IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.08.2018

CORAM

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

Tax Case (Appeal) No.1013 of 2008

M.Lankalingam ..Appellant/Appellant

-vs-

The Commissioner of Income Tax,
Chennai. ..Respondent/Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'B' Bench, Chennai dated 29.02.2008 in ITA No.1909/Mds/2007 for the assessment year 2003-04.

For Appellant : Mr.R.Kumar
For Respondent : Mr.D.Prabhu Mukunth Arunkumar, Standing Counsel

J U D G M E N T
[Delivered by T.S.Sivagnanam, J.]

Heard Mr.R.Kumar, learned counsel for the appellant and Mr.D.Prabhu Mukunth Arunkumar, learned Standing Counsel for the respondent.

2.This appeal, by the assessee, is directed against the order passed by the Income Tax Appellate Tribunal 'B' Bench, Chennai dated 29.02.2008, in ITA No.1909/Mds/2007 for the assessment year 2003-04.

3.The appeal has been admitted on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in applying the decision of the Supreme Court in the case of CIT v. Sterling Foods, 237 ITR 579 (SC), rendered with reference to deduction under Section 80HH of the Income Tax act, to computation of deduction under Section 80HHC of the Act?"

4.The Tribunal, by the impugned order, rejected the appeal petition filed by the appellant by following the decision in the case of Commissioner of Income Tax vs. Sterling Foods reported in (1999) 273 ITR 579 (SC). This appeal was entertained primarily on the ground that the decision in the case of Sterling Foods (supra) arose under Section 80HH of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and not under Section 80HHC of the Act.

5.A brief background with regard to the amendment, which was made to Section 80HHC(3) of the Act would be relevant at this juncture. The amendment was made by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect i.e., with effect from 1st April, 1992. By this amendment, certain benefits were extended to the exporter, who are entitled to claim according to Section 80HHC of the Act. The amendment also carved out two categories of exporters, viz., those whose export is less than Rs.10 crores per year and those exporters, whose exports turnover is more than Rs.10 crores per annum. Insofar as entitlement of these benefits to the exporter having turnover of more than Rs.10 crores per annum is concerned, two conditions were stipulated in the third and fourth proviso, which were required to be satisfied for claiming benefits. The two conditions being,

(i) the assessee had an option to choose either Duty Drawback or Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(ii) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme.

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.

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)].

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.

12.One of us (T.S.Sivagnanam, J.), had an occasion to consider similar issue in two writ petitions filed by an 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.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

abr
To

1.The Commissioner of Income Tax,
Chennai.

2.The Income Tax Appellate Tribunal 'B' Bench, Chennai.

3.The Assistant Commissioner of Income Tax,
Company Circle II(3), V Floor, New Block,
121 M.G.Road, Chennai-34.

4.The Commissioner of Income Tax (Appeals) III,
121, Mahatma Gandhi Road, Chennai.

Copy to: The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to Mr. T.N. Seetharaman, Advocate Sr.52570/18

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VGI(CO)
EU(06/09/2018)