

THE INCOME TAX APPELLATE TRIBUNAL  
"E" Bench, Mumbai  
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 7812/Mum/2019 (Assessment Year 2003-04)

Sanjay Sales Corporation Alta Bhavan 532, Senapati Bapat Marg Dadar, Mumbai-400 028.  PAN : AAMFS3154P (Appellant)	Vs.	ACIT, Circle-21(3) Room No. 209 Piramal Chambers Lalbaug Mumbai-400 012.  (Respondent)
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Assessee by	Shri H.P. Mahajani
Department by	Shri Vijay Kumar Menon
Date of Hearing	15.07.2021
Date of Pronouncement	29.09.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 1.10.2019 pertaining to assessment year (A.Y.) 2003-04.

2. The ground of appeal reads as under :-

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the stand of the Assessing Officer by considering the income from sale of DEPB at Rs. 1,19,67,203/- instead of Rs. 91,43,752/-.

3. Brief facts of the case are that the assessee is an exporter of bulk drugs, dyes and pigments. Return of income was filed by the assessee on 28.11.2003 declaring total income at Rs. 1,30,17,018/-. Assessment was completed u/s.143(3) on 27.03.2006 determining the total income at Rs.2,04,33,742/-. In the assessment order, profit of Rs. 1,19,67,955/- on transfer of DEPB u/s 28(iiid) was taxed instead of DEPB credit of Rs. 91.43J52/- credited by the assessee in his P& L account. The issue was discussed elaborately in the assessment order along with various case laws. The AO was of the view that the profits were arising only on sale of licenses and the entire sales proceeds should be treated as profits. As per AO, it is clear that the sales proceeds

received on transfer of DEPB licenses were to be taxed u/s.28(iiid). Hence, the income u/s 28(iiid) was worked out by the AO at Rs.1,19,67,955/- and it was also held that 90% of the same will not be eligible for deduction u/s.80HHC. The assessee filed appeal against the said order of the AO. However, the CIT(A) confirmed the action of the AO in bringing to tax the DEPB income of Rs.1,19,67,955/- as against Rs.91,43.7527- credited by the appellant in its accounts. The assessee filed further appeal before the STAT against the order of CIT(A). The Hon'ble ITAT 'K' Bench, Mumbai, vide order in ITA.No.750/Mum/ 2007 dated 23.09,2009, relied on the decision of Special Bench (Mumbai) in the case of M/s. Topman Exports (ITA No.5769/Mum/20Q6) and M/s. Kalpataru Colours & Chemicals (ITA No.5651 /Mum/2006) [20Q9-TIOL-531-ITAT-Mum-SB] and observed that the Special Bench, vide its order dated 11.08.2009 restored the matter to the file of the AO for considering the face value of DEPB as covered u/s.28(iiib) and profit on transfer of DEPB i.e., excess of sale price over the face value of DEPB as falling u/s.28(iiid). Accordingly in the present case, the Tribunal directed the AO to recompute deduction u/s 80HHC.

4. On further appeal, the Hon'ble Bombay Court vide order dated 29.06.2010 has decided the matter as under:

"By its impugned order the Tribunal has restored the matter to the AO for fresh decision in the light of the judgement in the case of Topman Exports vs. ITO (ITA 5769/Mum/2006 dated 11 August, 2009). By the judgement delivered today in the CIT vs. Kalpataru Colours and Chemicals (ITA(L) 2887 of 2009), the view of the Tribunal in the case of Topman has been disapproved. In the circumstances, this appeal is disposed of, on the request of learned counsel for the Revenue and the assessee, by directing the AO to dispose of the proceedings in accordance with law and, while passing fresh orders to have due regard to the judgement of this Court in the case of Kalpataru Colours and Chemicals (supra).

The appeal is accordingly disposed of. There shall be no order as to costs."

5. In view of the above, the AO while giving effect to the order of Hon. Bombay High Court vide his order dated 25.04.2011 determined total income at Rs. 2,04,33,740/- and treated the income from sale of DEPB at Rs.

1,19,67,955/- rejecting the claim of the appellant for taking it at Rs. 91,43,752/-

6. Upon assessee's appeal learned CIT(A) confirmed the Assessing Officer's order by observing as under :-

"17.5 The Bombay High Court in case of Kalpataru Colours and chemicals [2010] 192 Taxman 435 (Bombay) held that entirety of sale consideration of DEPB would fall within the purview of section 28(iiid).

17.6 The AO in his order dated 25.11.2011 [order giving effect to the order of Hon'ble High Court] has mentioned clearly that the AO's action of taxing the entire sales proceeds of Rs. 1,19,67,955/- u/s 28 (iiid) has been confirmed by the CIT(A) vide his order dated 17.11.2006 and hence no interference can be made.

17.7 On perusal of order of the Hon'ble Bombay High Court and ITAT, Mumbai; it is found that the issue of quantification of DEPB income u/s 28 (iiid) was not adjudicated in any of the aforesaid two orders and hence the same was not restored to me file of the AO.

17.8 The aforesaid view is proved beyond doubt by the fact that the appellant had filed Application No. 352/M/2013 on 24.09,2013 before the ITAT requesting the ITAT to adjudicated following ground stating that the same was inadvertently not adjudicated by the ITAT

*"2. Without prejudice to the above, on the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the action of the learned Assessing Officer in bringing to tax as DEPB income an amount of Rs. 1,19,67,955 as against that of Rs. 91,43,752/- credited by the Appellant in its accounts."*

17.9 The appellant in its latest submission dated 20.09.2019 did not communicate the outcome of the said miscellaneous application and even did not mention that the miscellaneous application was filed before the ITAT. In view of above, it seems that the appellant did not succeed before ITAT in getting any order in favour of the appellant on miscellaneous application.

17.10 Further, the appellant has not been able to point out any discrepancy in the order of the AO giving effect to the order of the High Court by specifying which findings or directions of the High Court was not followed by the AO.

17.11 The AO is correct in holding that the quantum of DEPB profits taxed u/s 28(iiid) was confirmed by CIT(A) and hence the same cannot be changed now. As discussed above, the ITAT and the High Court did not direct the AO to re-compute the income u/s 28(iiid). Moreover, the Bombay

High Court in case of Kalpataru Colours and chemicals [2010] 192 Taxman 435 (Bombay) has also held that entirety of sale consideration of DEPB would fall within the purview of section 28 (iiid) and that was also the view of the AO right from beginning. In view of above, the ground of the appellant is dismissed.”

7. Against the above order the assessee is in appeal before us.
8. We have heard both the parties and perused the records. Learned Counsel of the assessee contended that the decision of Hon'ble Bombay High Court followed by authorities below has been reversed by Hon'ble Supreme Court in the case of Topman Exports (supra). Hence, he submitted that on the touchstone of the decision the matter may be remitted to the file of the Assessing Officer to be decided as per the ratio from the said decision.
9. Per contra learned Departmental Representative agreed that the issue has now been dealt with by Hon'ble Supreme Court.
10. Upon careful consideration we note that Hon'ble Supreme Court in the case of Topman Exports (supra) has held as under :- (Head note only)

“On a reading of the paragraphs of the Hand Book on DEPB and the Export and Import Policy of the Government of India, 1997-2002, it is clear that the objective of DEPB scheme is to neutralize the incidence of customs duty on the import content of the export products. Hence, it has direct nexus with the cost of the imports made by an exporter for manufacturing the export products. The neutralization of the cost of customs duty under the DEPB scheme, however, is by granting a duty credit against the export product and this credit can be utilized for paying customs duty on any item which is freely importable. DEPB is issued against the exports to the exporter and is transferable by the exporter. [Para 10]

It is necessary to consider the relevant provisions of section 28 for determining whether DEPB will fall under clause (iib) or under clause (iiid) of section 28. [Para 11]

It will be clear from the provisions of section 28 that under clause (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income tax under the head 'Profits and Gains of Business or Profession'. DEPB is a kind of assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. Therefore, there is no doubt that DEPB is 'cash

assistance' receivable by a person against exports under the scheme of the Government of India and falls under clause (iiib) of section 28 and is chargeable to income tax under the head 'Profits and Gains of Business or Profession' even before it is transferred by the assessee. [Para 12]

Under clause (iiid) of section 28, any profit on transfer of DEPB is chargeable to income tax under the head 'Profits and Gains of Business or Profession' as an item separate from cash assistance under clause (iiib). The word 'profit' means the gross proceeds of a business transaction less the costs of the transaction.

'Profits' imply a comparison of the value of an asset when the asset is acquired with the value of the asset when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person. As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessee over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB (para 13)

It is thus, opined that while the face value of the DEPB will fall under clause (iiib) of section 28, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of section 28 and the High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the DEPB realized on transfer of the DEPB and not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB. [Para 14]

One may now point out the errors in the impugned judgment of the High Court. The first reason given by the High Court is that clause (iiia) of section 28 treats profits on the sale of an import license as income chargeable to tax and when the license is sold, the entire amount is treated as profits of business under clause (iiia) of section 28 and, thus, there is no justification to treat the amount which is received by an exporter on the transfer of the DEPB any differently than the profits which are made on the sale of an import license under clause (iiia) of section 28. In taking the view that when the import license is sold the entire amount is treated as profits of business, the High Court has visualized a situation where the cost of acquiring the import license is nil. The cost of acquiring DEPB, on the other hand, is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against exports has a cost element in it. Accordingly, when DEPB is sold by a person, his profit on transfer of DEPB would be the sale value of the DEPB less the face value of DEPB which represents the cost of the DEPB. The second reason given by the High Court in the impugned judgment is that under the DEPB scheme, DEPB is given at a percentage of the FOB value of the exports so as to neutralize the incidence of customs duty on the import content of the export products, but the exporter may not himself utilize the DEPB for paying customs duty but may transfer it to someone else and, therefore, the entire sum received on transfer of DEPB would be covered under clause (iiid) of section 28. The High Court has failed to appreciate that DEPB represents part of the cost incurred by a person for manufacture of the

export product and, hence, even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When, therefore, DEPB is transferred by a person, the entire sum received by him on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB. [Para 15]

The High Court has sought to meet the argument of double taxation made on behalf of the assessee by holding that where the face value of the DEPB was offered to tax in the year in which the credit accrued to the assessee as business profits, then any further profit arising on transfer of DEPB would be taxed as profits of business under section 28(iiid) in the year in which the transfer of DEPB took place. This view of the High Court, is contrary to the language of section 28 under which 'cash assistance' received or receivable by any person against exports such as the DEPB and 'profit on transfer of the DEPB' are treated as two separate items of income under clauses (iib) and (iiid) of section 28. If accrual of DEPB and profit on transfer of DEPB are treated as two separate items of income chargeable to tax under clauses (iib) and (iiid) of section 28, then DEPB will be chargeable as income under clause (iib) of section 28 in the year in which the person applies for DEPB credit against the exports and the profit on transfer of the DEPB by that person will be chargeable as income under clause (iiid) of section 28 in his hands in the year in which he makes the transfer. Accordingly, if in the same previous year the DEPB accrues to a person and he also earns profit on transfer of the DEPB, the DEPB will be business profits under clause (iib) and the difference between the sale value and the DEPB (face value) would be the profits on the transfer of DEPB under clause (iiid) for the same assessment year. Where, however, the DEPB accrues to a person in one previous year and the transfer of DEPB takes place in a subsequent previous year, then the DEPB will be chargeable as income of the person for the first assessment year chargeable under clause (iib) of section 28 and the difference between the DEPB credit and the sale value of the DEPB credit would be income in his hands for the subsequent assessment year chargeable under clause (iiid) of section 28. This interpretation, therefore, does not lead to double taxation of the same income, which the legislature must be presumed to have avoided. [Para 16]

The High Court has held that as the assessee had an export turnover exceeding Rs. 10 crores and did not fulfill the conditions set out in the third proviso to section 80HHC(3) the assessee was not entitled to a deduction under section 80HHC on the amount received on transfer of DEPB and to get over this difficulty the assessee contended that the profits on transfer of DEPB in section 28(iiid) would not include the face value of the DEPB so that the assessee gets a deduction under section 80HHC on the face value of the DEPB. This finding of the High Court is not based on an accurate understanding scheme of section 80HHC. [Para 17]

Sub-section (1) of section 80HHC makes it clear that an assessee engaged in the business of export out of India of any goods or merchandise to which this section applies shall be allowed, in computing his total income, a deduction to the extent of profits referred to in sub-section (1B), derived by him from the

export of such goods or merchandise. Sub-section (IB) of section 80HHC gives the percentages of deduction of the profits allowable for the different assessment years from the assessment years 2001-2002 to 2004-2005. Sub-section (3)(a) of section 80HHC provides that where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such exports shall be 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 carried on by the assessee. [Para 19]

Explanation (baa) under section 80HHC states that 'profits of the business' in the aforesaid formula means the profits of the business as computed under the head 'Profits and Gains of Business or Profession' as reduced by (1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature including any such receipts and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situated outside India. Thus, ninety per cent of the DEPB which is 'cash assistance' against exports and is covered under clause (iiib) of section 28 will get excluded from the 'profits of the business' of the assessee if such DEPB has accrued to the assessee during the previous year. Similarly, if during the same previous year, the assessee has transferred the DEPB and the sale value of such DEPB is more than the face value of the DEPB, the difference between the sale value of the DEPB and the face value of the DEPB will represent the profit on transfer of DEPB covered under clause (iiid) of section 28 and ninety per cent of such profit on transfer of DEPB certificate will get excluded from 'profits of the business'. But, where the DEPB accrues to the assessee in the first previous year and the assessee transfers the DEPB certificate in the second previous year, only ninety per cent of the profits on transfer of DEPB covered under clause (iiid) and not ninety per cent of the entire sale value including the face value of the DEPB will get excluded from the 'profits of the business'. Thus, where the ninety per cent of the face value of the DEPB does not get excluded from 'profits of the business' under Explanation (baa) and only ninety per cent of the difference between the face value of the DEPB and the sale value of the DEPB gets excluded from 'profits of the business', the assessee gets a bigger figure of 'profits of the business' and this is possible when the DEPB accrues to the assessee in one previous year and transfer of the DEPB takes place in the subsequent previous year. The result in such case is that a higher figure of 'profits of the business' becomes the multiplier in the aforesaid formula under sub-section (3) (a) of section SOHHC for arriving at the figure of profits derived from exports. [Para 20]

To the figure of profits derived from exports worked out as per the aforesaid formula under sub-section (3)(a) of section 80HHC, the additions as mentioned in first, second, third and fourth proviso under sub-section (3) are made to profits derived from exports. Under the first proviso, ninety per cent of the sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 are added in the same proportion as export turnover bears to the total turnover of the business carried on by the assessee. In this first proviso, there is no addition of any sum referred to in clause (iiid) or clause (iiie). Hence, profit on transfer

of DEPB or DFRC are not to be added under the first proviso. Where therefore in the previous year no DEPB or DFRC accrues to the assessee, he would not be entitled to the benefit of the first proviso to sub-section (3) of section 80HHC because he would not have any sum referred to in clause (iiib) of section 28. The second proviso to sub-section (3) of section 80HHC states that in case of an assessee having export turnover not exceeding Rs. 10 crores during the previous year, after giving effect to the first proviso, the export profits are to be increased further by the amount which bears to ninety per cent of any sum referred to in clauses (Hid) and (me) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. The third proviso to sub-section (3) states that in case of an assessee having export turnover exceeding Rs. 10 crores, similar addition of ninety per cent of the sums referred to in clause (Hid) of section 28 only if the assessee has the necessary and sufficient evidence to prove that (a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, 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 Entitlement Pass Book Scheme, being the Duty Remission Scheme. Therefore, if the assessee having export turnover of more than Rs. 10 crores does not satisfy these two conditions, he will not be entitled to the addition of profit on transfer of DEPB under the third proviso to sub-section (3) of section 80HHC. [Para 21]

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 (Hid) 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 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 fulfil the conditions set out in the third proviso to section 80HHC (Hi), 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 (iiie) 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. [Para 22]

The impugned judgment and orders of the High Court are accordingly, set aside. The appeals are allowed to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction under section 80HHC in the case of the assessee in accordance with this judgment. [Para 23]”.

11. Respectfully following the precedent we set aside the issue to the file of the Assessing Officer to decide the issue afresh in the light of judgement of Hon'ble Apex Court as above.

12. In the result, appeal filed by the assessee is allowed for statistical purposes.

Pronounced in the open court on 29.9.2021.

Sd/-  
(PAVANKUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 29/09/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
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BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS