

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 6736/DEL/2015 (A.Y 2000-01)

Om Prakash Arora AOV International, 136-A, Pocket-12, Jasola New Delhi AACPA1874A (APPELLANT)	Vs	ACIT Circle-22(1) New Delhi (RESPONDENT)
---	----	--

ITA No. 6737/DEL/2015 (A.Y 2001-02)

ITA No. 6738/DEL/2015 (A.Y 2002-03)

AOV International 136-A, Pocket-12, Jasola New Delhi AAFFA2656M (APPELLANT)	Vs	ACIT Circle-22(1) New Delhi (RESPONDENT)
--	----	--

Appellant by	Sh. R. S. Ahuja, CA
Respondent by	Sh. Amit Katoch, SR. DR

Date of Hearing	11.12.2018
Date of Pronouncement	17.12.2018

ORDER

PER SUCHITRA KAMBLE, JM

These three appeals are filed by the assessee against the order dated 5/8/2013 passed by CIT(A)-10, New Delhi for Assessment Year 2000-01, 2001-02 and 2002-03 respectively.

2. These three appeals are identical. Therefore, grounds of appeal for ITA No. 6736/Del/2015 are reproduced as under:-

“1. (A) That on the facts and circumstances of the case the Learned ITO & the CIT(A) erred in:

1) Not condoning the delay for filing the Appeal.
2) Not seeing the merits of the case that the assessee was entitled to claims based on the judgment of the Hon'ble Supreme Court.

3) Rejecting assessee claim u/s 80HHC of the I.T Act on the income earned from Sale of DEPB License on the basis of Taxation Laws (Amendment) Act, 2005 and the prevailing judgments of the Hon'ble Supreme Court.

4) Law to reopen the case for assessment u/s 147 of I.T Act, 1961.”

3. The brief facts of Assessment Year 2000-01 are taken first as the issue is identical in all the three appeals. In this case, return was filed by the assessee on 31/10/2000 declaring income of Rs. 24,43,040/- which was processed u/s 143(1) of the Income Tax Act, 1961. Subsequently, as per the Taxation Laws (Amendment) Act, 2005 a Clarification/Amendment was carried out to Section 80HHC of the Income Tax Act. In view of which, if any assessee satisfies the understated conditions then the profits computed under Clause (a), or Clause (b) or Clause (c) of Sub-Section (3) of Section 80HHC shall not be further increased by the amount which bears to 90% of DEPB/REP income:-

(i) The turnover of the assessee is more than 10 crore.

(ii) He had an option to choose either duty draw back or duty entitlement pass book scheme

(iii) The rate of draw back credit attributable to customs duty was not higher than the rate of credit allowable under duty entitlement pass book scheme.

The Assessing Officer noted that the assessee had claimed deduction u/s 80HHC on the income earned from sale of DEPB License and during the year under consideration, assessee's total export turnover was of Rs. 10,67,31,419/-. The Assessing Officer observed that the assessee satisfies all the above mentioned conditions, therefore, deduction claimed u/s 80HHC is restricted to the profit computed under subsection (3) of the said section and

no further increase as per the proviso to the said section on account of DEPB income is allowed. The Assessing Officer further observed that the assessee claimed excess deduction under Section 80HHC by increasing the deduction being 90% of the DEPB profits and held that income to the extent above has escaped assessment. Keeping in view the above facts, the Assessing Officer initiated proceedings to issue notice u/s 148 after obtaining the requisite approval from the competent authority and notice u/s 148 was served upon the assessee. In response to notice issued u/s 148, no return was filed by the assessee. The Assessing Officer during the course of assessment proceedings issued and served statutory notices u/s 142(1) along with questionnaire, but the same remained un-complied with. Since the proceedings initiated were time barring, the Assessing Officer completed the same in the manner as prescribed in the provisions of section 144 of the Income Tax Act, 1961. The Assessing Officer observed that assessee earned DEPB credits of Rs.33,61,129/- and was having turnover exceeding Rs.10 crore. In view of the amendment brought to Section 80HHC of the Income Tax Act by the Taxation Laws (Amendment) Act 2005, it was held by the Assessing Officer that DEPB credits are not covered under clause of Section 28 of the Income Tax Act and hence the said income will not qualify for any deduction under the proviso of Section 80HHC. Therefore, the Assessing Officer recalculated the deduction u/s 80HHC after deducting the 90% of draw back and DEPB income of Rs.31,13,526/- from the business profit of Rs.1,60,45,112/- and 90% of income falling u/s. 28(iia), (iib) or (iic) amounting to Rs.88,510/- was added back and accordingly deduction u/s 80HHC was computed at Rs. 1,30,20,096/-. Thus, assessment was completed at income of Rs.54,71,050/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before CIT(A). The CIT(A) dismissed the appeal of the assessee on the ground that appeal filed by the assessee is time barred/belated appeal.

5. The Ld. AR submitted that the appeal before the CIT(A) was filed after 5 years 6 months and 13 days. The fact was never denied by the assessee before the CIT(A). The Ld. AR submitted that the assessee in FY 1999-2000 relevant for AY 2000-01 was engaged in the business of trading and export of meat and engineering products, etc. The Ld. AR further submitted that the assessee filed return of income for Assessment Year 2000-01 on 31.10.2000 declaring Total Income of Rs. 24,43,040/- under the head Business Income comprising of income derived from export of meat and engineering products. This return was processed and assessed u/s 143(1) (a) of the Income Tax Act, 1961. The Ld. AR submitted that the case of the assessee was reopened under provisions of section 147/148 of the Income Tax Act, 1961 ('the Act') by issuing Notice u/s 148. The reason for reopening was amendment in Section 28 and section 80HHC by Taxation Law (Amendment) Act, 2005 with retrospective effect from 1st April, 1998 and therefore income was reassessed vide order framed u/s 144 of the Act at Rs.54,71,050- after re-computation of deduction claimed by the appellant u/s 80HHC. The Ld. AR submitted that the order framed u/s 144 read with section 147 and 148 was not appealed by the assessee on the advice of his counsel. The Ld. AR further submitted that on 8th February 2012, the Hon'ble Supreme Court in case of Topman Exports being Civil Appeal No. 1699 of 2012 arising out of SLP No. 26558 of 2010 reported in 205 Taxman 119 has held that Cost of acquiring Duty Entitlement Pass Book (DEPB) is not Nil because the person acquires it by paying custom duty on export content of the export product and this cost of acquisition is called the face value. Clause (iiic) of Section 28 refers to the cost of acquisition of DEPB and thus represents the face value of DEPB. Clause (iiid) of Section 28 refers to the profit on transfer of DEPB which is sale consideration reduced by face value of DEPB. Thus the interpretation given by the assessing officer to the amendment in Section 80HHC by the Taxation Law (Amendment) Act, 2005 with retrospective effect from 1st April, 1998 is incorrect in view of the judgment of the Apex Court and the appellant has been asked to pay huge amount of tax due to this incorrect interpretation in the reassessment made on the basis of the amendment. Now

on the passing of the judgment by the Apex Court it has been clear that the law existed since its inception on amendment as has been interpreted by the Hon'ble Court. The Ld. AR submitted that the assessee came to know about this judgment of the Apex Court referred above and about the interpretation of law and application of the same to his case, when he engaged a new Counsel in July 2013. The Ld. AR submitted that now on becoming aware of the law as it is, the assessee's case, on the principles of natural justice, is liable to be given the correct interpretation of law in a similar manner as the department had reopened the case on account of amendment in law and reassessed him on a higher income. Hence the assessee filed appeal against the order of reassessment of the assessing officer wherein he has determined a higher income in the hands of the assessee before the CIT(A). The Ld. AR submitted that the order of reassessment was made on 20.11.2008 and thus according to the provisions of section 249(2), the appeal against such reassessment could have been filed by the assessee latest by December 2009 and thus technically the appeal filed before the CIT(A) was delayed by 2018 days. But considering the judgment of the Apex Court passed on 08.02.2012 and the attention to the same being brought to the assessee by the new Counsel in July 2013, there is a sufficient cause with the assessee for such delay. The way the department had resorted to the provisions of reassessment for determining higher income to tax due to amendment in the Act brought by the Government with retrospective date (in 2005 with retrospective date of 1998) for collection of additional amount of tax on such reassessed income, the assessee also has a right to file an appeal against such reassessment order and his income is liable to be determined according to the interpretation of law as given by the Apex Court in its judgment. The Principles of natural justice allow the assessee to file this appeal with delay and considering the given facts such delay is prayed to be condoned by your Honor. The assessee relied upon the judgment of the Apex Court in case of Collector, Land Acquisition v. Mst. Katji (1987) reported in 167 ITR 471 wherein the Hon'ble Court has held that The expression

"sufficient cause " employed by the Legislature is adequately elastic to enable the court to apply the law in a meaningful manner which sub serves the ends of justice. Further the Ld. AR also relied upon the decision in case of N. Balakishnan v. M. Krishnamurthy, AIR 1998 SC 3222.

6. The Ld. DR submitted that the CIT(A) rightly dismissed the appeal of the assessee which is filed belatedly. The Ld. DR relied upon the order of the CIT(A).

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the CIT(A) has not taken into account that the case of the assessee was reopened under provisions of section 147/148 of the Income Tax Act, 1961 ('the Act') by issuing Notice u/s 148. The reason for reopening was amendment in Section 28 and section 80HHC by Taxation Law (Amendment) Act, 2005 with retrospective effect from 1st April, 1998 and therefore income was reassessed vide order framed u/s 144 of the Act at Rs.54,71,050- after re-computation of deduction claimed by the appellant u/s 80HHC. The Ld. AR submitted that the order framed u/s 144 read with section 147 and 148 was not appealed by the assessee on the advice of his counsel. The Ld. AR further submitted that on 8th February 2012, the Hon'ble Supreme Court in case of Topman Exports being Civil Appeal No. 1699 of 2012 arising out of SLP No. 26558 of 2010 reported in 205 Taxman 119 has held that Cost of acquiring Duty Entitlement Pass Book (DEPB) is not Nil because the person acquires it by paying custom duty on export content of the export product and this cost of acquisition is called the face value. Clause (iiic) of Section 28 refers to the cost of acquisition of DEPB and thus represents the face value of DEPB. Clause (iiid) of Section 28 refers to the profit on transfer of DEPB which is sale consideration reduced by face value of DEPB. Thus the interpretation given by the assessing officer to the amendment in Section 80HHC by the Taxation Law (Amendment) Act, 2005 with retrospective effect from 1st April, 1998 is incorrect

in view of the judgment of the Apex Court and the appellant has been asked to pay huge amount of tax due to this incorrect interpretation in the reassessment made on the basis of the amendment. Now on the passing of the judgment by the Apex Court it has been clear that the law existed since its inception on amendment as has been interpreted by the Hon'ble Court. It is the submission of the Ld. AR that the assessee came to know about this judgment of the Apex Court referred above and about the interpretation of law and application of the same to his case, when he engaged a new Counsel in July 2013. Thus, the reason for delay was properly explained by the assessee. Therefore, we are of the opinion that the delay should have been condoned by the CIT(A), otherwise the assessee will be remediless despite having legal position in its favour. Hence, we are condoning the delay in filing the appeal before the CIT(A) and remand back the matter to the file of the CIT(A) for adjudication of the issues contested therein on merits. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. The appeal of the assessee is partly allowed for statistical purpose. All the other two appeals are also on identical grounds, therefore, the three appeals are partly allowed for statistical purpose.

8. In result, all the three appeals filed by the assessees are partly allowed for statistical purpose.

Order pronounced in the Open Court on 17th December, 2018.

**Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 17/12/2018
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	11.12.2018
Date on which the typed draft is placed before the dictating Member	17.12.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	17.12.2018
Date on which the final order is uploaded on the website of ITAT	17.12.2018
Date on which the file goes to the Bench Clerk	17.12.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	