

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEAL NO. 53 OF 2006**

Sesa Goa Ltd.,
Having its Office at “Sesa Ghor”,
Patto Plaza, Panaj-Goa. Appellant

V e r s u s

The Commissioner of Income Tax,
having his office at
Aaykar Bhavan,
Patto, Plaza, Panaji-Goa. Respondent

Mr. P. J. Pardiwalla, Senior Advocate with Mr. R. G. Ramani,
Advocate for the Appellant.

Mrs. Asha Dessai, Advocate for the Respondent.

**CORAM: F. M. REIS, &
M. S. SANKLECHA, JJ**
Reserved on: 29th April, 2015
Pronounced on: 7th May 2015

Judgment: (Per M.S. Sanklecha, J.)

This appeal under Section 260A of the Income Tax Act, 1961
(the Act) challenges the order dated 4/4/2006 passed by the Income
Tax Appellate Tribunal (Tribunal).

2. This appeal relates to the Assessment year 1996-1997 filed by
the appellant-assesee. Appeal filed by the revenue for Assessment

year 1996-97 is ITA No.81 of 2006 and is being disposed of by a separate order.

3. This appeal was admitted on 3/10/2006 on the following substantial questions of law:

A) Whether on the facts and in the circumstances of the case, the receipts forming part of the Appellant's turnover in its accounts under the head (i) hire of barges; (ii) proceeds of services; (iii) repairs of vessels, which receipts have substantial costs, and arise from the main business activity of the Appellant, could be considered as similar to the specific receipts referred to it in the said clause (baa)?

B) Whether on the facts and in the circumstances of the case, receipts by way of sale proceeds from (i) sale of pig iron, (ii) sale of vessels, (iii) sale of engineering products, (iv) sale of material, and (v) sale of coke breeze could be considered as similar to the specified receipts referred to in the said clause (baa) ?

C) Whether on the facts and circumstances of the case, the receipts under the head "extraction charges" could be considered as part of the "total turnover" as defined in the said clause (baa), for the purpose of computation of deduction under section 80 HHC of the Act ?

4. Briefly, the facts leading to this appeal are as under:

(a) The appellant carries on business of mining and export of iron ore. This ore is not only mined by the appellant from its own mines

but also from mines belonging to others. The appellant receives extraction charges from mine owners in respect of the ores mined from mines belonging to others. These ores are thereafter purchased by the appellant from the mine owners in excess of the consideration received for extraction and exported. The appellant for carrying out its mining activities uses equipments/machines, services of engineers, barges for transport and repair facility. These when not required by the appellant are given to/used by others for consideration. Besides exports of ores the appellant also sells pig iron, vessels, engineering products, material and coke breeze in local market.

(b) For the Assessment year 1996-1997, the appellant had in its return of income declared a total income of Rs.9.73 crores. In its return of Income, the appellant had inter alia claimed the benefit of Rs.9.42 crores under Section 80 HHC of the Act.

(c) The Assessing Officer by an order dated 29/3/2001 passed under Section 143(3) read with Section 147 of the Act determined the appellant's income at Rs.19.43crores. However while determining the appellant's claim for deduction under Section 80HHC of the Act inter alia held that the following receipts :

- (1) Sale of pig iron;
- (2) Sale of vessels;
- (3) Sale of engineering products;
- (4) Sale of material;
- (5) Sale of coke breeze;
- (6) Hire of barges;
- (7) Proceeds of services; and
- (8) Extraction charges

are receipts similar to the receipts specified in clause (baa) of Explanation below sub section 4B of Section 80HHC of the Act. Thus out of the above receipts estimated expenses were deducted before reducing 90% of such receipts from profits of business computed under the head “profits and gains of business or profession”. This was necessary to apply the formula in Section 80HHC(3) of the Act to arrive at profits on account of exports for which deduction is available under Section 80HHC of the Act. Thus on carrying out the aforesaid exercise, the Assessment Order arrived at figure of negative deduction under Section 80HHC of the Act. Therefore no deduction in respect of its exports under Section 80HHC of the Act was granted to the appellant.

(d) Being aggrieved by the order dated 29/3/2001 of Assessment inter alia denying deduction under Section 80HHC of the Act, the appellant filed an appeal to the Commissioner (Appeals) (C.I.T. (A)). By an order dated 2/1/2002, the C.I.T. (A) held :

1. Sale of pig iron;
2. Sale of vessels;
3. Sale of engineering products;
4. Sale of material; and
5. Sale of coke breeze;

need not be deducted from profits of business in terms of clause (baa) of Explanation to sub-Section 4B of Section 80HHC of the Act to arrive at profits of the business;

The receipts on account of following :

6. Hire of barges;
7. Proceeds of services;
8. Repairs of vessels; and
9. Extraction charges

were held to be covered by clause (baa) of Explanation to Sub Section 4B of Section 80 HHC of the Act and 90% of the gross receipts were to be reduced for computing profits of the business in respect of hire of barges and 90% of the net receipts in respect of

proceeds of services, repairs of vessels and extraction charges. Moreover, so far as extraction charges are concerned the same were held to be includable in total turnover as defined in clause (ba) of the Explanation to Section 80HHC of the Act.

(e) Being aggrieved, both the appellant as well as the revenue filed appeals before the Tribunal. This appeal deals only with the appeal of the appellant assessee. On 4/4/2006, the Tribunal by the impugned order inter alia held :

(i) receipts on hire of barges, proceeds of services, repair of vessels fell within the clause (baa) of the Explanation to Section 80HHC of the Act. Further it held expenses are incurred to earn the receipts. Thus 90% of the net receipts i.e. after deducting expenses on the above account are to be reduced for computing profit of business under Section 80HHC of the Act;

(ii) receipts by way of sale proceeds i. e. sale of pig iron, of vessels, of engineering products, of materials and coke fell within the ambit of clause (baa) of Explanation of Section 80HHC of the Act. No expenses on the above are deductible. Therefore 90% of the gross receipts are deductible to compute

profit of business under Section 80HHC of the Act; and

(iii) the net receipts on account of extraction charges are to be included in profits of business and therefore not hit by clause (baa) of the Explanation to Section 80HHC of the Act.

However these receipts are to be included in the total turnover as defined in clause (ba) of Explanation to Section 80HHC of the Act. This figure of turnover is necessary to compute profits on account of exports in terms of Section 80HHC(3) of the Act.

5. Being aggrieved, the present appeal has been filed by the appellant and the same has been admitted on the aforementioned substantial questions of law.

6. For a proper appreciation of the issues raised before us, it would be necessary to reproduce the relevant provisions of Section 80HHC of the Act which would require consideration as under:

Section 80HHC- Deduction in respect of profits retained for export business.

(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the

provisions of this section, be allowed, in computing the total income of the assessee, a deduction of the profits derived by the assessee from the export of such goods or merchandise :

Provided respect of such trading goods.

(2)(a)

(3) For the purposes of sub-section (1), -

(a) Where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;

(b) (c).....:

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic), of section 28, the same proportion as the export turnover bears to the total turnover of business carried on by the assessee.

Explanation : For the purposes of this sub-section, -
(a) to (f)

(4), (4A) & (4B)

Explanation : For the purposes of this section,-

(a)

(ba) “Total turnover” shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962) :

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression “total turnover” shall have effect as if it also excluded any sum referred to in clauses (iiia),

(iiib) and (iiic) of section 28;

(baa) “Profits of the business” means the profits of the business as computed under the head “Profits and gains of business or profession” as reduced by -

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) The profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;

(c); (d); (e).....”

7. Mr. Pardiwala, learned Senior Counsel in support of the appeal submits that before the individual items involved in this appeal are considered, it would be necessary to first decide the true meaning and scope of clause (baa) of Explanation to Section 80HHC of the Act. It is submitted that the aforesaid provision i.e. clause (baa) of the Explanation to Section 80HHC of the Act has to be read strictly as only covering receipts which are specified therein i.e. 90% of the receipts by way of brokerage, commission, interest, rent, charges or any other receipts of a similar nature included in such profits. It is submitted that this Court in ***CIT vs. Pfizer Ltd.*** reported in **330 ITR 62** has construed clause (baa) of the Explanation to Section 80HHC of the Act to include only items specifically mentioned therein and

receipts similar in nature. Although the above view of this Court is at variance with its earlier view in *CIT Vs. Dresser Rand India (P) Ltd.* reported **323 ITR 429** yet, it is submitted that the decision of this Court in *Pfizer Ltd.* (supra) being latter in point of time to the decision in *Dresser Rand Ltd.* (supra), the same must prevail. Therefore the receipts which arise for consideration are to be decided on the touchstone of the decision of this Court in *Pfizer Ltd.* (supra). This is more so as in *Pfizer Ltd.* (supra) the decision of this Court in *Dresser Rand Ltd.* (supra) was considered along with the Supreme Court decision in *CIT Vs. K. Ravindranathan Nair* reported in **295 ITR 228** which was the basis of the decision in *Dresser Rand Ltd.* (supra). Thus the decision of this Court in *Pfizer Ltd.* (supra) not being per incuriam its conclusion that only receipts of nature similar to that specified in clause (baa) of Explanation to Section 80HHC of the Act have to be excluded is binding. This Court in *Pfizer Ltd.* (supra) held that income which are susceptible to a reduction of 90% are those which are specifically specified by the Legislature in clause(baa)(1) of the Explanation to Section 80HHC of the Act. Attention was fairly invited by Mr. Pardivala to an unreported decision of this Court in *Tax Appeal No. 26 of 2006* in *Damodar Mangalji Mining Company Vs. Joint Commissioner of Income Tax*

rendered on 18.10.2013 in favour of the revenue while construing clause (baa) of Explanation to Section 80 HHC of the Act. However, it is submitted that it was rendered per incurium as it was without considering the decision of this Court in *Pfizer Ltd.* (supra). It is therefore submitted that the nature of income which would stand included under clause (baa) of Explanation to Section 80HHC of the Act would only be items of receipts similar to those specified therein and not any other income received by the appellant in carrying of its business classifiable under the head of profits or gains of business and profession.

8. In the alternative it is submitted that if this Court is not inclined to follow the decision of this Court in *Pfizer Ltd.*(supra), then in view of the apparent conflict in the decision rendered by this Court in *Dresser Rand Ltd.* (supra) and *Pfizer Ltd.* (supra), the matter be placed before a larger bench of this Court to resolve the apparent conflict.

9. As against the above, Ms. Asha Desai, learned counsel for the Revenue states that the issue sought to be raised by the appellant is no longer res integra. This is so as the entire issue stands concluded by

the decision of the Apex Court in ***Ravindranathan Nair*** (supra). In the above case, the Apex Court has categorically held that processing charges which are received by the assessee for processing cashew nuts on job work for local sale being independent of its export income i.e. having no nexus to exports fell within clause (baa) of the Explanation to Section 80HHC of the Act. It is submitted that the decision of ***Ravindranathan Nair*** (supra) is the law declared by the Supreme Court under Article 141 of the Constitution of India and is binding on all. Therefore, the principles laid down therein would have to be applied while considering each individual item of receipt which are subject of exclusion to determine what does or does not fall within the true meaning of clause (baa) of the Explanation to Section 80HHC of the Act.

10. We have considered the rival submissions. Mr. Pardiwalla, learned Senior Counsel for the appellant submitted that the decision of the Supreme Court in ***Ravindranathan Nair*** (supra) was decision rendered on a question that did not arise for its consideration. The issue before the Supreme Court according to him was whether or not processing charges are to be included in the total turnover for the purpose of computing profits attributable to the

export business in terms of the formula prescribed in Section 80HHC(3) of the Act. The issue of clause (baa) of the Explanation to Section 80HHC of the Act was not before the Supreme Court and therefore, the decision rendered on that aspect would not cover the present controversy. The observations of the Apex Court in ***Ravindranathan Nair*** (supra) in respect of what is covered by clause (baa) of the Explanation to Section 80HHC of the Act is not the ratio of the decision. Moreover as the above issue was not argued before the Supreme Court in ***Ravindranathan Nair*** (supra) it may be considered as only an observation and of no binding effect. This according to us is not correct. In fact in paragraph 21 of the Supreme Court decision in ***Ravindranathan Nair*** (supra), the Apex Court records the submission of the assessee therein in respect of computation of business profits as under:

“21.....According to the assessee, the profits derived from local sales were includable in business profits but not in total turnover.”

It was in the above context that the Apex Court considered what is included and the extent of its inclusion in the meaning of business profit for purpose of Section 80HHC of the Act. For that purpose the examination of clause (baa) of Explanation to Section

80HHC of the Act was imperative. Thus, the Apex Court has very much dealt with the issue and the ratio of its decision in *Ravindranathan Nair* (supra) is that independent income having no nexus with exports would be covered by the words other similar receipts in clause (baa) of the Explanation to Section 80HHC of the Act. In that case, the processing charges received for processing of cashews for local sales was held to be independent income i.e. independent of export and therefore of a nature similar to the receipts specified in clause (baa)(1) of the Explanation to Section 80HHC of the Act. Thus the present controversy would have to be decided keeping in view the above test laid down by the Supreme Court in *Ravindranathan Nair* (supra).

11. It was also contended on behalf of the appellant that the decision of the Apex Court may require reconsideration as it completely skews the formula in Section 80 HHC(3) of the Act to determine the profits on account of exports. These receipts are taken as a part of the turnover (denominator in the formula) but are excluded from the business profits (numerator in the formula) to the extent of 90% of its receipts. The correctness of the decision of the Apex Court is not for us to consider. The decision of the Apex Court

is binding upon us. Therefore, the above submission is not even being considered, much less examined by us.

12. This brings us to the next submission on behalf of the appellant that the Apex Court decision in ***Ravindranathan Nair*** (supra) along with the earlier decision of this Court in ***Dresser Rand Ltd.*** (supra) was a subject matter of consideration in ***Pfizer Ltd.*** (supra). It is submitted that it is after consideration of the above decisions this Court in ***Pfizer Ltd.***(supra) held that clause (baa) of the Explanation to Section 80 of HHC of the Act that only the receipts which are by way of brokerage, commission, interest, rents, charges or receipts of similar nature, have to be excluded to the extent of 90% of its receipts for computation of business profits. Thus independent income having no nexus with export would be covered by clause (baa)(1) of Explanation to Section 80HHC of the Act if they are not of the nature specified therein as explained by this Court in ***Pfizer Ltd.*** (supra). It is also submitted that the view of this Court in ***Dresser Rand Ltd.***(supra) was different i.e. independent income not having nexus with exports were included in sub clause (baa) of the Explanation to Section 80HHC of the Act. In any case, it is submitted that the decisions of this Court in ***Pfizer Ltd.*** (supra) and ***Dresser***

Rand Ltd. (supra) are inconsistent to each other and in case we are not inclined to follow **Pfizer Ltd.** (supra) then this conflict in the two decisions in respect of the correct and the true meaning of clause (baa) of the explanation to Section 80HHC be referred to Larger bench of this Court so as to resolve the apparent conflict.

13. We find that though decisions of this Court in **Dresser Rand** (supra) and **Pfizer Ltd.** (supra) appear to be inconsistent to each other, the same on a closer reading is not found to be so. In fact in **Pfizer Ltd.** (supra) this Court follows the decision of the Apex Court in **Ravindranathan Nair** (supra) and does not detract from its own decision in **Dresser Rand Ltd.** (supra). In fact in para 6 of **Pfizer Ltd.** (supra) this Court records its finding in **Dresser Rand Ltd.** (supra) as under:

“6..... This Court noted that the Supreme Court had held that the processing charges though they form part of gross total income, constitute independent income like rent, commission and brokerage and that hence 90% of the same has to be reduced from gross total income.”

This Court in **Pfizer Ltd.** (supra) has further in para 11 thereof held as under:

“A contract of insurance is a contract of

indemnity. The insurance claim in essence indemnifies assessee for the loss of the stock in trade. The indemnification that is made to the assessee must stand on the same footing as the income that would have been realized by the assessee on the sale of the stock in trade. In these circumstances, we are clearly of the view that Insurance claim on account of the stock in trade does not constitute an independent income or a receipt of a nature similar to brokerage, commission, interest, rent or charges. Hence such a receipt would not be subject to a deduction of ninety percent under clause (1) of Explanation (baa).”.

(emphasis supplied)

Further this Court in ***Pfizer Ltd.*** (supra) at para 11A observes

as under:

“11A. Hence, the element of export turnover is a facet which has been taken care of by the legislature in the application of the formula which is referred to in sub section (3) of Section 80HHC. In determining the profits of the business for the purposes of Explanation (baa), the incomes which are susceptible to a reduction of ninety percent are those which are specifically prescribed by the legislature. These are inter alia the incomes referred to in clauses (iiia), (iiib) and (iiic) of Section 28 and receipts by way of brokerage, commission, interest, rent, charges or receipts of a similar nature included in such profits. Therefore, before a receipt is liable to be excluded to the extent of ninety, it must be a receipt of a nature similar to brokerage,

commission, interest, rent or charges. For the reasons which were have already indicated, we have come to the conclusion that the claim on account of insurance for the stock in trade did not constitute a receipt of similar nature within the meaning of Explanation (baa) and was therefore not liable to be reduced to the extent of ninety percent. The first question will therefore not raise any substantial question of law.”
(emphasis supplied)

14. Therefore, the test has necessarily to be whether or not 90% sought to be excluded is independent income having no nexus with export and therefore similar to the income described in sub clause (baa) of the Explanation to Section 80HHC of the Act. It must also be noted that in *Pfizer Ltd.* (supra), this Court has not stated that the stock in trade which was indemnified was not for exports.

In the above view, we see no contradiction between the above decisions In fact both the decisions of this Court in *Pfizer Ltd.* (supra) and *Dresser Rand Ltd.* (supra) are not at variance with each other in fact both of them are in line with the decision of the Apex Court in *Ravindranathan Nair* (supra). Thus in the above facts there appears to be no reason to refer this matter to the Hon'ble Chief Justice for the purpose of constituting a Larger bench to consider what appears to be at first blush inconsistency in the decisions of this Court in

Dresser Rand Ltd. (supra) and *Pfizer Ltd.* (supra) but clearly not so on a closer reading.

15. We shall now deal with the the three substantial questions of law, which have been admitted for our consideration. The same would be decided by us on the touchstone of the decision in *Ravindranathan Nair* (supra) as applied to the facts emerging for consideration in the context of clause (baa) and (ba) of Explanation to Section 80HHC of the Act.

16. Question “A”:

(a) The above question as framed challenges the inclusion of the following receipts:

- (I) Hire of barges,
- (II) Proceeds of services,
- (III) Repairs of vessels

being considered similar to the specific receipts set out in clause (baa) of the Explanation to Section 80HHC of the Act i.e. brokerage, commission, interest, rent, charges or any other receipts of similar nature for the purposes of reduction by ninety percent of the receipts to arrive at profits of business. The question as framed seeks to

exclude all the three aforementioned receipts as not being similar to rent, charges, interest etc on the ground that substantial costs were incurred to earn these receipts and therefore they cease to be of nature similar to the receipts specified in clause (baa) of the Explanation to Section 80HHC of the Act. This classification on the basis of incurring of cost is not appropriate for more than one reason. Firstly, the Apex Court in ***Ravindranathan Nair*** (supra) has laid down the test of receipt being hit by the clause(baa) is income/receipts having no nexus to exports; Secondly, the decision of the Apex Court in ***ACG Associated Capsules (P) Ltd. vs. CIT*** reported in ***343 ITR 89*** has held that expenses incurred to earn the receipts are allowed to be deducted and only the net amount is to be deducted to the extent of 90% takes care of situations where cost/expenses have been incurred to earn the receipts and lastly to accept the submission of the appellant-assessee would require adding words not found in clause (baa) of the Explanation to Section 80HHC of the Act and costs in the nature of opportunity costs would in any case be incurred in not deploying the funds at another place which would result in the receipts/income. The test laid down by the Apex Court in ***Ravidranathan Nair*** (supra) of nexus with exports is the appropriate test and therefore where the interest is earned by an assessee for the

delay in making payment by the foreign buyer such receipt on account of interest would not be hit by clause (baa) of the Explanation to Section 80HHC of the Act. Thus this classification of receipts on the basis of costs incurred as canvassed by the appellant is not acceptable.

(b) (I) Hire of barges:

The Tribunal by the impugned order held that the barges are given on hire by the appellant/assessee when the same are not required by the assessee for its own activities. The receipts received on hire of barges do not have any nexus with the exports of the appellant. These receipts on hire charges are admittedly a part of profits and gains of business computed under the heads of gains of business profits and being rent, clause (baa) to Explanation of Section 80HHC of the Act would apply. Mr. Paridwala, learned counsel for the appellant submitted that the barges are not given on hire but the appellant merely renders services by carrying other people's goods on their barges. Thus, the same is not in the nature of rent or charges. Consequently, they are neither the receipts specified in clause baa (1) of the Explanation to Section 80HHC of the Act nor is it similar to them. This submission on the part of Mr. Pardiwala is contrary to the submission made before the Assessing Officer wherein

the appellant has specifically stated that “whenever barges are idle, we hire them out to third parties.” Therefore, the receipts received on such hire would be in the nature of rent or similar to rent and therefore, would fall in the items specified in clause baa (1) of Explanation to Section 80HHC of the Act. Even if one accepts the submission of the appellant that these barges continue to be in control of the appellant and they only ferry goods of others for a charge, the receipts would certainly be classified as charges or of a nature similar to it and therefore, would fall under clause baa (1) of Explanation to Section 80 HHC of the Act. The appellant has not shown that the aforesaid activity has any nexus with its export activity. Consequently, following the decision of the Supreme Court in *Ravindranathan Nair* (supra), the aforesaid charges constitute independent income and is a receipt as rent/charges or at the very least similar in nature to it. Therefore, the impugned order of the Tribunal has correctly held these receipts are covered by clause (baa) (1) of Explanation to Section 80 HHC of the Act.

(c) II & III Proceeds of Services and Repairs of Vessels:

So far a receipts on the aforesaid two heads are concerned, we find that the Tribunal in the impugned order has rendered a finding that the same are incidental to the appellant's export activities. We

specifically asked the learned counsel for the Revenue whether the aforesaid activities are in fact incidental to export activities and she informed us that it is so as is evident from the finding in the impugned order. Once, the receipts by the appellant have nexus to export activities then, in view of the decision of the Apex Court in ***Ravindrathanan Nair*** (supra), the receipts of the same cannot be reduced to the extent of 90% as provided under clause baa (i) of the Explanation to Section 80HHC. In fact, the receipts having a nexus to exports would not be an independent income to be hit/covered by clause baa of Explanation to Section 80HHC of the Act. In view of the above, we find that after the impugned order has come to a finding that the aforesaid two receipts on account of proceeds of services and repairs of vessels are incidental to export activities, then the impugned order ought to have held that the proceeds of services and repairs of vessels are not covered by clause baa of the Explanation to Section 80HHC of the Act. However we wish to clarify that so far as proceeds of services and repairs of vessels are concerned we have had no occasion to examine the exact nature of the services only in view of the finding in the impugned order that these services have a nexus to the appellant's export activity. It is on the facts as existing in this case that the decision has been rendered

and it must not be construed that in every case that Proceeds of Services and Repairs of Vessels would be covered by this decision. It is needless to state that it would depend upon the fact situation existing in each case.

To summarize, the answer to question “A” is as under;

- (I) Hire of barges is similar to specified receipts referred to clause (baa)(1) of the Explanation to Section 80HHC of the Act;
- (II) Proceeds of services and;
- (III) Repairs of vessels,

the impugned order having held that the above receipts have nexus to exports. Thus following the decision of the Apex Court in *Ravindranathan Nair* (supra) the same cannot be considered as falling under items specified in clause baa(1) of the Explanation to Section 80 HHC of the Act.

17. **Regarding Question “B”:**

The receipts specified in Question “B” are on account of sales of :

(1) pig iron (2) vessels (3) engineering products (4) materials and (5) coke breeze.

The Tribunal by the impugned order held that the aforesaid

sales do not have any link with the export activities of the appellant. Thus, being independent income, the same would be hit by clause (baa) of the Explanation to Section 80 HHC of the Act. According to the appellant, the aforesaid receipts would not fall within the province of clause (baa) of the Explanation to Section 80 HHC of the Act as they are not receipts similar to the receipts specified therein. Mr. Pardiwala, learned counsel for the appellant while accepting the fact that the aforesaid sales are purely local sales and have no relation to the export sales, yet according to him the same would not be covered by clause (baa) of the Explanation to Section 80 HHC of the Act. In support reliance is placed on the decision of this Court in *Pfizer Ltd.* (supra) where it is contented by the appellant that the amount received on account of insurance i.e. insurance receipts on account of loss by fire of stock in trade is not an independent income and would not constitute a receipt of a nature similar to the one set out in clause (baa) of the Explanation to Section 80 HHC of the Act. On the above basis it is submitted that the aforesaid sales would not be an independent income and would not fall in the nature of the receipts specified in clause (baa) of the Explanation to Section 80 HHC of the Act. We have pointed out herein above while dealing with the appellant's request to place this matter before the larger bench, that

this Court in *Pfizer Ltd.* (supra) has come to a factual finding that the insurance amount received on account of loss of stock in trade was not an independent income or a receipt similar to the items specified in clause (baa) of the Explanation to Section 80 HHC of the Act. This finding is on the basis of facts which were available before the Court in *Pfizer Ltd.* (supra). It is pertinent to note that the order of this Court Court in *Pfizer Ltd.* (supra) does not state that the stock in trade which was lost on account of fire and for which insurance amount was received was in respect of stock in trade to be sold in the local market. Therefore, by following the decision of the Apex Court decision in *Ravindranathan Nair* (supra) wherein it has been has categorically stated whether or not a particular income constitutes an independent income would depend upon whether or not it has nexus with export. In case the income/receipts has nexus with export then such receipts are not hit by clause (baa) of the explanation to Section 80HHC of the Act. However, if the income is independent of exports, then it would be hit by the clause (baa) of the Explanation to Section 80 HHC of the Act. In this case, admittedly, the sales do not have any nexus with the export earning of the appellant and therefore, would be hit by clause (baa) of the Explanation to Section 80 HHC of the Act. However it is urged by

Mr. Pardiwala learned Senior Counsel for the appellant that the test of being independent of exports would fail in case of receipts of sums referred to in Section 28(iia), (iib), (iic),(iid) and (iie) of the Act which are specifically included in clause (baa)(1) of the Explanation to Section 80 HHC of the Act as all the above income as specified do have nexus with exports. In this case, clause (baa) of the Explanation to Section 80 HHC of the Act refers to specific clauses of Section 28 of the Act as one class of receipts which have to be reduced by ninety percent of the receipts and thereafter refer in the alternative to receipts of a class by way of brokerage, commission, interest, rent charges or any other receipts of a similar nature. The words “of a similar nature” are to be read ejusdem generis only to expressions brokerage, commission, rent charges and not to specific income referred to therein as falling under specific subclauses of Section 28 of the Act. The Rule of ejusdem generis is that where a general term follows particular expression then it takes colour from the preceding expression. Thus the test of being independent of exports is only to be applied for receipts by way of brokerage, commission, rent, charges all of which form a class and that class is not exhausted by enumeration of the words as it is followed by the words of a similar nature. This test of being independent of exports has no application to

specified incomes falling under Section 28 of the Act as it is separated by a disjunctive from the the other words which have been enumerated and such words form a class which is not exhausted by the receipts specified in clause (baa) of Explanation to Section 80 HHC of the Act. Thus we do not find any substance in the above distinction being sought to be drawn by Mr. Pardiwalla the learned Counsel for the Appellant. In view of the above, we find no fault with the impugned order of the Tribunal. Accordingly question “B” is answered in the affirmative i.e. in favour of the respondent/revenue and against the appellant.

18. **Regarding Question “C”:**

The impugned order of the Tribunal has held extraction charges to be a part of the total turnover as defined in clause (ba) of Explanation to Section 80HHC of the Act. In terms of the above definition of total turnover only specific items such as freight and insurance which are attributable to transportation of goods beyond the custom station as well as any sums referred to in Section 28(iia), (iib), (iic), (iid) and (iie) thereof are excluded. Extraction charges admittedly do not fall in the excluded category. In this case, the appellant entered into agreements with mine owners to extract ore

from their mines for a consideration. However, the same was subject to a condition that such ore would be sold only to the appellant and the expenditure incurred by the assessee to extract the ore would be deducted from the purchase price payable by the appellant to the mine owners. It is the contention of the appellant that the amount received on account of extraction of ore from the mine owners was only reimbursement of the expenditure incurred by the appellant and did not have any profit and therefore, did not form part of the assessee's turnover nor of its profits. Mr. Pardiwala, learned counsel for the appellant placed reliance upon the decision of the Apex Court in ***CIT Vs. Punjab Stainless Steel Industries*** reported in **307 ELT 214**, wherein the Supreme Court held that the word "turnover" would only mean the sales proceeds received in respect of goods in which the assessee is dealing in. Therefore, where the manufacturer and exporter of Stainless Steel utensils, sells scrap as well then any amount received on that account, cannot be included within the turnover of the manufacturer and exporter of stainless steel utensils. The Tribunal by the impugned order held that the extraction of ore is the core activity of the assessee for exports. Therefore, the profits of such activity would be included in the profits of the business. We find in this case, unlike ***Punjab Stainless Steel*** (supra) extraction of ore

is an activity in which the appellant is engaged and therefore, any amount received for extraction would certainly be included in the turnover of the appellant and the decision of the Apex Court in *Punjab Stainless Steel* (supra) would have no application in the present facts . However, it was contended by the appellant that on account of having included the amounts received on account of extraction of ore in total turnover as well as the the amounts received on sales of the ore which includes the cost of extraction of ore , the amounts on account of extraction charges is being included twice in computing the total turnover. We hold that the extraction charges per se are includable in the total turnover, However, while giving effect to this order the authorities under the Act would consider the appellant's submission that there has been inclusion of extraction charges in effect twice in the total turnover and if so, would ensure that the same is included only once. However, so far as extraction charges are concerned, the impugned order has correctly held them to be includable in total turnover as defined in clause baa of the Explanation to Section 80 HHC of the Act. Therefore, question "C" is answered in the affirmative i.e. in favour of the Revenue and against the Assessee/Appellant.

19. In the result:

(I) Question “A” so far as hire of barges is concerned is answered in the affirmative i.e in favour of the Revenue and against the Appellant/Assessee. So far as Proceeds of services and repairs of vessels are concerned, impugned order records a finding of fact that they have nexus to exports, therefore the same are answered in the negative i.e in favour of the Appellant/Assessee and against the Respondent/Revenue;

(II) Question “B”, is answered in the affirmative i.e in favour of the Respondent/Revenue and against the Appellant/Assessee; and

(III) Question “C” is answered in the affirmative i.e. in favour of the Respondent/Revenue and against the Assessee subject to the authorities under the Act while giving effect to this order ensure that the extraction charges are in effect not included twice while computing the appellant's total turnover.

The appeal is disposed of in the above terms.

No order as to costs.

M. S. SANKLECHA, J.

F. M. REIS, J.

Ap/-