

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

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No-4683/Del/2016
(Assessment Year: 2001-02)**

**Drishti Apparels
180, SEctot-6,
IMT Manesar
Gurgaon
AAAFD2361B**

vs

**ITO
Ward-23(4)
New Delhi**

Revenue by Sh. Sunil Arora, CA
Assessee by Sh. Abhishek Arora, Sr. DR

Date of Hearing 14.05.2019
Date of Pronouncement 17.05.2019

ORDER

PER K. NARSIMHA CHARY, J.M.

Challenging the order dated 29/06/2016 in Appeal No. 191/14-15 passed by the Ld. Commissioner of Income Tax (Appeals)-II, New Delhi ("CIT(A)") for A.Y. 2012-13, assessee preferred this appeal.

2. Brief facts of the case are that the assessee is a partnership firm which is engaged in the business of manufacture and export of

cotton garment, leather garment, bags and other leather goods & accessories. During the relevant year, A.Y 2001-02, the assessee had earned certain profits from export business and accordingly had claimed deduction 1,56,83,432/- in terms of section 80HHC of the Act. Their return of Income was filed on 31.10.2001 declaring total income of Rs.41,62,531.25/-.

3. Assessment in the case of the assessee was originally completed u/s 143(3) of the Income Tax Act, 1961 ("the Act"), vide order dated 16.03.2004 on total income of Rs. 1,57,37,189/- on account of disallowance of deduction u/s 80HHC of the said Act amounting to Rs. 1,56,83,432/- and certain ad-hoc disallowance of Vehicle running & maintenance, telephone expense etc.

4. The appeal preferred by the assessee was dismissed by the CIT(A) by order dated 15/09/2004 upholding the findings of the Ld. Assessing Officer and disallowing the claim of deduction u/s 80HHC. Such an order was carried by the assessee in appeal to the Tribunal and a Coordinate Bench of this Tribunal while order dated 28/02/2005 in ITA No. 2479/Del/2004 set aside the order of the Ld. CIT (A) regarding the issue of allowability of deduction u/s 80HHC to the assessee and directed the Ld. A.O to recompute the deduction u/s 80HHC of the Act in accordance with the findings given in such order.

5. Being aggrieved by the order of the Tribunal, the assessee preferred appeal to the Hon'ble High Court and the Hon'ble High

Court vide order dated 31/1/2012 in ITA No. 959/2005 remitted the issue to the file of the ITAT by observing that :

"2. After the present appeal was admitted, there has been retrospective amendment with appeal/ incorporation of section 28(iiid). There has been also corresponding amendment in section 80HHC. (Explanation Baa).

3. These amendments were made by Taxation Laws (Amendment) Act, 2005 with retrospective effect from 1st April, 1998.

4. In view of the aforesaid amendment, we feel that the matter should be considered and decided by the tribunal afresh as it requires factual examination and details. Accordingly, we answer the question of law mentioned above by directing the tribunal to decide the aspect/issue afresh in view of the retrospective amendment. The order passed by the tribunal deciding the question/issue will be treated as set aside."

6. On remained, the Tribunal, after considering the submissions on either side and taking note of the amendments in question, by order dated 16/3/2012 set aside the issue to the file of the Ld. Assessing Officer with a direction to compute the deduction u/s 80HHC of the Act, with the following observations:

"3. We have heard both the parties and gone through the material available on record. In this case the AO passed assessment order on 16.03.2004. The learned CIT(A) upheld the order of the AO vide her order dated 15.09.2004. ITAT disposed of assessee's appeal vide order dated 28th February, 2005. Taxation laws (Amendment) Act, 2005 inserted clause(iiid) to sec.28 with retrospective effect from 01.04.1998. As per clause (iiid), any profit on transfer of the Duty Entitlement Pass Book (DEPB) is taxable as business profit. The Taxation Laws (Amendment) Act, 2005 also inserted third and fourth provisos to sec. 80HHC(3) with retrospective effect from 01.04.1992.

Since amended provisions of sec.28(iiid) and second to fifth

Provisos were not available on Statute when the Assessing Officer, CIT(A) and ITAT passed the orders and since the provisions to sec. 80HHC(3) and clause (iiid) to sec. 28 have been inserted with retrospective effect, we feel it proper to set aside the issue to the file of the Assessing Officer with the directions to examine the claim of the assessee for deduction under sec.80HHC in respect of DEPB receipts in the light of amended provisions of Law. We would like to mention that Hon.ble Supreme Court in the case of M/s. Topman Exports (Supra) has held as under:-

“22. The aforesaid discussion -would show that where an assessee has an export turnover exceeding Rs. 10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under Explanation (baa) to Section 80HHC of the Act and there is nothing in Explanation (iiid) to Section 80HHC to show that this benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs. 10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit. The High Court, therefore, was not right in coming to the conclusion that as the assessee did not have the export turnover exceeding Rs. 10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and (iiid) of Section 28, the assessee was entitled to a deduction under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee. ”

In view of the amended provisions of law and the decision of Hon.ble Supreme Court in the case of M/s. Topman Exports (Supra), we set aside the issue to the file of the Assessing officer and direct him to compute deduction u/s 80HHC of the Act accordingly.”

7. Pursuant to the directions of the ITAT, while remitting the matter, Ld. A.O passed the order dated 28/3/2014 by considering the Taxation Law Amendment Act, 2005 in the light of the decision of the Hon’ble Apex Court in the case of Topman Exports (2012) 18 taxmann.com 120 (SC). In doing so, the Ld. A.O observed that though the assessee relied on the decision of the Hon’ble Gujrat High Court in case of Avani Export Vs. CIT(A) 2012 23 Taxman.com 62 (Gujrat) wherein retrospective amendments in the Act for held to be invalid, since the Hon'ble High Court while restoring the matter to the Tribunal directed the Tribunal to adjudicate the issue of deduction of 80HHC after considering the retrospective amendments by the Tax Law Amendment Act, 2005 w.e.f. 1/4/1998 in the light of M/s Topman Exports (supra).

8. The assessee preferred appeal against such an order before the CIT(A) and argued before the Ld. CIT(A) that to the facts of the case the decision of the Hon’ble Apex Court in the case of CIT Vs. Avani Exports 2015 58 Taxman.com 100 Supreme Court is applicable.Ld. CIT(A) also, however, made an observation that the ITAT directed the Ld. Assessing Officer to examine the claim of the assessee for deduction u/s 80HHC in respect of DEPB receipts in view of amended provisions of law and the decision of the Apex Court in the case of M/s Topman Exports (supra) and the ITAT

relied upon the decision of the Apex Court in the case of Topman Exports (supra) wherein it was held that the assessee was entitled only for the face value of the DEPB despite having export turnover in excess of Rs. 10 Crores and not the profit on sale of DEPB as the assessee's turnover was in excess of Rs. 10 crores and quoted the specific para of the decision given by the Hon'ble Apex Court in Topman Exports (supra) wherein profit on sale of DEPB u/s 28(iid) would not be eligible because of the Export turnover in excess of 10 crores. Ld.CIT(A) did not discuss the impact of decision of the Hon'ble Apex Court in the case of Avani Export and confirmed the findings of the Ld. A.O.

9. The assessee is, therefore, in this appeal before us contending that the authorities below committed an error in not considering the decision of the Hon'ble Apex Court in the case of Avani Export(Supra) and as a matter of fact such a decision covers the facts of this case and holds the fields.

10. Per contra, it is the submission of the Ld. DR that in so far as the orders of the Hon'ble High Court and the Tribunal in reminding the matter to the Tribunal and the Ld. A.O respectively, the specific direction was to examine a claim of the assessee for deduction u/s 80HHC in respect of the DEPB receipts and the profit on sale of DEPB in the light of the decision in Topman Exports (Supra) and, therefore, the authorities below are justified in confining themselves to the examination of the issue in the light

of the Amendments made by the Tax Law (Amendments) Act, 2005 in the light of the decision of the Hon'ble Apex Court in the case of Topman Export (Supra).

11. We have gone through the record in the light of the submissions made on either side. At the outset it is noticed that though originally in the grounds of appeal the assessee challenged the deduction u/s 80HHC of the Act at Rs. 1,40,41,961/- instead of deduction of Rs. 1,56,83,432/- by way of modification, they substituted figures Rs. 1,56,83,432/- with Rs. 1,57,75,985/- on the ground that as per the CBDT Circular No. 37/2016 deduction under Chapter VIA shall be allowed on enhanced income, i.e. income assessed after making additions and such income eligible for deduction u/s 80HHC, according to the assessee is Rs.1,57,75,985/.

12. It is an admitted fact that the assessee is an exporter of leather goods and has been claiming examination u/s 80HHC for several years and during the relevant previous year i.e. Financial Year 2000-01 relevant for the Assessment Year 2001-02, the export incentives, which the assessee was entitled to were changed from duty draw back to the DEPB license; that though the assessee claimed deduction u/s 80HHC on the profit from transfer of said license, such a claim was rejected by the authorities below; and that the assessee was allowed deduction u/s 80HHC by a

Coordinate Bench of this Tribunal by order dated 28/02/2005 against which the Revenue preferred an appeal.

13. It is also an in dispute that in the meantime Section 80HHC was amended by the Taxation Laws (Amendment) Act, 2005 with retrospective effect from 1/4/1998. In view of this, the Hon'ble Jurisdictional High Court by order dated 3/1/2012 remanded the matter to the Tribunal for deciding it afresh as it required factual examination and the details and to decide the issue afresh, in view of the retrospective amendment to Section 80HHC.

14. Pursuant to such direction of the Hon'ble High Court the Tribunal heard the matter and by order dated 16/3/2012 recorded that as under:-

"3. We have heard both the parties and gone through the material available on record. In this case the AO passed assessment order on 16.03.2004. The learned CIT(A) upheld the order of the AO vide her order dated 15.09.2004. ITAT disposed of assessee's appeal vide order dated 28th February, 2005. Taxation laws (Amendment) Act, 2005 inserted clause(iiid) to sec.28 with retrospective effect from 01.04.1998. As per clause (iiid), any profit on transfer of the Duty Entitlement Pass Book (DEPB) is taxable as business profit. The Taxation Laws (Amendment) Act, 2005 also inserted third and fourth provisos to sec. 80HHC(3) with retrospective effect from 01.04.1992.

Since amended provisions of sec.28(iiid) and second to fifth Provisos were not available on Statute when the Assessing Officer, CIT(A) and ITAT passed the orders and since the provisions to sec. 80HHC(3) and clause (Hid) to sec. 28 have been inserted with retrospective effect, we feel it proper to set aside the issue to the file of the Assessing Officer with the directions to examine the claim of the assessee for deduction under sec.80HHC in respect of DEPB receipts in the light of amended provisions of Law. We

would like to mention that Hon.ble Supreme Court in the case of M/s. Topman Exports (Supra) has held as under:-

“22. The aforesaid discussion -would show that where an assessee has an export turnover exceeding Rs. 10 crores and has made profits on transfer of DEPB under clause (d) of Section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of Section 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under Explanation (baa) to Section 80HHC of the Act and there is nothing in Explanation (baa) to Section 80HHC to show that this benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs.10 crores. In other words, where the export turnover of an assessee exceeds Rs. 10 crores, he does not get the benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit. The High Court, therefore, was not right in coming to the conclusion that as the assessee did not have the export turnover exceeding Rs. 10 crores and as the assessee did not fulfill the conditions set out in the third proviso to Section 80HHC (iii), the assessee was not entitled to a deduction under Section 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under Section 28 (iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in explanation (baa) to Section 80HHC read with the words used in clauses (iiid) and (iiid) of Section 28, the assessee was entitled to a deduction under Section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.”

In view of the amended provisions of law and the decision of Hon.ble Supreme Court in the case of M/s. Toman Exports (Supra), we set aside the issue to the file of the Assessing officer and direct him to compute deduction u/s 80HHC of the Act accordingly.”

15. The Tribunal, thereby, remanded the matter to the file of the Ld. Assessing Officer with a direction to compute the direction u/s 80HHC of the Act. In the light of the amended provisions of law and the decision of the Hon'ble Apex Court in the case of Topman Export (Supra). Subsequently, on March, 30, 2015, the Hon'ble Apex Court in the case of Avani Export (Supra) held that having seen the twin conditions and Section 80HHC benefit is not available after 1/4/2005, the cases of exporters having turnover below and above 10 crores should be treated similarly. This order was brought to the notice of the authorities below, but they have not given any consideration to this aspect and on the other hand they have stated that the mandate of the Hon'ble High Court and the Tribunal while remanding the matter to the Tribunal and the Ld. A.O is only to the exemption the claim of the assessee for a deduction u/s 80HHC, in respect of DEPB receipts in the light of the amending provisions of law and the decision of the Apex Court in the case of M/s Topman Exports (supra).

16. On a careful consideration of the matter, we find that now the law is firmly settled by the decision of the Hon'ble Apex Court that the 3rd and 4th proviso to Section 80HHC inserted by taxation law (Second Amendment Act, 2005) would not operate retrospectively, and period prior to the same and the cases of exporters having turnover below 10 crores and also the exporters with turnover above 10 crores should be treated similarly, and even the exporters with turnover exceeding 10 crores would be

entitled to claim the benefit of 3rd Proviso to 80HHC (3) without complying with any conditions laid down therein.

17. In the facts and circumstances involved in this matter, we have no hesitation to hold that this case is squarely covered by the decision of the Hon'ble Apex Court in the case of Avani Exports (Supra) and, therefore, the deduction u/s 80HHC of the Act shall be calculated in accordance with this decision. Decision of the Hon'ble Apex Court is the law of the land and the authorities cannot refuse to follow the same, when once it is brought to their notice.

18. With this view of the matter, we find force in the submissions of the Ld. AR that the deduction u/s 80HHC has to be computed by giving benefit of the decisions of the Hon'ble Apex Court in the case of Avani Exports (Supra). The assessee to provide the working for such a re-computation before the Ld. A.O and the Ld. A.O will verify and extend the benefit of the decision of the Hon'ble Apex Court in the case of Avani Export (Supra) to the case of the assessee.

19. In result, the appeal of the assessee is allowed.

Order pronounced in the open court on 17.05.2019

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER
Dated:17.05.2019

Sd/-
(K. NARSIMHA CHARY)
JUDICIAL MEMBER

*R.N

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	15.05.2019
Date on which the typed draft is placed before the dictating Member	16.05.2019
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	17.05.2019
Date on which the final order is uploaded on the website of ITAT	17.05.2019
Date on which the file goes to the Bench Clerk	20.05.2019
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	