessee has separate units at Mumbai and New Delhi which supply food and beverages in sealed containers to international flights leaving India. Such foods and beverages in sealed containers are cleared for transmission to the aircrafts and are also escorted by the Customs Authorities at International Airports. After due clearance from the Customs Authorities, such food and beverages are put on board of the aircrafts going out of India.

b) In its assessment for the Assessment Year 1998-99, the relevant previous year being the Financial Year ending on March 31, 1998, the assessee claimed deduction under Section 80HHC of the Act for Rs.5, 25, 71,710/- being the profits made from the sale of such food and beverages to such foreign airlines as according to the assessee such sale amounts to export within the meaning of the Section 80HHC of the Act. In the assessment made under Section 143(3) of the Act, the Assessing Officer disallowed such claim on the ground that the sale of such food and beverages to the foreign airlines did not amount to export out of India and that the payment received from the said foreign airlines in India in the form of rupees could not

be treated as payment in convertible foreign exchange within the meaning of the provisions of Section 80HHC of the Act.

c) Being dissatisfied, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals) and the said authority upheld the order of the Assessing Officer observing that the sale of the food and beverages to the foreign airlines was completed within the Indian territory itself and that the payment received from such foreign airlines in rupees could not be considered as payment received in convertible foreign exchange.

d) Being dissatisfied, the assessee preferred an appeal before the Income-tax Appellate Tribunal, Kolkata and the said Tribunal by the order impugned herein upheld the order of the CIT(A). The Tribunal held that the conditions for grant of deduction under Section 80HHC of the Act were not satisfied.

e) Being dissatisfied, the assessee has come up with the present appeal under Section 260A of the Act.

A Division Bench of this Court, at the time of admission of this appeal, formulated the following substantial questions of law:

"a) Whether on the facts and in the circumstances of the case the supply of food and beverages to the international airlines in

sealed containers constitutes export of goods out of India for the purposes of Section 80HHC of the Act.

"b) Whether on the facts and in the circumstances of the case the sale proceeds received, for supply of such food and beverages, was in convertible foreign exchange within the meaning of Section 80HHC of the Act.

"c) Whether on the facts and in the circumstances of the case your petitioner is entitled to the deduction claimed under Section 80HHC of the Act."

During the pendency of this appeal, the appellant came up with an application for permission to adduce additional evidence and this Court allowed such prayer by permitting the appellant to rely upon the documents annexed as Annexure-"A" to the said application which are as follows:

a) A Certificate issued by the office of the Commissioner of Customs dated April 13, 2004 certifying all bonded goods and catering food supplies that were carried in a sealed Hl-Lift of M/s. Oberoi Flight Services, which is escorted by the Customs Preventive Officer on duty, to the Air Crafts of International Airlines catered by them at the tarmac at Chhatrapati Shivaji International Airport, Mumbai, as required under the regulations of the Customs Act, 1963.

b) A letter written by the assessee to the General Manager of the Reserve Bank of India to issue a certificate showing that the payments made in Indian rupees to the hotels by Foreign Airlines and diplomats are being treated by Reserve Bank as Convertible Foreign Exchange for the purpose of Foreign Exchange Regulation Act, 1973 and the Rules made thereunder as also the Foreign Exchange Management Act.

c) A letter dated 7th November, 2005 written by Assistant General Manager, Foreign Exchange Department, Reserve Bank of India certifying that provisions of the DGFT Circular No.60/97-2002 dated December 24, 1998 regarding treatment of the amounts received in rupees by a hotel company out of repatriable funds would also apply under the FEMA Regulations.

While allowing such additional evidence, this Court also permitted the Revenue to adduce additional evidence in rebuttal for the purpose of refuting those documents. In spite of giving such opportunity, the Revenue decided not to give any further additional evidence on rebuttal.

We have, therefore, taken into consideration the aforesaid documents while considering the present appeal.

Mr. Bajoria, the learned Senior Advocate appearing on behalf of the appellant, has strongly criticized the orders passed by the authorities below by relying upon the provisions contained in Section 80HHC of the Act and particularly the Explanation added to the said Section. According to Mr. Bajoria, in this case, by virtue of Explanations (a) and (aa), even though his client has received the payment in Indian rupees, the same amounts to convertible foreign exchange within the meaning of the Explanation (aa) added to Section 80HHC and at the same time, the fact that the Customs Authority has cleared those articles to the aircraft at the airport which is a customs station within the meaning of the Customs Act, itself indicates that the aforesaid transportation of food items to the foreign bound aircrafts amounts to export of those articles and as such, his client is entitled to get the benefit of Section 80HHC of the Act.

In support of his contention, Mr. Bajoria has placed on reliance upon the following decisions:

1. Commissioner of Income-tax Vs. Rajendra Kasliwal, reported in (2004) Vol. 271 ITR 448;

2. Marble Men Vs. Commissioner of Income-tax and Ors., reported in (2005) Vol. 272 ITR 81;

3. Commissioner of Income-tax Vs. Silver and Arts Palace, reported in (2003) Vol. 259 ITR 684;

4. Indian Hotels Co. Ltd. Vs. Deputy Commissioner of Income-tax, ITAT, Mumbai 'D' Bench, reported in (2004) 86 TTJ 195.

Mr. Shome, the learned Senior Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Mr. Bajoria and has contended that the authorities below in the facts of the present case, rightly held that the assessee having received the consideration for sale of food and beverage items in Indian rupees, the same cannot, at any rate, be said to be "export" of those items. It is further contended that in order to export any item out of India, the formalities required for clearance of the goods provided in the Customs Act are to be complied with and in the case before us, the shipping bill required under the said Act for export could not be produced by the assessee. Mr. Shome submits that the documents relied upon by the appellant show that those were merely bills for re-exporting of the imported items which were very much within the warehouse of the customs and as such, such transaction carried on by the assessee did not come within the purview of "export". In support of his contention Mr. Shome relied upon the decision of the Supreme Court in the case of Burmah Shell Oil Storage and Distributing Co. of India Ltd. (In C. A. 751 of 57) and Standatd Vaccum Oil Co. (In C. A. No. 10 of 58), Appellants Vs. The Commercial Tax-Officer and others, reported in AIR 1961 SC 315.

Mr. Shome, further submits that the assessee, as it appears from record, also charged sales tax on those items of food and beverage from the airlines

authority and such conduct itself indicated that the transactions were sale of items within the country. Mr. Shome, therefore, prays for dismissal of the appeal.

Therefore, the only question that falls for determination in this appeal is whether the sale of items of food and beverage to the foreign airlines, in the manner as indicated above, amounts to export within the meaning of the Section 80HHC of the Act.

In order to appreciate the above question, it will be profitable to refer to the provisions contained in Section 80HHC of the Act which is quoted below:

> ***"Section 80HHC- DEDUCTION IN RESPECT OF PROFITS RETAINED FOR EXPORT BUSINESS.***
>
> *(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 of the profits 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 of the profits 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.

(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 1069b 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 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 1073 , 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 [1074 in accordance with the provisions of this section.

(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 1076 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 1078 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 purpose 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.

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 Regulation Act, 1973 (46 of 1973), 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) and (iiic) 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) and (iiic) 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;

(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.

(Emphasis supplied by us)

After hearing the learned Counsel for the parties and after going through the aforesaid provisions of law, we find that in order to get the benefit of deduction under Section 80HHC of the Act, the assessee must comply with the terms of the said section. In the case before us, the only grounds of refusal of the benefit are that first, that the sale of such food and beverages to the foreign airlines did not amount to export out of India and secondly, that the payment

received from the said foreign airlines in India in the form of Indian rupees could not be treated as payment in convertible foreign exchange within the meaning of the provisions of Section 80HHC of the Act. The word "export" has not been defined in the Act and thus, the said word is to be interpreted in the light of the language of Section 80HHC of the Act including the explanation added thereto and if the formalities required in Section 80HHC are fully complied with, in our opinion, it is not necessary that all the other formalities prescribed in the Customs Act for export of the articles are also required to be fully complied with by an assessee in addition to those prescribed under Section 80HHC.

As for instance, under the Customs Act, a transaction by way of sale or otherwise in a shop, emporium or any other establishment situate in India in exchange of Indian currency does not amount to export but for the purpose of getting benefit of deduction under Section 80HHC, if a transaction takes place by way of sale or otherwise in a shop or establishment situate in India involving clearance at any customs station as defined in the Customs Act and at the same time, the Reserve Bank of India treats such transaction in lieu of Indian currency as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder, the transaction should be treated as export out of India for the purpose of Section 80HHC of the Act by virtue of the added Explanations (a) and (aa) quoted above.

In this connection, we may profitably refer to the decision of the Supreme Court in the case of CIT Vs. Silver and Arts Palace, reported in (2003) 259 ITR 684 where the said Court has approved the decision of the Allahabad High Court in the case of Ram Babu and sons Vs. Union of India, reported in (1996) 222 ITR 606 laying down the proposition of law that if both the conditions mentioned in Explanations (a) and (aa) are complied with in a given situation, the transaction should be treated to be an export out of India for the purpose of Section 80HHC of the Act.

As regards the case of Burmah Shell Oil Storage and Distributing Co. of India Ltd (supra), relied upon by Mr. Shome, the contention in the Supreme Court, as also before the High Court, was that the sales of aviation spirit were made in the course of export of such spirit out of the territory of India, that they took place outside the State of West Bengal, that inasmuch as aviation spirit was delivered for consumption outside West Bengal, the sales could not fall within the Explanation to sub-cl. (a) of the first clause of Article 286 of the Constitution, and that unless they could be said to become "Explanation Sales", the power to tax did not exist. It is argued in support of the last contention that there was not even an averment in the reply of the respondents before the High Court that aviation spirit was delivered for consumption within West Bengal. In such a case, it was held that the test of export was that the goods must have a foreign destination where they could be said to be imported. It mattered not that there was no valuable consideration from the receiver at the destination end and if the

goods were exported and there was sale or purchase in the course of that export and the sale or purchase occasioned the export to a foreign destination, the exemption was earned. The crucial fact, according to the Apex Court, was the sending of the goods to a foreign destination where they would be received as imports.

It was further held there that the aviation spirit loaded on board of an aircraft for consumption, though taken out of the country, was not exported since it had no destination where it could be said to be imported, and so long as it did not satisfy that test, it could not be said that the sale was in the course of export. The Supreme Court further held that the sales could hardly be said to 'occasion' the export and the seller sold aviation spirit for the use of the aircraft, and the sale was not integrally connected with the taking out of aviation spirit and consequently, the sale was not even for the purpose of export and did not come within the course of export, which required an even deeper relation. The sale, thus, the Court concluded, did not come within Article 286(1)(b).

In our opinion, the observations of the Supreme Court in the context to Article 286 of the Constitution of India cannot have any application to a case where the question is whether the assessee is entitled to the benefit of deduction under Section 80HHC of the Act in light of the Explanations (a) and (aa) added to it. The Supreme Court in that case had no occasion to consider the effect of the Explanations (a) and (aa) indicated above which has been really taken note of by

the Apex Court in the case of Silver and Arts Palace (supra) relied upon by Mr. Bajoria. We, thus, find that the decision relied upon by Mr. Shome is of no avail to his client.

We, therefore, find no substance in the contention of Mr. Shome that in order to get benefit of Section 80HHC of the Act, the formalities prescribed under the Customs Act are required to be complied with in all respect even if the assessee complies with the condition prescribed both in the Explanations (a) and (aa) at the same time.

We similarly do not find any substance in the other contention of Mr. Shome that as the appellant has allegedly realised sale tax on the items, it is precluded from claiming the transaction as one of export out of India. It is now a settled law that in the field of taxation, there is no estoppel for the mistake of an assessee in treating the actual nature of transaction and the taxing authority cannot refuse to give appropriate benefit of deduction of tax merely for the mistake of an assessee if the said mistake is lawfully rectified. In the case before us, if the assessee has wrongly realised sale tax on the item of export by treating the sale as within the State, the law will take its own course for such wrong action of the assessee but such fact cannot be a ground for refusing a just benefit available under the Act.

Now the most vital question that arises for determination in this appeal is whether the appellant has complied with the conditions prescribed in both the Explanations (a) and (aa) of the Act.

We have already indicated that in this appeal we have on the prayer of the appellant admitted some additional pieces of evidence in support of its contention that it has complied with both the above conditions. In spite of giving opportunity to lead evidence in rebuttal to the Revenue for the purpose of disputing the genuineness of those additional pieces of evidence, the Revenue did not lead any evidence. We, therefore, accept the veracity of the statements contained in the additional pieces of evidence as well as the authority of the persons who issued the letters admitted as additional evidence and proceed to consider whether the appellant has complied with the conditions mentioned in both the Explanations (a) and (aa).

The Certificate issued by the office of the Commissioner of Customs dated April 13, 2004 certifies that all bonded goods and catering food supplies are carried in a sealed Hl-Lift of M/s. Oberoi Flight Services, the appellant before us, which is escorted by the Customs Preventive Officer on duty, to the Air Crafts of International Airlines catered by them at the tarmac at Chhatrapati Shivaji International Airport, Mumbai, as required under the regulations of the Customs Act, 1963. In our opinion, the aforesaid certificate indicates that the appellant in the process of selling the food and beverage in the said airport has complied with the condition mentioned in Explanation (aa) of the Section 80HHC.

Similarly in reply to the letter written by the assessee to the General Manager of the Reserve Bank of India to issue a certificate showing that the payments made in Indian rupees to the hotels by Foreign Airlines and diplomats are being treated by Reserve Bank as Convertible Foreign Exchange for the purpose of Foreign Exchange Regulation Act, 1973 and the Rules made thereunder as also the Foreign Exchange Management Act, it appears that the Assistant General Manager, Foreign Exchange Department has written a letter dated November 7, 2005. By the said letter the said officer has certified that the provisions of the DGFT Circular No.60/97-2002 dated December 24, 1998 regarding treatment of the amounts received in rupees by a hotel company out of repatriable funds would also apply under the FEMA Regulations. In the absence of any evidence disputing the said assertion of the officer concerned, we hold that the appellant has also complied with the condition mentioned in Explanation (a) added to section 80HHC of the Act.

We, thus, find that the appellant has successfully established before this Court by uncontroverted additional evidence that the transaction in question satisfies the conditions indicated in both the Explanations (a) and (aa) of section 80 HHC of the Act in respect of the disputed items at the Chhatrapati Shivaji International Airport, Mumbai, and thus, it is a fit case where the orders passed by the authorities below should be set aside and the Assessing Officer should be directed to consider the claim of deductions under Section 80HHC of the Act on

merit as the appellant has proved that the transaction in question from the said airport amounts to export out of India.

The extent of entitlement of the benefit of such deduction be considered after going through the materials placed by the appellant which the Assessing Officer in the past refused to consider on merit on the ground that the transaction in question did not amount to export out of India.

We, therefore, allow this appeal by setting aside the orders of the authorities below and by answering all the three formulated questions indicated above in the affirmative and against the Revenue.

The Assessing Officer should dispose of the claim within three months from today.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)