

## Cit vs Max India Ltd. on 1 November, 2007

**Bench: S.H. Kapadia, B. Sudershan Reddy**

### ORDER

1. In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under Section 263 of the Income Tax Act, 1961, two views on the said word "profits" existed. In our view the matter is squarely covered by the judgment of this Court in the case of Malabar Industrial Co. Ltd. v. CIT reported in (2000) 243 ITR 83; as also by the judgment of the Calcutta High Court in the case of Russell Properties P. Ltd. v. A. Chowdhury, Addl. CIT .

2. At this stage we may clarify that under paragraph 10 of the judgment in the case of Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83 this Court has taken the view that the phrase "prejudicial to the interests of the revenue " under Section 263 has to be read in conjunction with the expression "erroneous" order passed by the assessing officer. Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue ; or where two views are possible and the Income Tax Officer has taken one view which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue , unless the view taken by the Income Tax Officer is unsustainable in law. According to the learned Additional Solicitor General, on an interpretation of the provision of Section 80HHC(3) as it then stood the view taken by the assessing officer was unsustainable in law and therefore the Commissioner was right in invoking Section 263 of the Income Tax Act. In this connection, he has further submitted that in fact the 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the assessing officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with Section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of Section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers under Section 263 of the Income Tax Act.

3. For the above reasons, civil appeals filed by the department stand dismissed.

4. No order as to costs.