

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3300 OF 2007

Commr. of Income Tax-IV, Tamil Nadu

...Appellant(s)

Versus

B. Suresh

...Respondent(s)

W I T H

Civil Appeals Nos.3534, 3294, 3291, 3302, 3298, 3299, 3306, 3304, 5334, 4389, 2490, 2670, 2495, 2500, 2484, 2497, 2496, 2491, 2489, 2498, 2499, 2501, 2483, 2482, 2481, 2492, 2671, 2485, 2502, 2475, 2474, 2477, 2476, 2478, 5221 of 2007, 2811, 4454, 4707, 4705, 6643 of 2008, 94, 432, 1154, 1256, 1004, 1155, 1115 and 1303 of 2009

CIVIL APPEALS NOS. 1576 TO 1586 OF 2009

(Arising out of S.L.P.(C) Nos.8314, 8315, 18839, 10854 of 2008, 1361, 2162, 3758 of 2009, 9814, 9809 of 2008, 2771 & 5726 of 2009)

O R D E R

Delay condoned.

Leave granted in Special Leave Petitions.

The question which arises for determination in this batch of Civil Appeal(s) is whether the foreign exchange earned by transferring the right of exploitation of the films outside India by way of lease is admissible for deduction under Section 80HHC of the Income Tax Act 1961. According to the Department, movies/films are not goods. They are not merchandise. Hence Section 80HHC is not invokable. Further, according to the Department, there is a difference between “sale” and “lease” hence, the subject transaction will not fall under Section 80HHC.

Facts in Civil Appeal No.3300/2007:

During the relevant Assessment Year 1993-94, the assessee, B. Suresh, transferred feature film rights for exploitation outside India and earned income in foreign exchange. The assessee claimed deduction under Section 80HHC in respect of the said receipts. The Assessment Officer (AO) held that the assessee was not entitled to deduction under section 80HHC, inter alia, on the ground that the export was not of merchandise or goods as contemplated under Section 80HHC, but was merely an export of "rights" in the film. This decision of the AO was over-ruled by CIT(A). When the matter came before the Tribunal at the instance of the Department, there was already a judgment of the Bombay High Court in the case of **Abdulgafar A. Nadiadwala Vs. Asst. Commr. of Income Tax & Ors.**, reported in 267 ITR 488 Bom. Following the said decision, in the present case, the Tribunal held that the assessee was entitled to deduction under Section 80HHC, hence, this Civil Appeal by the Department.

Contentions:

On behalf of the Revenue, Shri V. Shekhar, learned senior counsel, submitted that the assessee in this case was not engaged in the export of goods and merchandise; that the films recorded on beta-cam tapes did not qualify either as 'goods' or 'merchandise'. In this connection, it was urged that beta-cam tape (cassette) was only a medium of transfer; that, there was no "sale" of the film in beta-cam format and that the assessee had only transferred the right to use for a period of five years and since the title remained with the assessee, the impugned

transaction fell outside Section 80HHC. According to the learned counsel, since the films transferred on beta-cam tapes were given on lease with a right to telecast given to Star TV under the Lease Agreement dated 29th March, 1995 for a period of five years, there was no element of sale so as to attract Section 80HHC. It was further urged that movies are neither “goods” nor “merchandise”. In this connection, learned counsel placed reliance on Dictionaries.

Shri Harish N. Salve and Shri S.Ganesh, learned senior counsel appearing on behalf of the assessee, submitted that on a bare reading of Section 80HHC(1), one finds that the deduction/concession is given in cases where an assessee derives profits from the activity of exports and earns foreign exchange. It is pointed out that the said Section is concerned with the Business Profits under the 1961 Act. It is submitted that the word “goods” or “merchandise” must be read as understood in common parlance. Our attention was also invited to the dictionary meaning of the word “merchandise”. On the basis of the said meaning, it was submitted that any article of commerce and trade could fall under the meaning of the word “merchandise”. It was submitted that one has to read the words “goods” and “merchandise” in the broad sense, keeping in mind the object of the Parliament in enacting Section 80HHC. According to the learned counsel, the said Section is an incentive provision. Its object to promote earnings in foreign exchange arising from exports, which includes sale of goods and merchandise. If one keeps the object in mind, according to the learned counsel, movies/films which are made would certainly come within the ambit and meaning of the word “merchandise” as an article of trade and commerce. It is also urged that with globalisation and also with advancement in

technology, the words “goods” and “merchandise” have to be read in widest possible terms.

Our attention is also invited to the scheme of Section 80HHC in support of the above contentions to point out that the word “sale” would also include “lease” as indicated in Rule 9A(7) which states that for the purposes of Rule 9A, the “sale” of the rights of exhibition of feature films would include the “lease” of such rights. Similarly, under Rule 9B(6), it has been, inter alia, provided that “sale” of rights of exhibition of a feature film would include the “lease” of such rights. It is also submitted on behalf of the assessee that Section 80HHC goes far beyond the physical exports referred to in Section 80HHC(1). Section 80HHC recognises even software transfers “by any means”. Further under clause (5) of Section 80HHC, the Parliament has clearly indicated that if an assessee has taken the benefit of Section 80HHC, he would not be entitled to claim the same benefit under Section 80HHF, which provision, according to the learned counsel, shows that benefit of deduction under Section 80HHC could be claimed for foreign exchange earned by sale of feature films or rights therein.

Findings:

Two questions arise for determination, namely, whether foreign exchange earned by transfer of feature film rights for exploitation outside India, in the form of lease, is entitled to the benefit of Section 80HHC deduction. The same is denied by the Department on the ground that there is no “sale”. The other question is whether such “rights” are goods/merchandise.

The basic requirement of Section 80HHC is earning in foreign exchange

and retention of profits for export business. Profits are embedded in the “income” earned. Earning of income depends on sale of goods and services. Today the difference between the two is getting blurred with globalization and cross-border transaction. Today with technological advancement one has to change our thinking regarding concepts like goods, merchandise and articles. In the case of B. Suresh, the assessee had bought rights of various decoders and had recorded movies on beta-cam tapes which were transferred as telecasting rights to Star T.V. for five years (it has a limited life). Hence such “rights” would certainly fall in the category of articles of trade and commerce, hence, merchandise.

On the question as to whether transfer of the said rights by way of lease would attract Section 80HHC, we find merit in the contention that under Rule 9A and Rule 9B, the word “lease” is included in the meaning of the word “sale”.

Lastly, we find no infirmity in the judgment of the Bombay High Court in the case of Abdulgafar A. Nadiadwala.

For the above reasons, the Civil Appeals filed by the Department are dismissed with no order as to cost.

.....J.

(S.H. KAPADIA)

.....J.

(H.L. DATTU)

New Delhi,
March 03, 2009.