

आयकर अपीलिय अधिकरण, अहमदाबाद खोयपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.791/AHD/2012
निधाखि वष/Asstt. Year: 1999-2000

Maheeraj Chemicals Pvt. Ltd. 141, Phase II, GIDC, Vatva, Ahmedabad-382330 PAN:AABCM0424C	Vs.	DCIT, Circle-4, Ahmedabad
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(Applicant)		(Responent)
Assessee by :		Smt Urvashi Shodhan, AR
Revenue by :		Shri Vinod Talwani, Sr.DR

सुनवाई कखिरीख/Date of Hearing : 01/11/2018
घोषणा कखिरीख/Date of Pronouncement: 06/12/2018

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals) ó VIII, [CIT(A) in short] vide appeal no.CIT(A)-VIII/DCIT.Cir.4/366/06-07 dated 19.10.2007 arising in the matter of assessment order passed under s.144 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 28.11.2006 relevant to Assessment Year (AY) 1999-2000.

2. The assessee has raised following grounds of appeals.

1. *Ld. CIT (A) erred in law and on facts in confirming action of AO in not granting deduction u/s 80HHC of the Act on DEPB income by virtue of Taxation Laws (Amendment) Act, 2005 on Rs. 1, 17, 68, 281/- ignoring submissions of the appellat. Ld. CIT (A) ought to have allowed claim of deduction u/s 80HHC of the Act on DEPB income.*

2. *Alternatively as per Taxation Laws (Amendment) Act, 2005 only profit on sale/transfer of DEPB licenses are covered u/s 28(iiid) of the Act as held by the Hon'ble Apex Court in Topman Exports vs CIT (247 CTR 353) and that would entitle the assessee to claim profit on sale/transfer of DEPB license as business profits subject to deduction u/s 80HHC of the Act.*
3. *Ld. CIT (A) erred in law and on facts in confirming action of AO in reducing 90% of gross interest income from business profit while computing deduction u/s 80HHC of the Act. Alternatively 90% of only net interest ought to be reduced from business profits for computing deduction u/s 80HHC of the Act. as held by the Hon'ble Apex Court in ACG Associated Capsules Pvt. Ltd. vs CIT (247 CTR 372).*
4. *Ld. CIT (A) erred in law and on facts in confirming disallowance of interest of Rs. 3, 99, 847/- from interest expenses claimed u/s 36(l)(iii) of the Act holding that interest bearing funds were utilized for making interest free deposits. Ld. CIT (A) erred in not appreciating that the appellant advanced interest free deposits from total interest free funds available in the form of capital and reserve of Rs. 318.8 lacs.*
5. *Ld. Ld. CIT (A) erred in law and on facts in confirming disallowance of rent and taxes of Rs. 1, 14, 7217- in absence of necessary details and evidences as well bad debts of Rs. 32, 0007- following judgment of Hon'ble Gujarat High Court. Ld. CIT (A) failed to appreciate that once amount is written off in the books of accounts then after amendment to section 36(l)(vii) of the Act there is no necessity to prove that the debt had become bad in the relevant year.*
6. *Levy of interest u/s 234B7 234C & 234D of the Act is not justified.*
7. *Initiation of penalty u/s 271(l)(c) of the Act is not justified.*

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. At the outset, we note that there was a delay of 1569 days in filing the appeal by the assessee. The reasons for the delay in filing the appeal was explained by the director of the company in the affidavit vide dated 31st July 2014. The extract of the affidavit is reproduced as under:

AFFIDAVIT

I, Mahesh D Agarwal, adult residing at 9, Rushil Bunglow, Bodakdev, Ahmedabad in the capacity as Director of Maheshraj Chemicals Pvt. Ltd., (having its registered office situated at 141, Phase II, GIDC, Vatva, Ahmedabad - 382330 and PAN No. AABCM 0424 C) hereby solemnly affirms as under:

1. *That I am a Director of the above named Maheshraj Chemicals Pvt. Ltd., since the inception of the company.*
2. *That the assessment proceedings before the Assessing Officer of all the assessment years since inception of the company were being handled by our statutory auditor and Chartered Accountants, M/s Parikh & Majmudar, Chartered Accountants, Ahmedabad.*
3. *That the assessment work before the Ld. Assessing Officer, Central Circle, Ahmedabad, had also been handled by Shri Satwik Durkal and his am of M/s Parikh & Majmudar. Chartered Accountants, Ahmedabad.*
4. *That prior to the search conducted at the premises of the company, the entire appellate work was also being carried out by M/s Parikh & Majmudar, Chartered Accountants, Ahmedabad.*
5. *That (on 21/03/2007/there was a search proceeding at the premises this assessee and the group companies.*
6. *That the company received order of Id. CIT (A) for AY 1999-2000 on 25/10/2007 ie. after the search operation took place.*
7. *That I had clarified with Shri Satwik Durkal of M/s Parikh & Majmudar Chartered Accountants, Ahmedabad, that I wished to entrust appellate work related to search proceedings to M/s G K Choksi & Co Chartered Accountants whereas Shri Satwik Durkal was entrusted with appellate work for years other than block period.*
8. *That it appears that Shri Satwik Durkal came to understand that even appeal against the order referred to in para 6 would be filed by M/s G K Choksi & Co. and M/s G K Choksi & Co. was of the belief that the same would be filed by the office of Mr. Satwik Durkal as it pertained to pre search period. Due to this misunderstanding between the company and Shri Satwik Durkal of M/s Parikh & Majmudar, Chartered Accountants, Ahmedabad, the appeal for AY 1999-2000 before Hon'ble Income Tax Appellate Tribunal, Ahmedabad, could not be filed and the said fact came to our notice only when appeal of other years came up for hearing before appellate forum.*
9. *That immediately upon knowing the fact about the non-filing of the appeal, our office along with the representative of M/s. Parikh & Majmudar, Chartered Accountants had approached Senior Advocate, Shri Saurabh Soparkar, for filing the appeal before the ITAT, Ahmedabad, and accordingly the appeal was filed with ITAT Ahmedabad for AY 1999-2000 on 10/04/2012.*
10. *That the above affidavit is being made because of the honest belief that Shri Satwik Durkal of M/s Parikh & Majmudar, Chartered Accountants,*

Ahmedabad would have filed the appeal timely. That this explains the delay in late filing of appeal under Bonafide belief.

11. *Whatever stated above is true and correct to the best of my knowledge and belief.*

*Place: Ahmedabad
Date: 31/07/2014*

3.1 The CA, full-time employee of the firm M/s Parikh & Majumdar, chartered accountants, also filed the affidavit vide dated 31st July 2014 who was appearing then before tax authorities during the relevant time. The extract of the affidavit is reproduced as under:

AFFIDAVIT

I, Satwik A Durkal, adult, occupation: Chartered Accountant, residing at T/7, Shanti Nagar Society, Opp Sarveshwar Temple, Old Vadaj, Ahmedabad – hereby solemnly affirms as under:

1. *That I am working with Parikh & Majmudar, Chartered Accountants, as full time employee and looking after filing of tax returns, assessment proceedings as well as filling of appeal of various clients of the firm regularly since last more than 15 years.*

2. *That I appeared before Id. Assessing Officer in the case of Maheshraj Chemicals Pvt. Ltd. (having its registered office situated at 141, Phase II, GIDC, Vatva, Ahmedabad - 382330 and PAN No. AABCM 0424 C) for its assessment proceedings.*

3. *That search took place on 21/03/2007 and I appeared before the Id. Assessing Officer for assessment proceedings of Maheshraj Chemicals Pvt. Ltd. for AY 2001-02 to AY 2007-08.*

4. *Mahesh Agarwal, director of Maheshraj Chemicals Pvt. Ltd. informed that the company wished to entrust appellate work to M/s G K Choksi & Co., Chartered Accountants, Ahmedabad for block period that is understood the said communication that all appellate work post search proceedings was to be handled by M/s G K Choksi & Co, whereas only assessment proceedings were to be handled by my firm.*

5. *That after getting appeal orders of various other appeals, Shri Manesh Agarwal informed me that the appeal for AY 1999-2000 was to be handled from our firm since it pertained to pre search period. However, a detailed dialogue was made at that juncture that due to our understanding that all appellate*

work subsequent to search was to be carried out by M/s G K Choksi & Co., Chartered Accountants, appeal for AY 1999-2000 was never filed by our firm before the Hon'ble Income tax appellate tribunal.

6. *That upon receipt of notice of hearing for other years before Hon'ble Income tax appellate tribunal, Ahmedabad the above fact came to the notice and immediately our office along with director Shri Mahesh Agarwal had approached Senior Advocate Shri Saurabh Soparkar for taking necessary steps in preparing appeal before Hon'ble ITAT, Ahmedabad and accordingly there was a delay in filing the appeal for the assessment year in question before ITAT, Ahmedabad.*

7. *The above affidavit is being made to clarify that due to misunderstanding between our firm i.e. Parikh & Majmudar, Chartered Accountants and the appellent company there is delay in filing of the appeal before the Hon'ble ITAT, Ahmedabad.*

8. *Whatever stated above is true and correct to the best of my knowledge and belief.*

Place: Ahmedabad

Date: 31/07/2014

4. In view of above the Ld. AR for the assessee before us submitted that the delay in filing the appeal occurred due to the unavoidable situation. Therefore the delay in filing the appeal should be condoned.

5. On the other hand the ld. DR opposed condoning such inordinate delay.

6. We have perused the records and heard the rival submissions of both the sides. There was a delay of 1569 days in filing the appeal by the assessee before us. In the condonation petition, it was explained that a search took place on the premises of assessee and the group companies on 21/03/2007. Assessee company received the order of ld. CIT(A) for the year under consideration after the date of search, i.e. on 25/10/2007. At that time it was decided between the assessee and CA Satwik A Durkal, full-time employee of the firm M/s Parikh & Majumdar, chartered accountants that appellate

proceeding only related to search proceeding will be entrusted to M/s G K Choksi & Co. chartered accountants. However, CA Satwik A Durkal misunderstood it as all the appellate proceeding of assessee including related to the year under consideration is entrusted to M/s G K Choksi & Co. chartered accountants. Accordingly, neither M/s G K Choksi & Co. chartered accountants nor M/s Parikh & Majumdar, chartered accountants could file the appeal before this tribunal and assessee noted this fact only when hearing of other years appeal started before this tribunal.

6.1 The Director of Assessee Company and the CA Satwik A Durkal filed the affidavit which has been cited in the earlier Para to explain the delay in filing the appeal and accordingly it was prayed for condonation of delay. However, on hearing dated 02nd may 2018 it was noted by the bench that CA Satwik A Durkal is not a partner of the firm M/s Parikh & Majumdar. Therefore, the bench asked the Id. AR to file the affidavit of the partner of M/s Parikh & Majumdar. In response to the Id.AR fled the affidavit of CA Hiten parikh, partner of M/s Parikh & Majumdar dated 3rd July 2018 which is reproduced as under:

AFFIDAVIT

I. Hiten Parikh, adult, occupation : Chartered Accountant, residing at "Shreeji Sadan",31 Surel Co op housing Society, Opp Rajvansh Tower, Bodakdev, Vastrapur, Ahmedabad -380015 hereby solemnly affirms as under:

- 1. That I am Partner with Parikh & Majmudar, Chartered Accountants, and looking after filing of tax returns, assessment proceedings as well as filing of appeal of various clients of the firm regularly since last more than 30 years.*
- 2. That I appeared before Id. Assessing Officer in the case of Maheshraj Chemicals Pvt. Ltd. (having its registered office situated at 141, Phase-II, GIDC, Vatva, Ahmedabad-382330 and PAN No.AABCM 0424 C) for its assessment proceedings.*

3. *That search took place on 21/03/2007 and I appeared before the Id. Assessing Officer for assessment proceedings of Maheshraj Chemicals Pvt. Ltd 2001-02 to AY 2007-08.*
4. *Shri Mahesh Agarwal, director of Maheshraj Chemicals Pvt. Ltd informed me that the company wished to entrust appellate work to M/s. G Choksi & Co. Chartered Accountants, Ahmedabad for block period that misunderstood the said communication that all appellate work post search proceedings was to be handled by M/s. G K Choksi & Co., whereas only assessment proceedings w to be handled by my firm.*
5. *That after getting appeal orders of various other appeals, Shri Mahesh Agarwal informed me that the appeal for AY 1999-2000 was to be handled from our firm since it pertained to pre search period. However, detailed dialogue was made at that juncture that due to our understanding that all appellate work subsequent to search was to be carried out by M/s.G K Choksi & Co. Chartered Accountants appeal for AY 1999-2000 was never filed by our firm before the Hon'ble income tax appellate tribunal.*
6. *That upon receipt of notice of hearing for other years before Hon'ble Income tax appellate tribunal, Ahmedabad the above fact came to the notice and immediately our office along with director Shri Mahesh Agarwal had approached Senior Advocate Shri Saurabh Soparkar for taking necessary steps in preparing appeal before Hon'ble ITAT, Ahmedabad and accordingly there was a delay in filing the appeal for the assessment year in question before ITAT, Ahmedabad.*
7. *The above affidavit is being made to clarify that due to misunderstanding between our firm i.e. Parikh & Majmudar, Chartered Accountants and the appellant company there is delay in filing of the appeal before the Hon'ble ITAT, Ahmedabad.*
8. *Whatever stated above is true and correct to the best of my knowledge and belief.*
Place : Ahmedabad
Date : 03/07/2018

6.2 Considering all the facts in totality as discussed above we deem it fit to condone the delay in the filing the appeal by the assessee.

6.3 In this regard we find support and guidance from the judgment of Honøble Madras High Court in the case of Sreenivas Charitable Trust v. Dy. CIT reported in 280 ITR 357 wherein it was held as under:

"3. The Supreme Court in Vedabai v. Shantaram Baburao Patil [2002] 253 ITR 798 held as under :

"In exercising discretion under section 5 of the Limitation Act the Courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard. The Court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance." (p. 799)

4. The Calcutta High Court in CIT v. Orissa Concrete & Allied Industries Ltd. [2003] 264 ITR 186 held as under :

". . . what is really indicated in the various decisions cited and in section 5 of the Limitation Act itself, is that a litigant would be required to explain why the appeal and/or application could not be filed within the period prescribed by limitation and explain the delay for such period for the purpose of linking up the circumstances which had caused the delay during the period of limitation and thereafter." (p. 192)

5. Recently, the Allahabad High Court in Ganga Sahai Ram Swarup v. ITAT [2004] 271 ITR 512 has taken the view that liberal view ought to have been taken by the authority as the delay was only of a very short period and the appellant was not going to gain anything from it.

6. Applying the ratio laid down by the Apex Court as well as various High Courts, we find, it is stated in the petition filed by the assessee for condonation of delay that the order copy was misplaced and thereafter it was found and sent to counsel for preparing the appeal and then, the appeal was prepared and filed before the Tribunal and in that process, the delay of 38 days occurred. As held by the Apex Court, no hard and fast rule can be laid down in the matter of condonation of delay and the Courts should adopt a pragmatic approach and the Courts should exercise their discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause" the principle of advancing substantial justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. We are, therefore, of the opinion that the Appellate Tribunal ought to have condoned the delay in filing the appeal, considering the reasons given by the assessee for the delay."

6.4 From the above it is clear that the expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, advancement of substantial justice is the prime factor while considering the reasons for condoning the delay.

6.5 We also note that the major issue raised on merit in the ground of appeal is in favor of the assessee. But there is a technical defect in the appeal since the appeal was not filed within the period of limitation. There was the affidavit filed by the assessee explaining the reasons for the delay in filing the appeal before us. However, the Revenue has not filed any counter-affidavit to deny the allegation made by the assessee.

6.6 It is also important to note that the Honøble Supreme Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) laid down certain principles for considering the condonation petition for filing the appeal which are reproduced hereunder:

(1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late (2) Refusing to condone delay can result in a meritorious matter being thrown at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

(3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, commonsense and pragmatic manner.

(4) When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

(6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

6.7 From the above judgment of the Honøble Apex Court, we note that the substantial justice deserves to be preferred rather than deciding the matter on the basis of a technical defect.

6.8 We also note that there is no allegation from the Revenue that the appeal was not filed within the time deliberately. Therefore, we are inclined to prefer substantial justice rather than a technicality in deciding the issue.

6.9 We also find that if we reject the application of the assessee for condoning the delay, then it would amount to legalize injustice on the technical ground whereas the Tribunal is capable of removing injustice and to do justice.

If the delay is not condoned, it will amount to legalizing an illegal order which would result in unjust enrichment on the part of the State by retaining the tax relatable to it. Under the scheme of Constitution, the Government cannot retain even a single pie of the individual citizen as tax, when an authority of law does not authorize it. Therefore, if we refuse to condone the delay, it would amount to legalize an illegal and unconstitutional order passed by the lower authority. Therefore, in our opinion, by preferring the substantial justice, the delay of 1569 days has to be condoned.

7. The next controversy arises whether the delay of 1569 days was excessive or inordinate. There is no question of any excessive or inordinate when there was the reasonable cause which prevented that assessee in filing the appeal. As such we need to consider the cause for the delay and not the length of the delay. Accordingly, in our considered view when there was a reasonable cause, the period of delay may not be a relevant factor. We find support from the judgment of the Honøble Madras High Court in the case of CIT v. K.S.P. Shanmugavel Nadai and Ors reported in 153 ITR 596 wherein it was held as under :

“Since in this case the assessee had been prosecuting other remedies, the time taken by those proceedings should naturally be taken while determining the question whether the assessee had sufficient cause for not presenting the appeal in time. Therefore, the revenue was not right in submitting that the appeal filed under

section 17 was an appeal against the original order of assessment under the Act, which was passed about 20 years ago, as it was evident that the appeal was against an order of rejection of relief by the assessing authority. Thus, though the Tribunal's view that there was no question of limitation in such cases, was not correct yet the AAC was right in condoning the delay and entertaining the appeal."

8. From the above, we note that the Honøble Madras High Court in the above case was pleased to condone delay for 20 years approximately by holding that there was sufficient and reasonable cause on the part of the assessee for not filing the appeal within the period of limitation.

8.1 The delay in the instant case is just of 1569 number of days which cannot be considered to be inordinate or excessive in comparison to the delay of 7330 days approximately.

8.2 In view of the above we are of the opinion that when there is sufficient cause for not filing the appeal within the period of limitation, the delay has to be condoned irrespective of the duration/period of the delay. In this case, the non-filing of an affidavit by the Revenue for opposing the condonation of the delay itself is sufficient for condoning the delay of 1569 number of days. Thus, we condone the delay of 1569 days in filing the appeal and proceed to hear the appeal on merit for the adjudication.

9. The 1st issue raised by the assessee in ground No. 1 and 2 is that the learned CIT-A erred in confirming the order of the AO by not granting deduction under section 80HHC of the Act in respect of the DEPB income amounting to 1,17,68,281.00 only.

9.1 Briefly stated facts are that the assessee is a private limited company and engaged in the business of manufacturing and trading of dyes and dyes intermediates. The assessee during the year has shown income from the DEPB 1,17,68,281/- in its profit and loss account. The assessee in respect of such income has claimed deduction under section 80HHC of the Act.

9.2 However, the AO was of the view that the assessee is not eligible for deduction in respect of the DEPB income as discussed above in view of the fact that the turnover of the assessee is exceeding 10 crores. Therefore, he opined that the 3rd proviso to section 80HHC(3) of the Act hits the DEPB income declared by the assessee which is reproduced 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 (iii)e) 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 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 Free Replenishment Certificate, being the Duty Remission Scheme.”

9.3 On a question by the AO about the applicability of the provisions as contained in the 3rd proviso to section 80HHC(3) of the Act, the assessee failed to make any satisfactory reply. Accordingly, the AO derived the conclusion that the assessee failed to meet the criteria as laid down under the provisions to section 80HHC of the Act. Accordingly, the AO disallowed the deduction claimed in respect of the DEPB income amounting to 1,17,68,281/- under section 80HHC of the Act.

10. Aggrieved assessee preferred an appeal to Id. CIT(A) who confirmed the order of the AO by observing as under :

3.3 As regards reduction of DEPB income of Rs.1,17,68,2817- .the Assessing Officer's action of excluding the same is confirmed as the export turnover of the appellant is more than Rs. 10 crores and the appellant has not proved that it has satisfied the two conditions and as per Taxation Laws (Amendment) Act 2005, the appellant has to prove following conditions:-

- (a) He had an option to choose either duty drawback or duty entitlement pass book scheme/DFRC scheme, being duty remission scheme and*
- (b) The rate of draw back credit attributable to the customs duty was higher than the rate of credit allowable under the DEPB Scheme being Duty Remission Scheme.*

As the appellant has failed to-fulfill the above conditions, the Assessing Officer disallowed claim of deduction u/s 80HHC in respect of DEPB income. The appellant's claim for deduction u/s80-HHC of the Act on DEPB income is rejected.

11. Being aggrieved by the order of Id. CIT(A) assessee is in appeal before us. The learned AR before us submitted that the dispute in the instant case relates to the assessment year 1999-2000 whereas the amendment under section 80HHC of the Act as discussed in the order of the AO was brought in the year 2005. Therefore, the amended provisions cannot be applied to the instant case. The learned AR in support of his claim relied on the judgment of Hon'ble Gujarat High Court in the case of the *Avani exports* reported in 348 ITR 391. The Id. AR also submitted that the Honourable Apex court subsequently confirmed the view taken by the Hon'ble Gujarat High Court in the case of *Avani exports* reported in 58 Taxmann.com 100.

12. The learned counsel for the assessee alternatively submitted that only the profit element embedded in the DEPB income should be excluded while working out the deduction under section 80HHC of the Act.

13. On the other hand the ld. DR vehemently supported the orders of authorities below.

14. We have heard the rival contentions and perused the materials available on record. In the instant case, the issue relates to the deduction claimed by the assessee under section 80HHC of the Act. As per the AO, the turnover of the assessee exceeds the rupees 10 crores. Therefore, the deduction under section 80HHC of the Act was available subject to the fulfillment of the conditions as specified under the 3rd proviso to section 80HHC(3) of the Act. As per the AO, the assessee failed to fulfill the conditions imposed under section 80HHC of the Act. Therefore, the AO disallowed the deduction claimed by the assessee in respect of the DEPB income amounting to 1,17,68,281/-. The ld. CIT-A subsequently confirmed the view taken by the AO.

15. It is an undisputed fact that the provision of section 80HHC was amended in the year 2005 w.r.e.f. 1.4.1998 by the Taxation Laws (Amendment) Act ,2005 and the case before us relates to the assessment year 1999-2000. Thus this retrospective amendment was very much applicable for the year under consideration. However, the Honøble Courts have held that such amendments are prospective in nature. In this regard we find support and guidance from the judgment of Avani exports (supra) wherein it was held as under:

“18. The last question is whether the impugned amendment should be set aside on the ground that this type of substantive amendment cannot be made with retrospective operation.

19. The learned counsel appearing on behalf of the Revenue has, however, opposed the aforesaid contention on the ground that as on DEPB profit no such benefit/deduction was earlier allowable, it cannot be branded as retrospective amendment. The learned counsel appearing on behalf of the Revenue contend that the Parliament has the necessary power to grant benefit/concession retrospectively to small exporters and deny similar benefits/concessions to large exporters on a

reasonable classification of levels of income/turnover. According to them, where the Proviso extends the benefits/concessions retrospectively subject to certain conditions, howsoever stringent these might appear to be, the validity of the impugned amendments cannot be assailed on the grounds of unreasonableness or intelligible classification.

20. After hearing the learned counsel for the parties and after going through the decisions cited at the bar, we are of the view that although in taxing statute laxity is permissible and after giving a benefit to the assessee based on some specific conditions, such benefit can definitely be curtailed but the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the Revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could arrange his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. In the case before us, the object of the amendment, as it appears from the statements of the Finance Minister while moving the bill, is to get rid of the alleged wrong decision of the Tribunal interpreting the then provision of the Statute in a way beneficial to the assesses, which according to the Finance Minister, was never the intention of the legislature. If such be the position, the Revenue has definitely right to challenge the decision of the Tribunal as a wrong one before the higher forum; but on a plea of delay in disposal of appeal if filed, without challenging the decision of the Tribunal before High Court or Supreme Court, the Revenue cannot curtail such benefits by proposing amendment, incorporating a new provisions in the Statute from an anterior date. According to the existing law enacted by the Parliament itself, wrong orders passed by a Tribunal should be challenged by the aggrieved party before the appropriate High Court and if such party is still aggrieved by the order of the High Court, he should move the Supreme Court.”

15.1 The judgment of the Honøble Gujarat High Court as discussed above was subsequently upheld by the Honøble Apex court reported in 58 taxmann.com 100 wherein it was held as under:

“4. Against the High Court judgment these SLPs are filed by the Union of India. Mr. Mukul Rohtagi, learned Attorney General for India submits that once the prayer made was to sever the aforesaid two conditions as onerous and ultra vires, the High Court should have couched the reliefs in terms of that prayer only, instead of stating that the operation of the Section would be given effect to prospectively only and these conditions would not operate retrospectively. At the same time, he accepts that the legal position would be that those exporters with turnover of rupees less than Rs. 10 crores and other like the respondents with turn over of more than Rs.10 crores would be at par and both would be entitled to the benefits.

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.""

15.2 In view of the above we note that there is no ambiguity that the amended provisions cannot be applied in the year under consideration. Besides this, we also note that the Honøble Supreme Court has held to treat the exporter similarly whether the turnover exceeds Rs. 10 crores or not. Therefore we set aside the order of Id. CIT(A) and direct the AO to allow the deduction under section 80HHC in respect of the DEPB income declared by the assessee.

15.3 The other alternate contention made by the assessee becomes infructuous in view of the fact that the assessee succeeds in its appeal on account of its main ground of appeal. Therefore we are not inclined to adjudicate the other alternate contentions raised by the learned counsel for the assessee. Hence the ground of appeal of the assessee is allowed.

16. The 2nd issue raised by the assessee in ground No. 3 is that Id. CIT (A) erred in reducing 90% of gross interest income from business profit while working out the deduction under section 80HHC of the Act. Alternatively, the assessee submitted that only 90% of net interest income should have been reduced from the business profit while working out the deduction under section 80HHC of the Act.

16.1 The assessee in the year under consideration has shown interest income from the bank amounting to Rs. 66533/- only. The assessee in respect of such interest income claimed the deduction under section 80HHC of the Act.

16.2 However, the AO was of the view that the interest income has not been derived from the export activities. Therefore the same is not eligible for deduction under section 80HHC of the Act. Accordingly, the AO reduced 90% of interest income from the profit of the business while computing the deduction under the provisions of section 80HHC of the Act.

17. Aggrieved assessee preferred an appeal to Id. CIT (A). The assessee before the Id. CIT (A) submitted that certain deposits were made with the bank to import the materials which were necessary for the business activities of the assessee. The assessee has earned interest income on such FDs which were made for the purpose of the business. Therefore, the assessee submitted that there is a direct nexus between the interest income and the export activities. Accordingly, he pleaded before the Id CIT-A that the interest income is very much eligible for deduction under section 80HHC of the Act.

17.1 However, the learned CIT(A) disregarded the contention of the assessee and confirmed the order of AO.

18. Being aggrieved by the order of Id. CIT (A) assessee is in appeal before us. The Id. AR before us submitted that the interest income was earned in connection with the export business. Therefore such income is eligible for deduction under section 80HHC of the Act. The LD. AR also alternatively submitted that the 90 % of net interest income should reduced from the profit of the business while computing the deduction under section 80HHC of the

Act. The Id. AR in support of his alternate contention relied on the judgement of Honourable Supreme Court in the case of ACG Associated capsules versus CIT reported in 247 CTR 372.

19. On the other hand Id. DR vehemently supported the orders of authorities below.

20. We have heard the rival contentions and perused the materials available on record. At the outset we note that the Id. CIT(A) rejected the claim of the assessee without adducing any reason on the eligibility of deduction under section 80HHC of the Act in respect of interest income.

20.1 As per the claim of the assessee the interest income was received from the bank on the FD made in connection with the import of raw materials which was required for the purpose of export activities. But we find that there was no documentary evidence filed by the assessee before the authorities below as well as before us in support of its contention. Therefore in the absence of documentary evidence that the assessee has earned interest income in connection with the export activities, we reject the contention of the Id. AR for the assessee.

20.2 However we find force in the alternate contention of the assessee that the 90% of net interest income should be reduced from the profit of the business for the computation of deduction under section 80HHC of the Act. In this regard we find support and guidance from the judgment of Honøble Supreme Court in the case of associated capsules (supra) wherein it was held as under:

“11. For this interpretation of Explanation (baa) to Section 80HHC of the Act, we rely on the judgment of the Constitution Bench of this Court in Distributors (Baroda) (P.) Ltd. (supra). Section 80M of the Act provided for deduction in respect of certain intercorporate dividends and it provided in sub-section (1) of Section 80M that "where the gross total income of an assessee being a company includes any income by way of dividends received by it from a domestic company, 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 from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this Section. The Constitution Bench held that the Court must construe Section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in sub-section (1) of Section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included. Similarly, Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in clause (1) of Explanation (baa) has not been included in the profits of business of an assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC.

12. If we now apply Explanation (baa) as interpreted by us in this judgment to the facts of the case before us, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under Section 28 of the Act, and if any quantum of the rent or interest of the assessee is allowable as an expense in accordance with Sections 30 to 44D of the Act and is not to be included in the profits of the business of the assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt of rent or interest will not be deducted under clause (1) of Explanation (baa) to Section 80HHC. In other words, ninety per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the assessee as computed under the head "Profits and Gains of Business or Profession", is to be deducted under clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business.”

20.3 In view of the above we are of the opinion that the assessee's profit of the business would be reduced by 90% of net interest income. Hence the ground of appeal of the assessee is allowed.

21. The next issue raised by the assessee in ground No. 4 is that the Id. CIT (A) erred in disallowing the interest of 3,99,847/- under section 36(1)(iii) of the Act on account of diversion of the interest-bearing fund.

22.1 The assessee in its balance sheet as on 31st March 1999 has shown fixed deposits amounting to 28,56,048.00 only. But there was no interest income shown by the assessee in respect of such fixed deposits.

21.2 However, the AO observed that the assessee had incurred interest expenses amounting to 25,29,867/- on the borrowed fund. Accordingly, the AO was of the view that the borrowed fund has been utilized for interest-free fixed deposits. Therefore, the AO worked out the amount of proportionate interest on such fixed deposit amounting to 3,99,847/- and disallowed the same under section 36(1)(iii) of the Act. Thus the interest disallowed was added back to the total income of the assessee.

22. Aggrieved assessee preferred an appeal to Id. CIT (A). The assessee before the Id. CIT (A) submitted that it has sufficient fund in the form of capital and reserve amounting to 318.80 lacs. As such the interest-free deposits were made out of its own fund. Therefore there cannot be any disallowance on account of diversion of interest-bearing fund to non-interest-bearing fixed deposits.

23. However, the Id. CIT (A) disagreed with the contention of the assessee and confirmed the order of AO by observing as under:

~~I~~ have considered the submissions of the A.R. I find that the (acts are within the knowledge of the but the appellant has not furnished the necessary details in form of cash flow and balance sheet to prove that interest free funds have been utilized in making the deposits. Hence disallowance of interest is confirmed.∅

24. Being aggrieved by the order of Id. CIT (A) assessee is in appeal before us. The Id. AR before us reiterated the submissions as made before the Id. CIT (A) whereas the Id. DR vehemently supported the orders of authorities below.

We have heard the rival contentions and perused the materials available on record. There is no ambiguity that the own fund of the assessee exceeds the amount of fixed deposits as discussed above. Therefore an inference can be drawn that the investment in the fixed deposits was made out of the own fund of the assessee. Therefore, in our considered view there can be no question of making any disallowance of interest on account of diversion of the fund as discussed above.

24.1 In holding so, we find support and guidance from the judgment of Honøble Bombay High Court in the case of *Reliance Utilities and Power Ltd.* reported in 313 ITR 340 wherein it was held as under:-

“The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the CIT(A) and Tribunal”

24.2 Similarly, we also rely on the judgment of the Honøble Bombay High Court in the case of *CIT vs HDFC Bank Ltd* reported in 366 ITR 505 (Bom). The relevant extract of the order is reproduced below:-

“Where assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it would have to be presumed that investment made by the Assessee would be out of the interest-free funds available with Assessee and no disallowance was warranted u/s 14A.”

24.3 Similarly, we also find support from the judgment of Honøble Gujarat High Court in the case of UTI Bank Ltd. reported in 32 Taxmann.com 370 where the headnote reads as under :

“If there are sufficient interest free funds to meet tax free investments, they are presumed to be made from interest free funds and not loaned funds and no disallowance can be made under section 14A”

24.4 In view of the above proposition, we hold that no disallowance of interest expense claimed by the assessee can be made on account of diversion of the fund. Hence, we reverse the order of the authorities below. The AO is directed to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

25. The last issue raised by the assessee in ground No. 5 is that Id. CIT (A) erred in confirming the disallowance of the expenses under the head rent and taxes of 1,14,721/- only. The assessee also submitted that the Id. CIT (A) erred in not allowing the deduction on account of bad debts of Rs. 32000/-.

25.1 At the outset, the Id. AR submitted that he had been instructed not to press the disallowance made by the AO 1,14,721/- on account of the interest expenses. Therefore, we dismiss the same as not pressed.

25.2 The assessee in the year under consideration has claimed bad debts amounting to 32,000/- only. However, the assessee during the assessment proceedings failed to produce any documentary evidence showing the debts became bad. Therefore the same was disallowed by the AO and added to the total income of the assessee.

Aggrieved assessee preferred an appeal to Id. CIT (A) who has confirmed the order of AO by observing as under:

“The appellant has not submitted necessary details "and evidence for incurring the said expenditure before the Assessing Officer nor before me , and for the bad debts the appellant has not proved that the debt has become bad , hence the disallowance of rent and taxes is confirmed and disallowance of the bad debts is confirmed following the decision of Gujarat High Court in case of Dhal Enterprises & Engineers Pvt. Ltd.,(207 CTR 729) (Guj.) " wherein it has been held that the assessee should prove that the debt has become bad in that year.”

26. Being aggrieved by the order of Id. CIT (A) assessee is in appeal before us. The learned AR before us submitted that bad debts were actually written off in the books of accounts. Therefore the same should be allowed as deduction in view of the judgment of Honourable Supreme Court in the case of TRF Ltd reported in 323 ITR 397.

27. On the other hand the Id. DR vehemently supported the orders of authorities below.

28. We have heard the rival contentions and perused the materials available on record. In the instant case we note that the disallowance for the bad debts was confirmed by the Id. CIT (A) after having reliance on the judgement of Honøble Gujarat High Court in the case of the Dhal enterprises and engineers private Ltd reported in 207 CTR 729. However, we find that the issue has been settled by the Honøble Supreme Court in the case of TRF Ltd (supra) wherein it was held as under:

“4. This position in law is well-settled. After 1-4-1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. However, in the present case, the Assessing Officer has not examined whether the debt has, in fact, been written off in accounts of the assessee. When bad debt occurs, the bad debt account is debited and the customer's account is credited, thus, closing the account of the customer. In the case of companies, the provision is deducted from sundry debtors. As stated above, the Assessing Officer has not examined whether, in fact, the bad debt or part thereof is written off in the accounts of the assessee.”

28.1 There were no details furnished by the Revenue that the assessee has not claimed the bad debts in the books of accounts. Therefore once the assessee has written off the bad debts in the books of accounts, then it is sufficient for claiming the deduction under section 36(1)(vii) of the Act. Therefore, we reverse the order of authorities below and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is partly allowed.

29. In the result the appeal of the assessee is partly allowed.

Order pronounced in the Court on 06/12/2018 at Ahmedabad.

-Sd-

(MADHUMITA ROY)

JUDICIAL MEMBER (True Copy)

Ahmedabad; Dated 06/12/2018

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आदेश क प्रत/Copy of the Order forwarded to :

1. अपीलार्थ / The Appellant
2. प्रत्यर्थ / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. व्रभागीय प्रत, आयकर अपीलार्थ आधिकरण / DR, ITAT,
6. गार्डफाईल / Guard file.

-Sd-

(WASEEM AHMED)

ACCOUNTANT MEMBER

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)

आयकर अपीलार्थ आधिकरण, अहमदाबाद / ITAT, Ahmedabad