IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Income Tax Appeal No. 408 of 2007 (O&M)
Date of Decision: 02.09.2016

M/s Mahavir Spinning Mills Ltd. ..Appellant

versus

Commissioner of Income Tax, Ludhiana and another ..Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.

Present : Ms. Radhika Suri, Senior Advocate with
Ms. Rinku Dahiya, Advocate, for the appellant.

Mr. Rajesh Katoch, Advocate, for the respondent(s).

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S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order of the Income Tax Appellate Tribunal in respect of the assessment year 1996-97. By an order dated 14.12.2007, the appeal was admitted on the following substantial questions of law:-

i) Whether on a true and correct interpretation of Section 80 HHC of the Income Tax Act, 1961, the Tribunal has erred in law in holding that the export turnover of the unit whose profits are exempt under section 10B of the Income Tax Act, 1961 is not to be included in the 'export turnover' for the purposes of calculating the deduction under section 80HHC of the Income Tax Act, 1961?

ii) Whether the Tribunal was right in law in not considering, dealing with the decision of a co-ordinate Bench on the issue which admittedly applied and had attained finality?

The second question does not really arise as we intend deciding the question of law in any event.

For Subsequent orders see ITA-406-2008, ITA-137-2012, ITA-91-2015 and 2 more.

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2. The appellant-assessee admittedly availed the benefit under section 10B of the Income Tax Act, 1961 (for short 'the Act').

3. Sections 10B and 80HHC of the Income Tax Act, 1961 (for short 'the Act') at the material time and in so far as they are relevant read as under:-

> "“**10B**. (1) Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export- oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.
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> xx xx xx xx xx
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> (3) The profits and gains referred to in sub- section (1) shall not be included in the total income of the assessee in respect of any five consecutive assessment years, falling within a period of eight years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things, specified by the assessee at his option:
>
> Provided that nothing in this sub- section shall be construed to extend the aforesaid five assessment years to cover any period after the expiry of the said period of eight years.
>
> (4) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year relevant to any subsequent assessment year,-…………..
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> xx xx xx xx xx
>
> (iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I [1] or section 80-IA] in relation to the profits and gains of the undertaking; and……………………."
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> **80HHC.** [(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……………"
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> xx xx xx xx xx
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> xx xx xx xx xx
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> [(3) For the purposes of sub-section (1),—
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> (*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

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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 :...........................”

Explanation.—For the purposes of this section,—

(a)................

(*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*), 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

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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 ;]……………………………..”

4. The formula for computing the profits derived by the assessee from the exports of any goods or merchandise to which the section applies is admittedly as under:-

$$\text{“Profits derived from export of articles or things or computer software} = \frac{\text{Profits of the business of the undertaking} \times \text{Export turnover in respect of the articles or things or computer software.}}{\text{Total turnover of the business carried on by the undertaking.”}}$$

The assessee manufactures the goods or merchandises exported by it and, therefore, clause 8 of sub section (3) of section 80 HHC of the Act applies to this case. The proviso to definition of total turnover in explanation (ba) does not refer to. It excludes from the expression total turnover sums referred to in Sections 28(iiia) (iiib) and (iiic) but not section 10B. A plain language of the definition of the expression total turnover does not warrant the exclusion of any benefit under section 10B of the Act.

5. Sub section 4 (iii) of section 10B of the Act provides that in computing the total income of the assessee, no deductions shall be allowed under the section mentioned therein in relation to the profits and gains of the undertaking. Section 80 HHC is not one of those sections. What is more important is the fact that section 80HHC does not preclude the assessee from availing deductions thereunder in the event of the assessee having availed the benefit of section 10B. However, the fact that section 10B(4)(iii) does not refer to section 80HHC indicates strongly that the legislature did not intend denying an assessee who had availed the benefit of section 10B a deduction under section 80HHC. The contention on behalf of the

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department that to the extent of benefit received under section 10B the same cannot be included in the export turnover and total turnover in the formula stipulated in section 80HHC is not well founded.

6. Ms. Suri reliance upon a circular dated 16.12.1998 issued by the C.B.D.T. containing explanatory notes on the provisions relating to direct taxes in respect of the Finance Act, 1988 is well founded and the same insofar as it is relevant reads as under:-

> "***New provision to extend tax holiday to hundred per cent export-oriented units:-***
>
> **18.1** xx xx xx xx xx
>
> **18.2** The above tax holiday was not available to a hundred per cent export-oriented undertaking. Such undertakings were eligible only for deduction out of their export profits under section 80HHC of the Income-tax Act. With a view to providing further incentive for earning foreign exchange, a new section 10B has been inserted by the Act so as to secure that the income of a hundred per cent export-oriented undertaking shall be exempt from tax for a period of five consecutive assessment years falling within the block of eight assessment years. The exemption provided under the new section is similar to the one provided to industrial undertakings operating in free trade zones. The exemption under the new provisions will be subject to the following conditions:-………………"

Paragraph 18.2 clearly states that "the above tax holiday" meaning thereby the one provided in section 10A was not available to a hundred per cent export-oriented undertaking. Such undertakings were eligible only for deduction under section 80HHC but further states that it was with a view to providing "further incentive" for earning foreign exchange that a new section 10B has been inserted. Clearly, therefore, the benefit of section 10B was a further incentive and not an incentive in lieu of the incentive contained in section 80HHC. It is because the tax holiday provided in section 10A was not available to hundred per cent export-oriented undertakings and that such hundred percent oriented undertakings were eligible only for deduction under section 80HHC and that section 10B

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was enacted to provide such undertakings a "further incentive" for earning foreign exchange.

7. Mr. Katoch, learned counsel appearing on behalf of the respondent-department contended that section 80HHC is a self contained code as are sections 10A and 10B. None of the sections refer to other sections. He relied upon section 80HHC(4)(C)(b) of the Act.

8. Firstly, sub section 4(C) was inserted by the Finance Act, 2003 w.e.f. 01.04.2004. It, therefore, does not apply to the assessment year in question i.e. 1996-97. In any event, it would make no difference. Sub section 4(C)(b) provides that the provisions of section applies to the assesssee 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 that such sale shall be deemed to be export out of India for the purposes of this section. He contended that the words "of any goods or merchandise to which this section applies" indicate that the goods and merchandise which are the subject matter of an exemption of section 10A and 10B would not be covered. It is little difficult to appreciate this submission. Section 80HHC does not provide that it does not apply to goods which are the subject matter of deduction under section 10A or 10B of the Act.

9. Mr. Suri rightly submitted that wherever the legislature intends excluding the benefit under a provision on account of an assessee having availed a benefit under another provision, it was so provided. For instance, sections 10A(1) and 10A(4) and 10A(4)(iii) of the Act as it stood prior to the amendment w.e.f. 01.04.2001 read as under:-

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> "**Special provision in respect of newly established industrial undertakings in free trade zones.**
>
> **10A** (i) **Special provision in respect of newly established undertakings in free trade zone, -** Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee.
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> xx xx xx xx xx xx
>
> (4) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,-
>
> xx xx xx xx xx
>
> (iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-HHA or section 80-I or section 80IA or Section 80J in relation to the profits and gains of the industrial undertaking; and……………"

10. Section 80HHC was not included. What is important to note is that the legislature expressly provided that an assessee who derives the benefit under section 10A would be precluded from deriving the benefits under certain sections alone. As we noticed earlier a similar provision was there in section 10B(4)(iii).

11. The nature and the extent of the benefits under section 80HHC and 10B are also entirely different. As we mentioned earlier a circular dated 16.12.1988 provided that section 10B was introduced to confer an additional benefit upon an assessee.

12. Our view is supported by a judgment of the Division Bench of Delhi High Court dated 17.10.2008 in ITR No. 10 of 2000 *Commissioner of Income Tax, Delhi (Central) v. M/s Dabur India Ltd.* That was a reference pertaining to the assessment year 1989-90 in respect of a case under section 10A of the Act. The assessee had claimed deduction under section 80HHC and while doing so included the export turnover of its unit in the Export

For Subsequent orders see ITA-406-2008, ITA-137-2012, ITA-91-2015 and 2 more.

::: Downloaded on - 07-09-2016 15:02:24 :::

Promotion Zone (EPZ). The Tribunal accepted the assessee's contention that for the purpose of computation of profits derived from the export turnover, it was the total export turnover which had to be considered for arriving at the amount of export turnover as well as the amount of total turnover. It was contended on behalf of the revenue that once the income from the unit in EPZ was included from scope and ambit of total income, it could not be reintroduced for the sake of making a deduction under section 80HHC as profits and gains of the business. Delhi High Court held as under:-

> "10. Having considered the arguments advanced by the counsel for the parties, while we agree with what the learned counsel for the revenue states that the provisions of Section 10(A)(4)(iii) would not be applicable for the present assessment year, i.e., 1989-90, we would still not be in a position to agree with his submissions that the export turnover of the unit in the free trade zone is to be excluded for the purposes of computing deduction under Section 80HHC. The deduction under Section 80HHC is to be computed as per the formula specified in Section 80HHC(3) which speaks of three components. The three components being the export turnover in respect of the goods in question, the total turnover of the business carried on by the assessee and the profits of the business. None of these components has reference to the expression ―total income‖. The deduction has to be computed on the basis of these components. A literal reading of the provisions and literal application of the formula does not enable us to exclude the export turnover of the unit in the EPZ from the export turnover of such goods nor from the total turnover of the business. The profit arising out of these units in the EPZ is also not excludable from the profits of the business. We may note that Section 80HHC is a beneficial provision for the purposes of encouraging exports. Although in this case, there is no doubt with regard to the interpretation or the manner in which the deduction under Section 80HHC is to be computed, even if there were any such doubts, the provision would have to be interpreted to fulfill the objective of giving a benefit to the assessee who indulges in exports. Looked at in any manner, we are of the opinion that the export turnover from the unit in the EPZ is not to be excluded while computing the deduction under Section 80HHC. The deduction that is to be computed is without reference to the total income. Once the deduction is computed in terms of the formula prescribed in Section 80HHC(3), the amount so arrived at is to be deducted from the total income. However, while computing the deduction, reference to total income' is not called for."

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13. We are in respectful agreement with the judgment. For the point under consideration the provisions of Section 10A and 10B are similar. The judgment though under section 10A applies to the present case under section 10B.

14. A similar view has been taken by Madras High Court in *Commissioner of Income Tax v. Ambatture Clothing Ltd. [2010]194 Taxman 79 (Madras)* where it was held:-

> “4. When we examine the issue raised in this appeal, at the very outset, it will have to be pointed out that even under Section 10A(6)(iii) of the Act, there is a specific provision, which reads as under:
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> > "No deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and"
>
> 5. The very statutory provision prescribing a prohibition in respect of the deductions in relation to the profits and gains itself, has not specifically included Section 80HHC. Apparently, it therefore would only mean that there was no prohibition for claiming any deduction under Section 80HHC while applying the benefits provided under Section 10A of the Act. If that is the statutory prescription, by which the assessee was entitled to claim a benefit under Section 80HHC in relation to the profits and gains while invoking Section 10A, it will have to be concluded that the assessment order in having allowed such a deduction of the remaining 10% of the profits earned by the assessee, was not erroneous. In any event, having regard to such a statutory prescription available for the assessee to claim the benefit under Section 80HHC in respect of the profits earned from Section 10A of the Act, there is absolutely no scope for the Assessing Authority to have invoked Section 154 of the Act, in order to state that, that can be considered as an error apparent, inasmuch as, there was no error at all, much less, apparent error to be rectified by the Assessing Authority.
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> 6. This conclusion of ours is apart from the conclusion of the Tribunal in having held that in that situation what was held by the Assessing Authority in the original assessment order was a possible view and that cannot be considered as an error apparent on the face of the records.”

15. A similar view was taken by the judgment of a Division Bench of Bombay High Court dated 01.04.2014 in Income Tax Appeal No. 5794 of

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2010 *Commissioner of Income Tax v. M/s Hindustan Lever Ltd.* Paragraph-8 of the judgment reads as under:-

> "8. In so far as question (E) is concerned, the same reads as under:-
>
> > "Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in holding that while computing deduction u/s.80HHC of the Act, the net foreign exchange relating to export from Kandla Free Trade Zone has also to be considered even though such receipt is covered by Section 10A of the Income Tax Act ?"
>
> Even on this question our attention has been invited to the order of the Tribunal for the earlier assessment year. It is submitted that the Tribunal merely followed its view taken earlier, however, the argument is that this issue is raised for the first time, therefore, this is not something which would be said to be covered by any prior adjudication. The Tribunal has considered this question in two parts, first it referred to the aspect of deduction under Section 80HHC of the Act and in that regard the arguments of both the sides have been noted. The argument was that there should be exclusion of net foreign exchange realization on exports from Kandla Free Trade Zone and exclusion of net foreign exchange realization of goods manufactured in Malaysia and exported to Middle East. The assessee submitted that the relevant provision and as it stood then, there is no scope for reading something into the Statute and which was never there. After referring to the Department's representative's arguments and reproducing the section, what the Tribunal has done is that it referred to the language of the provision as it then stood. For net foreign exchange realization of the assessee from Kandla Free Trade Zone and net foreign exchange realization on exports from Malaysia to Middle East, the deduction from sub-section (1) of the statutory provision as it then stood is when an assessee being an Indian Company exports out of India during the previous year relevant to assessment year any goods or merchandise, then there shall be and in accordance with the provisions so also subject to the section, from the total income of the assessee, a deduction of an amount equal to the aggregate of 4% of the net foreign exchange realization and 50% of the profits derived by the assessee from the export of such goods or merchandise as exceeds the amount referred to in clause (a) of sub-section (1) of Section 80HHC of the Income Tax Act,1961. The Tribunal held that sub-section (1) only stipulates that the assessee should be an Indian Company, resident in India and engaged in the business of export out of India of any goods or merchandise to which the section applied. Four percent of the net foreign exchange realization referred to, is not restricted to the exports out of India. There is nothing in the language of this provision which enables the Tribunal to uphold the view of the Assessing Officer. The Tribunal also found that this provision does not

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> speak of any other claim and exemption or deduction. There is nothing in the language of the provision. Its plain and literal meaning conveys that so long as the 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 the provision applies, then, in accordance with and subject to the provisions of this section, is allowed deduction in computing total income. There is nothing, according to the Tribunal, in the language to the contrary. What has been referred to by the Tribunal, in our opinion, rightly is sub-section (1) in its entirety. Even the provisos have been noted. Even sub-section (2) has been noted for the purpose of the present appeal. The Tribunal has found that the net foreign exchange realisation from Kandla Free Trade Zone alone has to be considered. The foreign exchange realization on the goods exported directly from Malaysia to Middle East cannot be considered. In such circumstances, merely because deduction under Section 10A was claimed by the assessee on such exports would not be a reason for dis-entitling it to claim deduction under section 80HHC(1) (Clause a) of the Income Tax Act,1961. The relief, therefore, has been confined to net foreign exchange realization in the form of export from Kandla Free Trade Zone. The other claim viz. net foreign exchange realization on the goods exported from Malaysia to Middle East has been excluded. In our view, the order of the Tribunal on this count and particularly, going by the reasoning in paragraphs 49 and 50 of the impugned order, does not raise any substantial question of law. The appeal, therefore, deserves to be dismissed on this count.

16. We are, therefore, unable to agree with the decision of the Tribunal and of the CIT (Appeals) upholding the assessment order. The Tribunal held that the turnover of sales made by the assessee for which deduction under section 10B had been claimed did not answer the description of the turnover eligible for deduction under section 80HHC and therefore, the Assessing Officer rightly excluded such turnover from export turnover while computing relief available to the assessee under section 80HHC of the Act. We are unable to agree. Section 80 HHC clearly defines the terms export turnover, total turnover and profits of business. None of these definitions exclude the export turnover in respect whereof benefit has been derived under section 10B. To accept the respondent’s contention

For Subsequent orders see ITA-406-2008, ITA-137-2012, ITA-91-2015 and 2 more.

::: Downloaded on - 07-09-2016 15:02:24 :::

would require the section to be rewritten and the expression to be redefined which is not permissible.

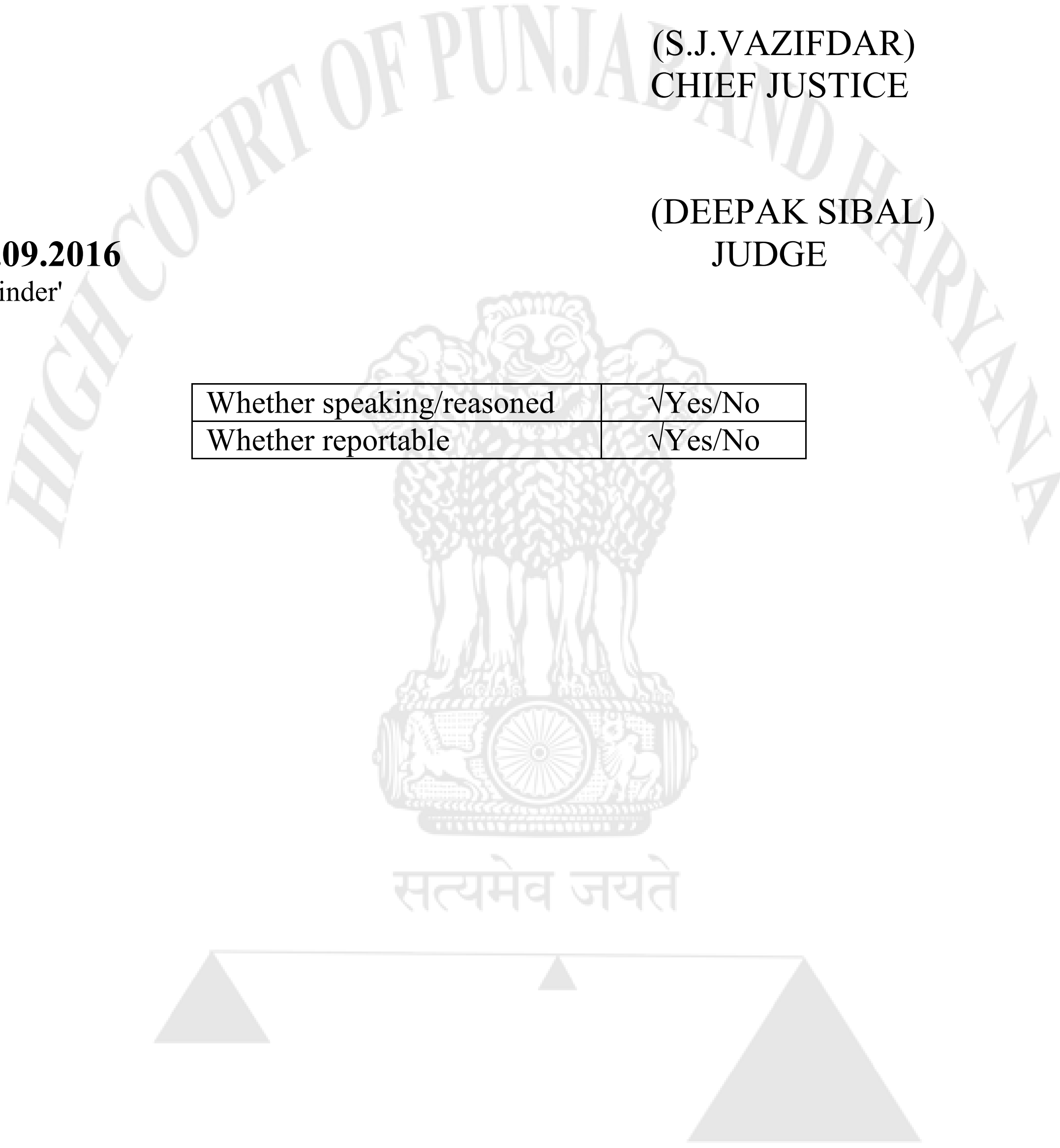
17. In the circumstances, the first question of law is answered in affirmative in favour of the appellant. The impugned order of the Tribunal is, therefore, set-aside. The Assessing Officer shall compute the assessee's income accordingly.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

02.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No



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