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

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A Nos. 2787 to 2790/Kol/2013

Assessment Years : 2001-02,2002-03,2003-04 & 2004-05

Quality Bags Exporters (P)Ltd. Kolkata [PAN : AAACQ 0402 D] (Appellant)	-vs.-	A.C.I.T., Central Circle-IV, Kolkata (Respondent)

For the Appellant : Shri Subash Agarwal, Advocate
For the Respondent : Shri Debasish Roy, JCIT, Sr.DR

Date of Hearing : 16.08.2016.
Date of Pronouncement : 02.09.2016.

ORDER

Per N.V.Vasudevan, JM

These are appeals by the Assessee against the common order dated 16.09.2013 of CIT(A)-Central-I, Kolkata relating to AY 2001-02 to 2004-05.

2. The Assessee is a company. For all the aforesaid assessment years original assessments were completed u/s 143(3) of the Income Tax Act, 1961 (Act) after allowing deduction u/s 80HHC of the Act. The assessment for all the aforesaid assessment years was reopened by issue of a notice u/s 148 of the Act. The reason for reopening assessments u/s 147 of the Act have been set out in the order of assessment as follows :-

> "However , after noticing the CBDT Circular F.No.153/193/2004 TPT. which clarified that profit on sale of DEPB licences are not covered under the provisions of Section 28(iiia). Therefore not entitled for enhanced deduction u/s.80HHC(3) on said export incentive and that assessee's entire export Incentives Includes profit on sale of DEPB licences of Rs.1784429/- on which excess deduction was granted u/s.80HHC of Rs.1427543/- a show cause letter was sent why assessment should not be reopened u/s

147 vide this office letter dated 10.08.2005. However, no notice u/s 148 was issued as the matter was open before CBDT for reconsideration of the aforesaid clarification. "

3. In all the assessment years similar observations were made and assessments were concluded by the AO by observing as follows :-

"Taxation Laws Amendment Bill-II of 2008 has brought an amendment to section 80HHC with retrospective effect wherein enhance deduction u/s.80HHC on sale of DEPB licences was withdrawn where export turnover of the assessee is over 10 crores. As assessee's export turnover for previous year under consideration exceeded Rs. 10 crores and that business profit includes incentives In the form of sale of DEPB licenses of Rs.1784419/-. On which excessive deduction u/s 80HHC. of Rs.1427543/- was granted a notice u/s.148 was issued. In response to the same AR of assessee requested to treat the return filed originally on 15.10.2001 as return in response to notice u/s.148.

A notice u/s.143(2) was issued. In response to the same Shri Anil Mandanewala AR of the assessee attended and agreed for withdrawal of excess deduction u/8.80HHC in respect of export Incentive In the form of sale of DEPB licenses as it is in conformity with the amended provision of section 80HHC brought out by Taxation Laws Amendment Bill of 2005."

4. Against the aforesaid orders of AO the assessee preferred appeal before CIT(A).

5. There was a delay of 2380 days in filing the appeals before CIT(A). The same was explained by the assessee in an application for condonation of delay as follows :-

"The appellant-assessee received the order u/s. 147/143(3) along with a demand notice u/s. 156 on 27.06.2006 and the last date of filing the appeal was 26.07.2006. The appellant-assessee failed to file the appeal within the prescribed time due to the reasons stated as under –

(1) In the instant year, the appellant-assessee claimed exemption U/S 80HHC to the tune of Rs. 1,34,76,630/- which was allowed by the Ld. AO. vide an order u/s 143(3).

(2) Subsequently, the case was reopened and finally the reassessment was completed by the Ld. AO. by passing an order u/s 143(3)1 147. In the reassessment so framed, the Ld. AG. made a disallowance of Rs. 14,27,543/- in respect of deduction u/s 80HHC.

(3) The appellant-assessee was under a bonafide belief based on the legal advice given by his A/R Sri Anil Kr. Mandawewala that the disallowance u/s 80HHC was rightly made by the Ld. AO. Therefore, no appeal was filed by the appellant-assessee.

4. The appellant-assessee, on receipt of a letter dated 15.1.2013 from the A.O. about the standing demand directing the assessee to pay the same within 7 days of receipt of the letter, approached Sri Subash Agarwal, Advocate on or around 20.01.2013 to write a petition to the A.O. to keep the demand pending for some more time because of the fund crunch since its regular A/R was out of station.

5) On enquiry by the Ld. Advocate, the entire facts were explained to him.

6) The Ld. Advocate expressed the opinion that in view of a recent judgement of the Hon'ble Supreme Court in the case of Topman Exports vs. CIT (2012) 342 ITR 49, the benefit of deduction U/S 80HHC cannot be denied in respect of the face value of the DEPB Licenses received even after the amendment made by the Taxation Laws Amendment Act, 2005 in Section 80HHC.

(7) The said advocate prepared the appeal and sent the papers for signature on 29.01.2013.
(8) After signature, the papers were returned to him on 31.01.2013. Accordingly, the appeal was filed on 31.01.2013.

(9) For the aforesaid reasons, there is a delay in filing the appeal of around 2380 days.
In view of the above circumstances, there was a reasonable cause for not filing the appeal within time. Therefore, the petitioner, most humbly prays that the delay of around 2380 days in filing the appeal may please be condoned."

6. The CIT(A) in the impugned order dealt with the aforesaid objections of the assessee as follows :-

"4. I have considered the facts of the case and the material placed on record. I find that the assessment orders under appeal were made on 02-06-2006 and 27-06-2006. However, the present appeals contesting those orders were filed on ,31-01-2013. All the 4 appeals are admittedly delayed by over 6 ½ years. It can be argued that there has been no unanimity among the judicial authorities in interpreting the implications of the retrospective amendments in section 80HRC brought about by the Taxation Laws (Amendment) Act, 2005. The legal opinion initially given by the tax consultant was also shared by many judicial authorities. But then, the first judicial decision favourable to the assessee came on 11-08-2009 from the Hon'ble Special Bench, of the ITAT in the case of M/s Topman Exports reported in[2009] 318 ITR (AT) 87 (Mumbai) [SB]. That was the occasion when the assessee could have filed the appeals contesting the assessment orders presently under consideration. But, the assessee preferred no appeals till 31-01 .. '2013. lam of the opinion that the delay during the period from 11-08-2009 to 31-01-2013 cannot be condoned. For, there can be no ,justification for not acting for a period of 3 1/2 years. The assessee has made no- efforts to pursue its tax cases by keeping itself abreast of the growing legal developments. Also, the assessee has .made no sincere efforts to obtain correct legal advice even though it was for its own benefit. The assessee cannot be. allowed to prefer an appeal whenever it likes and then apply to the judicial authority for condoning. the delay as such an approach could mean throwing away the very provisions involving limitation. I

> am aware that a judicial authority is generally expected to take a liberal view while deciding an-application for condoning the delay. But, in the present case, I am of the considered view that the facts do not justify the condonation of delay. There has been no effort on the part of the assessee in pursuing its tax matters. In view of the above, I am not satisfied that there was any reasonable cause for not presenting the appeals in time. I therefore refuse to condone the delay filing of the appeals. In consequence, the appeals are not admitted.

6. Aggrieved by the order of CIT(A) the assessee has raised the present appeals before the Tribunal.

7. We have heard the submissions of the ld.counsel for the assessee as well as the submissions of the ld. DR.. At page 179 of the assessee's paper book the ld. Counsel for the assessee who appeared before AO has given a certificate which reads as follows :-

> "This is to certify that I had appeared in the course of re-assessment proceedings of M/s.Quality Bags Exports (P)Ltd for AYs: 2001-2,2002-2003 and 2003-2004 and also during the normal assessment proceedings u/s 143(3) for the A.Y.:2004-2005 of the said company. In the course of the re-assessment/ assessment proceedings, I agreed to the withdrawal of deduction u/s 80HHC on the basis of the Taxation Laws Amendment Bill, 2005, whereby an amendment was made in sec. 80HHC with retrospective effect withdrawing deduction u/s 80HHC on export incentives, where an assessee's turnover exceeded Rs.10 crores. On the basis of the said amendment, I also suggested the assessee that no purpose would be served in filing the appeal as the disallowance was made in consonance with the above stated amendment made in the law."

8. It is thus clear that the assessee had guided by a profession advice did not think it fit to file any appeal against the impugned orders of the AO. It is clear from the record that the AO issued a letter dated 15.01.2013 demanding the payment of arrears of taxes arising out of the order of assessment u/s ,147 r.w.s.143(3) of the Act. It is also seen that in that connection the assessee had met the present lawyer Shri Subash Agarwal who advised the assessee the correct legal position pursuant to the decision of the Hon'ble Supreme Court in the case of Topman Exports (supra). Thereafter the appeal has been filed by the assessee before CIT(A). It is clear from the evidence on record that the delay in filing the appeal was due to non availability of a proper professional advice to

the assessee. In a similar situation in the case of Shri Anupam Biswas vs ITO in ITA No.2198/Kol/2014 order dated 09.12.2015.. this Tribunal has taken the following view :-

> *"6. I find that the issue whether deduction u/s.10(10C) of the Act should be allowed to RBI employees retiring under OERS is no longer res integra and has been concluded in several decisions including the decision in the case of CIT Vs. Koodathil Kaliyatan Ambujakshn (2008) 219 CTR (Bom) 80. In fact the CBDT in Instruction dated 8.5.2009 has accepted this decision and opined that employees of RBI who accepted ;OERS would be entitled to the benefit of Sec.10(10C) of the Act.*
>
> *7. Now the situation in the present case is that the Assessee would be entitled to the benefit of deduction u/s.10(10C) of the Act but the delay in filling the appeal would be the only hurdle in not getting such benefit. Tax liability has to be in accordance with law and no tax shall be levied or collected save under the authority of law. There cannot be a liability to tax by default. Keeping in view the principles emanating from the decisions referred to above and keeping in view the fact that the Assessee would be otherwise entitled to the benefit of deduction u/s.10(10C) of the Act and keeping in mind the circumstances in which the appeal of the Assessee was filed belatedly, we are of the view that the delay in filing the appeal should be condoned. When the very liability of the assessee was non-existent the delay in filing appeal should be condoned. I am of the view that the delay in filing the appeal was due to a reasonable cause. I accordingly condone the delay in filing the appeal.*
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> *8. As far as the merits of the claim of the assessee for deduction u/s 10(10C) of the Act, as already observed by me, the issue whether deduction u/s.10(10C) of the Act should be allowed to RBI employees retiring under OERS is no longer res integra and has been concluded in several decisions including the decision in the case of CIT Vs. Koodathil Kaliyatan Ambujakshn (2008) 219 CTR (Bom) 80. In fact the CBDT in Instruction dated 8.5.2009 has accepted this decision and opined that employees of RBI who accepted OERS would be entitled to the benefit of Sec.10(10C) of the Act. In view of the above, we hold that the claim for deduction u/s.10(10C) of the Act has to be allowed to the Assessee. The fact that the Assessee voluntarily offered the sum in question to tax cannot be the basis to sustain the levy of tax. I therefore hold that there was a mistake apparent on the face of the record and the application u/s.154 of the Act filed by the Assessee ought to be allowed. I direct the AO to allow deduction accordingly."*

9. On an identical statutory amendment to section 80HHC of the Act when there was delay in filing appeal before the Tribunal, the delay was condoned by the Hon'ble Mumbai Bench of ITAT in the case of Pahilajrai Jaidishin vs JCIT in ITA No.1398/Mum/2012 order dated 28.08.2013. The delay in that case was a delay of 1598 days which was condoned by the Tribunal observing as follows :-

"2. The appeal is however delayed by 1598 days. The appeal which was due to be filed within the statutory time limit of 60 days from the date of receipt of order of CIT(A), has been filed by the assessee only on 29.2.2012. The assessee has filed condonation application requesting or con donation of delay. The assessee in the condonation application has submitted that claim of the assessee had been rejected by the AO in view of the retrospective amendment made to section 80HHC of the Taxation Laws Amendment Act 2005. It has also been submitted that appellate authorities were also not allowing claim in respect of DEPB income and the assessee had, therefore, been advised that no purpose will be served in filing the appeal before the Tribunal. However the position was made clear by the Judgment of Hon 'ble Supreme Court in case of Topman Exports Ltd dated 8.2.2012 (342 ITR 49) after which the assessee was advised to file the appeal which was the reason for long delay and accordingly it has been requested that the delay may be condoned.

2.1 The learned AR for the assessee submitted that there was no lack of due diligence in filing of the appeal and the delay was not deliberate. Therefore, the delay was required to be condoned. Reliance was placed on the judgment of Hon 'ble High Court of Bombay in case of Remex Construction/Remex Electricals Vs ITO and others (166 ITR 18) in which delay of three years has been condoned. Reference was also made to the recent decision dated 8.2.2013 of the Kolkata Bench of Tribunal in case of Magnum Exports Vs. ACIT in ITA no. 1111/Kol/ 2012 in which under similar situation the Bench had condoned the delay of 2078 days in filing the appeal. The learned DR had no serious objection in the matter.

2.2 We have perused the records and considered matter carefully. Considering the facts and circumstances of the case, we are satisfied that there was reasonable cause for delay in filing the appeal. We, therefore, in the interest of justice, condone the delay and admit the appeal for adjudicating the dispute.

10. The Hon'ble ITAT, Kolkata in the case of Surajmall Exports in ITA NO.410/Kol/2013 order dated 30.11.2015 on the same retrospective amendment has also taken a similar view and condoned the delay of 2041 days delay of filing the appeal by observing as follows :-

"4. At the outset, it is noted that there is a delay of 2041 days on the part of the assesese in filing this appeal before the Tribunal. In this regard, the assessee has moved an application seeking condonation of the said delay, which is duly supported by an affidavit filed by its Chartered Accountant. The reasons given by the assesese for the delay in filing this appeal are as under:-

"3. The proceedings completed u/s 143(3) of the Act was reopened for reassessment u/s 147 of the Act and reassessment order u/s 147 of the Income Tax Act, 1961 was passed by the Assessing Officer on 19.12.2006. In the said reassessment order, the Assessing Officer has categorically noted that:

It may be noted that the case was reopened in pursuance of the amendment brought into section 80HHC read with section 28(iiid) of the Act by the Taxation Laws Amendment Act 2005 with retrospective effect from 01/4/1998.

4. The Appellant, being an exporter with turnover during the relevant assessment year exceeding 10 crore, was not in a position to discharge the burden cast upon it under the Third Proviso retrospectively inserted w.e.f 1-4-1998 in section 80HHC of the Income-tax Act, 1961 by the Taxation Laws Amendment Act 2005 (hereinafter the Amendment Act) for availing the deduction under sub-section (1) to the extent of profit referred in sub-section (1B) of section 80HHC of the Income-tax Act, 1961.

5. The Assessing Officer, following the Amendment Act disallowed the deduction u/s 80HHC of the Act on profit on the transfer of the Duty Entitlement Passbook Scheme (DEPB).

6. The Appellant carried the matter to the Commissioner of Income-tax (Appeal). The issue involved is purely legal in nature. The Indian Exporters Grievances Forum (IEGF), an association of exporters of which the Appellant is a member filed a Writ Petition in the Hon'ble High Court Bombay challenging the constitutional validity of the Amendment Act. The deduction u/s 80HHC of the Act was disallowed by the Assessing Officer merely on the ground on the Amendment Act. On filing of the Transfer Petition by the Union of India with a prayer to transfer all the petitions filed in various High Court, the Hon'ble Supreme Court was seized of the matter to the challenge to the constitutional validity of the Amendment Act. It was in this background that the Appellant requested the Commissioner of Income-tax (Appeal) to keep the appeal in abeyance as the matter was sub-judice before the apex court.

7. The request of the Appellant to keep the appeal in abeyance, was not acceded by the CIT(A). The CIT(A) in its impugned order dated 10-04-2007 has dismissed the Appeal of the Appellant. While dismissing the appeal, the CIT(A) had made following observations in paragraph 8 of the impugned order:

> *As regards ground no. 1, Shri Mundra agreed that the AO's action was in conformity with the provisions of the amended law. In fact, the appellant is challenging the validity of the retrospective amendment. This is an issue which cannot be decided in the proceedings before me.*

8. The issue being challenge to the validity of the Amendment Act, could be decided only by the constitutional court being the High Court or the Supreme Court. This issue could not have been agitated before this Tribunal. Approaching this Tribunal before the constitutional validity is decided by the High/Supreme Court would result in dismissal of appeal for want of jurisdiction of this Tribunal to decide such constitutional questions, which was relied upon by the Appellant.

9. In the facts and circumstances that Appellant accepted the advice of his CA and under a bonafide belief, diligently pursued the challenge to the constitutional validity of the Amendment Act, through its association IEGF before approaching this Tribunal.

The petitions challenging the constitutional validity of the Amendment Act was transferred by the apex court to the Gujarat High Court.

10. The Gujarat High Court heard the petitions transferred to it as per the apex court order. The division bench of Acting CJ Shri Bhaskar Bhattacharya and Justice Shri J.B. Patra passed an order and judgment dated 02-07-2012 in Avani Exports Vs. Commissioner of Income-tax [(2012) 23 taxmann.com 62 (Gujarat)] in which paragraph 25, 26 & 27 of the said judgment reads as under:

> *"25. In the case before us, it is not one where the executive has failed to carry out the object of the Parliament necessitating exercise of control by retrospective amendment what the executive ought to have achieved. In the present case, according to the Finance Minister presenting the Bill, a valid piece of legislation has been wrongly interpreted by the Tribunal. We have already pointed out that according to the existing law, if a valid piece of legislation is wrongly interpreted by the Tribunal, the aggrieved party should move higher judicial forum for correct interpretation. As pointed by the Apex Court in the case of Pritvi Cotton Mills Ltd (supra), the legislature does not possess or exercise power to reverse the decision in exercise of judicial power. Thus, we are of the view that the principles laid down in the case of R. C. Tobacco (P) Ltd. (supra) has no application to the facts of the present case. The impugned amendment granting benefit restricting it to a class of assessee whose turnover is less than Rs. 10 Crore is permissible prospectively but the way it has been enacted, it takes away an enjoyed right of a class of citizen who availed of the benefit by complying with the requirements of the then provisions of law.*
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> *26. On consideration of the entire materials on record, we, therefore, find substance in the contention of the learned counsel for the petitioners that the impugned amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assesses.*
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> *27. We, accordingly, quash the impugned amendment only to this extent that the operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assessees whose export turnover is above Rs. 10 Crore. In other words, the retrospective amendment should not be detrimental to any of the assesses.*

11. The Appellant initiated action to file the appeal with Tribunal believing that the petition of IEGF, among others, is disposed by the Gujarat High Court. When the Appellant approached the IEGF, he was told that IEGF petition is not included in the

batch of petition decided by the Gujarat High Court. The Appellant waited for some time in the hope that similar order would be passed in the matter of IEGF. When the Appellant found that IEGF matter was pending in the apex court, he approached advocate Mr. Akhileshwar Sharma, Advocate for his opinion who had appeared for various petitioners in the Gujarat High Court in the group matter in Avani Exports Vs. Commissioner of Income- tax. The advocate Mr. Sharma by his opinion advised the Appellant that the Gujarat High Court while passing the judgment in the Avani Exports has acted as jurisdictional High Court for the entire country and therefore, the Appellant may now file appeal in the ITAT Kolkata relying upon the Gujarat High Court judgment. The Appellant thereafter, filed this appeal.

12. The Appellant humbly submits to this Hon'ble Tribunal that there was no wilful negligence or mala fide intention on the part of the Appellant. The Appellant has been prosecuting with due diligence with bonafide belief that issue being constitutional in nature has to be resolved by the constitutional court before the same can be relied upon by them in their appeal in the Tribunal. The delay is the result of the complex circumstances created after the Amendment Act, its challenge before various High Court, the action of the Union of India in filing the various Transfer Petition in the apex court, the order of the apex court transferring the petition to the Gujarat High Court, the failure on the part of the Union of India in not including the petition of IEGF in the list of cases pending before the apex court and the various High Court. The brief history of litigation surrounding the Amendment Act, its journey to various forums and the present status of the IEGF petition is given later in this submission".

5. We have heard the arguments of both the sides on the application filed by the assessee for condonation of delay in filing this appeal. It is observed that in the identical facts and circumstances involved in the case of Magnum Export, the Coordinate Bench of this Tribunal has condoned a similar delay of 2078 days on the part of the assessee in filing its appeal for the similar reasons vide its order dated 08.02.2013 passed in ITA No. 1111/KOL/2012. This decision of the Coordinate Bench of this Tribunal cited by the ld. Counsel for the assesese thus is squarely applicable in the present case and this position is not disputed even by the ld. D.R. at the time of hearing before us, we, therefore, condone the delay on the part of the assessee in filing this appeal before the Tribunal and proceed to dispose of the said appeal on merit."

11. An Identical view was taken by the ITAT, Kolkata Tribunal in ITA No.1111/Kol/2012 in the case of Magnum Export order dated 08.02.2013 wherein there was a delay of 2078 days in filing the appeal. Keeping in mind the proceedings on the issue we are of the view that the CIT(A) ought to have condoned the delay on the part of the assessee in filing the appeal before CIT(A). We therefore, for the reasons given above, condone the delay in filing the appeal by the assessee before CIT(A) as the delay

in filing the appeal was occasioned by reasonable and sufficient cause as set out in the petition for condonation of delay.

12. The ld. Counsel for the assesee made the submissions that if the delay is condoned the issues may be sent to the AO for considering the claim of the assessee as the same was not considered in the original assessment proceedings. We are of the view that the request made by the ld. Counsel for the assessee is acceptable and accordingly the issue is sent back to the AO for consideration afresh in the light of the judicial pronouncements referred to by the ld. Counsel for the assessee before us.

13. In the result the appeals of the assessee are allowed.

Order pronounced in the Court on 02.09.2016.

Sd/-	Sd/-
[Dr.Arjun Lal Saini]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 02.09.2016.
[RG PS]

Copy of the order forwarded to:

1. Quality Bags Exporters (P)Ltd., 7C, Kiran Shankar Roy Road, Kolkata-700001.
2. A.C.I.T., Central Circle-IV, Kolkata.
3. CIT(A)-Central-I, Kolkata 4. CIT-Central-I, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata
Benches