

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member  
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 410/KOL/ 2013  
Assessment Year : 2001-2002**

**Surajmal Exports,.....Appellant**  
**28/2, Shakespeare Sarani,**  
**Kolkata-700 017**  
**[PAN : AALFS 5891 E]**

**-Vs.-**

**Assistant Commissioner of Income Tax,.....Respondent**  
**Circle-32, Kolkata,**  
**10B, Middleton row,**  
**Kolkata-700 071**

**Appearances by:**

*Shri Akhileshwar Sharma, Advocate, for the assessee*  
*Shri M.K. Biswas, JCIT, Sr. D.R., for the Department*

Date of concluding the hearing : November 26, 2015  
Date of pronouncing the order : November 30, 2015

**O R D E R**

**Per Shri P.M. Jagtap:-**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 10.04.2007 for the assessment year 2001-02 and the solitary issue arising out of the same relates to the disallowance made by the Assessing Officer and confirmed by the Id. CIT(Appeals) on account of assessee's claim for deduction under section 80HHC amounting to Rs.32,38,664/-.

2. The assessee in the present case is a partnership firm, which is engaged in the business of export of Yarn and Fabrics manufactured by others. The return of income for the year under consideration was filed by it on 31.10.2001 declaring total income of Rs.5,89,920/-. In the assessment originally completed under section 143(3) vide an order dated 01.03.2004, the total income of the assessee was determined by the

Assessing Officer at Rs.15,74,206/- after allowing the claim of the assessee for deduction under section 80HHC by taking into consideration receipts from DEPB sold amounting to Rs.38,63,331/-. The said assessment was subsequently reopened by the Assessing Officer on 29.03.2006 in pursuance of the amendment made to section 80HHC read with section 28(iiid) of the Act by the Taxations Laws (Amendment) Act, 2005 with retrospective effect from 1<sup>st</sup> April, 1998. The said amendment, which was relevant in the case of the assessee, as contained in 3<sup>rd</sup> proviso was as under:-

*“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”.*

Since the export turnover of the assessee during the year under consideration was more than Rs.10 crores and the conditions as stipulated in Clause (a) & (b) of the relevant third proviso, were not satisfied in its case, the deduction allowable to the assessee under section 80HHC was worked out by the Assessing Officer at NIL and the total income of the assessee accordingly was computed by him at Rs.38,28,581/- in the assessment completed under section 143(3) read with section 147 vide order dated 19.12.2006.

3. Against the order passed by the Assessing Officer under section 143(3) read with section 147, an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the disallowance made therein by the Assessing Officer on account of its claim of deduction under section 80HHC. During the course of appellate proceedings before the Id. CIT(Appeals), a request was made by the assessee for keeping its appeal in abeyance on the ground that the issue at the relevant time was subjudiced before the Hon'ble Supreme Court under petition filed by the Indian Exporters Grievances Forum. However, keeping in view that there was no order passed by any competent Court staying the appellate proceedings before him, the Id. CIT(Appeals) did not accept the request of the assessee for keeping its appeal in abeyance and proceeded to dispose of the appeal of the assessee on merit. In this regard, he found that the disallowance made by the Assessing Officer on account of assessee's claim for deduction under section 80HHC was in conformity with the provisions of the amended law as made applicable to the year under consideration and accordingly upholding the same, he dismissed the appeal of the assessee. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. At the outset, it is noted that there is a delay of 2041 days on the part of the assessee in filing this appeal before the Tribunal. In this regard, the assessee has moved an application seeking condonation of the said delay, which is duly supported by an affidavit filed by its Chartered Accountant. The reasons given by the assessee for the delay in filing this appeal are as under:-

*"3. The proceedings completed u/s 143(3) of the Act was reopened for reassessment u/s 147 of the Act and reassessment order u/s 147 of the Income Tax Act, 1961 was passed by the Assessing Officer on 19.12.2006. In the said reassessment order, the Assessing Officer has categorically noted that:*

*It may be noted that the case was reopened in pursuance of the amendment brought into section 80HHC read with section 28(iiid) of the Act by the*

*Taxation Laws Amendment Act 2005 with retrospective effect from 01/4/1998.*

4. *The Appellant, being an exporter with turnover during the relevant assessment year exceeding 10 crore, was not in a position to discharge the burden cast upon it under the Third Proviso retrospectively inserted w.e.f 1-4-1998 in section 80HHC of the Income-tax Act, 1961 by the Taxation Laws Amendment Act 2005 (hereinafter the Amendment Act) for availing the deduction under sub-section (1) to the extent of profit referred in sub-section (1B) of section 80HHC of the Income-tax Act, 1961.*

5. *The Assessing Officer, following the Amendment Act disallowed the deduction u/s 80HHC of the Act on profit on the transfer of the Duty Entitlement Passbook Scheme (DEPB).*

6. *The Appellant carried the matter to the Commissioner of Income-tax (Appeal). The issue involved is purely legal in nature. The Indian Exporters Grievances Forum (IEGF), an association of exporters of which the Appellant is a member filed a Writ Petition in the Hon'ble High Court Bombay challenging the constitutional validity of the Amendment Act. The deduction u/s 80HHC of the Act was disallowed by the Assessing Officer merely on the ground on the Amendment Act. On filing of the Transfer Petition by the Union of India with a prayer to transfer all the petitions filed in various High Court, the Hon'ble Supreme Court was seized of the matter to the challenge to the constitutional validity of the Amendment Act. It was in this background that the Appellant requested the Commissioner of Income-tax (Appeal) to keep the appeal in abeyance as the matter was sub-judice before the apex court.*

7. *The request of the Appellant to keep the appeal in abeyance, was not acceded by the CIT(A). The CIT(A) in its impugned order dated 10-04-2007 has dismissed the Appeal of the Appellant. While dismissing the appeal, the CIT(A) had made following observations in paragraph 8 of the impugned order:*

*As regards ground no. 1, Shri Mundra agreed that the AO's action was in conformity with the provisions of the amended law. In fact, the appellant is challenging the validity of the retrospective amendment. This is an issue which cannot be decided in the proceedings before me.*

8. *The issue being challenge to the validity of the*  
8. *The issue being challenged to the validity of the Amendment Act, could be decided only by the constitutional court being the High Court or the Supreme Court. This issue could not have been agitated before this Tribunal. Approaching this Tribunal before the constitutional validity is decided by the High/Supreme Court would result in dismissal of appeal for want of jurisdiction of this Tribunal to decide such constitutional questions, which was relied upon by the Appellant.*

9. *In the facts and circumstances that Appellant accepted the advice of his CA and under a bonafide belief, diligently pursued the challenge to the constitutional validity of the Amendment Act, through its association IEGF before approaching this Tribunal. The petitions challenging the constitutional validity of the Amendment Act was transferred by the apex court to the Gujarat High Court.*

10. *The Gujarat High Court heard the petitions transferred to it as per the apex court order. The division bench of Acting CJ Shri Bhaskar Bhattacharya and Justice Shri J.B. Patra passed an order and judgment dated 02-07-2012 in Avani Exports Vs. Commissioner of Income-tax [(2012) 23 taxmann.com 62 (Gujarat)] in which paragraph 25, 26 & 27 of the said judgment reads as under:*

*25. In the case before us, it is not one where the executive has failed to carry out the object of the Parliament necessitating exercise of control by retrospective amendment what the executive ought to have achieved.*

*In the present case, according to the Finance Minister presenting the Bill, a valid piece of legislation has been wrongly interpreted by the Tribunal. We have already pointed out that according to the existing law, if a valid piece of legislation is wrongly interpreted by the Tribunal, the aggrieved party should move higher judicial forum for correct interpretation. As pointed by the Apex Court in the case of Pritvi Cotton Mills Ltd (supra), the legislature does not possess or exercise power to reverse the decision in exercise of judicial power. Thus, we are of the view that the principles laid down in the case of R. C. Tobacco (P) Ltd. (supra) has no application to the facts of the present case. The impugned amendment granting benefit restricting it to a*

*class of assessee whose turnover is less than Rs. 10 Crore is permissible prospectively but the way it has been enacted, it takes away an enjoyed right of a class of citizen who availed of the benefit by complying with the requirements of the then provisions of law.*

*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 assessees whose assessments were still pending although such benefit will be available to the assessees 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 assesses.*

*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 assessees whose export turnover is above Rs. 10 Crore. In other words, the retrospective amendment should not be detrimental to any of the assesses.*

*11. The Appellant initiated action to file the appeal with Tribunal believing that the petition of IEGF, among others, is disposed by the Gujarat High Court. When the Appellant approached the IEGF, he was told that IEGF petition is not included in the batch of petition decided by the Gujarat High Court. The Appellant waited for some time in the hope that similar order would be passed in the matter of IEGF. When the Appellant found that IEGF matter was pending in the apex court, he approached advocate Mr. Akhileshwar Sharma, Advocate for his opinion who had appeared for various petitioners in the Gujarat High Court in the group matter in Avani Exports Vs. Commissioner of Income- tax. The advocate Mr. Sharma by his opinion advised the Appellant that the Gujarat High Court while passing the judgment in the*

*Avani Exports has acted as jurisdictional High Court for the entire country and therefore, the Appellant may now file appeal in the ITAT Kolkata relying upon the Gujarat High Court judgment. The Appellant thereafter, filed this appeal.*

*12. The Appellant humbly submits to this Hon'ble Tribunal that there was no wilful negligence or mala fide intention on the part of the Appellant. The Appellant has been prosecuting with due diligence with bonafide belief that issue being constitutional in nature has to be resolved by the constitutional court before the same can be relied upon by them in their appeal in the Tribunal. The delay is the result of the complex circumstances created after the Amendment Act, its challenge before various High Court, the action of the Union of India in filing the various Transfer Petition in the apex court, the order of the apex court transferring the petition to the Gujarat High Court, the failure on the part of the Union of India in not including the petition of IEGF in the list of cases pending before the apex court and the various High Court. The brief history of litigation surrounding the Amendment Act, its journey to various forums and the present status of the IEGF petition is given later in this submission".*

5. We have heard the arguments of both the sides on the application filed by the assessee for condonation of delay in filing this appeal. It is observed that in the identical facts and circumstances involved in the case of Magnum Export, the Coordinate Bench of this Tribunal has condoned a similar delay of 2078 days on the part of the assessee in filing its appeal for the similar reasons vide its order dated 08.02.2013 passed in ITA No. 1111/KOL/2012. This decision of the Coordinate Bench of this Tribunal cited by the Id. Counsel for the assessee thus is squarely applicable in the present case and this position is not disputed even by the Id. D.R. at the time of hearing before us, we, therefore, condone the delay on the part of the assessee in filing this appeal before the Tribunal and proceed to dispose of the said appeal on merit.

6. At the time of hearing before us, Id. Representatives of both the sides have agreed that the issue relating to the assessee's claim for

deduction under section 80HHC has to go back to the Assessing Officer for deciding on merit keeping in view the relevant provisions of the law as are finally applicable to the year under consideration. It is also observed that vide its order dated 08.02.2013 (supra) passed in the case of Magnum Export, the Coordinate Bench of this Tribunal has also restored a similar issue to the file of the Assessing Officer for deciding the same afresh after verifying the relevant facts from record and applying the relevant provisions of law. We accordingly set aside the impugned order of the Id. CIT(Appeals) on this issue and restore the matter to the file of the Assessing Officer for deciding the same afresh by applying the relevant provisions of law and after verifying the relevant facts and figures from the record.

**7. In the result, the appeal of the assessee is treated as allowed.**

Order pronounced in the open Court on November 30, 2015.

Sd/-

Sd/-

**(S.S. Viswanethra Ravi)**  
**Judicial Member**

**(P.M. Jagtap)**  
**Accountant Member**

***Kolkata, the 30<sup>th</sup> day of November, 2015***

Order pronounced by

Sd/- Sd/-  
(S.S.V.R.) (W.A.)  
J.M. A.M.

- Copies to : (1) ***Surajmal Exports,***  
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***10B, Middleton row,***  
***Kolkata-700 071***  
(3) ***Commissioner of Income-tax (Appeals)- XIX, Kolkata***  
(4) ***Commissioner of Income Tax, Kolkata***  
(5) ***The Departmental Representative***  
(6) ***Guard File***

*By order*

*Assistant Registrar,*  
*Income Tax Appellate Tribunal,*  
*Kolkata Benches, Kolkata*