(2001) 07 BOM CK 0086

Bombay High Court

Case No: Income-tax Appeal No. 131 of 2001, Writ Petition No"s. 436, 437 and 438 of 2001

IPCA Laboratories Ltd.		APPELLANT
	Vs	
Deputy Commissioner of Income Tax		RESPONDENT

Date of Decision: July 2, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 143(3), 147, 148, 149, 149(1)

Citation: (2001) 170 CTR 568 : (2001) 251 ITR 401 : (2003) 127 TAXMAN 7

Hon'ble Judges: V.C. Daga, J; S.H. Kapadia, J

Bench: Division Bench

Advocate: Y.P. Trivedi, F.V. Irani and Atul K. Jasani, for the Appellant; J.P. Deodhar, instructed by H.D. Rathod, R.V. Desai and P.S. Jetley, for the Respondent

Judgement

S.H. Kapadia, J.
The short question which arises for determination in this appeal is as follows :

"Whether the loss in respect of export of trading goods was to be ignored while determining the appellant"s entitlement to deduction u/s 80HHC(3)(c) of the Act ?"

2. To decide the aforestated question of law, the following facts are required to be stated.

3. Facts : The appellant-company is an Export House, It holds a certificate issued by the Chief Controller of Imports and Exports. To give boost to the export of goods and to earn foreign exchange for the country, the appellant was allowed to disclaim the benefits in respect of export goods manufactured by others (hereinafter referred to as "supporting manufacturers"). This was in view of the fact that such supporting manufacturers were not good enough to market their goods on their own level. In this appeal we are concerned with the assessment year 1996-97. On November 28, 1996, the return of income was filed by the appellant declaring "nil" income. The taxable income before deductions under Chapter IV-A was Rs. 4.39 crores (approximately). However, against the said taxable

income, the appellant claimed deductions under Chapter VI-A. One such deduction was u/s 80HHC of Rs. 3.78 crores. The return was processed on March 3, 1997. On a perusal of the details filed along with the return of income, it was found that the assessee was an exporter of goods which were self-manufactured as well as of the goods manufactured by the supporting manufacturers. Accordingly, the profits eligible for deduction consisted of profits from exports of self-manufactured goods ; profits from exports of goods manufactured by the supporting manufacturers and profits for export incentives. The appellant filed Form No. 10CCAC along with the return of income which indicated net loss from the export of goods. The break up of the loss was shown as under :

4. The profit from export incentives was included in the profit from export of self-manufactured goods. However, the result was a net loss from export of goods. Before the Assessing Officer, it was contended by the appellant that the case of the appellant fell u/s 80HHC(3)(c) of a mixed exporter. The appellant disclaimed the trading export turnover in favour of the supporting manufacturers. They contended that since they disclaimed the entire trading exports in favour of the supporting manufacturers, the profits of such export turnover should be reduced for the purpose of deduction u/s 80HHC of the Act as per the proviso to Section 80HHC(1). It was contended on behalf of the appellant before the Assessing Officer that the term "profit" included loss. It was contended that the expression "profits and gains" under the Income Tax Act represented plus income whereas losses represented minus income. In other words, it was urged that the loss was a negative profit. It was contended that since the entire trading export turnover stood disclaimed in favour of the supporting manufacturers, there was no export turnover of trading goods so far as the assessee was concerned and, therefore, what was required to be considered was only the profits of the assessee in respect of the export of goods manufactured or produced by it and not the profits of the supporting manufacturer. Before the Assessing Officer, it was further argued by the assessee that if the proviso to Section 80HHC(1) can be invoked only in cases of positive profits in exports and not in cases of loss, i.e., negative profit, then the same criteria should be applied for the purposes of interpretation of Section 80HHC(3)(c) and if such a criteria is applied, then the loss incurred by the assessee in the context of exports of trading goods should be ignored for the purposes of Section 80HHC(3)(c) and that such loss should not be adjusted against profits from export of self-manufactured goods. The Assessing Officer rejected the aforestated contentions of the assessee. The Assessing Officer came to the conclusion that u/s 80HHC(3)(c), the loss of Rs. 6.86 crores was required to be adjusted against profit from export of self-manufactured goods of Rs. 3.78 crores. That the said loss of Rs. 6.86 crores cannot be ignored. That if the contention of the assessee was to be accepted, it would mean that both, the assessee and the supporting manufacturer, would become eligible for tax concession u/s 80HHC whereas, if there was no disclaimer, none would be entitled for the said benefit. He found that the said Section 80HHC(1) came to be amended with effect from April 1, 1989, when the word "profit" came to be substituted for the expression ""whole of income". He came to the conclusion that the object of this amendment was to ensure that deduction is allowed u/s 80HHC only when the assessee

is having profit. That, although the word "income" may include loss, for the purposes of admissibility of deduction u/s 80HHC, the assessee must have profit from the activity of exports. That, the assesses can disclaim the export benefits in favour of the supporting manufacturer under the proviso to Section 80HHC(1), only when the assessee has profits from the export activities because the said proviso talks of profits and not income which may include loss. He, therefore, concluded that the proviso was not applicable in the present case. Accordingly, the Assessing Officer did not grant the benefit of deductions u/s 80HHC to the assessee. Being aggrieved, the matter was carried in appeal. The Commissioner of Income Tax also came to the same conclusion, viz., that since the entire trading exports stood disclaimed, the profit of the said export turnover of trading goods should be reduced for the purposes of deduction u/s 80HHC of the Act. He came to the conclusion that Section 80HHC(1) was an enabling section, whereas Sub-section (3) sets out the formula for working out individual profit from each of the two activities of the Export House. He also placed reliance on the circular bearing No. 621, dated December 10, 1991. The Commissioner of Income Tax (Appeals) came to the conclusion that if the export profits computed under Sub-section (3) was negative, no deduction was allowable under Sub-section (1) of Section 80HHC and under that situation, the proviso to Sub-section (1) will be of no help to the assessee. He further came to the conclusion that the proviso under Sub-section (1) provides for reduction of deduction otherwise leviable under Sub-section (i). However, if Sub-section (1) is not applicable for want of profits, then the proviso will also not apply. Accordingly, the first appellate authority dismissed the appeal. Being aggrieved, the matter was carried in appeal to the Tribunal which came to the conclusion that the net result of Sub-clauses (i) and (ii) to Section 80HHC(3) is that there should be profits for the purposes of Section 80HHC and if the net result was a loss, then the assessee was not entitled to claim the benefit of deduction u/s 80HHC. Accordingly, the appeal came to be dismissed. Being aggrieved by the said decision, the assessee has come to this court u/s 260A of the Income Tax Act.

5. Arguments : Mr. Trivedi. learned senior counsel appearing on behalf of the assessee, submitted that the Tribunal failed to interpret the relevant provisions of law in a liberal way. He contended that Section 80HHC gives incentives for exports. He contended that the Tribunal has interpreted the said section narrowly. He contended that Section 80HHC(3)(c) refers to aggregation of profits on trading goods with profits on self-manufactured goods. That, in the case of profit on trading goods the same has to be clubbed with the profits on self-manufactured goods. However, in the cases of a loss on trading of goods, the same has to be ignored and not considered with the profits from self-manufactured goods activity. He submitted that the word "profit" in Section 80HHC(1) and the word "profit" in the Section 80HHC(3) must get a uniform interpretation. He contended that it is now well-settled that the word ""profit" under the Income Tax Act includes loss.

6. That the word "loss" is negative profit/minus profit. He contended that the Department has given two different meanings to the word profit. He pointed out that according to the

Department the word "profit" in Section 80HHC(1) did not include loss, whereas the word "profit" in Section 80HHC(3) included minus profit/loss. He contended that in the circumstances one of the two meanings to the word "profit" should be assigned and such meaning should be applied uniformly to the word "profit" in Section 80HHC(3)(i) and in Section 80HHC(3)(c). He further contended that the Department erred in setting off the loss on export of trading goods against profits on export of self-manufactured goods. He contended that such an adjustment is not provided for in Section 80HHC(3)(c). He submitted that Sub-clauses (i) and (ii) of Section 80HHC(3)(c) are independent of each other and the profits are required to be calculated separately from both the activities. He contended that both the two activities constituted separate independent activities/business and if there is loss in one of the two activities, then the same should be ignored. In other words, he contended that the word "profit" excludes minus profit/loss and in the circumstances, he contended that the word "profit" in Section 80HHC(1) and the word "profit" in Section 80HHC(3)(c) should be read so as to exclude minus profit/loss. On the other hand, alternatively, he contended that if the word "profit" included minus profit/loss, then the same meaning should be assigned to the word "profit" in Section 80HHC(1) and if such meaning is assigned, even then, the same result is arrived at, viz., that the loss incurred on export of trading goods shall be ignored and only the profits on the self-manufactured goods shall be taken into account for the purposes of deduction u/s 80HHC(1). He contended that in the present matter, the assessee has incurred a loss of Rs. 6.86 crores on trading goods, whereas the assessee has earned profits from exports of self-manufactured goods of Rs. 3.78 crores. He, therefore, contended on the basis of his above submissions, that the loss of Rs. 6.86 crores be ignored and only profits from export of self-manufactured goods of Rs. 3.78 crores be taken as deduction for the purposes of Section 80HHC(3)(c). He further contended that in the present matter, the Exporting House-assessee has disclaimed the entire export turnover of trading goods in favour of the supporting manufacturers under the proviso to Section 80HHC(1). He eon-tended that in view of the disclaimer of 100 percent, export turnover of the trading goods, the loss from export of trading goods should be ignored. He contended that when the entire trading export turnover stood disclaimed, there was no export turnover of the trading goods. That the trading turnover and the profits/loss connected thereto go hand in hand and if the trading turnover in its entirety stands excluded, the loss/profit which go along with such turnover should also be excluded while working out adjusted export turnover, adjusted profits of business, adjusted total turn-over and what was required to be considered was only the profits of the assessee-company from export of self-manufactured goods. Briefly, he contended that in view of the disclaimer of the total turnover of trading goods, the losses from such activity should be ignored and only the profits from export of self-manufactured goods should be taken into account for the purposes of calculating the deduction u/s 80HHC(1).

7. Findings : We do not find any merit in the above arguments on behalf of the assessee. At the outset, for the sake of convenience, we have set out herein below Section 80HHC in its entirety as it stood at the relevant time. In this appeal we are concerned with the

assessment year 1996-97.

"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 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. . .

(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 profit 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."

8. From a plain reading of this Section it appears to us that this legislation was brought to give deduction in respect of profits derived from the export business. It is Sub-section (1) that says where an assessee is engaged in the business of export out of India of any goods to which this Section applies, he will be allowed a deduction of the profits derived by the assessee from the export of such business, in computing his total income. Before allowing a deduction, the profits of the assessee from the export business are to be ascertained first. In Sub-section (3) a formula for calculating the profit from the following types of export business is laid down :

(i) in Sub-clause (a), when the assessee is engaged in the business of export of goods, merchandise, manufactured or processed by him ;

(ii) in Sub-clause (b), when the assessee is engaged in the business of export of trading goods only ;

(iii) when the assessee is engaged in the business of export of goods, merchandise, manufactured or processed by him and of trading goods.

"(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."

9. From a plain reading of the above Section, it is clear that u/s 80HHC(1), it has been expressly provided that where an assessee is engaged in the business of exports to which the Section applies then, in computing the total income of the assessee, a deduction of the profits derived from export activity is given. In other words, from the gross total income of the assessee, deduction u/s 80HHC is given in order to arrive at the total income/taxable income of the assessee. Section 80HHC is a Section Which comes under Chapter VIA of the Income Tax Act. The said Chapter provides for special deductions from gross total income. One such deduction is export profits. We would like to emphasise the word "deduction" in Section 80HHC(1). Section 80A deals with deductions to be made under Chapter VIA in computing the total income. It lays down that in computing the total income, there shall be allowed deduction from the gross total income of an assessee as specified in Section 80C to Section 80U. Section 80A(2) lays down that the aggregate amount of the deductions under Chapter VIA shall not exceed the gross total income of the assessee. In other words, what is contemplated is a deduction from the gross total income. This aspect is important because computation of deduction is contemplated by Section 80HHC(3), whereas the effect to be given to such computed deduction is contemplated in Section 80HHC. In other words, the machinery to compute the deduction is provided in Section 80HHC(3) and after computing such deduction, such amount of deduction is required to be deducted from the gross total income of the assessee in order to arrive at the taxable income/total income of the assessee as contemplated by Section 80HHC(1). This distinction answers the present controversy. In other words, the deduction u/s 80HHC(1) has to be a positive figure. If after computing the deduction u/s 80HHC(3)(c) in the cases of mixed exports, there is a resultant loss, it cannot be deducted from the gross total income in order to arrive at the total income. Only the resultant profits from the export activities representing net profits u/s 80HHC(3)(c) could be deducted from the gross total income to arrive at the total income/taxable income. Therefore, the word "profit" in Section 80HHC(1) cannot be a loss. We may also point out that Section 80HHC is a separate code. Section 80HHC finds place in Chapter VIA. Therefore, deduction u/s 80HHC is allowable only to the extent of income from export business included in the total income. It is a deduction from the gross total income of the assessee. It is a deduction which is applied to arrive at the taxable income of the assessee. This aspect is very important. Essentially, Section 80HHC(1) provides for an incentive to an exporter in the form of a deduction from the gross total income to the extent of the profits retained for export business. The very headnote to Section 80HHC indicates that Section 80HHC(1) contemplates a deduction equal to an amount of profit retained for export business. In other words, "profit" in Section 80HHC(1) represents a positive figure. It does not denote minus profit. It is for this reason that the headnote specifically refers to retention of profits from export business. In the scheme of Chapter VIA, a negative profit or a loss cannot be deducted from the gross total income to arrive at the taxable income. The deduction u/s 80HHC is basically a tax concession or an incentive for earning export profits. To the extent the assessee earns such profits, the gross total income is reduced and correspondingly the taxable income is reduced. Therefore, such deductions are also called as tax concessions. Moreover, the word

"profit" in Section 80HHC(1) has been introduced from April 1. 1989, for the word "income".. Now, the word "income" as it stood before April 1, 1989, could have included losses. However, in order to avoid claims from exporters for excessive benefits under the said Section and to avoid misuse of the said provision the Legislature made the above change. Therefore, the word "profit" does not mean "minus profits". At this stage, one may look at the provisions of Sub-section (3) which starts with the expression "for the purposes of Sub-section (1)". This expression shows that Sub-section (3) is in aid of Section 80HHC(1). Now, Sub-section (3) consists of three Sub-clauses. Sub-clause (a) deals with profits derived by an assessee by export of self-manufactured goods. Sub-clause (b) deals with profits derived from exports of trading goods. Sub-clause (c) deals with profits from export of self-manufactured goods and trading goods. In other words, Sub-clause (c) refers to mixed activities of the assessee. The entire Sub-section (3) deals with computation of profits. The entire Sub-section (3) indicates the formula for calculating the profits derived from the afore-stated activities of the assessee. It is basically a machinery Section. Subsection (1) provides for deduction of profits from the gross total income, whereas Sub-section (3) lays down the manner of calculating the profits which, as stated above, constitute deduction/tax concession u/s 80HHC(1). Therefore, the only sub-section u/s 80HHC which provides for deduction for profits retained is Sub-section (1) and subsection (3) merely is in aid of Sub-section (1) of Section 80HHC. We cannot assign a meaning to the word "profit" by takings clue from the word "profit and gains" in the charging Section of the Income Tax Act or from the word "profit" in the computation Section 80HHC(3)(c). Similarly, as stated above, Section 80HHC(3)(c) refers to computation of export profits. It lays down the method to arrive at deduction as contemplated u/s 80HHC(1). Now, Section 80HHC(3)(c) deals with mixed exports. It refers to the aggregation of individual profits from the two activities. The two sub-clauses are separated by the word "and". In the case of loss from trading goods, such losses can be adjusted against profits from self-manufactured goods. Therefore, the word "profit" u/s 80HHC(3)(c) which is a machinery Section and which provides for a formula to compute export profits, depending on the activity undertaken by the assessee, can mean minus profit/loss. To continue reading the aforestated Section, it may be pointed out that as a general rule, deduction is available to an assessee who is engaged in the export activity. Therefore, a manufacturer or a processor would get the benefit of Section 80HHC only if he is the exporter. However, an exception is carved out from this general rule which is provided in Sub-section (1A) of Section 80HHC which grants deduction to a supporting manufacturer who has sold goods to any Export House, provided such Export House has not claimed a deduction in respect of the ultimate export of goods and has given a certificate in the prescribed form to the supporting manufacturer. It may ultimately depend on the amount of concession disclaimed by the Export House. It will ultimately depend on the amount of export turnover of trading goods disclaimed by the Export House. The object is clear, viz., that to the extent the Export House disclaims the concession from the trading goods, the Export House cannot claim the benefit of Section 80HHC and to that extent, the tax concession/deduction u/s 80HHC(1) stands proportionately reduced in the hands of the Export House. In other

words, if the Export House made profits on the export of trading goods, on export of such manufactured goods and incentives, then all the three profits would be clubbed together and the total deduction would be available to the Trading House from the gross total income. This would be the case where there is no disclaimer, but if there is a disclaimer, as in the present case, then the total deduction/tax concession which, as stated above, is the net profit calculated u/s 80HHC(3), would stand proportionately reduced to the extent of the disclaimed amount which is passed on to the supporting manufacturer. It is for this reason that the proviso is introduced by the Legislature in Section 80HHC(1). Under that proviso, the Export House is entitled to issue a disclaimer certificate in favour of the supporting manufacturer. The said proviso is not introduced after Section 80HHC(3), The reason is clear. Section 80HHC(3Xc) provides for computation of net profit and after arriving at such profit, effect is given to the resultant figure u/s 80HHC(1) which provides for deduction from gross total income only to the extent of the resultant figure calculated u/s 80HHC(3)(c) in order to arrive at the taxable total income of the assessee. At this stage, we may look at the proviso to Sub-section (1). The proviso enables the Export House to disclaim the tax concession to the extent of the export turnover of the trading goods. The proviso states that to the extent of the amount of such turnover, the Export House certifies that the deduction may be given to the supporting manufacturer. In other words, under the certificate, the Export House disclaims the deduction. The Export House does not disclaim the turnover. The Export House disclaims the tax concession to the extent of the amount of the export turnover. The amount of export turnover is only a yardstick. Therefore, the proviso refers to the deduction being disclaimed by the Export House in favour of the supporting manufacturer. It is for this reason that the Legislature has introduced the proviso to Sub-section (1). Therefore, the words "deduction of the profits" in Sub-section (1) would apply with equal force to the proviso. To put it briefly, if the resultant figure calculated under Sub-section (3)(c) is the net profit, then the assessee would be entitled to deduction u/s 80HHC(1) and if the assessee, as in the present case, has issued a certificate of disclaimer then, to that extent, the deduction available to the assessee under Sub-section (1) shall stand reduced. Therefore, in every matter of mixed activity, the assessee will have to first compute the net profit u/s 80HHC(3)(c); that such net profit should be a positive figure and only if it is a positive figure it can come within the purview of Sub-section (1) and the assessee would be entitled to deduction under Sub-section (1) because in that event, it would amount to profits retained for export business and it is only such positive net profit which could be taken into account as deduction from gross total income to arrive at the taxable income. However, if the assessee has issued a certificate under the proviso, then the deduction/concession contemplated by Sub-section (1) shall stand proportionately reduced and to that extent, the tax concession would be less as the assessee has given the certificate in favour of the supporting manufacturer. In other words, if the resultant figure under Sub-section (3)(c) is in the negative, then no deduction can be claimed under Sub-section (1) and if Sub-section (1) does not apply, then the proviso does not come into the picture. Therefore, we find merit in the contention of the Department that the benefit of disclaimer for the purposes of claiming tax concession can be availed of by the assessee only if

there is profit under Sub-section (1) which has to be a positive figure. Now, under the proviso to Section 80HHC(1), the total tax concession would stand reduced proportionately to the extent of disclaimer. It is clear, therefore, that the only effect of disclaimer is to reduce tax concession. That such disclaimer will reduce the resultant figure of deduction falling u/s 80HHC(1). Hence, it is clear that the disclaimer can only operate if there is profit u/s 80HHC(1) which, as stated above, refers only to positive figure of profit and which excludes loss. In other words, if the resultant figure is a loss, as in this case, the assessee cannot claim deduction of the loss u/s 80HHC(1) from gross total income and so also, the assessee cannot ignore the loss. Our reasoning is also supported by the formula given by the circulars issued by the Department which clearly show that the assessee will have to first compute the deductions u/s 80HHC(3)(c) in order to arrive at the total tax concession as if there was no disclaimer and thereafter, proportionately reduce the tax concession from the total tax concession arrived at u/s 80HHC(3)(c) in proportion to the amount disclaimed. It is for this reason that in the circular the formula suggested for calculating the tax concession in cases of disclaimer is :

Export profits = Export profits on trading goods x Disclaimer export turnover/ Total export turnover

10. This formula shows that one has to work out the total tax concession without the disclaimer and in the cases of disclaimer, the total concession arrived at without disclaimer shall stand proportionately reduced to the extent of the amount of turnover disclaimed. The tax concession u/s 80HHC is intended to compensate the exporter for comparative disadvantage faced by him in the international market. u/s 80HHC(3), a new formula is suggested. Under this formula, the profits from the business of exports are required to be computed in the following manner :

(a) Where the export is of goods manufactured by the taxpayer, the export profits will be computed in the ratio of export turnover to total turnover.

(b) Where the export is of trading goods, the export profits will be computed by deducting from the sale proceeds of exports, the direct costs and the indirect costs attributable to the export.

(c) Where the export consists of trading goods and of self-manufactured goods, then the export profits will be the aggregate of the following two amounts :

(i) export profits relating to export of self-manufactured goods to be calculated in the ratio of export turnover of self-manufactured goods to the total turnover of such goods. In other words, export profits from self-manufactured goods shall be arrived at by applying the ratio of export turnover of self-manufactured goods to the total turnover of self-manufactured goods.

(ii) profits relating to export of trading goods to be arrived at by deducting from the sale proceeds, the direct and indirect costs.

11. In this matter, we are concerned with the mixed activity, viz., export of trading goods and export of self-manufactured goods. Therefore, we are concerned with Section 80HHC(3)(c) which is already discussed herein-above. The profits computed under the formula in Clause (c) of Section 80HHC(3) shall be increased by the amount which bears to 90 per cent, of export incentives. This is mentioned in the proviso to Section 80HHC(3)(c). The entire discussion on Section 80HHC(3)(c), therefore, shows that it deals with computation of profits which represent deduction. It indicates that profits from the two activities should be aggregated. The two sub-clauses in Clause (c) are required to be read conjunctively and not disjunctively, particularly in view of the fact that the two sub-clauses are separated by the word "and". At this stage, it may be pointed out that earlier it was held by the Supreme Court that in cases where an assessee has two business activities whose income fell under the head "Profits and gains from business" then, for the purposes of Section 80HHC, the loss from one business activity can be ignored and only the profit from a business activity of export should be taken into account. However, the Section has undergone a drastic change since then and it is for this reason that Clause (c) clearly states that an aggregate of the profits of the two activities should be taken together. In this case we are concerned with ascertaining the meaning of the word "profit" in Clause (c). The object of aggregation of the profit is clear, viz., that the net resultant of the aggregation should be taken for the purposes of arriving at the tax concession/deduction. It is for this reason that the word "profit" in Clause (c) includes loss/minus profit. Therefore, if there is a loss in export of trading goods and if there is a profit in export of self-manufactured goods, then the loss from export of trading goods could be set off against the profits from export of self-manufactured goods. This is the correct meaning of the word "aggregation". This is the meaning required to be given to the word "and" in Clause (c). The idea is clear. However, if on an aggregation the resultant figure is a loss then such losses cannot be used as deduction for the purposes of Section 80HHC(1) and nor can such losses be ignored. Similarly, the proviso to Section 80HHC(1) and its placement shows that disclaimer can operate only if there is a profit u/s 80HHC(1). It is for this reason that the proviso talks about reduction in deduction. The word "deduction" as used in Section 80HHC(1) and in the proviso thereto indicates tax concession. They have to be read in the same way. They refer only to profits and not to losses. Hence, it is clear that unless there is a profit, there cannot be tax concession to the assessee. If there is a loss, the assessee cannot ignore it. The only result of disclaimer is that deduction u/s 80HHC(1) will be proportionately reduced. Further, disclaimer will come under the scheme of Section 80HHC(1) and not u/s 80HHC(3) and, accordingly, the word "profit" in Section 80HHC(1) which excludes the loss will also apply to reduction of deduction for disclaimer in tax concession under the proviso to Section 80HHC(1). In the present case, if the assessec''s argument is to be accepted, it would mean that even in cases where the net result of the aggregation is a loss/negative profit, even then, the assessee would be entitled to deduct such negative

profit from gross total income to arrive at the total income u/s 80HHC(1). This would defeat the purpose of Section 80HHC. Now, in the present case, without disclaimer and on the basis of the aggregation of the profits which includes loss, the resultant figure is a loss in the hands of the Export House and, therefore, they are not entitled to claim deduction u/s 80HHC(1). However, the argument is that because of the disclaimer, the loss on the export of trading goods amounting to Rs. 6.86 crores be ignored and only the profits from the self-manufactured goods of Rs. 3.78 crores alone should be taken into account. This is an ingenious method because if this argument is accepted, then the supporting manufacturer as well as the Export House would be both entitled to the benefit of tax concession/deduction u/s 80HHC. This would defeat the very object of Section 80HHC(1). In the circumstances, we hold that the word "profit" in Section 80HHC(1) cannot include losses whereas the word "profit" in Section 80HHC(5)(c) includes losses/minus profit. The two Sections operate in completely different spheres. One is the computation/machinery section; the other, viz., Section 80HHC(1) provides for deduction from the gross total income to arrive at the total taxable income of the assessee. Section 80HHC(1), therefore, deals with the manner of effecting the deduction arrived at u/s 80HHC(3)(c). In our view, the Section is clear. It is not ambiguous. Hence, the question of liberal interpretation does not arise.

12. For the aforestated reasons, the above question is answered in the negative, i.e., in favour of the Department and against the assessee. In other words, the loss in respect of export of trading goods cannot be ignored as contended by the assessee. We do not find any error in the judgment of the Tribunal.

13. Before concluding, however, there is one more point which needs to be mentioned. The assessee claimed deduction u/s 80-IA to the tune of Rs. 85 lakhs in respect of liquid formulation manufactured at Ratlam. As done in the preceding years, the Assessing Officer held that in order to work out the deductions under the said section, the eligible profit has got to be reduced by deducting research and development capital expenditure from the profits of the industrial undertaking. According to the Department, the Assessing Officer''s order was confirmed by the Commissioner of Income Tax (Appeals) in the past. In the present matter, the Assessing Officer has followed the decision of the earlier years. The assessee contended before the first appellate authority that the exclusion of miscellaneous income of Rs. 4.14 lakhs was wrong ; that such income formed part of business profits and, therefore, such income ought not to be excluded while working out the deduction u/s 80-IA of the Act. However, the first appellate authority confirmed the order of the Assessing Officer in reducing research and development expenses and excluding the miscellaneous income from the profits of the industrial undertaking for the purposes of allowing deduction u/s 80-IA. The Tribunal, however, in the appeal filed by the assessee, came to the conclusion that the Commissioner of income tax''s order for the earlier assessment year was accepted by the assessee ; that no appeal was filed. Hence, the Tribunal refused to decide the point raised by the assessee. Accordingly, the Tribunal dismissed the appeal. However, learned counsel for the assessee pointed out to

us, that the assessee has filed an appeal against the order of the Commissioner of Income Tax for the earlier years which has been missed out by the Tribunal. In this case, we are not required to decide the question raised by the assessee for the aforestated reasons. Mr. Desai has not seriously controverted the above facts. In the circumstances, we remand the matter back to the Tribunal with a direction to decide this last point u/s 80-IA of the Income Tax Act and except the point regarding Section 80-IA, the rest of the order of the Tribunal is confirmed. On the question of Section 80-IA, the matter is remanded back. Subject to above, the appeal is disposed of with no order as to costs.

14. Both the above writ petitions involve the same question of law. Both the petitions involve the same parties. Hence, they are heard together.

15. By the above two writ petitions, the petitioner which is an Export House seeks to challenge a notice u/s 148 of the Income Tax Act, 1961. For the sake of brevity, the facts in Writ Petition No. 436 of 2001 are reproduced hereinbelow :

Facts :

(a) The petitioner is a company registered under the Companies Act, 1956. It is engaged in the manufacture of bulk drugs and formulations. The petitioner is an Export House. The petitioner exports self-manufactured goods. The petitioner also buys goods manufactured by supporting manufacturers and it exports the same as trading goods. The petitioner has also issued a disclaimer certificate in favour of the supporting manufacturers.

The petitioner filed its return of income for the assessment year 1992-93 on December 30, 1992. In its return of income, the petitioner claimed deduction of Rs. 1.46 crores (approx.) u/s 80HHC by filing its return of income along with the form prescribed for disclaimer of tax concession in respect of export of trading goods. The said certificates were in favour of the supporting manufacturers. A questionnaire was submitted by the Department on September 2, 1994, to the assessee. On March 31, 1995, respondent No. 1 completed the assessment of the petitioner for the assessment year 1992-93 u/s 143(3) of the Act. The first-respondent partly disallowed the petitioner''s claim u/s 80HHC and as against the petitioner''s claim for deduction under that Section for Rs. 1.46 crores (approx.), the deduction was reduced to Rs. 1.19 crores (approx.).

(b) Being aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals). The appeal was partly allowed.

(c) By the impugned notice dated March 30, 1999, respondent No. 1 has alleged that he had reason to believe that the petitioner''s income had escaped assessment and, accordingly, he has called upon the petitioner to file a return of income within 35 days.

(d) By letter dated April 6, 1999, the chartered accountants of the petitioner requested the Assessing Officer to furnish reasons recorded by respondent No. 1 prior to issuance of the notice u/s 148.

(e) On April 20, 1999, the petitioner filed a return of income for the assessment year 1992-93 showing the same income declared by it in its original return of income filed on December 30, 1992. The returns were filed without prejudice to the rights of the petitioner to challenge the impugned notice. In the computation, the petitioner once again claimed the deduction at Rs. 1.46 crores (approx.) u/s 80HHC.

(f) Being aggrieved by the notice, the present petition has been filed.

Arguments :

16. Mr. Trivedi, learned senior counsel appearing on behalf of the assessee, submitted that the original assessment was made on March 31, 1995. It was for the assessment year 1992-93. It was made u/s 143(3). He contended that under the proviso to Section 147 of the Act, no action can be taken for reopening such assessment after the expiry of four years from the end of the assessment year 1992-93 on March 31, 1997, unless respondent No. 1 has reason to believe that the assessee''s income has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It was urged that, in the present case, an affidavit-in-reply has been filed on behalf of the Department which clearly indicates that the reopening of the assessment by the Department was based on change of opinion. It was, therefore, contended that the reopening of the assessment was bad in law as the pre-condition for issue of a valid notice and for valid initiation of reassessment proceedings had not been fulfilled.

4. In reply, it was urged on behalf of the Department that under Explanation 2 to Section 147, it is clearly laid down that for the purposes of Section 147, certain cases of escapement of income as mentioned in the Explanation shall be deemed to be cases where income chargeable to tax has escaped assessment. In this connection, reliance was placed by the Department on Clause (c) of Explanation 2 to Section 147. It was argued that, in the present case, although an assessment was made u/s 143(3) earlier, the income has been made the subject of excessive relief and, therefore, the deeming provision of Explanation 2 would apply. It was also urged that u/s 149 assessment can be reopened even after four years if the income escaping assessment is of a specified amount. In this connection, reliance was placed on Section 149(1)(a)(ii).

Findings :

17. We find merit in this petition. We are confining this judgment to the facts of the case. In the present case, the period of four years came to an end on March 31, 1997. In the present case, an affidavit has been filed on behalf of the Department. In the present case, it is the case of the Department in the affidavit that the predecessor of respondent No. 1 had passed an order of assessment u/s 143(3) on March 31, 1995, computing the total income of the assessee at Rs. 2.86 crores (approx.). That, subsequently, another predecessor in office of respondent No. 1 formed an opinion that the income chargeable

to tax had escaped assessment. This was on March 16, 1999. We have gone through the reasons. The position of law after April 1, 1989, is not in dispute. By virtue of a proviso to Section 147, no action can be taken for reopening after four years unless the Assessing Officer has reason to believe that income has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In the present case, the affidavit and the reasons disclosed indicate that the Department has purported to reopen the assessment only on the basis of change of opinion. This position is, in fact, conceded vide para. 3 of the affidavit-in-reply dated March 13, 2001. The reasons also do not spell out failure on the part of the assessee to disclose fully and truly all material facts. In the circumstances, the deeming provision in Explanation 2 to Section 147 has no application to the facts of the present case. Section 149 only prescribes the time limit for giving notice. We are required in this case to look into the facts in order to ascertain whether the pre-condition for the issue of a valid notice u/s 148 has been fulfilled or not. We are satisfied on the facts of the present case that reopening is sought on the basis of change of opinion. Further, even in the reasons, there is nothing to indicate that reopening is sought on the ground of the failure on the part of the petitioner to disclose fully and truly all material facts.

Conclusion :

18. In the circumstances, the impugned notice is set aside. Both the above writ petitions are made absolute in terms of prayer (b) with no order as to costs.

19. C. C. expedited.

20. By this petition, the assessee-Export House seeks to challenge the impugned notice dated March 17, 1999, u/s 148 of the Income Tax Act, 1961, issued by respondent No. 1 seeking to reassess the petitioner''s income for the assessment year 1994-95. The facts giving rise to this writ petition are as follows :

(i) The petitioner is a company, registered under the Companies Act. It is engaged in the manufacture of bulk drugs and formulations.

(ii) The assessee filed its return of income for the assessment year 1994-95 on November 30, 1994. In its return of income, the petitioner-assessee claimed a deduction of Rs. 3.08 crores u/s 80HHC by filing along with its return of income, Form No. 10CCAC prescribed under the rules. The said form showed that the petitioner had exported goods manufactured by it as also goods purchased from others. The petitioner also filed along with its return of income, disclaimer certificates in favour of the supporting manufacturers of the trading goods,

(iii) The assessment of the petitioner was taken up for scrutiny and during the scrutiny, respondent No. 1 had raised various queries including the query in respect of the petitioner''s claim u/s 80HHC. All the queries were fully answered.

(iv) On March 26, 1997, respondent No. 1 completed the assessment for the assessment year 1994-95 u/s 143(3). By his assessment order, respondent No. 1 disallowed the revised claim of Rs. 3.20 crores made u/s 80HHC and allowed the original claim for Rs. 3.08 crores under the said Section 80HHC.

(v) Being aggrieved, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals). By his order dated July 15, 1998, the Commissioner of Income Tax (Appeals) directed the Assessing Officer to reconsider the revised claim of the assessee.

(vi) On March 17, 1999, respondent No. 1 issued the impugned notice u/s 148 alleging that he had reason to believe that the petitioner"s income chargeable to tax for the assessment year 1994-95 had escaped assessment and, accordingly, the assessee was called upon to file its return of income within 35 days from the date of the service of the notice.

(vii) By letter dated March 19, 1999, the assessee requested respondent No. 1 to furnish to it, the reasons recorded prior to the issuance of the notice.

(viii) On April 16, 1999, the assessee filed, under protest, its return of income for the assessment year 1994-95.

(ix) In the meantime, a similar claim of the petitioner for deduction u/s 80HHC was denied by the Department for the assessment year 1996-97. Being aggrieved, the assessee appealed to the Commissioner of Income Tax (Appeals) and, thereafter, to the Tribunal. By order dated December 29, 2000, the Tribunal dismissed the appeal of the assessee. Being aggrieved by the decision of the Tribunal dated December 29, 2000, the assessee preferred Income Tax Appeal No. 131 of 2001 to this court u/s 260A of the Income Tax Act. The contention of the assessee in the said Income Tax Appeal No. 131 of 2001 was that the losses incurred by the assessee in respect of the export of trading goods should be ignored while determining the assessee"s entitlement to deduction u/s 80HHC(3)(c). The said Income Tax Appeal No. 131 of 2001 has been disposed of by this court on July 2, 2001 (see IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax,), the contention of the assessee has been rejected. The judgment of the Tribunal has been confirmed. Accordingly, the said Income Tax Appeal No. 131 of 2001 came to be dismissed (see IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax,).

(x) In the meantime, the assessee filed Writ Petition No. 436 of 2001 (see IPCA Laboratories Ltd. Vs. Gajanand Meena, Deputy Commissioner of Income Tax and Others (No. 2),), challenging the impugned notice u/s 148, dated March 17, 1999, i.e., the present petition which was filed by the petitioner pending their appeal in this court being Income Tax Appeal No. 131 of 2001 (see IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax,).

Arguments :

21. Mr. Trivedi, learned senior counsel appearing on behalf of the petitioner-assessee, urged before us that in the present case, the reopening of the assessment is sought by the impugned notice well within the period of four years. However, he contended that even under the law as of present, reassessment cannot be based on change of opinion. He contended that the original assessment got completed on March 26, 1997. He contended that although the impugned notice was well within four years, it was based on mere change of opinion. He contended that the subsequent events, viz., the decision of the Tribunal and the decision of this court, rejecting the assessee''s contentions, have taken place much after the Assessing Officer issued the impugned notice dated March 17, 1999, and, therefore, there were no supervening events between the date of completion of the original assessment on March 26, 1997, and March 17, 1999, when the impugned notice was issued by the Assessing Officer. He contended that even after the amendment of the provisions of Sections 147 and 148, it is well settled that mere change of opinion cannot be a ground for reopening the assessment. He contended that in the present case, the reasons given for reopening the assessment clearly show mere change of opinion. It was, therefore, contended that the impugned notice was invalid and it was liable to be set aside. He contended that the subsequent events of this court deciding the matter against the assessee in appeal cannot give validity to the impugned notice u/s 148 which has been issued without jurisdiction. He contended that the jurisdictional fact, supporting reassessment, does not exist, in this case. He relied upon the judgment of the Gujarat High Court in the case of Garden Silk Mills (P) Ltd. Vs. Deputy Commissioner of Income Tax, . This judgment has been cited in support of his above contentions. He also relied upon the judgment of the Delhi High Court in the case of Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax, . He also relied upon the judgment of the Gujarat High Court in the case of Birla Vxl Ltd. Vs. Assistant Commissioner of Income Tax, . According to learned counsel, all the aforestated judgments have interpreted the provisions of law as in existence after April 1, 1989. According to learned counsel for the assessee, the position is that even after April 1, 1989, the officer must have material before him, which material must have nexus with the formation of belief and that mere change of opinion will not constitute such material. Hence, he contended that even after April 1, 1989, the position in law remains the same to the above extent.

22. Mr. Desai, learned senior counsel appearing on behalf of the Department, contended that the present case falls under Explanation 2 to Section 147 which lays down certain cases which are deemed to be cases where income chargeable to tax has escaped assessment. In particular, he relies upon Clause (c)(iii) in support of his contention that in the present case, the assessee has got the benefit of excessive relief u/s 80HHC(1) by reason of the assessee ignoring the losses in computing the net profits u/s 80HHC(3)(c). He contended that this case falls under Explanation 2 and, therefore, the judgments cited on behalf of the assessee have no application to the facts of the present case. He also relied upon the judgment of the Gujarat High Court in the case of Praful Chunilal Patel Vs. M.J. Makwana, Assistant Commissioner of Income Tax, in support of his contention that where the Assessing Officer made the mistake of overlooking something which he ought

to have taken into account at the time of the original assessment and if such error has led to escapement of income from assessment, then the Section 148 notice could be sustained. He contended that in the present matter, the Assessing Officer has found that the assessee had claimed excessive relief u/s 80HHC(1) by ignoring the losses on export of trading goods while computing the net profits u/s 80HHC(3)(c). He, therefore, contended that on the ground of error, the Department was entitled to reassess the income of the assessee for the assessment year 1994-95.

Findings :

23. We find merit in the case of the Department. The impugned notice has been issued within four years. In the present case, it is the case of the Department that the assessee has obtained excessive relief in the order dated March 26, 1997 ; that the assessee was not entitled to ignore the losses in computing the net profits u/s 80HHC(3)(c) ; that by virtue of ignoring the losses, the assessee as well as the supporting manufacturer claimed benefits despite 100 per cent, export turnover being disclaimed. In the reasons given at exhibit K to the affidavit-in-reply, the officer has clearly stated that as per the provisions of Section 80HHC(3)(c), profit from exports was required to be calculated in a composite manner. That in the present case, on aggregation, there was loss of Rs. 3.55 crores from the export of trading goods and the resultant amount was a net loss and since the resultant amount was a loss, the assessee was not entitled to claim the relief u/s 80HHC(1). That, in order to become eligible for deduction u/s 80HHC(1), the resultant amount calculated u/s 80HHC(3)(c) cannot be a figure of loss. That, an ingenious method for claiming deduction was adopted by the assessee which has gone unnoticed by the Assessing Officer who passed the order of assessment on March 26, 1997, u/s 143(3) of the Act. In view of the said reasons, we are of the view that the Assessing Officer-respondent No. 1 herein was right in giving the impugned notice. In the present case, the impugned notice has been given within a period of four years. The present case falls clearly under Explanation 2(c)(iii). Therefore, the present case is one of those cases which the Legislature, by a deeming section, has said that such cases would constitute cases of income escaping assessment. This is demonstrated by the reasons given by the Assessing Officer. Hence, the aforestated judgments cited on behalf of the assessee do not apply to the facts of the present case, We may also mention that the expression "reason to believe" refers to the belief which prompts the Assessing Officer to apply Section 147 to a particular case ; that it will depend on the facts of each case ; that the belief must be of an honest and reasonable person, based on reasonable grounds ; that the Assessing Officer is required to act, not on mere suspicion, but on direct or circumstantial evidence ; that the expression "reason to believe" does not mean a subjective satisfaction on the part of the Assessing Officer. In the present case, we are satisfied that the reasons for the belief have a rational connection with the formation of the belief. Hence, the validity of the impugned notice is sustained. In the case of Garden Silk Mills (P) Ltd. Vs. Deputy Commissioner of Income Tax, , the assessee sought adjustment in the valuation of the closing stock as disclosed in the audited books of

account on the ground of applicability of Section 43B. On that basis, the inquiry was made and the claim was allowed. In those set of circumstances, the Gujarat High Court came to the conclusion that the Assessing Officer was not justified in initiating proceedings u/s 147. The Gujarat High Court examined the reasons given by the Assessing Officer on the ground that the said reasons were based on mere change of opinion. It was a case of underassessment. It was not a case falling under Explanation 2. This has been noted even by the aforestated judgment of the Gujarat High Court. In the said judgment, the Gujarat High Court found on the facts that the Assessing Officer, while passing the original order of assessment, did not exercise due diligence. The Gujarat High Court further laid down that had it been a case of lack of application of mind or a mistake, the matter would have stood on a different footing. Therefore, the judgment of the Gujarat High Court, on the facts, has no application to the present case. The present case is similar to the case reported in the case of Praful Chunilal Patel Vs. M.J. Makwana, Assistant Commissioner of Income Tax, . In that matter, it has been laid down that where the Assessing Officer has overlooked something at the time of the original assessment, which he ought to have looked into and which has resulted in the income escaping assessment, then reassessment within four years was permissible. The ratio of the said judgment applies to the facts of the present case. The present case is not based on change of opinion. It is based on the Assessing Officer overlooking the meaning of the word "profit" in Section 80HHC(3)(c).

24. Before concluding, we may mention that in the case of the same assessee in respect of the assessment year 1996-97 in Income Tax Appeal No. 131 of 2001 (IPCA Laboratories Ltd. Vs. Deputy Commissioner of Income Tax,), this court has come to the conclusion that in calculating the profits u/s 80HHC(3)(c), the assessee was not entitled to ignore the losses in respect of the export of trading goods and that if the net result of the computation under the Section is a loss, then the assessee is not entitled to claim the relief u/s 80HHC(1). For the aforestated reasons, the following order is passed.

ORDER

25. There is no merit in this writ petition. The writ petition fails. The same is dismissed. No order as to costs.