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

INCOME TAX APPEAL NOS. 67/2010 AND 458/2010

Reserved on : 30th November, 2011.
% **Date of Decision** : 20th December, 2011.

COMMISSIONER OF INCOME TAX .... Appellant
Through Mr. Kamal Sawhney, Advocate with Mr. Amit Shrivastava, Advocate.

VERSUS

SHASHI KANT MITTAL ..Respondent
Through Mr. Salil Kapoor, Mr. Sanat Kapoor, Mr. Ankit Gupta and Mr. Vikas Jain, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

For detailed order see ITA No.1223/2011 titled ***Commissioner of Income Tax Vs. Lovlesh Jain*** pronounced today.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

DECEMBER 20th, 2011
NA

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

\+ **INCOME TAX APPEAL NO. 1223/2011**

Reserved on : 16th November, 2011.
% **Date of Decision :** 20th December, 2011.

COMMISSIONER OF INCOME TAX .... Appellant
Through Ms. Suruchi Aggarwal, Advocate.

VERSUS

LOVLESH JAIN .....Respondent
Through Nemo.

INCOME TAX APPEAL NOS. 67/2010 AND 458/2010

Reserved on : 30th November, 2011.
% **Date of Decision :** 20th December, 2011.

COMMISSIONER OF INCOME TAX .... Appellant
Through Mr. Kamal Sawhney, Advocate with Mr. Amit Shrivastava, Advocate.

VERSUS

SHASHI KANT MITTAL ..Respondent
Through Mr. Salil Kapoor, Mr. Sanat Kapoor, Mr. Ankit Gupta and Mr. Vikas Jain, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

As identical legal questions arise for consideration in the aforementioned appeals under Section 260A of the Income Tax Act, 1961 (the Act, for short), they are being disposed of by this common order.

2. The contention of the Revenue in these appeals is that the respondent assessee is not entitled to deduction under Section 10A/ 10B of the Act for the following reasons:-

(i) The assessee had not "exported" gold ornaments as the imported standard gold (i.e. 24 carat gold bars, bricks or biscuits), which was converted into ornaments by the assessee, was not owned by the assessee. The assessee was paid making charges and not sale consideration. The imported standard gold was owned by the third parties resident abroad. Accordingly the assessee had not derived profits and gains as are derived by an undertaking from export of articles/things.

(ii) The assessee is not an undertaking engaged in manufacture or production of articles or things. Conversion of standard gold into ornaments is not "manufacture" or "production" of articles or things. The assessee did not manufacture or produce articles/things.

3. For the sake of convenience, the two contentions have been discussed separately.

4. The factual matrix relevant for deciding the aforesaid appeals are as under:-

ITA No. 1223/2011 (Lovlesh Jain)

5. This appeal pertains to the Assessment Year 2007- 08.

5.2 The facts as recorded by the Assessing Officer in the case of Lovlesh Jain are that the assessee had received gold supplied by Ramdan Jewellery, Dubai and the same after conversion into jewellery was "exported" by the assessee to Ramdan Jewellery, Dubai. Ramdan Jewellery, Dubai continued to remain the legal owner of the gold and had not sold the gold to the assessee and no sale consideration for purchase of gold was paid. The assessee was paid conversion charges or production/manufacturing charges for converting the gold into jewellery. The Assessing Officer held that the assessee was not manufacturing ornaments/ jewellery and was not an exporter as he was paid making charges for the job work/services for making ornaments as per specification of third parties. Accordingly, it was held that the assessee was not entitled to deduction under Section 10A of the Act.

5.3 The CIT (Appeals) decided the issue in favour of the assessee. He held that the assessee was engaged in the activity of production of jewellery, which is covered by Section 10A and the Assessing Officer had not examined the said aspect and had only considered whether or not assessee was engaged in manufacturing. He further held that the

assessee was engaged in "export" in view of sections 2(o) and 2(m) of Special Economic Zones Act, 2005. Accordingly, he did not agree with the finding of the Assessing Officer and held that the assessee was entitled to deduction under Section 10A.

5.4 The tribunal has dismissed the appeal of the Revenue and agreed with the findings given by the CIT(Appeals).

ITA 67/2010 (Shashi Kant Mittal)

6. This appeal pertains to the assessment year 2002-03. The assessee's unit for making gold jewellery is located in NSEZ area, Noida. In the assessment year 2002-03, the assessee had received standard gold from M/s Onrich Jeweller (LLC), Deira, Dubai, UAE and after manufacturing the jewellery, it was "exported" to M/s Onrich at Dubai and to a third person at London on instructions from M/s Onrich, Dubai. The gold imported into India was of 0.995 purity and was required to be converted into jewellery of 22/21 carats. On another occasion gold was received by the assessee in form of "breads" and was required to be "manufactured" into jewellery. The gold, on all occasions, was sent free of cost.

6.2 In the present case, the assessee had claimed deduction under Section 10B of the Act. The Assessing Officer disallowed the said deduction on the ground that the assessee did not manufacture any article or thing and the ownership over raw gold and jewellery was of

the foreign party i.e. M/s Onrich Jewellery and the assessee had received making charges.

6.3 The CIT (Appeals) held that the conversion of raw gold or gold bars into jewellery amounts to manufacture. He also held that whether or not assessee's activity was manufacture or not, was independent of the question of ownership of the gold. He relied upon decisions of the Gujarat High Court in ***CIT versus J.B. Kharwar& Sons,***[1987] 163 ITR 394 and the Madras High Court in ***Taj Fire Works Industries***, [2007] 288 ITR 92.

6.4 The tribunal has upheld the view taken by the CIT(Appeals) and held that the primary gold was put to mechanical, physical and chemical process before it was converted into gold jewellery. The primary gold was melted by applying heat, mixed with copper through chemical process poured into dyes or drawn into wires etc. by physical and mechanical process. These dyes and wires were soldered/flattened through human labouror and mechanical process to make gold ornaments/jewellery. It was further held that the requirement of Section 10B is that the assessee should have exported articles or things. It was observed that the assessee for the purpose of said deduction, had taken value of the jewellery exported and from the same reduced the cost of the material, which was provided by the customer. The tribunal

has relied upon the decision of the Madras High Court in ***Taj Fire Industries*** (supra).

ITA 458/2010 (Shashi Kant Mittal)

7 The present appeal pertains to the assessment year 2004-05. The factual position remains the same but in the present case the raw/standard gold was sent by Conrich Jewellery (LLC), Deira, Dubai, UAE, and after 'manufacture', jewellery was sent back to the same party and a third company located in London on the request of Conrich Jewellery. The standard/ raw gold was of 0.999 or 0.995 purity and jewellery manufactured was of 22/21 carat. However, in this year, the deduction was claimed under Section 10A of the Act.

7.2 The Assessing Officer held that the transaction entered into by the assessee with parties abroad cannot be regarded as "export" as the ownership remained with the foreign party and the assessee had merely received making charges and, therefore, did not "export" gold jewellery. He also referred to sub-section (3) of Section 10A, which requires "sale proceeds" of articles or things or computer software exported out of India should be received/brought into India within the stipulated time. It was observed that the term "sale proceed" is not equivalent to making charges.

7.3 The CIT (Appeals), allowed the appeal filed by the assessee following the order in the immediate preceding assessment year 2003-

04, mentioned above. The Revenue preferred further appeal before the ITAT but the same had been dismissed by the impugned order dated 30th April, 2009. The tribunal followed their earlier order for the assessment year 2003-04.

Whether the assessee is an undertaking engaged in manufacture or production of articles or things ?

8. Section 10A/10B of the Act stipulates that an assessee is entitled to deduction from such profits and gains as are derived by an undertaking from export of articles or things or computer software, from the total income of the assessee. Deduction under the said Section is admissible for the prescribed period from the date when the assessee begins to manufacture or produce articles or things or computer software.

9. The assessee converts standard gold into ornaments. The standard gold has purity levels of 0.999/0.995, whereas the ornaments have a purity level of 22 carats or lower. Purity is reduced by mixing other metals like silver, copper, etc. This is necessary to give strength and durability to the ornaments as gold with 0.999/0.995 purity is very soft and tends to bend or break easily. The contention of the Revenue is that conversion of standard gold into ornaments does not amount to "manufacture or production" of articles or things as the primary material is the same, i.e. gold, and no new product with different

chemical composition or attributes comes into existence. The term "manufacture or production" used in Section 10A and 10B have to be given strict and restrictive interpretation.

10. The word "manufacture" can be given, both a wider as well as a narrower connotation. In wider sense, it simply means to make, fabricate or bring into existence an article or product either by physical labour or by mechanical power. Given a narrower connotation it means transforming of the raw material into a commercial product/commodity or finished product which has a new, separate entity but this does not necessarily mean that the material by which the commodity is manufactured must lose its identity. The latter connotation has been accepted and applied with some moderation/clarification in several decisions, keeping in view the context in which the word "manufacture" has been used. The Supreme Court in ***Graphic Company India Limited versus Collector of Customs***, (2001) 1 SCC 549 and ***Union of India versus Delhi Cloth and General Mills Company Limited***, AIR 1963 SC 791 has held that manufacture has to be understood to mean transformation of goods into a new commodity commercially distinct and separate, and having its own character, use and name whether it be the result of one or several processes. However, every change does not result in "manufacture" though every change in an article may be a result of treatment or

manipulation by labour or/and machines. If an operation or process that renders a commodity or article fit for use, which it is otherwise not fit, the change/process falls within the meaning of the word "manufacture".

11. We may refer with profit to the Supreme Court's elucidation in ***Commissioner of Income Tax, Kerala v Messrs Tara Agencies,***[2007] 292 ITR 444 (SC). Herein the Supreme Court has turned to the definition provided in the Central Excise Act, 1944 among other relevant definitions. The relevant paragraphs of this decision are reproduced below:

> "11. The term manufacture has not been defined in the Income-tax Act, 1961.
>
> 12. The term manufacture has been defined in section 2(f) of the Central Excise Act, 1944. Parts (i) and (ii) of section 2(f) read as under:-
> 2(f). 'Manufacture' includes any process-
> (i) incidental or ancillary to the completion of a manufactured product; and
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture".
>
> 12A. Clause (f) gives an inclusive definition of the term 'manufacture'. According to the dictionary, the term 'manufacture' means a process which results in an alteration or change in the goods which are subjected to the process of manufacturing leading to the production of a commercially new article. In determining what constitutes 'manufacture' no hard and fast rule can be applied and each case must be decided on its own facts having regard to the context in which the term is used in the provision under consideration.

13. The term manufacture has been defined by the Black Law Dictionary (5th Edition) as under: 'Manufacture : The process or operation of making goods or any material produced by hand, by machinery or by other agency; anything made from raw materials by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labor or machine.

14. The word 'manufacture' has been defined in Halsbury's Laws of England, 3rd Ed. Vol. 29 p.23 as under:-
'Manufacture has been defined as a manner of adapting natural materials by the hands of man or by man-made devices or machinery and as the making of an article or material by physical labour or applied power'; but the practice is to accept as 'manufacture' a wider range of industrial activities than such a definition would suggest. It includes articles made in situ as well as articles made in a factory.

15. The Supreme Court of the United States of America has defined the term 'manufacture' a century ago in Anheuser-Busch Brewing Assn. v. United States (1907) 52 L Ed. 336. The definition has been followed in subsequent American, English and Indian cases. The definition reads as under: Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary. ..There must be transformation; a new and different article must emerge, .having a distinctive name, character or use."

12. As noticed above, Section 10A/10B is applicable when an undertaking manufactures, or is engaged in production of articles or things. The term "production" has a larger magnitude and is more

expansive and liberal than the term "manufacture". The terms manufacture and produce were interpreted in the ***Commissioner of Income Tax, Bombay City versus TATA Locomotive and Engineering Company Ltd.*** (1968) 68 ITR 325 (Bom.), and it was held:-

> " In its roots the word "manufacture" comes from the Latin word "manus" which means "hand" (and "manu" is the ablative of the word "manus") and the word "facere" which means "to make". In origin, therefore, the word implied the making of anything by hand, by with the passing of time and in the context of industrial development the word has acquired a number of shades of meaning. In connection with industry or in industrial undertaking, two shades of meaning are important. In the Oxford Dictionary, vol. 6, the two shades of meaning are given as follows : (1) The first is "the action or process of making articles or material (in modern use, on a large scale) by the application of physical labour or mechanical power. " This is the most generic meaning in its application to industry or industrial undertaking or establishments. (2) There is also another more limited meaning which is found referred to in the authorities as meaning the transforming of raw material into a commercial commodity or a finished product which has a separate identity (Commissioner of Income tax v. Ajay Printery Pvt. Ltd.(1)). This shade of meaning is more appropriately used in the past participle "manufactured". See Oxford Dictionary, Vol. 6, at page 143, sense No. 1, where the meaning is "fabricated from raw material". In Aswathanarayana v. Dy Commercial Tax Officer (1) at page 801 one finds a useful compilation of meaning attached to the word "manufacture" from various dictrionaries and other sources.
>
> Similarly, the word "produce" with reference to its meaning in industry or political economy has two different senses. In vol. 8 of the Oxford Dictionary, at page 1422, the two meaning are given as follows: "To

bring forth, bring into being or existence (a) generally to bring (a thing) into existence from its raw materials or elements or as the result of a process" and " (d) To compose or bring out by mental or physical labour (a work of literature of art); to work up from raw material, fabricate, make, manufacture (material object) ".

In the Ajay Printer's case, a Division Bench of the Gujarat High Court pointed out that the word "manufacture" has a wider and a narrower connotation. In the wider sense it simply means to make, or fabricate or bring into existence an article or a product either by physical labour or by power. The word "manufacture" in ordinary parlance would mean a person who makes, fabricates or brings into existence a product or an article by physical labour or power. The other shade of meaning which is the narrower meaning implies transforming raw materials into a commercial commodity or a finished product which has an entity by itself, but this does not necessarily mean that the materials with which the commodity is so manufactured must lose their identity. Thus both the words "manufacture" and "produce" apply as well to the bringing into existence of something which is different from its components. One manufactures or produces an article which is necessarily different from its components."

13. The difference in the words 'manufacture', 'production (to produce)' and 'process' was examined by the Supreme Court in ***Commissioner of Income Tax, Kerala v. Tara Agencies,*** (2007) 6 SCC 429. On the question of what is meant by the term 'production', it has been elucidated and explained as under:-

> "**16.** In *Black's Law Dictionary* (5th Edn.), the term "production" has been defined as under:
> "*Production.*—Process or act of producing. That which is produced or made; i.e. goods. Fruit of labor, as the productions of the earth,

> comprehending all vegetables and fruits; the productions of intellect, or genius, as poems and prose compositions; the productions of art, as manufactures of every kind."
>
> **17.** The term "produce", as defined in *New Webster's Dictionary of the English Language* (Deluxe Encyclopædic Edition), is as follows: "*Produce.*—To bring forth into existence; to bring about; to cause or effect, esp. intellectually or creatively; to give birth to; to bear, furnish, yield; to make accrue; to bring about the performance of, as a movie or play; to extend, as a line. To bring forth or yield appropriate offspring, products, or consequences."

14. In ***Income Tax Officer versus Arihant Tiles and Marbles Private Limited,*** [2010] 320 ITR 79 (SC), it was observed that cutting of marble blocks into slabs or tiles per se may not amount to "manufacture" but the activity would constitute "production". Further, when one refers to the word "production", it means a process plus something in addition thereto. Every manufacture can qualify as production but every production need not amount to manufacture. The original marble block does not remain a block when it becomes slab or a tile and undergoes polishing, etc. and, therefore, amounts to production and qualifies for deduction under Section 80IA of the Act. Even though the chemical composition or the basic material may be the same but in commercial parlance, the two products were different. In this case, the Supreme Court noticed and observed that if the

contention of the Revenue is accepted, it would have negative revenue consequences as the assessees are also liable to pay excise duty, sales tax, etc. because of the processing involved, resulting in the said change. The aforesaid change was held to be sufficient. After referring to ***CIT versus N. C. Budharaja & Co.*** (1993) 204 ITR 412 (SC), it was observed that the word "production" when used in juxtaposition with the word "manufacture" takes within its ambit bringing into existence new goods by a process which may or may not amount to manufacture. The word "production" takes in all the by-products, intermediate and residual products, which emerge in the course of manufacture of goods.

15. In ***CIT versus Emptee Poly Yarn (P.) Ltd.*** (2010) 320 ITR 665, the thermo mechanical process that converts partially oriented yarn into textured yarn, which is a new and a distinct product or article was regarded as manufacture as it brings about a structural change in the yarn itself. Partially oriented yarn cannot be used in warp or weft but texturized yarn can be used. It was held that the structure, the character, the use and the name of the product are indicia, which are to be taken into account while deciding the question whether the process amounts to "manufacture" or not. We have referred to the said decision, as the chemical composition of the partially oriented yarn and

the textured yarn is similar, but the use, name and character of the yarn becomes different after texturizing.

16. In the present case, manufacture as well as production of goods, articles or things is covered under Section 10A/10B. The activity for converting gold bricks, biscuit or bars, into jewellery amounts to "production or manufacture" of a new article. The gold, silver or platinum in bar, biscuit or brick form, is converted by manual labour and by the use of implements/tools or by machinery, culminating into an entirely new article/thing called jewellery or ornaments. Jewellery is a wearable item and is used by both men and women. This process has been referred to above in paragraph 6.4, while adverting to the factual matrix in the case of Shashi Kant Mittal. Jewellery/ornaments in common parlance or in commercial terms has a distinct identity, treated as a new article and not the same as raw or standard gold in the form of bricks, biscuits or bars. As a result of the said processing, a commercially different saleable product comes into existence. Jewellery has a distinctive name, character and use. It can no longer be regarded as the original commodity, has separate consumers and is a new commercial commodity. The activity of the respondent assessee amounts to "manufacture or production" and, therefore, qualifies for deduction under Section 10A/10B.

17. This contention/question, accordingly, is decided against the Revenue and in favour of the assessee. It is held that conversion of standard gold into ornaments or jewellery undertaken by the respondent-assessee amounts to manufacture/production and qualifies for deduction under Section 10A/10B of the Act, if other conditions stipulated in the said Section are duly satisfied.

Whether the assessee have earned profits/gains as are derived by an undertaking from the export of articles/things ?

18. Case of the Revenue is that the assessee had not exported jewellery as the assessee were not owners of the imported gold or the exported jewellery and were paid making charges. The income earned does not qualify for deduction under Section 10A/ 10B of the Act.

19. The term "export" has not been defined in the Act. The said term, therefore, has to be interpreted and given a meaning for the purpose of Section 10A/10B. The terms 'export' and 'import' out of India are associated, and have an indelible link, with the Customs Act, 1962. In the present case, we are concerned with 'export' or 'import' of goods/articles out of India. It will be, therefore, appropriate to appreciate how the terms 'export' and 'import' have been understood and interpreted, and whether the question of ownership is relevant and material. As noticed below, in some decisions, the Supreme Court has referred to the interpretation given to the terms 'import' and 'export' in

the Customs Act, 1962 to decide and interpret the provisions of the Act i.e. Income Tax Act. We have also taken into consideration how the term 'export' is understood in normal common parlance and in the commercial world.

20. Way back in 1958, the Supreme Court in the case of ***Central Indian Spinning and Weaving and manufacturing Company Vs. Municipal Committee, Wardha****1958 (1) SCR 1002* had held that the word "export" has no special meaning, but it bears the ordinary dictionary meaning, which means "taking out of the country". In the said case the words "export" and "import", with reference to tax imposed by the Municipal Committee, were required to be interpreted. It was held that the words "exported from" means taking out of the municipal limits. Referring to the term "export" it was held that the same is opposite to the term "import", which means to bring in from a foreign or external source. Thereafter, it was elucidated and explained as under:-

> "'Import' is derived from the Latin word importare which means 'to bring in' and 'export' from the Latin word exportare which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico, logically they do not have any reference to goods in 'transit' a word derived from transire bearing a meaning similar to transport, i.e., to go across. The dictionary meaning of the words 'import' and 'export' is not restricted to their derivative meaning but bear other connotations also.

According to Webster's International Dictionary the word "import" means to bring in from a foreign or external source; to introduce from without; especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export. Similarly "export" according to Webster's International Dictionary means "to carry away; to remove; to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import". The Oxford Dictionary gives a similar meaning to both these words. The word "transit" in the Oxford Dictionary means the action or fact of passing across or through; passage or journey from one place or point to another; the passage or carriage of persons or goods from one place to another; it also means to pass across or through (something) to traverse, to cross. Even according to the ordinary meaning of the words which is relied upon by the respondent, goods which are in transit or are being transported can hardly be called goods 'imported into or exported from' because they are neither being exported nor imported but are merely goods carried across a particular stretch of territory or across a particular area with the object of being transported to their ultimate destination which in the instant case was Nagpur.

The respondent's counsel sought to support his argument by referring to the following cases decided by various Indian High Courts where the words , import' and 'export' were construed as meaning 'bring in' or 'take out of or away from' and it was also held that goods in transit are also covered by the words 'imported into'or 'exported from'."

21. In the case of ***Abdulgafar A. Nadiawala Vs. Assistant Commissioner of Income Tax and Other****[2004] 267 ITR 488* (Bom) with reference to Section 80HHC of the Act, it has been held as under:-

> "The phrase' export out of India' has been defined in cl. (aa) in Explanation-s. (4A). The apex Court has considered this clause in the case of CIT vs. Silver Art Palace: 2003 (259) ITR 684(SC), wherein the apex Court has observed that for the purposes of special deduction under that section there will be no export out of India; if two cumulative conditions are fulfilled, viz., (a) the transaction is one by way of sale or otherwise in a shop, etc. situated in India, and (b) it does not involve clearance in any customs station as defined in the Customs Act. Since, in that case, the transaction of counter sales involved customs clearance it was held that there was export out of India. In the case of Ram Babu and Sons vs. Union of India: 1996 (222) ITR 606(M), the Allahabad High Court had already taken this view and further observed that it is the transaction which should involve clearance at customs station, if it is to be an export out of India. If the goods are required to be cleared from the customs station either by the purchaser or the seller it would be an export out of India. It is, thus, clear that if, ultimately, that articles or goods are taken from India to outside India through customs clearance, the goods can be said to have been exported out of India In this view of the matter, we hold that the goods were exported out of India as contemplated under s 80HHC of the Act."

22. The words "export" and "import' have been used in number of enactments like the Customs Act, 1962, the Foreign Exchange Management Act, 1999, the Copyright Act, 1957, the Constitution of India, etc. and have been given identical or similar meaning. Universally, in these enactments the word "export" has been defined to mean taking outside India or taking goods outside India by land, air or

sea. The words "export" and "import" have been defined in the Customs Act, 1962 as under;-

> "**2. Definitions.**—In this Act, unless the context otherwise requires,—
>
> xxx
>
> (18) "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India;
>
> xxx
>
> (23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India"

Thus, bringing goods into India from abroad is 'import' and sending goods out of India to any country abroad is 'export'. When standard gold was brought into India, it was imported and when jewellery/ornaments were sent out of India, they were exported.

23. The next question relates to ownership and whether the assessees can be treated as exporters. In ***CIT vs. Podar Cement (Pt) Ltd.***, (1997) 5 SCC 482, it was held that the concept of 'ownership' can have various connotation and meanings. The concept has evolved over a passage of time and has to be interpreted keeping in view the context in which the word is used. The following passage from the said judgment is appropriate:

> "**32.**....In the meantime, it would not be irrelevant to go into the concept of 'ownership'. What is ownership after all? Read from the Roman law up to the English law at the present stage, medieval stage having been interspersed with different formulae, the position that now juristically emerges is this. The full rights of an owner as now recognised are:

'(*a*) The power of enjoyment (e.g., the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);
(*b*) possession which includes the right to exclude others;
(*c*) power to alienate inter vivos, or to charge as security;
(*d*) power to leave the res by will.'

One of the most important of these powers is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing.... But every owner does not possess all the rights set out above — a particular owner's powers may be restricted by law or by an agreement he has made with another.' (Refer to G.W. Paton on *Jurisprudence*, 4th Edn., pp. 517-18.)

While dealing with the concept of possession and enumerating the illustrative cases and rules in this respect, Paton says at p. 577 in clause (*x*):
'To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others:....'

Reference in this connection has been made to the case of *Tubantia*: *Young* v. *Hichens* and of *Pierson* v. *Post*.
It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

To the same effect and with a more vigorous impact is the subject dealt with by *Dias on Jurisprudence*, (4th Edn., at p. 400):
'The position, therefore, seems to be that the idea of ownership of land is essentially one of the 'better right' to be in possession and to obtain it, whereas with chattels the concept is a more absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner.'

"Again, at p. 404, the learned author says:
'Special attention should also be drawn to the distinction between "legal" ownership recognised at common law and "equitable" ownership recognised at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity.'"

24. The words 'importer', 'exporter', 'imported goods' and exported goods' has been defined in Section 2 of the Customs Act, 1962. They read as under:

> "2. **Definitions.**—In this Act, unless the context otherwise requires,—
>
> XXX
>
> (19) "export goods" means any goods which are to be taken out of India to a place outside India;
>
> (20) "exporter", in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner or any person holding himself out to be the exporter;
>
> XXX
>
> (25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;
>
> (26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;"

25. The expressions/terms, 'importer' and 'exporter' are wide and not restricted to the 'owner' of the goods at a particular point of time. Owner is treated as the importer/exporter but a person who holds himself out as an importer or exporter is also an importer or exporter. The activity undertaken i.e. export/import is important and the person involved and associated with the said activity is important/relevant, mere ownership is not the sole criteria to determine whether a person is

an importer or exporter. Further the expression 'exported' or 'imported' goods has reference to the nature of the goods as in the case of expressions 'import' or 'export', and not a person/owner.

26. Referring to the definition clause as well as the clauses of the Imports (Control) Order, 1955 and Export- Import Policy, the Supreme Court in ***UOI vs. Sampat Raj Dugar,*** 1992(62) E.L.T. 163(S.C.), examined the question of ownership with reference to the term 'importer' and it was held as under:-

> **"19.** ... The definition of 'importer' in Section 2(26) of the Customs Act is not really relevant to the question of title. It only defines the expression 'importer'."

27. The aforesaid observations are apposite when we examine the question of 'ownership' of a person who exports the goods.

28. The Supreme Court in the case of ***Sea Pearl Industries Vs. Commissioner of Income Tax, Cochin*** *(2001)247 ITR 578 (SC)* examined the word "export", which is used in Section 80HHC of the Act. In this case reference was made to Section 2(18) of the Customs Act, 1962, which defines the term "export" as taking out of India to a place outside India. It was held that the said definition does not prescribe the idea of ownership within the word "export". Thus, for the purpose of 80HHC, assessee should be an exporter of goods, but this does not require that the assessee must be the owner of the goods as well. It was held that the object of Section 80HHC is to grant incentive

for earning foreign exchange and, therefore, is to be considered and given purposive interpretation. In the said case the assessee had handed over the documents of export to an export house for negotiation and the letter of credit by the importer-buyer was opened in favour of the export house. Subsequently, the letter of credit was endorsed in favour of the assessee by the export house and the entire amount was credited in the assessee's account. Thus, though the export house was not the owner of shipment, it was held that they were entitled to claim deduction under Section 80HHC and the assessee, who was the owner of the shipment, was not entitled to claim the said deduction. The export, it was held, was made by the export house. It was observed:-

> " Section 80-HHC requires (*i*) the assessee to export the goods and (*ii*) the sale proceeds to be "receivable" by the assessee in convertible foreign exchange. The foundation of the appellant's arguments before us, as far as the first requirement is concerned, is the agreement between the appellant and the export house and in particular the clause which provides that the property in the goods would pass to the export house only after they had crossed the customs barrier. However, as rightly contended by the respondent, the question of title or property in the goods exported is not relevant to Section 80-HHC. The section does not in terms require the exporter to be the owner of the goods. Even Section 2(18) of the Customs Act does not include the idea of ownership within the definition of the word "export". This may be contrasted with Section 5(3) of the Central Sales Tax Act, 1956 where the emphasis is on the transfer of title by a last sale or purchase "... preceding the sale or purchase occasioning the export". That is why in *C.T. Ltd.* v. *CTO* relied on by the appellant, this Court held that although State Trading Corporation (STC) was shown as the exporter of goods, since there was no sale to STC, STC merely acted as an agent of the assessee who had purchased the goods for

> export. This decision cannot be relied on to construe Section 80-HHC of the Income Tax Act.
>
> The object of Section 80-HHC is to grant an incentive to earners of foreign exchange. The matter will, therefore, have to be considered with reference to this object...."
>
> (Emphasis supplied)

29. The Supreme Court relied upon their earlier decision in ***Mineral and Metal Trading Corp. Vs. R.C. Mishra***, (1993) 201 ITR 851, wherein with reference to the words "sale proceeds" and who was the actual beneficiary/recipient, it was observed;-

> "Secondly, the phrase "sale proceeds ... receivable by the assessee" in Section 80-HHC, sub-section (2), cannot be construed to mean "sale proceeds ultimately received". Payment for the export was by the letter of credit. The letter of credit being in favour of the export house, the foreign exchange was "receivable" by it. That the export house may have chosen to transfer the foreign exchange to a third party under some independent arrangement would not make the third party the exporter. Whatever be the internal arrangement between the export house and the appellant, as far as the Income Tax Authorities were concerned, the export house would clearly be the exporter."
>
> (Emphasis supplied)

30. The expression used in Section 10A(1) is, "the deduction of such profit and gains as are derived by an industrial undertaking from export." Similarly expression used in Section 10B(1) is "a deduction of such profit and gains as are derived by a hundred percent export-oriented undertaking". The relevant words are "as are derived by an undertaking from export". The said expression means that the profit and gains must be "as are" derived from export of things or articles and nothing more. The expression "sale proceeds" used in the Section

10A(3) refers to proceeds which have to be received or brought into India by the assessee in convertible foreign exchange. This means and requires that that the requisite foreign exchange must be brought into India. We do not think that the expression "sale proceeds" should be given a narrow and restricted meaning. The object and purpose behind Section 10A(3) of the Act is to ensure that the export proceeds in foreign exchange are brought into India.

31. In the present case, the standard gold was imported into India and then converted into jewellery or ornaments and was sent out of India i.e. jewellery and ornaments were exported. When the import was made, the assessee was shown as a consignee and an importer and when the export was made the assessee was shown as a consignor i.e. the exporter. The assessee complied with the various formalities, when the standard gold was imported and then again when the jewellery/ ornaments were exported. The assessee was in actual physical possession of the gold when it remained in India and would have been liable in case of loss etc. The concept of and the term "ownership", as observed above, has various jurisprudential connotations. For all practical purposes, the assessee was in possession of gold and had a right, dominance and dominion over it. They were liable to pay Customs duty etc. in case export was not made. Keeping in view the nature of transactions in question, it is not possible to hold that the

assessee did not "export" the jewellery/ornaments and that the transactions in question cannot be regarded as export for the purpose of Section 10A/10B of the Act. Thus, when the assessee had exported the ornaments, it was exporting articles or things. The assessee were exporters or had exported articles/things as understood in common parlance.

32. Reliance placed by the learned counsel for the Revenue on ***Commissioner of Income Tax Vs. Ravindranathan Nair*** *(2007) 295 ITR 228 (SC)* is not appropriate. In the said case, as recorded, in paragraph 2 of the decision, the assessee had a factory in which he processed cashew nuts, which were grown in his farm. These were exported. The assessee also processed cashew nuts, which were supplied to him by third party exporters on job work basis. After processing, the processed cashew nuts were returned to the exporters and he earned processing charges. The exporters were third parties, who thereafter, exported the cashew nuts from India. The assessee was not an exporter of the said processed cashew nuts. It was in this context that the Supreme Court examined whether the processing charges earned by the assessee from the said third parties exporter can be included in the export turnover for calculating export profit under Section 80HHC (3) of the Act. In the said case, the assessee himself had not exported the processed cashew nuts on which processing

charges were paid. The exports in fact were made by third parties and not by the assessee. We may, however, note that under Section 80HHC even profit earned from export and trading of goods is entitled to exemption. Section 10A does not apply to export income earned by an assessee from merely trading the goods and postulates that the assessee must be an undertaking, which manufactures or produces articles or things, which are exported.

33. This condition in the present case is satisfied. Accordingly, the contention raised by the Revenue fails and has to be rejected. The question is answered in favour of the assessee.

Appeals are accordingly dismissed. No costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

DECEMBER 20th, 2011
NA