IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case (Appeal) No.621 of 2011

Shri R.Sathiyan
Prop M/s.Suriya International
32, Kamarajapuram North, Karur. ...Appellant/Respondent

Vs.

The Assistant Commissioner of Income Tax
Circle-II, Range-II
Tiruchirapalli. ...Respondent/Applicant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai dated 14.01.2011 in M.A.170/Mds/2010 in ITA No.1836/Mds/2007 against the order of the Income Tax Appellate Tribunal Bench C Chennai. dated 14/05/2010 in ITA.No.1836/Mds/2007 for Amenment year 2004-2005. Commissioner (A) against the order of the Income Tax(A), Trichy, dated 30/04/2007 in ITA.No.630/06-07 for the amenment year 2004-2005 against the order of the Deputy Commissioner of Income Tax, Circle - II, Tiruchirapalli, dated 21-12-2006 in P.A.No.AAYPS 7833F

For Appellant : Mr.M.P.Senthil Kumar

For Respondent : Mr.M.Swaminathan
Senior Standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J.)

The Assessee R.Sathiyan, Proprietor of M/s.Suriya International, Karur has filed this appeal under Section 260A of the Income Tax Act, raising the purported substantial questions of law from the order of the Income Tax Appellate Tribunal dated 14.05.2010, in which the matter regarding taxability of

DEPB licence and deduction under Section 80HHC of the Act was remanded back by the learned Tribunal to the Assessing Authority to be decided in the light of a Special Bench in the course of "Topman Exports -Vs- ITO 318 ITR (AT) 87" . The relevant portion in paragraph No.4 of the order is quoted below for ready reference.

> "4. We have heard the rival submissions and perused the orders. Question raised in this appeal is on treatment of DEPB for the purpose of computing deduction under Section 80HHC of the Act. How the DEPB benefits have to be considered, whether at the time of receipt or at the time of accrual or at the time of credit or on sale, have all been considered by the Special Bench in the case of Topman Exports (supra). Neither AO nor did the ld.CIT(A) had the benefit of the wisdom of the Special Bench at the time of dealing with this issue. Hence, in the interest of justice, we set aside the order of the AO and ld.CIT(A) in this regard and remit the issue back to the file of the AO for deciding it based on the guidelines laid down by The Special Bench in the case of Topman Exports (supra)."

2. The Revenue seems to have filed a Miscellaneous Application in M.A.No.170/Mds/2010 for Assessment Year 2004-05 for submitting before the Tribunal that the judgment of a Special Bench of the Tribunal in "Topman Exports -Vs- ITO" stood overruled or reversed by Bombay High Court in the case of "C.I.T -Vs- Kalpataru Colours and Chemicals" reported in 328 ITR 451. However, the learned Tribunal, by the order dated 14.01.2011 passed in the above Miscellaneous Application, maintained its remand order made earlier on 14.05.2010 by observing as under.

> "7. Therefore, for maintaining judicial discipline, we find it appropriate to modify the directions given to the AO in the order of the Tribunal as under:
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> Hence in the interest of justice, we set aside the order of AO and Ld.CIT(A) on the aspect of Sec.80HHC deduction, and remit the issue back to the file of the AO for deciding it based on the principles evolving out of Topman Export's case and the decisions of any higher judicial authorities, on the relevant issue, which are available to the AO when he considers it afresh.
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> 8. Needless to mention assessee has to be given a fair chance to represent its case.

9. The Misc.Petition filed by the Revenue is disposed of with the above directions.”

3. Thus, the matter stood remanded back to the Assessing Authority finally even with the later order passed in the Miscellaneous Application. It is brought to our notice that the Hon'ble Supreme Court, in the case of “M/s.Topman Exports -Vs- C.I.T” decided on 08.02.2012 reported in [2012] 3 S.C.C.593 has reversed the view of the Bombay High Court decision and has held in favour of the Assessee as under.

> “22. The aforesaid discussion would show that where an assessee has an export turnover exceeding Rs.10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section 80HHC, but he would get the benefit of exclusion of a smaller figure from profits of the business under explanation (baa) to Section 80HHC of the Act and there is nothing in explanation (baa) to Section 80HHC to show that this benefit of exclusion of a smaller figure from profits of the business will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs.10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in
> computation of a bigger export profit. The High Court, therefore, was not right in coming to the conclusion that as the assessee did have the export turnover exceeding Rs.10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB
> and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and M/S Topman Exports vs Commr Of Income Tax,Mumbai on 8 February, 2012 Indian Kanoon - http://indiankanoon.org/doc/54571471/ 22 (iiie) of

Section 28, the assessee was entitled to a deduction under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.

23. The impugned judgment and orders of the Bombay High Court are accordingly set-aside. The appeals are allowed to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction under Section 80HHC in the case of the appellants in accordance with this judgment. There shall be no order as to costs."

4.The present appeal was admitted by the Coordinate Bench of this Court on 31.01.2012 on the following substantial questions of law.

"(1) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal had rightly exercised its jurisdiction under Section 254 (2) of the Income Tax Act in view of the subsequent decision of Bombay High Court (328 ITR 451)?

(2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in rectifying its order dated 14.05.2010, which was decided based on the decision of the Special Bench of the Income Tax Appellate Tribunal, Mumbai dated 11.08.2009 (318 ITR (AT) 87) by relying on the subsequent decision of the Bombay High Court dated 28.06.2010 in the case of CIT -Vs- Kalpataru Colours & Chemicals (328 ITR 451)?

(3) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not appreciating that when DEPB receivable is assessed as income under Section 28(iv) of the Inome Tax Act, 1961, the same has to be treated as export receipts while computing deduction under Section 80HHC since 28(iv) was not referred to in Explanation (baa) to Section 80HHC?"

5. Having heard the learned counsel for the parties and in view of the aforesaid legal position, since the matter stands remanded back to the Assessing Authority in the present case, we leave it free for the assessing authority to comply with the law laid down by the Hon'ble Supreme Court and pass appropriate orders in accordance with law, without answering the substantial questions of law raised in the present appeal as such.

6. The Appeal accordingly stands disposed of. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

KST

To

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

2. The Commissioner of Income Tax(A),
   Trichy.

3. The Deputy Commissioner of Income-Tax,
   Circle - II, Tiruchirapalli.

+1cc to Mr.M.Swaminathan, Advocate, S.R.No.18816
+1cc to Mr.Philip George, Advocate, S.R.No.18597

T.C.(A) No.621 of 2011

MP(CO)
KKV/16/06/2020