IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.2.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A).No.99 of 2007

Commissioner of Income Tax
Chennai. .. Appellant/Appellant

Vs.

M/s.Sun T.V. Ltd.,
No.93A, Kodambakkam High Road
Chennai - 600 034. .. Respondent/Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 3.8.2006 made in ITA No.125/Mds/2002 for the assessment year 1998-99, against the Order of the Commissioner of Income Tax (Appeals)-VI, 121, Mahatma Gandhi Road, Chennai-600 034 dated 15.11.2001 and made in ITA No.130/2001-02/VI against the Order of the Deputy Commissioner of Income Tax, Media Circle-II, Chennai-600 034 dated 22.3.2001 and made in PAN/GIR No.135-S

For Appellant : Mr.J.Narayanaswamy
Junior Standing Counsel (IT)
For Respondent : Mr.P.S.Raman, Senior Counsel
M/s.P.Gayathri Jothilakshmi & Y.Anitha

J U D G M E N T
(Delivered by P.D. DINAKARAN, J.)

This appeal is directed against the order of the Income Tax Appellate Tribunal dated 3.8.2006 made in ITA.No.125/Mds/2002 for the assessment year 1998-99, raising the following substantial question of law:

"Whether in the facts and circumstances of the case, the Tribunal

was right in treating the right to telecast the programme in foreign countries, as a sale of goods or merchandise eligible for the purpose of deduction under Section 80HHC?

2.1. Only a woodcut reference to the facts of the case is suffice. The assessee company is engaged in the business of telecasting Tamil Programmes through satellite. The assessee company entered into agreements with four parties, viz., (i) MTV Channel P. Ltd., Colombo, (ii) Radio Asia, South Africa, (iii) Singapore Cable Vision, Singapore; and (iv) Singapore Television Twelve P. Ltd., Singapore giving them rights to telecast programmes produced by the appellant, and for having given the rights to the above parties, the appellant received an amount of Rs.50,86,342/- as remuneration. The appellant claimed the said amount as deduction under Section 80HHC of the Income Tax Act (for brevity, "the Act"). However, the Assessing Officer, rejected the same on the ground that there was no sale of any goods or merchandise in this case and only assignment of right has taken place.

2.2. The appeal preferred by the assessee against the said order of the Assessing Officer was allowed by the Commissioner of Income Tax (Appeals), observing that the assessee has assigned rights to telecast the programmes in foreign countries either by sale of video cassettes or with the help of satellite and in any case, after entering into agreement with the foreign parties, the appellant forfeits its right to telecast these programmes in those countries, and therefore, the transaction can effectively be termed as sale of goods or merchandise.

2.3. On appeal, at the instance of the Revenue, the Tribunal upheld the order of the Commissioner of Income Tax (Appeals) and decided the issue in favour of the assessee. Hence, the present appeal raising the question of law referred to above.

3. The main thrust of the argument of Mr.J.Narayanaswamy, learned Junior Standing Counsel for the appellant is that deduction under Section 80HHC of the Act is applicable only for profits derived from export of goods and merchandise, and thus cannot apply to the transaction of the assessee who has not exported any goods or merchandise, but only given to the foreign parties the rights to telecast the programme.

4. Mr.P.S.Raman, learned Senior Counsel for the assessee in his replication asserted that the order of the Tribunal warrants no interference, as the same was passed after carefully wading through the records and reiterated the application of the ratio laid down in the decision of the Division Bench of the Bombay High Court in Abdulgafar A.Nadiadwala v. Assistant Commissioner of Income Tax and Others, [2004] 267 ITR 488, in all fours to the facts of the case on hand.

5. We have given careful consideration to the submissions made on behalf of both sides.

6. For considering the issue raised in this appeal, the primal point that has to be determined is whether the product involved in this case can be said to be "goods" and/or "merchandise", as defined under Section 80HHC of the Act.

7. At this juncture, a reference to Section 80HHC of the Act is essential:

> "Section.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 of the profits derived by the assessee from the export of such goods or merchandise:
>
> .....
>
> (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.
>
> Explanation.--For the purposes of this clause, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.
>
> (b) This section does not apply to the following goods or merchandise, namely:--
>
> (i) mineral oil; and
>
> (ii) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.--The sale proceeds referred to in clause (a) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2.--For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

(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 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 Duty Remission Scheme; and

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

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.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form along with the return of income, 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 in accordance with the provisions of this section.

(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.

(4B) For the purposes of computing the total income under sub-section (1) or sub-section (1A), any income not charged to tax under this Act shall be excluded.

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

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder;

(aa) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other

establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) ;

(b) "export turnover" means the sale proceeds received in, or brought into, India by the assessee in convertible foreign exchange in accordance with clause (a) of sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962).

(ba) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962):

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 ;

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by--

(1) ninety per cent. of any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India ;

(c) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or Trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India;

(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 the purposes of export.

8. The provisions of the Act do not define the word “goods” or “merchandise”. Hence, a reference to meaning of "goods" and "merchandise" as can be inferred from the law settled so far would be a guiding factor to decide the case on hand.

9. The Larger Bench of the Apex Court in Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308, while testing whether the property involved in a transaction is "goods" for the purposes of sales tax held as under:

> "The term "goods" includes all types of movable properties, whether those properties be tangible or intangible. In India the test to determine whether a property is "goods" for the purpose of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. The Intellectual property, once it is put on to a medium, whether it be in the form of books or canvas or computer discs or cassettes, and marked would become "goods". A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."

10. The said view of the Larger Bench of the Apex Court was also adopted by a Three Judge Bench of the Apex Court in Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1.

11. From the law as enunciated from the decisions referred supra, "goods" may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If the above attributes are satisfied, the same would be goods.

12. In the case on hand, the Appellate Tribunal as well as Commissioner of Income Tax (Appeals), after careful consideration of the facts of the case, found that the assessee assigned rights to telecast the programmes in foreign countries either by sale of video cassettes or with the help of satellite, of course after entering into agreements with foreign parties, which forfeits its right to telecast these programmes in those countries. We are, therefore, satisfied that the attributes required for bringing the property involved within the meaning of "goods" is satisfied with reference to its utility; capability of being bought and sold; and capability of being transmitted, transferred, delivered, stored and possessed.

13. In view of our above finding that the property involved is "goods", we find no hesitation to hold that the assessee is entitled to deduction under Section 80HHC of the Act, and our above view is fortified with the decision of the Division Bench of the Bombay High Court in Abdulgafar A.Nadiadwala v. Assistant Commissioner of Income Tax and Others, [2004] 267 ITR 488.

14.1. Alternatively, it is contended by Mr.J.Narayanaswamy, learned standing counsel for the Revenue that the deduction could be claimed by the assessee only under Section 80HHE or 80HHF of the Act, but not under Section 80HHC; and that since Section 80HHF of the Act providing deduction in respect of profits and gains from export or transfer of any film software, television software, music software, television news software, including telecast rights was inserted by the Finance Act, 1999, with effect from 1.4.2000, the assessee is not entitled to deduction even under Section 80HHF of the Act for the assessment year 1998-99.

14.2. A contention made in the above lines, was carefully considered by the Division Bench of the Bombay High Court in Abdulgafar A.Nadiadwala v. Assistant Commissioner of Income Tax and Others, [2004] 267 ITR 488 and rejected.

14.3. Apropos the applicability of Section 80HHE of the Act, the same is related to deduction in respect of profits from export of computer software, etc., and not to the telecast rights of films, which are governed under Section 80HHF of the Act.

14.4. Moreover, in view of the ratio laid down by the Apex Court in Tata Consultancy Services v. State of A.P. and Bharat Sanchar Nigam Ltd. v. Union of India, referred supra, we are of the considered opinion that

merely because Section 80HHF came to be inserted with effect from 1.4.2000, that, by itself, does not mean the benefit of Section 80HHC could be denied to the transactions which are governed under Section 80HHC of the Act. Of course, it goes without saying that in view of the specific provision under Section 80HHF for deductions in respect of profits and gains from export or transfer of any film software, television software, music software, television news software, including telecast rights, the assessee could very well in future claim such deductions and the same would be taken care of under Section 80HHF(5) of the Act to prevent double benefits being claimed by the assessee in such events. However, in view of our clear finding that the transaction in question is covered under section 80HHC, it is inappropriate to hold that merely because Section 80HHF was not on the statute book during the assessment year in question, viz., 1998-99, the assessee is not entitled to claim deduction without any hindrance under Section 80HHC in spite of compliance of the ingredients thereunder.

In the result, finding no substantial question of law arising for our consideration, this appeal is dismissed. No costs.

sasi

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1.The Assistant Registrar,
Income Tax Appeallate Tribunal
Madras Bench "B" Chennai.

2.The Commissioner of Income Tax (Appeals)-VI
Chennai.

3.The Commissioner of Income Tax, Chennai.

4.The Deputy Commissioner of Income Tax,
Media Circle -II, Chennai-600 034.

+1 cc to Mrs. Pushya Sitaraman, Advocate Sr.No.12466.

+1 cc to Mr.J.Ravichandran, Advocate Sr.No.12538.

NG(CO)
DCP/21.3.07

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