IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA Nos.1627,1628 and 1634/Hyd/2016
(Assessment Years:2002-03, 2004-05 & 1999-2000)

M/s. Nekkanti Sea Foods Ltd, Hyderabad PAN: AAACN4664J *(Appellant)*	Vs	Dy. Commissioner of Income Tax, Circle 16(1) Hyderabad *(Respondent)*

For Assessee : Shri S. Rama Rao
For Revenue : Shri Nilanjan Dey, DR

Date of Hearing: 10.10.2018
Date of Pronouncement: 31.10.2018

O R D E R

Per Smt. P. Madhavi Devi, J.M.

All these are assessees appeals for the A.Ys 2002-03, 2004-05 & 1999-2000 respectively against the separate orders of the CIT (A)-4, Hyderabad, dated 8.9.2016. Since the issue in all these appeals is common, the appeals were heard together and are disposed of by this common and consolidated order. For the sake of clarity and convenience, the grounds of appeal for the A.Y 2002-03 are reproduced hereunder:

> *"1. The order of the learned CIT (A) is erroneous both on facts and in law.*
>
> *2. The learned CIT (A) erred in confirming the action of the AO in not allowing the indirect expenditure incurred on procurement and sale of DEPB licenses for the purpose of arriving at the deduction u/s 80HHC of the I.T. Act.*

3. The learned CIT (A) erred in confirming the charging of interest u/s 234B of the I.T. Act without considering the fact that the tax arose on account of retrospective amendment brought in.

4. Any other ground or grounds that may be urged at the time of hearing".

2. Further, the assessee has also raised the following additional grounds of appeal:

"The AO erred in excluding the income from the DEPB license for the purpose of deduction u/s 80HHC in view of the fact that the 4th proviso to sub-section (3) of section 80HHC is held by the Supreme Court as prospective".

3. Brief Facts of the case are that the assessee company, engaged in the business of processing and export of marine products, filed its return of income for the relevant A.Ys. During the assessment proceedings u/s 143(3) of the Act, the deduction claimed by the assessee u/s 80HHC was disallowed by the AO holding that the assessee company does not have profits from the export business under clause (a), (b) or (c) of sub-section (3) of section 80HHC and therefore, the proviso to sub-section (3) of section 80HHC is not at all attracted and the assessee would not be eligible for any deduction u/s 80HHC. In the appeal filed by the assessee, the CIT (A) also confirmed the disallowance against which the assessee filed further appeal to ITAT and the Coordinate Bench of this Tribunal in ITA Nos.1665 & 1666 for the A.Y 1999-2000 and 2002-03 vide order dated 29.05.2009, by following the decision of the Hon'ble Supreme Court in the case of IPCA Laboratories Ltd vs. DCIT (2004) 266 ITR 521 held that the assessee is not eligible for such deduction i.e. u/s 80HHC when there is negative profit in the aggregate.

4. Further, as regards the computation of profit on sale of DEPF license is concerned, the Bench remitted the issue to the file of the AO for reconsideration as to whether the assessee has incurred any expenditure for the sale of DEPB license and if it is incurred, then to reduce it from the gross receipts on sale of DEPB license while computing the profits of the assessee. Consequent thereto, the AO considered the assessee's submissions that the expenditure relevant to earning of income under the head sale of DEPB has two components i.e. direct and indirect cost and that the application and license fee and sales tax are the direct expenses attributable to the sale of DEPB and the indirect costs incurred on export incentives are in the form of excess payments made in procurement of raw-material and the export incentives and should also be considered. The AO, however, reduced only the direct cost and later computed the income from DEPB incentives. He observed that if 90% of income from export incentive is reduced from the profits of the business, the assessee dies not have positive profits. Thus, he invoked the 3rd proviso to sub-section (3) of section 80HHC and observed that the assessee has not explained as to how the conditions stipulated therein have been fulfilled by the assessee. He therefore, disallowed the claim of the assessee u/s 80HHC. Aggrieved, the assessee preferred an appeal before the CIT (A) seeking reduction of indirect expenses from DEPB sale receipts for further computation u/s 80HHC of the Act. The CIT (A) however, confirmed the order of the AO and the assessee is in second appeal before us.

5. As the additional ground raised by the assessee goes to the root of the matter and is a legal ground, we deem it fit and proper to admit the same and consider the merits of the said ground. We find that the AO has disallowed the claim of deduction u/s 80HHC mainly by invoking the proviso 3 & 4 of sub-section 3 of section 80HHC.The learned Counsel for the assessee submitted that the proviso 3 to sub-section 3 of section 80HHC has been introduced by the Finance Act of 2005 whereas the A.Ys before us are 1999-2000, 2002-03 and 2003-04 and therefore, the said conditions are not applicable to the A.Ys before us. For this proposition, he placed reliance upon the decision of the Hon'ble Gujarat High Court in the case of Avani Exports v. CIT (2012) 348 ITR 391 (Guj.) which has been confirmed by the Hon'ble Supreme Court as reported in (2015) 58 Taxmann.com 100(S.C). He submitted that the said decision has also been followed and confirmed by the Hon'ble Supreme Court in the subsequent case in the case of Union of India vs.Paliwal Overseas (P) Ltd reported in (2017) 77 Taxmann.com 35 (S.C). The learned Counsel for the assessee has filed copies of the orders before us.

6. The learned DR, on the other hand, supported the orders of the authorities below.

7. Having regard to the rival contentions and the material on record, we find that the Hon'ble Supreme Court has confirmed the decision of the Hon'ble Gujarat High Court in the case of Avani Export (Supra) that the amendment to section 80HHC(3) made by the Taxation Law 2nd Amendment of 2005 with

retrospective effect i.e. w.e.f. 1.4.1992, is only prospective in nature and that the cases of exporters having a turnover below Rs.10.00 crores and those above Rs.10.00 crores would be treated similarly and on par prior to the period of amendment. The relevant paras of the Hon'ble Gujarat High Court are reproduced hereunder:

> *"**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".*

8. We find that the issue is therefore, covered by the above decisions and respectively following the same, the additional ground of appeal raised by the assessee is allowed and

consequently, we direct the AO to recompute the deduction u/s 80HHC in accordance with law after reducing both the direct and indirect expenses from DEPB receipt..

9. In the result, assessee's appeals are partly allowed for statistical purposes.

Order pronounced in the Open Court on 31st October, 2018.

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 31st October, 2018.
Vinodan/sps

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5 The DR, ITAT Hyderabad
6 Guard File

By Order