* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on 15.02.2012

\+ **ITR 133/1997**

M/S. INDIAN DEL. (P) LTD. … Petitioner

versus

COMMISSIONER OF INCOME TAX … Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Anoop Sharma
For the Respondent : Mr Sanjeev Sabharwal

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE V.K.JAIN

BADAR DURREZ AHMED, J. (ORAL)

1. This Income Tax Reference under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') pertains to the assessment year 1988-1989. The Income Tax Appellate Tribunal by virtue of its order dated 30.05.1997 had referred the following questions for determination by this Court:-

> "1. Whether on true and correct construction of the provision of Section 80-HHC(1) read with sub-section 2(a) thereof and explanation (aa) to the sub-section (4A) thereof and Sec. 28 of the Income-tax Act, 1961, the Tribunal was right in holding that the assessee was not entitled to deduction in respect of profits made by it on sales of its manufactured goods to UNICEF?
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> 2. Whether the expression 'Export out of India' of any goods did not bring within its scope sales made to UNICEF, a United Nations Organisation, which was also

regarded as "deemed export" under the Import and Export policy of the Government of India?

3. Whether the Tribunal was right in holding that the assessee's office establishment also could be regarded as "any other establishment" within the meaning of Explanation (aa) to sub-section (4A) of Section 80-HHC of the Income-tax Act, 1961?"

2. Essentially, the core issue in this case is whether sale of goods in India to UNICEF, which is a United Nation Organization, can be construed as export out of India. The goods were EPI posters in Hindi, Urdu and Gurmukhi. The sales were made to UNICEF by the assessee in India. There is no dispute that the payment for the sales was received by the assessee in convertible foreign exchange. The question as to whether such a sale of goods would amount to "export out of India" has arisen in the context of Section 80-HHC of the said Act.

3. In case it is held that such sales would amount to exports out of India, then the assessee would be entitled to claim the deduction under Section 80-HHC. On the other hand, if it is held that the sales made to UNICEF in India do not constitute export out of India, then the assessee would not be entitled to claim the deduction under the said Section.

4. The facts of the present case are as follows:-

4.1 The assessee is a private limited company engaged in the business of metal printing, coating, varnishing, lacquering and sizing etc. Its turnover during the year in question was Rs.3,70,15,570/- which included sales to UNICEF amounting to Rs.2,58,26,371/-. These sales were claimed by the assessee to be its "export sales" for purposes of relief under section 80-HHC.

4.2 The order for the aforesaid purchases had been placed by UNICEF under the aid-programme of the UNO and this required goods to be consigned/delivered to designated consignees as specified by UNICEF. The assessing officer has recorded findings of fact to the effect that all designated consignees were stationed in India and the assesses had not placed any evidence on record to show that the goods were actually sent out of India by its efforts or through the designated consignees of UNICEF. The assessing officer, however, noted, and this not being disputed before us, that the payment for the sales made to UNICEF was received in "convertible foreign exchange". On the basis of the aforesaid facts the assessee claimed a deduction of Rs.31,29,786/- under Section 80-HHC.

4.3 The assessing officer issued a show cause letter to the assessee dated 03.09.1990 asking it to explain as to why the claim be not denied since the deduction was admissible in respect of goods or merchandise exported out of India, subject to certain other conditions being fulfilled. In reply to the show cause, the assessee filed a letter dated 15.10.1990 raising numerous arguments with reference to the provisions of Section 80-HHC, the Imports & Exports (Control) Act, 1947, the Imports(Control) Order, 1955 and the Import and Export Policy itself. Numerous arguments were advanced but two main points were raised, namely, that the export by the assessee was a "deemed export" eligible for deduction and the primary purpose of introducing and giving relief under section 80-HHC was the earning of "convertible foreign exchange."

5. The Assessing Officer, after considering the reply submitted by the assessee, rejected the arguments advanced on behalf of the assessee and held that the assessee was not entitled to the said deduction under Section 80-HHC inasmuch as the assessee had not complied with the stipulation that the goods should have been exported out of India. The Assessing Officer also noted that the goods which were

sold to UNICEF were printed EPI posters in Hindi, Urdu and Gurmukhi and that these goods had not only been sold in India but appeared to have been utilized also in India, under the aid programme undertaken by UNICEF in India. The Assessing Officer categorically returned a finding that the said goods never crossed the territory of India and, therefore, it could not be said that the assessee had exported the goods out of India or that it was engaged in the business of export out of India. The Assessing Officer also rejected the plea taken by the assessee that the sale to UNICEF ought to be regarded as a "deemed export".

6. Being aggrieved by the order passed by the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax(Appeals) who upheld the view taken by the Assessing Officer. Thereafter the assessee filed an appeal before the Tribunal.

7. The Tribunal by its order dated 30.05.1996 in ITA No. 3084/del/1991 confirmed the view taken by the Commissioner of Income Tax (Appeals). The Tribunal came to the conclusion that the provisions of Section 80-HHC required two conditions to be satisfied before an assessee could claim deduction thereunder. The two conditions being:-

(i) the assessee should be engaged in the business of export out of India and

(ii) sale proceeds of goods or merchandise exported out of India are receivable in convertible foreign exchange.

8. According to the Tribunal, the said twin conditions had to be satisfied as the two conditions were not alternatives but were cumulative and were independent of each other.

9. The Tribunal came to the conclusion that in view of the fact that the goods had not crossed the territorial boundary of India or, for that matter, any customs

station as defined in Section 2(13) of the Customs Act, 1962, the sale of goods to UNICEF in India could not be regarded as an export out of India. With regard to the arguments raised by the assessee that the sale to UNICEF ought to be construed as a "deemed export", the Tribunal repelled the same by taking a view that a deeming provision in one enactment cannot be imported into another enactment. The assessee had sought to import the expression "deemed export" as applicable in the import and export policy into the Income-tax Act, which the Tribunal, in our view, rightly rejected.

10. The Tribunal also went further to return a finding that the assessee's case also fell within explanation (aa) to Section 80-HHC(4) which reads as under:-

> "(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)"

According to the Tribunal, UNICEF would be regarded as "any other establishment" as appearing in the said explanation (aa) and, therefore, the sale to UNICEF could not, by any stretch of imagination, be considered as an export out of India.

11. It is in this backdrop that the aforesaid three questions have been referred to us by the Tribunal for our consideration.

12. The learned counsel appearing on behalf of the assessee submitted that we must give a purposeful interpretation to the words 'export out of India'. He also submitted that since the phrase 'export out of India' has not been defined in the Income-tax Act, 1961, the meaning ascribed to it in the other Acts and enactments ought to be considered. Consequently, he submitted that the concept of "deemed

export" which was available in the import and export policy ought to be applied while construing the provisions of Section 80-HHC. The learned counsel also sought to place reliance on a notification dated 06.01.1971 issued by the Government of India, Ministry of Foreign Trade indicating that sales made to India under the United Nations aid programme ought to be construed as "deemed export" for the purposes of obtaining benefits under the import and export policy. Another point raised by the learned counsel for the assessee was that these were sales made to UNICEF and, therefore, there was no necessity of transporting the goods beyond the territory of India inasmuch as UNICEF itself is an international organization of the United Nations.

13. We have also heard the learned counsel for the revenue who supported the decision of the Tribunal and the lower authorities.

14. After considering the arguments advanced by the counsel for the parties and going through the record of the case, we feel that the matter has been adequately and correctly addressed by the authorities below. The main issue that arises for consideration is whether the sale of goods in question to UNICEF in India for use in India can be construed as an export out of India? Section 80-HHC, as already noted above, requires twin conditions to be satisfied. The first being that the goods must be exported out of India and the second is that the sale proceeds of such goods or merchandise exported out of India should be received in convertible foreign exchange within a stipulated period of time. These conditions are apparent on a plain reading of Section 80(HHC)(1) & (2). Insofar as the second condition is concerned, there is no dispute inasmuch as it is an admitted position that the sale proceeds have been received in convertible foreign exchange. The only question that arises for consideration is whether the goods were exported out of India or not? It is clear that these conditions are independent conditions and both have to be

satisfied before an assessee can claim the benefits of Section 80-HHC. The satisfaction of one condition in the absence of other condition being satisfied would not entitle the assessee to claim the deduction under Section 80-HHC.

15. The term 'export out of India' has not been defined in the Income-tax Act, 1961. The plain and simple meaning of the term 'export out of India' would entail the transfer of goods out of the territory of India. The goods must physically move out of India at least insofar as tangible goods are concerned.

16. The learned counsel for the assessee, as mentioned above, urged us to import the concept of "deemed export" from the import and export policy. We entirely agree with the view taken by the Tribunal that the concept of "deemed export" prevalent in another legislation or policy cannot be imported into the Income-tax Act, 1961 unless the said Act specifically says so. Insofar as the notification dated 06.01.1971 is concerned, the benefits that would be available to the Indian firms in view of the said notification have been specified in paragraph 2 thereof, which reads as under:-

> "2…(a) Import replenishment licenses as per provisions contained in the Import Trade Control (Policy (Vol.II) for registered exporters.
> (b) Cash Assistance at the rate announced in various instructions issued by Government from time to time.
> (c) Drawback of customs and central excise duties.
> (d) Rebate of central excise duties on the finished products.
> (e) Concessional supplies of steel as otherwise permissible on exports."

17. None of these benefits include the benefit under the said Act. Therefore, the said circular would be of no help to the assessee.

18. The third argument of the learned counsel for the assessee that the export was made to UNICEF and, that, therefore, there is no need for the goods to cross the boundary of India so as to constitute export out of India, is also not tenable. There is no distinction made in the said Act between exports made to one party or another. The provision in question, that is, Section 80-HHC speaks only of export out of India, irrespective of who the purchaser or consignee is, be it a private party or an organization such as UNICEF. The fact remains that the goods had not been physically exported out of India and, therefore, the important and necessary condition precedent for claiming the deduction under Section 80-HHC has not been satisfied.

19. Consequently, questions 1 and 2 referred to us are answered in the affirmative and in favour of the revenue. In view of answers to questions 1 and 2, it is not necessary for us to answer question No.3 which is returned unanswered. The reference is disposed of accordingly.

BADAR DURREZ AHMED, J

V.K.JAIN, J

FEBRUARY 15, 2012
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