

In the High Court of Judicature at Madras

Dated: 14.07.2015

Coram

The Honourable **Mr.JUSTICE R.SUDHAKAR**
and
The Honourable **Ms.JUSTICE K.B.K.VASUKI**

Tax Case (Appeal) No.355 of 2006

Commissioner of Income Tax
Chennai

.... Appellant

Vs.

M/s.Devi Marine Food Exports Ltd.,
3/284, Muttukadu Road,
Neelankarai, Chennai - 41.

.... Respondent

APPEAL under Section 260A of the Income Tax Act against the orders dated 31.08.2005 in I.T.A.No.225/Mds/2001 on the file of the Income Tax Appellate Tribunal Madras 'A', Chennai for the assessment year 1994-95.

For Appellant : Mr.Arun Kurien Joseph
for Mr.T.Ravikumar
Standing Counsel for Income Tax

For Respondent: Mr.S.Sridhar

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Tax Case (Appeal) filed by the Revenue as against the order of the Income Tax Appellate Tribunal for the assessment year 1994-1995 was admitted by this Court on the following substantial question of law:

"When the statute is clear as to what benefits a manufacturer/supporting manufacturer is entitled to, can the benefits which are exclusively made available to a manufacturer under sub section 3 of Section 80HHC can be extended by any fiction to a supporting manufacturer?"

2. The brief facts of the case are as follows:

The assessee/respondent is a company engaged in the business of export of marine food products as supporting manufacturer. The assessment in this case relates to the assessment year 1994-95. During the assessment year in question, they claimed deduction under Section 80HHC of the Income Tax Act as well as the export turnover with regard to the goods exported as a supporting manufacturer. The Assessing Officer, originally, completed the assessment allowing the total claim. Subsequently, the assessment was reopened, since the Assessing Officer felt that the assessee was not entitled to claim

deduction with regard to the exports done as a supporting manufacturer. The Assessing Officer, after taking into consideration Explanation (b) to Section (4B) of Section 80HHC of the Income Tax Act read with Sub-section (2)(a), held that the export turnover should not be included for the purpose of claiming deduction under Section 80HHC of the Income Tax Act. Accordingly, the Assessing Officer restricted the claim of deduction claimed under Section 80HHC of the Income Tax Act. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who allowed the appeal holding as follows:

"2.2 I have considered the issue keeping in view the assessment order as well as the submissions of the appellant. In this connection I find sufficient force in the submissions of the appellant that the Company would be entitled to deduction u/s.80HHC with regard to the export done as a supporting manufacturer. In this connection I find that the Delhi Bench of the ITAT in the case of Eastern Leather Products (P) Ltd., as referred to above has clearly brought out that although the Section does not specifically provided for the benefit u/s.80HHC on export incentives to supporting manufacturers as such incentives are normally received by the trading/export houses but in the present case the assessee company being a supporting manufacturer has received the export incentives directly from the

Government on the goods exported as per the orders received through the export house and the same have been assessed as income as per the provisions of sec.28 of the Income-tax Act. Further, I find that the appellant had also submitted a disclaimer certificate from the export house before the Assessing Officer wherein it was shown that the incentives had not be claimed. Under these circumstances, I find sufficient force in the plea of the appellant that it would lead to a situation where the benefit will not accrue to anyone and such a situation will certainly defeat the meaning of the incentives which has been provided in sec.80HHC Thus in view of the facts as brought out above and also keeping in view the decision of the ITAT Delhi Bench in the case of Eastern Leather Products (P) Ltd., the Assessing Officer is directed to allow the claim for deduction u/s. 80HHC with regard to the export done as a supporting manufacturer."

(Emphasis supplied)

3. Aggrieved by the said order of the Commissioner of Income Tax (Appeals), the Revenue has filed an appeal before the Tribunal. The Tribunal supported the view of the Commissioner of Income Tax (Appeals) and dismissed the appeal holding as follows:

"5. The plain reading of the above provisions clearly shows that there is no proviso in sub-section (3A) providing for increase of the amount of profit by

sums referred to in clauses (iiia), (iiib) and (iiic) of section 28. At this juncture we agree with the contention of the Id. DR that doctrine of casus omissus is a well settled rule of interpretation and as observed by the Hon'ble Madhya Pradesh High Court we have no power to read something which has been left by the Legislature. But the matter ends there. We think if we simple go behind sub-section (3A) then it would become very clear that normally supporting manufacturer would not be entitled to receive sums referred to in clauses (iiia), (iiib) and (iiic) of section 28, which comprises of profit on sale of licence granted under the Import Control Order, cash assistance received or receivable from the Government under any of the Scheme of the Government of India and any duty or customs or excise which may be claimed and commonly known as duty draw back. Such incentives which is the common parlance known as export incentives can naturally be claimed only by actual exporters of the goods and merchandise and that is why the Legislature in its wisdom did not include profits arising from such items under sub-section (3A).

6. Now let us examine the issue from two angles. If the actual exporter hands over the amount of export incentives to the supporting manufacturer by way of sale price, then such sale price becomes trading receipts in the hands of supporting manufacturer and has to be included in his export turnover as well as

total turnover and profit arising has to be included in business profits and thus such supporting manufacturer becomes entitled to deduction under section 80HHC on such incentives by calling them simply trading receipts. If we view the same matter from another angle, i.e. if such export incentives are endorsed in favour of supporting manufacturer by the exporthouse, then he becomes entitled to receive the same from Government authorities and to our mind deduction under section 80HHC has to be allowed because again the same can be treated as part of the trading receipts in view of the agreement between the parties to hand over the export incentive to supporting manufacturer. In this background we are of the considered opinion that when deduction under section 80HHC can be allowed on export incentives to supporting manufacturers only when such supporting manufacturer had received the same either in the form of trading receipt by way of increase in the sale price or by way of endorsement of such incentives in his favour. In such a situation it cannot be said that no deduction under section 80HHC(3A) would be available to supporting manufacturer because no proviso for the same is there in comparison to section 80HHC(3) because the same partakes the form of trading receipts. In view of these circumstances we find no reason to interfere with the order of the Id.CIT(A)."

4. Aggrieved by the order of the Tribunal, the Revenue is before this Court.

5. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

6. The core issue in this case is whether the supporting manufacturer is entitled to seek the benefit of cash assistance (Export incentive) granted by the Government exclusively to the Export House or Trading House in terms of sub-Section (3) to Section 80HHC of the Income Tax Act and if such incentive is passed on by the Export House or Trading House to the supporting manufacturer, whether such amount would be hit by the provisions of sub-section (3) to Section 80HHC of the Income Tax Act.

7. Before going into the merits of the case, the relevant provision, namely, Section 80HHC of the Income Tax Act needs to be seen.

Deduction in respect of profits retained for export business.

"80HHC. (1)

(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)

(2).....

(3) For the purposes of sub-section (1),—

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee ;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such

export ;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,—

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee ; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall

be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided also *that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—*

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) 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 :

Provided also *that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be*

further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that,—

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme.

Explanation.—For the purposes of this clause, “rate of credit allowable” means the rate of credit allowable under the Duty Free Replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :

Provided also *that in case the computation under clause (a) or clause (b) or clause (c) of this sub-section is a loss, such loss shall be set off against the amount which bears to ninety per cent of—*

(a) any sum referred to in clause (iiia) or clause (iiib) or clause (iiic), as the case may be, or

(b) any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, as applicable in the case of an assessee referred to in the second or the third or the fourth proviso, as the case may be, the same

proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Explanation.—For the purposes of this sub-section,—

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods ;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3) ;

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(f) "trading goods" means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,—

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or

Trading Houses, the profits of the business ;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.

(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."

(Emphasis supplied)

8. A plain reading of the above provision reveals that Section 80HHC(1A) of the Income Tax Act provides that the supporting manufacturer shall be entitled to a deduction of profit derived by the assessee from the sale of goods or merchandise. Clause (3) of Section 80HHC provides the manner in which the deduction should be arrived at and it also provides for increase of the amount of profit by sums referred to in clauses (iiia) (iiib) and (iiic) of Section 28 of the Income Tax Act. However, similar provision is not available for the purpose of computation of profits in clause (3A) of Section 80HHC in relation to the supporting manufacturer. Clause (4A) of Section 80HHC provides that deduction under Clause (1A) would be admissible if the supporting manufacturer furnishes the certificate in the prescribed form along with the return of income.

9. In the instant case, the Export House received export orders and the same was passed on to the assessee company for execution. The assessee company exported the goods directly to the foreign constituents, for which they received both payment and export incentives directly from the Government. Section 80HHC of the

Income Tax Act does not specifically provide benefit to the supporting manufacturer on export incentives, which was normally received by the Export House. In this case, the assessee, being a supporting manufacturer, had received the export incentives directly from the Government on the goods exported as per the orders received through the Export House and the same had been assessed as income as per the provisions of Section 28 of the Income Tax Act. The assessee had also submitted a disclaimer certificate from the Export House before the Assessing Officer in terms of Section 80HHC(4A) of the Income Tax Act.

10. If the agreement between the Export Trading House and the supporting manufacturer clearly provides for increase in sale price, the amount equivalent to the export incentive and to that extent a certificate is issued by the Export Trading House in terms of clause (4A) to Section 80HHC of the Income Tax Act, then it is a clear case that the Trading House, which is entitled to seek benefit under Section 80HHC(1), passed on the benefit to the supporting manufacturer.

11. If the Trading House is agreed to and in terms of the said

agreement, they have passed on the additional price - export incentive, supported by the certificate in terms of Clause (4A) to Section 80HHC, then the requirement under clause (1A) to Section 80HHC is satisfied by the supporting manufacturer. The incentives stated in Section 28(iia) (iib) and (iic) of the Income Tax Act, no doubt, would accrue only to the Export Trading House. But once the said amount stands transferred to the supporting manufacturer by the Export House or Trading House, it takes the colour of additional price and that is in relation to the agreement between the parties subject to issuance of certificate in terms of Clause (4A) to Section 80HHC of the Income Tax Act. In the instant case, the assessee had directly exported the goods to the foreign constituents and received the export incentives directly from the Government based on the agreement between the Export House and the assessee, as a supporting manufacturer.

12. The above-said view of ours is fortified by the decision of the Supreme Court in the case of ***Commissioner of Income-tax, Thiruvananthapuram V. Baby Marine Exports*** reported in **[2007] 290 itr 323**, wherein the Supreme Court has considered the similar claim of the Supporting Manufacturer under Section 80HHC of the

Income Tax Act and held as follows:

"19. According to s.80HHC91), the export house in computing its total income is entitled to deduction to the extent of the profit derived by the assessee from the export of the goods or merchandise. Whereas, according to s.80HHC91A), the supporting manufacturer shall be entitled to a deduction of profit derived by the assessee from the sale of goods or merchandise. The term "supporting manufacturer" has been defined in this section and it reads as under:

"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 the purposes of export'.

According to the said definition, the respondent clearly comes within the purview of supporting manufacturer. On plain construction of s.80HHC(1A) the assessee being supporting manufacturer shall be entitled to a deduction of the profit derived by the assessee from the sale of goods or merchandise.

20. The respondent-a supporting manufacturer sold the goods or merchandise to the export house and received the entire FOB value of the goods plus the export house premium of 2.25 per cent of the FOB value. The relevant cl. 12 of the agreement has already been extracted in the earlier part of the judgment and

according to the said clause, the export house is under obligation to pay to the supporting manufacturer an incentive of 2.25 per cent on the FOB value according to the terms of the agreement.

The respondent, a supporting manufacturer, admittedly sold the goods to the export house in respect of which the export house has issued a certificate under proviso to sub-s.(1). According to the section, the respondent-assessee, in computing the total income be allowed a deduction to the extent of profits referred to in sub-s.(1B).

21. The Tribunal has arrived at definite conclusion that the export house premium is nothing but an integral part of sale price realized by the assessee - a supporting manufacturer from the export house. The Tribunal further held that the export house premium cannot possible be considered to be either commission or brokerage, as a person cannot earn commission or brokerage for himself.

22. The High Court has upheld the findings of the Tribunal. In our considered view, the order of the Tribunal is based on proper construction of s.80HHC(1A) of the IT Act that the export house premium is an integral part of the sale price realized by the assessee from the export house.

23. We find no merit in the submission of the appellant that Indian currency could not be subject-matter of deduction under s.80HHC. The requirement of realizing

the sale proceeds of the goods or merchandise in convertible merchandise (sic-foreign exchange) is applicable only to the export house and a claim for deduction under s.80HHC(1). The requirement of realization of sale proceeds in foreign exchange expressly made inapplicable to the supporting manufacturer by s.80HHC(2A) and further the supporting manufacturer's claim of deduction is only under s.80HHC(1A) and not under s.80HHC(1) which applies to export houses only.

24. The submission of the appellant that the premium earned by the respondent assessee is totally unrelated to export is fallacious and devoid of any merit. This submission of the appellant is also contrary to the specific terms of the agreement between the appellant (sic-export house) and the respondent.

25. On plain construction of s.80HHC(1A), the respondent is clearly entitled to claim deduction of the premium amount received from the export house in computing the total income. The export house premium can be included in the business profit because it is an integral part of business operation of the respondent which consists of sale of goods by the respondent to the export house.

26. The order of the Tribunal, which has been upheld by the High Court in the impugned judgment, is based on proper construction of s.80HHC of the IT Act, 1961. The appeal filed by the appellant being devoid of any

merit is accordingly dismissed."

13. Therefore, so long as the Export Trading House transfers the export incentive accrued to its export turnover in the form of additional price to the supporting manufacturer pursuant to an agreement entered into between them, supported by Clause (4A) to Section 80HHC of the Income Tax Act, the Department cannot deny the benefit of deduction claimed under Section 80HHC (1A) of the Income Tax Act.

14. In the light of the above, we answer the question of law in favour of the assessee and against the Revenue. Accordingly, this Tax Case (Appeal stands dismissed. No costs.

Index :Yes/No
Internet :Yes/No
sl

(R.S.,J) (K.B.K.V.,J)
14.07.2015

To

1. The Income Tax Appellate Tribunal Madras 'A' Bench, Chennai.
2. The Commissioner of Income Tax (Appeals) XIII, Chennai.
3. The Joint Commissioner of Income Tax, Special Range VII, Chennai.

R.SUDHAKAR,J.

AND
K.B.K.VASUKI,J.

sl

Tax Case (Appeal) No.355 of 2006

14.07.2015