IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 22-02-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Judgment reserved on : 18-02-2019 Judgment delivered on : 22-02-2019

T.C.A.Nos.1331 TO 1335 of 2005

M/s.Parwaz Food Packer (PFP) ... Appellant in all Appeals

-vs-

Deputy Commissioner of Income Tax,
Circle VII,
(Formerly City Circle IV (1) (Scrutiny),
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai-600 034. ... Respondent in all Appeals

T.C.A.No.1331 of 2005 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', dated 24.08.2004, passed in ITA No.2349/Mds/2003.

T.C.A.No.1332 of 2005 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'D', dated 01.06.2004, passed in ITA No.23/Mds/2004.

T.C.A.No.1333 of 2005 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', dated 24.08.2004, passed in ITA No.567/Mds/2001.

T.C.A.No.1334 of 2005 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', dated 24.08.2004, passed in ITA No.2350/Mds/2003.

T.C.A.No.1335 of 2005 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench 'C', dated 24.08.2004, passed in ITA No.1251/Mds/2002.

For Appellant : Mrs.Pushya Sitharaman,
Senior Counsel,
for Mr.Rathana Asohan.

For Respondent : Mr.Karthik Ranganathan,
Senior Standing Counsel.

JUDGMENT

Dr.Vineet Kothari,J.

Assessee has filed the above Tax Case Appeals viz., T.C.A.Nos.1331,1333,1334 and 1335 of 2005 under Section 260-A of the Income Tax Act, 1961, in short, 'the Act', aggrieved by the orders passed by the learned Income Tax Appellate Tribunal, in short, 'the Tribunal', Chennai Bench 'C', dated 24.08.2004, for Assessment Years 1992-1993, 1997-1998, 1993-1994 and 1994-1995 respectively, and T.C.A.No.1332 of 2005 against the order passed by the learned Income Tax Appellate Tribunal, Chennai Bench 'D', dated 01.06.2004, for Assessment Year 1995-1996.

2. The following Substantial Questions of Law arise for consideration of this Court :

> *(i) Whether the Assessee, namely, M/s.Parwaz Food Packer, as a Supporting Manufacturer, is entitled to deduction under Section 80HHC (1A) of the Act for the export made by it for and on behalf of Export Houses viz., M/s.Lloyds International Limited and M/s.Adani Export Limited ?*

(ii) Whether the condition of production of Certificates of the Export House and Report of the Accountant, as prescribed under sub-section (4A) of Section 80HHC of the Act is a mandatory requirement or not ?

(iii) Whether the Export Premium or Commission received by the Assessee from the Export Houses at the rate of 3.25% of the FOB value of the exports made by it on behalf of the Export Houses is also entitled to deduction under Section 80HHC (1A) of the Act in terms of the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax v. Baby Marine Exports, (2007) 290 ITR 323 (SC) ?

(iv) Whether the Reassessment Proceedings under Section 147/148 of the Act for Assessment Years 1992-1993 and 1993-1994 beyond a period of four years of Assessment Years in question in the year 1999 by the Assessing Authority to disallow part of

deduction under Section 80HHC (1A) of the Act to the extent of Export Premium was justified or not ?

3. The learned Tribunal, while passing the common order on 24.08.2004, disallowed the said claim of the Assessee under Section 80HHC (1A) of the Act, following the decision of the Hon'ble Supreme Court in the case of *Sea Pearl Industries* v. *Commissioner of Income Tax*, (2001) 247 ITR 578, with the following observations :

> *"22. In the case before us, the **assessee had not entered into any agreement with the foreign buyers and it had entered into an agreement with only M/s.Lloyds** and in the agreement the assessee was called as "The Processors" and clause No.1 of the agreement shows that the assessee has exported the goods on behalf of M/s.Lloyds. The export orders were secured by M/s.Lloyds and the agreement refers the assessee as Processor only. Clause No.2 shows that all the **shipping documents were arranged in the name of M/s.Lloyds and L.C. was opened in favour of M/s.Lloyds and all shipping documents were done by the assessee for which it has received service charges at 3.5% on FOB value of exports**. As per Appendix-I of the agreement, the export order is in the name of the*

Export House, bill of lading essentially in the name of Export House, commercial invoice in the name of the Export House.

*23. **There was no privity of contract between the foreign buyers and the assessee**. The assessee could not sell any goods in its own name to the foreign buyers. Since as per the agreement between the export houses and the assessee the goods were to be boarded on the ship by them, **the documents were prepared "on account of the export houses"** as the export houses alone had contract to export goods to the foreign buyers. Contracts were not endorsed in favour of the assessee. If the foreign buyers failed to pay the price, the assessee had no cause of action against the foreign buyers as the assessee is not party to the agreement with the foreign buyer. Even as per the agreement with the export houses, **the assessee was only processors and the export houses are the exporter**. As observed by the CIT (A), the foreign buyers made letters of credit in the name of the export houses and thereafter, of course, that letter of credit was endorsed in the name of the assessee by the export houses. The contracts between the export houses and foreign buyers were independent and exclusive. The assessee has no hand in it. The contracts between the assessee and the export houses are also separate contracts and those contracts cannot bind the foreign* *buyers as there was no privity of contract with the assessee, the processors and the foreign buyers. Merely because the G.R.I. form prescribed by the Reserve Bank of India under the rules framed under the Foreign Exchange Regulation Act for accounting for the receipt of foreign exchange was signed by the assessee, they will not become the exporters. As per the contract between the assessee and the export houses, the f.o.b. price in foreign exchange has to be received by the assesee and the* ***draw back was received by the assessee, only because the assessee has paid the customs duty and it is the person who paid the customs duty who is entitled to get the draw back****. There was also specific provision in the agreement with the export houses that the benefits under the Customs and Central Excise Act will be delivered by the assessee.* ***The benefits under the export-import policy regarding REP licence will be obtained by the export houses****. There is no merit in the contention of the assessee that it has exported its products by selling them to the export house after the goods had crossed the customs barrier as the question of title or property in the goods exported is not relevant to section 80HHC and the section does not in terms require the exporter to be the owner of the goods.*

24. Under section ***80HHC*** *as it stood during the relevant period,* ***only the exporter was entitled to claim***

the benefits *and the* ***export houses are the real exporters****, who have got privity of contract with the foreign buyers. As per the contract with the foreign buyers, foreign exchange was receivable by the export houses. Only because of the contract between the export house and the assessee,* ***the foreign exchange was later credited in the assessee's bank as instructed by the export houses. Only on behalf of the export houses, the assessee shipped the goods*** *on account of the exporter and merely because of a statement in the contract that the title to the goods will pass only after the goods crossed the customs frontiers that will not make the assessee as real exporter.* ***Here the export houses have admittedly got the benefit under section 80HHC and there is no dispute that no certificate was issued by the export houses in favour of the assessee****. As per the scheme of the statute, there will be only one exporter in respect of the export and that exporter had already got the benefit and processors or supporting manufacturers is not entitled for relief u/s 80HHC due to non-production of disclaimer certificate by the assessee. Moreover,* ***it was investigated by the Revenue that the Export House has availed the benefit u/s 80HHC which is evident from the CIT (A) order for the AY 1994-95 and 1995-96*** *in page no.13 which is as follows :-*

> *'As the appellant has not given details of the claim made by the Export houses in the latter's tax assessments, enquiries were made through the Investigation wing at Bombay in the case of the main export house, M/s.Lloyds International Limited through which the appellant has claimed to have routed its exports. This has led to the startling recovery that M/s.Lloyds has not only availed itself of the benefits of deduction under sec.80HHC on the premium obtained on the sale of import licences in toto, it did not also disclaim any turnover in favour of the appellant or any others and indicated clearly that the entire export turnover effected by it was its own. (copies of the form 10CCAC filed for both the years by the above export house are annexed to this order.) Having therefore allowed the benefit to pass into the hands of the export house as a consequence of the agreements entered into with the same, it is crystal clear that the refusal of the appellant to provide a disclaimer certificate from the export houses on the plea that it is the 'real exporter', is only a thin attempt to hide the fact that no turnover was disclaimed in its favour by them.'*

*25. Considering the entire facts and circumstances of the case, we are of the view that the ratio of the decision of the **Hon'ble Supreme Court reported in 247 ITR 578 (supra) applies to this case and the assessee is not entitled to the benefit of section 80HHC of the Act**, as the real exporter is the export house which has not given disclaimer certificate in prescribed form and this ground is dismissed."*

4. Mrs.Pushya Sitharaman, learned Senior Counsel, appearing for the Assessee, has submitted that the Assessee made direct exports of the goods to the foreign buyers, namely, sea products, such as, shrimps, prawns, fish etc., on behalf of the Export House viz., M/s.Lloyds International Limited and M/s.Adani Exports Limited and received the convertible foreign exchange into his own accounts from the foreign buyers and though the Certificates, as envisaged in Sub-section (4A) of Section 80HHC of the Act were not produced by the Assessee, the other relevant documents, such as, Bill of Lading, would support the claim of the Assessee of the said deduction under Section 80HHC (1A) of the Act; the said conditions under Sub-section (4A) should be read as directory and the Assessee should be held entitled to the said deduction under Section 80HHC (1A) of the Act for Assessment Year 1997-1998. The learned Senior Counsel further submitted that as far as the Export Premium or Commission received from the Export House at the rate of 3.25% of the FOB value of exports is concerned, the controversy has been settled by the Hon'ble Supreme Court in the case of *Baby Marine Exports* (supra) and, therefore, to the extent of Export Premium, the Assessee should be held entitled to the benefit of deduction under Section 80HHC (1A) of the Act in terms of the said decision of the

Hon'ble Apex Court.

5. On the question of reopening of Assessment under Section 147/148 of the Act for Assessment Years 1992-1993 and 1993-1994, learned Senior Counsel for the Appellant/Assessee, submitted that there was no failure on the part of the assessee to disclose truly and fully the relevant material particulars before the Assessing Authority, who had rightly allowed the said deduction in original assessment under Section 143 (3) of the Act and, on the basis of the subsequent findings of the learned Commissioner of Income Tax (Appeals) for Assessment Year 1996-1997, he could not have reopened the assessment for Assessment Years 1992-1993 and 1993-1994 only to disallow the benefit of deduction under Section 80HHC (1A) of the Act to the extent of Export Premium received by the assessee and the Tribunal has gone a step further and erred in wholly disallowing the benefit under Section 80HHC (1A) of the Act, on the ground of non-production of relevant Certificate and Report of Accountant under Section 80HHC (4A) of the Act. She further submitted that notices for reopening under Section 147/148 of the Act having been admittedly issued in the year 1999, much after the end of relevant Assessment Year 1993-1994, after obtaining the approval of the learned CIT, they were

apparently time barred and, as such, reassessment could not have been made against the assessee. Finally, she would contend that the Export Houses were only getting profits on account of sale of REP Licence on the basis of export made by the assessee also and the exports were actually made by the assessee only as per the agreement between the parties.

6. Conversely, Mr.Karthik Ranganaghan, learned Senior Standing Counsel, appearing for the Respondent/Revenue, has urged before us that in view of the admitted failure of the assessee to produce the relevant mandatory Certificates and Declarations from Export Houses and Report of Chartered Accountant, which Certificates are essential to establish that there is no double claim of deduction under Section 80HHC of the Act, one by the Main Export House and the other by the Supporting Manufacturer like the assessee in the present case, and since there was no production of such Certificates and Declarations, which was mandatory, there was no question of allowing any deductions under Section 80HHC (1A) of the Act to the Assessee.

7. The learned Senior Standing Counsel has also submitted that

even though in view of the decision of the Hon'ble Supreme Court in the case of *Baby Marine Exports* (supra), the Export Premium received by the assessee from the Export Houses to the extent of 3.25% of the FOB value could be treated as part of export turnover and could be entitled to deduction under Section 80HHC (1A) of the Act, but, in view of non-compliance of conditions in Sub-section (4A) of Section 80HHC of the Act, by virtue of non-furnishing of Declarations from Export Houses, even the said claim of the assessee to the extent of Export Premium or Commission received from Export Houses will not be eligible for deduction under Section 80HHC (1A) of the Act. The learned Senior Standing Counsel further submitted that only direct exports by the Exporters are eligible for deduction under Section 80HHC (1) of the Act, whereas, the Supporting Manufacturers, whose exports are eligible to get this deduction under Section 80HHC (1A) of the Act, shall be subject to compliance of all the conditions under Sub-section (4A) of Section 80HHC of the Act.

8. On the question of reopening of Assessment under Section 147/148 of the Act, the learned Senior Standing Counsel for the Revenue drew our attention to the time limit prescribed for issuing notices under

Sections 147/148 in S.149 of the Act, wherein, prior to amendment with effect from **01.06.2001** by Finance Act,2001, in Clause (iii) of Clause (a), the prescribed limitation was up to 10 years, if the escaped assessment amounts to Rs.1.00 lakh or more and, therefore, he submitted that since the disallowance under Section 80HHC (1A) of the Act was more than the said prescribed limit of Rs.1.00 lakh, the reopening was within the limitation. He further urged that the agreement between the Assessee and the Export Houses clearly indicated that the export was for and on behalf of the Export Houses only and the Assessee, as an agent of the Export Houses only, was entitled to only the service charges or the Commission to the extent of 3.50% of the FOB value of the exports, which deduction the assessee could not get, in view of the admitted failure to comply with the mandatory conditions of subsequent Sub-section (4A), by producing relevant declarations. He further submitted that deduction in respect of these very exports was already availed by the Export House itself under Section 80HHC (1) of the Act and, therefore, double deduction could not be given and that was the reason why the Export House did not give the Disclaimer Declaration to the Assessee under Section 80HHC (4A) of the Act.

9. We have heard the learned counsel for the parties at length

and perused the material on record.

10. We have no iota of doubt that the conditions prescribed under Section 80HHC (1A) of the Act read with Section 80HHC (4A) of the Act are mandatory and cannot be held to be directory in nature and the Assessee cannot claim benefit under the said provisions as Supporting Manufacturer, in the absence of relevant Certificate from the Export House, and the Report of the Chartered Accountant, as stipulated therein. It is clear from the Scheme of the provisions of Section 80HHC of the Act that direct exporters get the said benefit under Sub-section (1) of Section 80HHC of the Act, whereas, the Supporting Manufacturers started getting the said deduction after the amendment of Section 80HHC with effect from **01.04.1989**. The said provisions of Section 80HHC to the relevant extent are quoted below for ready reference :

> *"**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*

to the extent of profits, referred to in sub-section (1B), 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 derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.*

(1A) Where the assessee, ***being a supporting 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 proviso 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 to the extent of profits, referred to in sub-section (1B), 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.*

(1B) For the purposes of sub-sections (1) and (1A), the ***extent of deduction*** *of the profits shall be an amount equal to—*

(i) ***eighty per cent*** *thereof for an assessment year beginning on the 1st day of April, 2001;*

(ii) ***seventy per cent*** *thereof for an assessment year beginning on the 1st day of April, 2002;*

(iii) ***fifty per cent*** *thereof for an assessment year beginning on the 1st day of April, 2003;*

(iv) ***thirty per cent*** *thereof for an assessment year beginning on the 1st day of April, 2004,*

and ***no deduction*** *shall be allowed in respect of the assessment year beginning on the* ***1st day of April, 2005 and any subsequent assessment year****.*

(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, within such further period as the competent authority may allow in this behalf.

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*(4A) The deduction under sub-section **(1A) shall not be admissible unless the supporting manufacturer furnishes** in the prescribed form along with his return of income,—*

*(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 auditor** auditing the accounts of the Export House or Trading House under the provisions of this Act or under any other law.*
>
> *xxxxx*
>
> *(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 purposes of export"*

11. The purpose of providing the aforesaid twin conditions of Report of Accountant and Disclaimer Certificate from Export House is obviously to avoid the double claim of deductions in respect of the same exports and earning of foreign exchange for the country, one in the hands of Export House and the other in the hands of Supporting Manufacturer. The disclaimer on the part of Export House to the extent to which the export is allowed to be made on behalf of Export House by Supporting Manufacturer is, therefore, necessary to establish the claim of deduction under Section 80HHC of the Act.

12. The Report by a Chartered Accountant, qualified under

Section 288 (2) of the Act, is to verify the said fact at the hands of an independent professional. These two requirements, namely, Disclaimer Declaration and Report of Accountant are, therefore, at the root of the claim by the Supporting Manufacturer. In fact, the definition of '**Supporting Manufacturer**' in Clause (d) of Explanation to the said proviso also clearly stipulates that to the **Supporting Manufacturer**, who is manufacturing or processing goods or merchandise and selling such merchandise to an Export House or a Trading House, for the purpose of export, the claim of deduction is given under Sub-section (1A) of Section 80HHC to support and give incentive to such Supporting Manufacturers, as indicated above. The contention raised on behalf of the assessee that these conditions can be taken as directory is, therefore, liable to be rejected and the compliance of these conditions is, therefore, held to be mandatory. Since, admittedly, the assessee, in the present case before us, in none of the Assessment Years, has complied with these conditions, he is not entitled to deduction under Section 80HHC (1A) of the Act, at all.

13. Once we come to the conclusion that the Assessee is not entitled to said deduction for want of compliance with the mandatory conditions, there is no doubt in holding that even though Export Premium

would form part of FOB value and could have been entitled to deduction under Section 80HHC (1A) of the Act in terms of the decision of the Hon'ble Supreme Court in the case of *Baby Marine Exports* (supra), the distinguishing feature in the case before the Hon'ble Supreme Court and the case before us is that, in the case before the Hon'ble Supreme Court, the assessee complied with all the conditions and was held entitled to deduction under Section 80HHC (1A) of the Act and the only issue was, whether such deduction would extend to Export Premium also or not, and that question was answered in favour of the assessee by the Apex Court. There is no dispute on the said proposition laid down by the Hon'ble Supreme Court, but the entitlement to get such deduction under Section 80HHC (1A) of the Act would depend upon the compliance with the mandatory conditions vide Sub-section (4A) of furnishing requisite Disclaimer Declaration from the Export House about the disclaimer and Report of Chartered Accountant and non-compliance of which would be fatal to the claim of the assessee under Section 80HHC (1A) of the Act altogether on the amount of FOB value as well as Export House Premium.

14. Coming to the issue of Reassessment under Section

147/148 of the Act, we not only find that pre-amendment, the time limit for issuance of notice was up to 10 years, as pointed out by the learned Standing Counsel for the Revenue, but, we also are of the view that once we come to the conclusion that in the absence of compliance with the mandatory conditions the Assessee is not at all entitled to the said deduction under Section 80HHC (1A) of the Act, the resort to Section 147/148 of the Act by way of Reassessment for disallowing the said deduction to the assessee or in the original assessment proceedings becomes academic and on the ground of limitation alone, the law, as interpreted by us, about the mandatory compliance of the conditions cannot be allowed to be defeated for those years also, if the contention raised by the Assessee in this regard were to be accepted for Assessment Years 1992-1993 and 1993-1994. The said question also, therefore, deserves to be answered against the Assessee.

15. Therefore, we do not find any merit in these Appeals filed by the Assessee and the questions framed above deserve to be answered in favour of the Revenue and against the Assessee, which we do so. Accordingly, we hold that the Assessee is not entitled for any deduction

under Section 80HHC (1A) of the Act for any of the Assessment Years in question before us, for want of compliance with the mandatory conditions prescribed under Section 80HHC (1A) read with Sub-section (4A) and in respect of FOB value of export made by it on behalf of Export Houses as well as in respect of Export Premium received by it during these years and the question of resort to Section 147/148 of the Act for Reassessment is, therefore, academic and left unanswered.

16. Appeals of Assessee are dismissed. No costs.

Index : Yes (V.K.,J.) (C.V.K.,J.)
Internet : Yes 22-02-2019
Speaking Order

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To

1.Deputy Commissioner of Income Tax,
Circle VII,
(Formerly City Circle IV (1) (Scrutiny),
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai-600 034.

2.Income Tax Appellate Tribunal,
Chennai Bench 'C',
Chennai.

3.Income Tax Appellate Tribunal,
Chennai Bench 'D',
Chennai.

DR.VINEET KOTHARI, J.
and
C.V.KARTHIKEYAN, J.

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T.C.A.Nos.1331-1335 / 2005

22-02-2019