

IN THE INCOME TAX APPELLATE TRIBUNAL "B-SMC" BENCH : KOLKATA

[Before Hon'ble Shri S.S. Godara, JM]

I.T.A No.1810/Kol/2018

Assessment Year : 2004-05

Smt. Shefali Ghosh  
PAN: ADTPG6963A  
(Appellant)

Vs.

A.C.I.T, Cir-43, Kolkata  
(Respondent)

For the Appellant : Shri Subash Agarwal, Advocate, Id.AR

For the Respondent : Shri C.J. Singh, JCIT, Id.Sr.DR

Date of Hearing : 28-02-2019

Date of Pronouncement : 28-02-2019

**ORDER**

1. This assessee's appeal is directed against the CIT(A), 13, Kolkata's order, dated - passed in case no. 281/CIT(A)-13/Cir-43/Kol/2014-15 involving proceedings u/s 143(3) of the I.T Act, 1961 ( in short 'Act').

Heard both the sides. Case file perused.

2. The assessee's first substantive ground challenges both the lower authorities' actions denying the of section 80HHC deduction amounting to Rs. 7,21,651/-. The CIT(A)'s detailed discussion to this effect reads as under:-

*"I have perused the facts of the case and argument of the appellant. In case of Goodricke Group Limited, Kolkata v /s DCIT, Cir-4(1), Kolkata, Kolkata on 14 March, 2018 ITA NO.309/Kol/2015Honle ITAT has held that "considering the order of Hon'ble Gauhati High Court in respect to income under clause (iii) of sec. 28 of the Act, we are of the considered view that profits from sale of DEPB license and gain from*

*foreign exchange should be included as business income computed prior to the application of Rule 8 of the Rules and the deduction u/s. 33AB of the Act should be made from the composite income i.e. before applying Rule 8 of the Rules that profit from sale of DEPB license is an income included in sub clause iii(d) of clause (iii) of section 28 of the Act as income chargeable to tax under the head "Profits and Gains of Business or Profession" and, therefore, as per the order of Hon'ble Guwahati High Court in Mcleod Russel India Ltd. Vs. CIT 260 CTR 337 (Gau), this amount has to be included in composite income before applying Rule 8(1) of the Rules. Further a new proviso to section 80HHC(3) has been inserted for allowing the deduction for profit on account of sale of DEPB licence. For this purpose the exporters have been classified in 2 categories -*

- (1) Assesseees having export turnover upto Rs. 10 crores.*
- (2) Assesseees having export turnover exceeding Rs. 10 crores.*

*The assesseees having export turnover upto Rs. 10 crores have no difficulty and will get deduction of 90% of export incentive on account of profits on transfer of DEPB licenses but assesseees having export turnover exceeding Rs. 10 Gores will get this deduction if the assessee has necessary and sufficient evidence to prove that -*

*(a) he had an option to choose either the duty drawback or the DEPB Scheme or the Duty Free Replenishment Certificate as the case may be, being 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 DEPB Scheme or the Duty Free Replenishment Scheme as the case may, be being Duty Remission Scheme.*

*So, from a perusal of the above insertion of the Taxation Law Amendment Act,2005 w.r.e.f. AY 1998-99 any profit on transfer of DEPB license is chargeable under the head "Profit & Gains for Business or Profession" u/s. 28(iiid) of the Act and we note that sub- section (3) to sec. 80HHC provides formula for the computation of export profits. According to the said formula, the profit derived from the export is the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business. The profits of business is defined in clause (baa) of explanation u/s. 80HHC which as far as it related to this appeal means the profits of the business as computed under the head 'profits and gains of business or*

*profession' as reduced by 90% of export benefit referred to it clauses (iiia) to (iiie) of section 28. As per the second and third proviso to section 80HHC(3) the export profit so computed shall be further increased in this case by an amount which bears 90% of the profit on sale of DEPB, the same proportion as the export turnover bears to the total turnover of the business. In view of the insertion of clause (iiid) to section 28 and simultaneous insertion of third proviso to section 80HHC with retrospective effect from 01.04.1998, there was no justification in rejecting the appellant's such enhanced claim. Therefore, benefit has to be given to the assessee as per second/third proviso to sec. 80HHC(3) of the Act. In case if the assessee falls in 2nd proviso, there is no difficulty in availing the deduction, however, in case if the assessee falls in the third proviso i.e. if the turnover is exceeding Rs. 10 cr. will get this deduction, if the assessee has necessary and sufficient evidence to prove clause (a) and (b) given in para 18 supra. With this aforesaid observation, we direct the AO to grant deduction in accordance to law.*

*Perusal of aforesaid decision clearly shows that the appellant case is not covered under the proviso of the newly inserted, provision of section 80HHC(3) therefore the AO has rightly disallowed the benefit of DEPB. Hence the action taken by the AO is upheld and the ground of appeal is dismissed.”*

3. I have given my thoughtful consideration to the rival contentions against and in support of the impugned disallowance. It emerges during the course of hearing at the outset that the lower authorities have applied the provisions of section 80HHC(3) 2<sup>nd</sup> to 4<sup>th</sup> proviso to deny the impugned deduction. Hon’ble Gujarat High Court’s decision Avani Exports V/s CIT in (2012) 348 ITR 319 (Guj.) as upheld in Hon’ble apex court, has already settled the law that section 80HHC amended by way of above said proviso brought in the Act by the Finance Act 2005 w.e.f A.Y 1998-99 do not carry retrospective effect. I therefore accept assessee’s arguments in principle.

4. Next comes equally important aspect of computation of assessee’s section 80HHC deduction claim, Hon’ble apex court’s decision in Topman Exports Vs. CIT (2012) 342 ITR 49 (SC) has settled the law that it is only the profit element than the

entire sale price that required to be considered in such a situation. I therefore restore the instant first substantive ground back to the Assessing Officer for re-computation of assessee's deduction claim. This substantive ground as taken is accepted for statistical purposes.

5. The assessee's second substantive ground challenges correctness of the Assessing Officer as well as the CIT(A)'s action in treating interest amount of Rs.3,68,383/- as income from other sources. The assessee's only argument during the course of hearing is that the lower authorities ought to have adopted netting principle regarding the interest amount in issue. I find hon'ble Gujarat high court's decision in CIT Vs. 2015 367 ITR 12 as well as in apex court's judgment in 201 343 ITR 89 (SC) in ACG Capsules V/s CIT settle the law that netting principle has to be adopted in such an issue. I therefore direct the Assessing Officer to frame a fresh computation by adopting netting formula.

6. The assessee is very fair in not pressing third substantive ground seeking to delete vehicle expenses and depreciation disallowance amounting to Rs. 53,800/- keeping in mind smallness of sum involved.

7. This assessee's appeal is partly allowed for statistical purpose in above terms.

Order pronounced in the Court on 28-02-2019

Sd/-

[ S.S.Godara ]  
Judicial Member

Dated :28-02-2019

PP, Sr. PS

Copy of the order forwarded to:

1. Appellant/Assessee: Smt. Shefali Ghosh C/o Subash Agarwal & Associates, Siddha Gibson, 1 Gibson Lane, Suite-213, 2<sup>nd</sup> Fl., Kolkata-69.
2. Respondent/ Department : The ACIT, Cir-43, Kolkata. .
3. C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar  
Head of Office/D.D.O., ITAT, Kolkata