IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-Tax)
(Original Side)

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.217 of 2003

Jai Mica Supply Co. Pvt. Ltd.

Versus

Commissioner of Income-Tax, West Bengal-II

For the Appellant: Mr. J.P. Khaitan.

For the Respondent: Md. Nizamuddin.

Heard on. 02.08.2011.

Judgment on: August 12, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax Act, 1961 ("Act") is at the instance of an assessee and is directed against an order dated April 7, 2003 passed by the Income-tax Appellate Tribunal, "B" Bench, Kolkata in ITA No.698/Cal/1995 for the Assessment Year 1990-91 and thereby dismissing the appeal filed by the appellant.

Being dissatisfied, the assessee has come up with the present appeal.

The facts giving rise to filing of the present appeal may be summarized thus:

a) The appellant is a private liability company within the meaning of the Companies Act, 1956 and is regularly assessed to tax under the Income-tax Act, 1961 and the present appeal arises out of the assessment of the appellant for the Assessment Year 1990-91 for which the relevant previous year was the financial year ending on March 31, 1990.

b) The appellant carries on business of manufacturing various Mica products from raw mica obtained from mines.

c) Mica obtained from the mines is subjected to several operations, such as, disintegration, washing, drying and removal of the alien and scissors to obtain specific sizes. Further process is undertaken to differentiate between different qualities and to obtain different thickness.

d) The fabricated mica parts, depending upon the requirement of the buyers, are coated with silver paste by the process of screen printing. The printing machine is also filled with a small furnace for the purpose of drying the Silvered Mica parts. Such silvered mica parts are subjected to further drying in a bigger furnace at high temperature.

e) The appellant also manufactures Mica flakes by pulverizing selected mica pieces. Flakes are manufactured in different mesh specifications depending upon the buyers' requirements and are used in the manufacture of pearlescent pigment.

f) According to the appellant, the fabricated Mica parts, silvered mica parts, micanite sheets and mica flakes manufactured out of processed mica are treated as distinct commercial commodities different from the raw mica obtained from the mines.

g) During the material period, the appellant exported fabricated mica electronic components pursuant to the orders received from foreign customers. The appellant was registered with the Engineering Export Promotion Council as a manufacturer and exporter of fabricated mica parts.

h) In respect of the fabricated mica electronic components exported by it, the appellant claimed deduction under Section 80HHC of the Act and in the assessment made under Section 143(3) of the Act for the Assessment Year 1990-91, the Assessing Officer allowed the claim of the appellant under Section 80HHC in respect of the fabricated mica electronic components exported to other countries.

i) The Commissioner of Income-tax, however, issued a notice dated December 21, 1994 proposing to revise the said assessment by

directing the Assessing Officer to withdraw the deduction allowed under Section 80HHC, since according to him, the processed minerals endorse were excluded from the purview of Section 80HHC for the Assessment Year 1990-91.

j) The appellant filed detailed reply along with various enclosures thereby contending that the appellant exported mica products which were held as distinct commercial commodities different from the mineral mica obtained from the mines.

k) The Commissioner of Income-tax, however, by an order dated January 31, 1995 held that processed mica was not covered by Section 80HHC prior to the Assessment Year 1991-92 and directed the Assessing Officer to withdraw the deduction granted under the said section.

l) Being dissatisfied, the appellant preferred an appeal before the Income-tax Appellate Tribunal, where there was a difference of opinion between the members who heard the appellant's appeal. The Accountant Member was of the view that the appellant was entitled to deduction under Section 80HHC as valued products exported by the appellant were not mineral as such. The learned Judicial Member, however, was of the view that by virtue of amendment made by Finance Act, 1991, the appellant's products were not covered by

Section 80HHC during the Assessment Year 1990-91. As a result, the matter was referred to a Third Member who by an order dated March 31, 2003 agreed with the view taken by the Judicial Member and subsequently, by an order dated April 7, 2003 the Division Bench of the Tribunal dismissed the appeal filed by the appellant in view of the majority view.

Being dissatisfied, the assessee has come up with the present appeal.

A Division Bench of this Court, at the time of admission of this appeal formulated the following substantial questions of law:

"1) Whether on a true and proper interpretation of Clause (b) of Sub Section (2) of Section 80HHC of the IT Act, 1961 prior to its amendment with effect from April 01, 1991, the export of fabricated mica products, namely, fabricated mica electronic components was not eligible for deduction under Section 80HHC and the Tribunal was justified in upholding the order passed by the Commissioner of Income Tax under Section 263 withdrawing the deduction allowed in the assessment?

"2) Whether the Tribunal was justified in law in holding that the goods exported by the appellant were not manufactured products of mica or new and distinct commercial commodities different from the mineral mica obtained form the mines but only different

varieties/qualities/forms/kinds of mica and its purported findings in this behalf are wholly arbitrary, unreasonable and perverse having been arrived at by ignoring the provisions of the exports [Control] Order 1988, the Commercial names/identity of the products and the material contents of the certificates issued by the engineering Export Promotion Council, details of process undertaken by the appellant, authoritative literature, sales literature, orders of the foreign customers and the invoices raised by the appellant on the foregoing customers?

"3) Whether and in any event the circular dated July 27, 1994 issued by the Central Board of Direct Taxes was applicable for the assessment year 1990-91 and the Tribunal was justified in law in not holding that commissioner is bound by the said circular incompetent to proceed under Section 263?

"4) Whether and in any event and assuming though denying that two views were possible in the matter, the Tribunal was justified in law in upholding the order passed by the Commissioner under Section 263 when the Assessing Officer had taken a view which was not unsustainable in law?

"5) Whether and in any event the Tribunal was justified in law in seeking to uphold the order under Section 263 on a new ground neither taken in the notice issued by the Commissioner or the order

passed by him namely, alleged lack of enquiry/verification in making the assessment?"

Mr. Khaitan, the learned Counsel appearing on behalf of the appellant, in support of this appeal, has strenuously contended before us that the assessee being a manufacturer and exporter of fabricated minerals which are distinct from minerals taken from mines, is entitled to the benefit of Section 80HHC of the Act. Mr. Khaitan contends that the goods exported by his client did not come within the purview of the word "minerals and ores" within the meaning of Section 80HHC (2)(b)(ii) of the Act and thus, the learned Tribunal below committed substantial error in law in affirming the order passed under Section 263 of the Act.

Mr. Khaitan further contends that at least there was no scope of invoking Section 263 of the Act when the points involved in this appeal is not free from doubt in view of conflicting decisions of the Supreme Court in the case of Gem Granites vs. Commissioner of Income-tax, reported in 271 ITR Page 322 and Stonecraft Enterprises Vs. Commissioner of Income-tax, reported in 1999 237 ITR page 131. Mr. Khaitan, therefore, prays for setting aside the order under Section 263 of the Act.

Mr. Nizamuddin, the learned Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Mr. Khaitan and has contended that in view of the decision of the Supreme Court in

the case of Gem Granites Vs. Commissioner of Income-tax (Supra), the Tribunal below rightly dismissed the appeal.

Therefore, the first question that arises for determination in this appeal is whether the products exported by the appellant came within the purview of exclusion of the benefit of Section 80HHC of the Act as provided in sub-section 2(b) thereof for the relevant assessment year.

In order to appreciate the aforesaid question it will be profitable to refer to the provision contained in Section 80HHC of the Act it stood at the relevant time along with its amendments which were given effect to from the next assessment year:

> ***"Deduction in respect of profits retained for export business.***
> ***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, then 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 of the export business of the assessee the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee.

(1A) Where the assessee, being a suppurating 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 provision 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 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.

(2)(a) This section applies to all goods or merchandise, other than those specified in clause (b), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer) in convertible foreign exchange (within a period of six months from the end of the previous year or, where the Chief Commissioner or Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is, for reasons beyond his control, unable to do so within the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf.

(b) This section does not apply to the following goods or merchandise namely:-

(i) mineral oil; and

(ii) minerals and ores (other than processed minerals and specified in the Twelfth Schedule). (words in bracket added with effect from April 1, 1992)

The following Explanations shall be inserted by the Finance (No.2) Act, 1991 w.e.f. 1-4-1992:

Explanation 1: The sale proceeds referred to in clause (a) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2: For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to a branch, office warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50 of the Customs Act, 1962 (52 of 1962), shall, for the purpose of this section, be deemed to be the sale proceeds thereof.

(3) For the purpose of sub-section (1), profits derived from the export of goods or merchandise out of India shall be the amount which bears to the profits of the business 9as computed under the head "Profits and gains of business or profession"), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

The following sub-section (3) shall be substituted for the existing sub-section (3) by the Finance (N0.2) Act, 1991, w.e.f. 1-4-1992:

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

(a) where the export out of India of goods or merchandise manufactured 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) 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 by the assessee and of trading goods, the profits derived from such export shall,-

(i) in respect of the goods or merchandise manufactured 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 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 clause (iiib) and (iiic), of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.*

Explanation: For the purposes of this sub-section,-

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3);

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods;

(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods;

(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover'

(f) "trading goods" means goods which are not manufactured by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,-

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business as computed under the head "Profits and gains of business or profession";

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or profession") the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of sector 288, certifying that the deduction has been correctly claimed on the basis of the amount of export turnover.

(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 auditors auditing the accounts of the Export House or Trading House under the provisions of this Act or under any other law.*

Explanation: For the purposes of this section,-

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 19j73 (46 of 1973), and any rules made thereunder;

(aa) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962);

(b) "export turnover" means the sale proceeds, received in, or brought into, India by the assessee in convertible foreign exchange in accordance with clause (a) of sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962);

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

***Provided** that in relation to any assessment year commencing on or afte4r the 1st day of April, 1991, the expression "total turnover" shall have efffect as if it also excluded any sum referred to in clauses (iiia), (iiib) and (iiic) of Section 28;*

The following clause (baa) shall be inserted by the Finance (No.2) Act, 1991, w.e.f. 1-4-1992:

(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;

*(bb) ****

(c) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India;

(d) "supporting manufacturer" means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing) goods or merchandise and selling such goods or

merchandise to an Export House or a Trading House for the purposes of export.

Deduction in respect of earnings in convertible foreign exchange.

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 a hotel or of a tour operator, approved by the prescribed authority in this behalf or of a travel agent, 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 a sum equal to the aggregate of-*

(a) fifty per cent of the profits derived by him from services provided to foreign tourists; and

(b) so much of the amount out of the remaining profits referred to in clause (a) as is debited to the profits and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised for the purposes of the business of the assessee in the manner laid down in sub-section (4):

Provided *that a hotel or, as the case may be, a tour operator approved by the prescribed authority an or after the 30th day of November, 1989 and before the 1st day of October, 1991, shall be deemed to have been approved by the prescribed authority for the purposes of this section in relation to the assessment year commencing on the1st day of April, 1989 or the 1st day of 1990 or, as the case may be, the 1st day of April, 1991 if the assessee was engaged in the business of such hotel or as such tour operator during the previous year relevant to any of the said assessment years.*

Explanation: The expression "office machines and apparatus" includes all machines and apparatus used in offices, shops, factories, workshops, educational institutions, railway stations, hotels and restaurants for doing

office work and for data processing (not being computers within the meaning of section 32AB).

23. *Steel furniture, whether made party or wholly of steel.*

24. *Safes, strong boxes, cash and deed boxes and strong room doors.*

25. *Latex foam sponge and polyurethane foam.*

26. *****

27. *Crown corks, or other fittings of cork, rubber, polyethylene or any other material.*

28. *Pilfer-proof caps for packaging or other fittings of cork, rubber, polyethylene or any other material.*

29. ****.*

THE TWELFTH SCHEDULE

[see section 80HHC (2)(b)(ii)]

PROCESSED MINERALS AND ORES

(i) *Pulverised or micronised–barytes, calcite, steatite, pyrophylite, wollastonite, zircon, bentonite, red or yellow oxide, red or yellow ochre, talc, quartz, felspar, silica powder, garnet, silliminite, fireclay, ballclay manganese dioxide orre.*

(ii) *Processed or activated-bentonite, diatomious earth, fuller's earth.*

(iii) *Processed-kaolin (china clay), whiting calcuium carbonate.*

(iv) *Beneficated-chromite, fluorspar, graphite, vermiculite, ilminite, brown ilminite (lencoxene) rutile, monazite and other mineral, concentrates.*

(v) *Mica block, mica splittings, mica condenser films, mica powder, micanite, silvered mica, punched mica, mica paper mica tapes, mica flakes.*

(vi) Exfoliated-vermiculite, calcined kyanite, magnesite, calcined magnestie, calcined alumina.

(vii) Sized iron ore processed by mechanical screening or crushing and screening through dry process or mechanical crushing, screening, washing and classification through wet process.

(viii) Iron ore concentrates processed through crushing, grinding or magnetic separation.

(ix) Agglomerated iron ore.

(x) Cut and polished minerals and rocks including cut and polished granite.

Explanation: For the purposes of this Schedule, "processed", in relation to any mineral or ore, means-

(a) dressing through mechanical means to obtain concentrates after removal of gangue and unwanted deleterious substances or through other means without altering the minerological identity:

(b) pulverisation, calcination or micronisation;

(c) agglomeration from fines;

(d) cutting and polishing;

(e) washing and levigation;

(f) beneficatioin by mechanical crushing and screening through dry process;

(g) sizing by crushing, screening, washing and classification through wet process;

(h) *other upgrading techniques such as removal of impurities through chemical treatment, refining by gravity separation bleaching, floatation or filtration."*

On a plain reading of the aforesaid provision, we find that for the assessment year in question, if the exported items came within the purview of goods and merchandise which are *"minerals and ores",* the same should not get the benefit of Section 80HHC of the Act whereas from very next assessment year, if the exported goods and merchandise are found to be of the nature of the processed minerals as indicated in Twelfth Schedule of the Amended Act, those should get the benefit of deduction.

The aforesaid amended provision has been given effect to not retrospectively but prospectively from the next assessment year. Thus, from the next assessment year, the appellant would get the benefit of the said section for exporting the similar item of goods and merchandise.

We are unable to accept the contention of Mr. Khaitan that simply because the goods and merchandise exported by his client were made by converting mica into pieces of specific sizes, the same lost its character as goods and merchandise of the category of "minerals and ores". In the sub-section 2(b) for the relevant assessment year what was excluded from the benefit of the section 80HHC was not simply the export of "minerals or ores" but also "goods and merchandise, namely, minerals or ores" and thus, any articles for sale if made of minerals or ores came within the purview of such expression although

from the next assessment year, processed articles from minerals have been given benefit.

From the materials on record, we find that the subject-matter of export was really processed minerals within the meaning of the Twelfth Schedule and the appellant's item of export came within item No.(v) of the Twelfth Schedule, namely, mica blocks, mica splittings, mica condenser films, mica powder, micanite, slivered mica punched mica, mica paper, mica tapes, mica flakes and the goods in question are really processed mineral as would appear from explanation given to the said Schedule.

We have already pointed out that the said benefit of amendment can be available from the next assessment year and thus, for the assessment year in question, the exported goods cannot get the benefit of Section 80HHC of the Act.

The next question that falls for determination is whether it was a fit case of invoking Section 263 of the Act.

After hearing the learned Counsel for the parties, we find that the Assessing Officer gave the benefit of Section 80HHC of the Act notwithstanding the fact that the legislature had excluded the operation of Section 80HHC in respect of goods and merchandise of mineral items processed by the appellant for the assessment year in question. Thus, the decision to give benefit though law did not permit grant of such benefit is a grave error on the part of the Assessing

Officer which has resulted in the loss of revenue and consequently, it was a fit case for invoking the jurisdiction under Section 263 of the Act.

We do not find any substance in the contention of Mr. Khaitan that there were conflicting views on this point when the notice under Section 263 of the Act was issued. At one point of time, when the matter was before the Tribunal, the decision of Two-Judge-Bench in the case of Stenocraft Enterprises (Supra), created a doubt as to the applicability of Section 80HHC of the Act, but after the decision of the Supreme Court in the case of Gem Granites (Supra), there is no scope of any confusion and we therefore, find that the Commissioner of Income-tax did not commit any illegality in invoking of Section 263 of the Act at a point of time when there was no confusion in the field and the Tribunal also rightly dismissed the appeal filed by the appellant.

We, thus, find no merit in the appeal. The appeal is, thus, dismissed by answering all the five points formulated in this appeal in the affirmative and against the assessee.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)