IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.10.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.1538 of 2008

M/s.Fisher Sanmar Ltd., ... Appellant

vs.

The Assistant Commissioner of Income Tax,
Company Circle II(1),
Chennai-600 034 ... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income-Tax Appellate Tribunal, Madras "A" Bench, dated 28.02.2008 in ITA No.720/Mds/2007, for the assessment year 2003-04.

For Appellant : Mr.R.Venkatanarayanan for M/s.Subbaraja Aiyar Padmanabhan and Ramamani

For Respondent : Mr.Karthik Ranganathan

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JUDGMENT

[Delivered by T.S.Sivagnanam, J.]

This appeal by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, Madras "A" Bench (the 'Tribunal' for brevity), in ITA No.720/Mds/2007, for the assessment year 2003-04.

2.The Appeal has been admitted, vide order dated 14.08.2008, on the following Substantial Question of Law:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the appellant is not entitled to deduction u/s.80HHC in respect of 90% of income from sale of DEPB license?"*

3.We have heard Mr.R.Venkatanarayanan, the learned counsel for the appellant/assessee and Mr.Karthik Ranganathan, the learned Counsel for the respondent/Revenue.

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4.The learned counsel for the assessee as well as the Revenue agree that the above Substantial Question of Law has been

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answered in the case of **M.Lankalingam vs. The Commissioner of Income Tax, Chennai (T.C.A.No.1013 of 2008, dated 1.8.2018)**. The operative portion of the judgment reads as follows:

> *"6.Writ Petitions were filed by the exporters challenging the third and fourth proviso to Section 80HHC(3) of the Act. The contention was that these conditions are severable and therefore, these two conditions should be declared as ultra vires and severed. All the writ petitions, which were filed in various States of the Country, were clubbed together and were directed to be heard by the Hon'ble High Court of Gujarat, by the Hon'ble Supreme Court. The Hon'ble High Court of Gujarat, vide judgment* ***in Avani Exports v. Commissioner of Income Tax [(2012) 348 ITR 391(Gujarat)],*** *quashed the impugned amendment only to the extent that the operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assessees, whose export turnover is above Rs.10 crores. In other words, the retrospective amendment should not be detrimental to any of the assessees.*

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7.As against the said judgment, the Revenue, filed Appeals before the Hon'ble Supreme Court and during the course of argument, the learned Attorney General of India accepted the legal position that those exporters whose turnover is less than Rs.10 crores and other like the respondents(therein) with turnover of more than Rs.10 crores would be at par and both would be entitled to the benefits. Accordingly, the Hon'ble Supreme Court substituted the direction issued by the High Court with the following direction:-

"Having seen the twin conditions and since 80HHC benefit is not available after 1.4.05, we are satisfied that cases of exporters having a turnover below and those above 10 cr. should be treated similarly. This order is in substitution of the judgment in Appeal."

The decision in the said case has been reported in ***CIT v. Avani Exports [(2015) 58 taxmann.com 100 (SC)].***

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8.In our considered view, the decision in the case of ***CIT v. Avani Exports*** *(supra) would squarely apply to the facts of this case and the Tribunal committed an error in applying the decision in* ***Sterling Foods*** *(supra).*

9.Mr.R.Kumar, learned counsel for the assessee submitted that the Court may set aside the order and direct the relief to be granted, since the Assessing Officer has not given this deduction in the assessment order dated 30.03.2006, nor given any reasons for not allowing the deduction.

10.We refrain from passing any positive direction except to state the correct legal position. In fact, the assessee while challenging the assessment order before the Commissioner of Income Tax (Appeals), in the memorandum of grounds, has specifically stated that the Assessing Officer erred in not granting proper deduction under Section 80HHC of the Act and in particular, the Assessing Officer is not right in excluding exchange gain of Rs.2,58,204/- from export turnover and DEPB of Rs.36,48,697/- in computing "Profits of the Business".

11.Thus, this computation necessarily has to be done by the Assessing Officer and not by this Court.

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*12.One of us (T.S.Sivagnanam, J.), had an occasion to consider similar issue in two writ petitions filed by the assessee, one in W.P.No.13910 of 2008 wherein, the assessee sought for declaration to declare the amendment to Section 80HHC as ultra vires and in the other writ petition, viz., W.P.No.13909 of 2008, their challenge was to the assessment order. Following the decision in **CIT v. Avani Exports** (supra), both the writ petitions were allowed.*

*13.In the light of the above, the tax case appeal is allowed and the order passed by the Tribunal is set aside. Consequently, the order passed by the Commissioner of Income-tax (Appeals) is set aside and the matter is remanded to the Assessing Officer to apply the decision in the case of **CIT v. Avani Exports** (supra) and proceed to grant proper deduction to the assessee under Section 80HHC of the Act. Since the assessment pertains to the year 2003-04, the Assessing Officer is directed to give priority to the matter and conclude the proceedings within a period of three months from the date of receipt of a copy of this judgment. No costs"*

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5.Thus, by following the above decision, the Tax Case Appeal, filed by the assessee, is allowed and the order passed by the Tribunal is set aside and the matter is remanded to the Assessing Officer to apply the decision in the case of **Avani Exports v. Commissioner of Income Tax [(2012) 348 ITR 391 (Gujarat)]** and to proceed to grant proper deduction to the assessee under Section 80HHC of the Act. Since the assessment pertains to the year 2003-04, the Assessing Officer is directed to give priority to the matter and conclude the proceedings within a period of three months from the date of receipt of copy of this judgment. No costs.

(T.S.S.J.) **(V.B.S.J.)**
23.10.2018

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Index:Yes/No

To

1.The Income-Tax Appellate Tribunal, Chennai "D" Bench.
Madras.

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T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

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