

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.07.2015

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUDHAKAR**
and
THE HONOURABLE Ms.JUSTICE **K.B.K.VASUKI**

Tax Case (Appeal) Nos.298 and 299 of 2015

Commissioner of Income Tax
Chennai.

.. Appellant in both T.C.(A)s

versus

M/s.Orient Express
26-B, Jawaharlal Nehru Salai,
Ekkaduthangal,
Chennai - 600 057.

.. Respondent in both T.C.(A)s

PRAYER: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 as against the order dated 10.06.2014 made in I..T.A..Nos.816&817/Mds/2014 on the file of the Income Tax Appellate Tribunal, Madras 'B' Bench for the assessment year 1999-2000 & 2003-04.

For appellant

: Mr.T.Ravikumar
Standing Counsel for Income Tax

J U D G M E N T

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

The above Tax Case (Appeals) are filed by the Revenue as against the order of the Income Tax Appellate Tribunal raising the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessee was entitled to deduction on profit from sale of DEPB from its total income without fulfilling the conditions prescribed in the 3rd proviso to Section 80HHC of the Income Tax Act?

2. Whether in the facts and circumstances of the case, the Tribunal was right in overlooking the fact that in the absence of 3rd proviso to Section 80HHC of the Income Tax Act, the assessee would not be entitled to deduction of profit from sale of DEPB license from its total income in the light of Explanation (baa) to Section 80HHC and Section 28(iii) of the Income Tax Act?"

2. The assessee is engaged in the business of manufacture of leather and leather garments. The assessment in these cases relate to the assessment years 1999-2000 and 2003-2004 and for the said assessment years, the assessee claimed deduction under Section

80HHC of the Income Tax Act. The Assessing Officer denied the said claim on the ground that the turnover of the assessee during the year exceeded Rs.10.00 crores and hence the assessee had not satisfied the twin conditions in the amended provision of Section 80HHC(3) of the Income Tax Act; consequently, the assessee was not entitled to the benefit under Section 80HHC of the Income Tax Act. Aggrieved by the same, the assessee preferred appeals before the Commissioner of Income Tax (Appeals), who by following the decision of the Gujarat High Court in the case of ***Avani Exports & Others V. CIT*** reported in ***348 ITR 391 (Guj.)***, allowed the appeals by directing the Assessing Officer to recompute the deduction. As against the said order of the Commissioner of Income Tax (Appeals), the Revenue preferred appeals before the Income Tax Appellate Tribunal. The Tribunal, following the said decision of the Gujarat High Court, which was relied on by the Commissioner of Income Tax (Appeals), partly allowed the appeal holding as follows:

"We have heard the submissions made by the representatives of both the sides and have perused the orders of the authorities below. We find that the assessee has rightly claimed deduction under Section 80HHC in accordance with judgment of the Hon'ble Supreme Court of India in the cases of Topman Exports reported as 342 ITR 49 (SC) and IPCA Laboratory Ltd.,

Vs. DCIT reported as 266 ITR 521 (SC0 (supra). We do not find any infirmity in the order of the CIT(Appeals) in deleting the dis-allowance made by the Assessing Officer u/s.80HHC of the Act. However, for computation of deduction, we deem it appropriate to remit the file back to the Assessing Officer. The Assessing Officer shall re-compute the deduction in accordance with the decision rendered in the case of M/s.Avani Exports & Others Vs. CIT (supra). Accordingly, the appeals of the Revenue are partly allowed for statistical purposes."

3. Aggrieved by the order of the Tribunal, the Revenue has filed the present Tax Case (Appeals) raising the above-mentioned substantial questions of law.

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

5. It is seen that Section 80HHC(3) of the Income Tax Act was amended by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect from 1st April, 1998 by way of adding second, third, fourth and fifth proviso to Section 80HHC(3) and inserting clause (iiid) and (iiie) in Section 28 with effect from 1st April, 1998 and 1st April 2001 respectively.

6. The dispute arose due to the condition contained in third and fourth proviso to Section 80HHC(3), which mandates satisfaction of two conditions by the assessee whose export turnover is more than Rs.10.00 crores to claim the benefit under Section 80HHC of the Income Tax Act. This amendment classified the exporters into two categories, i.e., whose export is less than Rs.10.00 crores and more than Rs.10.00 crores. The assessee, whose export is more than Rs.10.00 crores has to satisfy the twin conditions imposed in the third and fourth proviso to Section 80HHC(3) of the Income Tax Act. The twin conditions were: (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 Duty Remission Scheme.

7. The said amendment came to be challenged in a batch of writ petitions throughout the Country, which got transferred to the Gujarat High Court. The Gujarat High Court in the case of ***Avani Exports & Ors. V. Commissioner of Income Tax & Ors. reported in (2012)***

348 ITR 391 quashed the 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 assesseees, whose export turnover is above Rs.10 crores, holding as follows:

"26. On consideration of the entire materials on record, we, therefore, find substance in the contention of the learned counsel for the petitioners that the impugned amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assesseees whose assessments were still pending although such benefit will be available to the assesseees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assesseees.

27. We, accordingly, quash the impugned amendment only to this 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 assesseees whose export turnover is above Rs.10 crore. In other words, the retrospective amendment should not be detrimental to any of the assesseees."

8. The Revenue challenged the above-said decision of the Gujarat High Court before the Supreme Court and the Supreme Court in the case of ***Commissioner of Income Tax V. Avani Exports reported in [2015] 58 taxmann.com 100 (SC)***, while upholding the decision of the Gujarat High Court clarified and held as follows:

"5. We find that in essence the High Court has quashed the severable part of third and fourth proviso to Sec.80HHC(3) and it becomes clear therefrom that challenge which was laid to the conditions contained in the said provisos by the respondent has succeeded. However, to make the position crystal clear, we substitute the direction of 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."

With the aforesaid clarification all these SLPs including that of assessee filed against the judgment of M.P. High Court are disposed of."

9. The Revenue, on the premise that the decision of the Gujarat High Court is pending before the Supreme Court has filed the present Tax Case (Appeals). Now the Supreme Court has rendered a finding

that the exporters having a turnover below Rs.10.00 crores and above Rs.10.00 crores should be treated similarly and the amendment to Section 80HHC(3) is effective prospectively.

10. We find that the case of the respondent/assessee falls within the parameters of the above-said decision of the Gujarat High Court, affirmed by the Supreme Court. Hence, following the above-said decision of the Gujarat High Court, affirmed by the Supreme Court, we do not find any reason to entertain these appeals.

11. In the result, the above Tax Case (Appeals) are dismissed. No costs. Consequently, M.P.No.1 of 2015 is closed.

Index: Yes / No
Internet: Yes / No

(R.S.,J.) (K.B.K.V.,J.)
07.07.2015

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To

The Income Tax Appellate Tribunal, Madras 'B' Bench.

R.SUDHAKAR,J.
AND
K.B.K.VASUKI,J.

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