IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA NO. 4192/MUM/2012 : **A.Y : 2003-04**

Anandkumar Jain 5, Jai Gopal Indl. Estate, Bhavani Shankar Road, Dadar (W), Mumbai 400 028. **PAN : AABPJ4857G** (Appellant)	Vs.	ITO, Ward 18(2)(2), Mumbai. (Respondent)

Appellant by : Shri Jitendra Sanghavi &
Shri Amit Khatiwala
Respondent by : Shri Rajesh Kumar Yadav

Date of Hearing : 25/06/2019
Date of Pronouncement : 20/08/2019

O R D E R

PER G.S. PANNU, VICE PRESIDENT

The captioned appeal filed by the assessee is directed against an order passed by the CIT(A)-29, Mumbai dated 24.01.2011, which in turn, arises out of an order passed by the Assessing Officer under section 154 of the Income Tax Act, 1961 (in short 'the Act') dated 04.02.2010 for previous year relevant to Assessment Year 2003-04.

2. In this appeal, assessee has raised the following Grounds of appeal :-

"1. The Learned Commissioner of Income-tax (Appeals) has erred in law and in facts in passing order u/s. 250 of the Act dated 29.03.2011 dismissing the appeal filed by the appellant.

2. The Learned Commissioner of Income-tax (Appeals) has erred in law and in facts in dismissing the appeal filed by the appellant without granting a reasonable opportunity of being heard to the appellant.

3. The Learned Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the Rectification order passed by the assessing officer u/s 154 of the Act was bad in law and invalid.

4. The Learned Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the order passed by him suffered from mistake apparent on record and hence was liable to be rectified u/s. 154 of the Act."

3. Briefly put, the relevant facts are that assessee is an individual engaged in the business of manufacturing and export of garments. He filed his return of income for Assessment Year 2003-04 on 20.10.2003 declaring a total income of Rs. 96,25,198/- after claiming deduction u/s 80HHC of Rs. 99,73,059/-. The case of the assessee was selected for scrutiny assessment. In the course of scrutiny assessment, the Assessing Officer noted that assessee carried on business in the name and style of M/s Fair Lady and M/s Fair Lady (Exports). The first concern is doing business in local markets only and the other concern is 100% export unit. The assessee had furnished separate Profit & Loss account and Capital account of both the concerns. The Assessing Officer observed that the possibility of intermingling of transactions of local as well as export unit cannot be ruled out and accordingly, show caused assessee as to why accounts of both the concerns

should not be merged and why the profits in the export business should not be considered after taking into account the gross turnover of local business and total export turnover in light of the provisions of Section 80HHC of the Act. The Assessing Officer worked out the deduction under Section 80HHC of the Act after considering profit/income of the assessee of both the proprietary concerns together. Further, while computing the revised deduction under Section 80HHC of the Act, the Assessing Officer reduced 90% of the Duty drawback, Excise duty refund and DEPB from the profits of the business of the assessee and arrived at the deduction under Section 80HHC at Rs. 18,84,051/-. Aggrieved by the same, assessee preferred an appeal before CIT(A) for allowance of 100% deduction under Section 80HHC of the Act on account of sale proceeds of DEPB license. The CIT(A) upheld the action of the Assessing Officer in denying deduction under Section 80HHC of the Act on sale proceeds of DEPB license. On further appeal before the Tribunal, the Tribunal upheld the order of CIT(A). Thereafter, the Special Bench of Tribunal in the case of Topman Exports vs. ITO (OSD) 33 SOT 337 (SB) dated 11.08.2009 decided this issue in favour of the assessee. The assessee thus filed rectification application under Section 154 of the Act before the Assessing Officer. The Assessing Officer rejected the assessee's application under Section 154 of the Act vide order dated 04.02.2010 holding that the denial of deduction under Section 80HHC of the Act was rightly done in the order passed under Section 143(3) of the Act in view of the fact that the total turnover exceeded Rs. 10 Crores and in view of the amendment made in Act in 2005. Further, he noted that the department has filed appeal before the Hon'ble Supreme Court against the decision of the Bombay High Court in the case of *Topman Exports (supra)*. Accordingly, he held that the issue of allowance of

deduction under Section 80HHC of the Act is a debatable issue and thus, cannot be said to be a mistake apparent from record and cannot be rectified under Section 154 of the Act. Only mistakes which are patent mistakes can be rectified under Section 154 of the Act and not something which can be determined by the long drawn process of reasoning. Accordingly, he rejected the assessee's application under Section 154 of the Act. On appeal before the CIT(A) against the order of the Assessing Officer under Section 154 of the Act, the CIT(A) firstly held this cannot be termed as a mistake apparent from record and thus, the same cannot be rectified under Section 154 of the Act and agreed with the contention of the Assessing Officer that the issue is debatable. Secondly, on merits, the CIT(A) held that the issue of allowance of deduction under Section 80HHC of the Act has been decided against the assessee by the order of the Hon'ble Bombay High Court in the case of *Kalpataru Colours [2010] 192 taxman 435 (Bom)*. Accordingly, the CIT(A) dismissed the appeal of the assessee vide order dated 24.01.2011. The assessee did not prefer further appeal against the order of the CIT(A). Subsequently, the Hon'ble Supreme Court in the case of *Topman Exports vs. CIT, 342 ITR 49 (SC)* reversed the decision of the Hon'ble Bombay High Court in the case of *Kalpataru Colours (supra)* vide its order dated 08.02.2012. The assessee thus preferred the instant appeal before the Tribunal against the impugned order of the CIT(A) on 15.06.2012, i.e. after a delay of 420 days. The assessee filed the request for condonation of delay dated 03.07.2014 alongwith the affidavit of the legal heir of the assessee, Ms. Anchal Jain dated 03.07.2014 explaining the reason for delay in filing the present appeal.

4. Before us, the learned Representative for the assessee drew our attention to the factual matrix which is discussed above in detail. Our attention was also drawn to the request for condonation of delay and affidavit of the legal heir, which reads as under:-

".....

2. I say that the appeal against the order dated 24.01.2011 passed by the Ld. Commissioner of Income-tax (Appeals) -29, Mumbai, has been filed before the Hon'ble Tribunal on 15.06.2012 for AY. 2003-04. The appeal is thus filed belatedly by 420 days before the Hon'ble Tribunal.

3. I say that the Ld. CIT(A) has dismissed the appeal of the applicant because the Hon'ble Jurisdictional High Court in the case of CIT vs. Kalpataru Colours And Chemicals [328 ITR 451] was against the issue involved in the assessee's case.

4. I say that I was advised by my Tax Consultant that no fruitful purpose would be served by filing an appeal before the Hon'ble Tribunal since the Hon'ble Jurisdictional High Courts was against the applicant and that the same was also binding on the Hon'ble Tribunal.

5. I say that thereafter I was informed that the said judgement of the Hon'ble Bombay High Court was reversed by the Hon'ble Supreme Court in the case of Topman Exports v. CIT [342 ITR 49] (SC)].

6. I say that I was accordingly advised by my Tax Consultants that since the judgment of the Hon'ble Bombay High Court has been reversed by the Hon'ble Supreme Court, the same no longer remained a good law and that the order of the Ld. CIT(A) should be challenged before the Hon'ble Tribunal.

7. I say that no sooner I was informed that the appeal should be filed before the Hon'ble Tribunal and that the judgment of the Hon'ble Bombay High Court has been reversed.

8. I say that immediately thereafter I instructed my Tax Consultant to prepare the relevant documents and file the appeal for the Hon'ble Tribunal. Accordingly, the appeal was filed on 15.06.2012.

9. I say that the delay in filing the appeal is solely due to the bonafide and genuine belief and that no malafide intentions are involved in filing the appeal late.

10. I say that the application for condonation of delay is being separately filed and I confirm the facts stated therein to be correct."

From above, it can be seen that the assessee chose not to file the appeal before the Tribunal based on the advice of the Consultant that the jurisdictional High Court decision, which is binding on the assessee, has decided the issue against the assessee; and, as such, filing appeal before Tribunal will not be fruitful. Subsequently, since the Hon'ble Supreme Court decided the issue in favour of the assessee in another case, the assessee was advised to file appeal before the Tribunal. As such, delay in filing the appeal was solely due to the bona fide and genuine belief and that no mala fide intentions were involved.

5. In this regard, the learned Representative placed reliance on the following decisions, wherein delay in filing appeal before Tribunal due to the subsequent decision of the Hon'ble Supreme Court was condoned:

a) Magnum Exports vs. ACIT, ITA No. 1111/Kol/2012

b) My Favourite Lady Exports Pvt. Ltd. vs. ITO, ITA No. 5152/Mum/2014

c) Pahilajal Jaikishan vs. JCIT, ITA No. 1392/Mum/2012

d) Surajmal Exports vs. ACIT, ITA No. 410/Kol/2013

e) Nulux Engineers vs. Addl. CIT, ITA No. 2309/Mum/2012 & ITA No. 7341/Mum/2014

6. In light of the above decisions, learned Representative requested to condone the delay in filing the appeal.

7. As regards the observation of the Assessing Officer that denial of the deduction under Section 80HHC of the Act on the sale proceeds of the DEPB license, which was allowed by the Hon'ble Special Bench of the Tribunal in another case, cannot be said to be mistake apparent from the record under Section 154 of the Act and cannot be rectified under Section 154 of the Act, the learned Representative relied on the decision of the Hon'ble Supreme Court in the case of *ACIT vs. Saurashtra Kutch Stock Exchange Ltd., 173 Taxman 322 (SC)* wherein it was held that the law has always been the same. The judges only interpret the law but do not make new law. Thus, the subsequent judgment does not make the new law but only interprets the old law which was already in existence. As such, it was argued that the law declared by the Hon'ble Supreme Court in the case of *Topman Exports (supra)* always existed and the order passed against the said law is a patent mistake apparent from record and was thus rectifiable under Section 154 of the Act.

8. On merits, the learned Representative relied on the decision of the Hon'ble Supreme Court in the case of *Topman Exports (supra)* and requested to direct the Assessing Officer to re-compute the deduction under Section 80HHC of the Act in light of the said decision.

9. Per Contra, the learned DR objected to the condonation of delay and relied on the decision of our co-ordinate bench in the case of *Kunal Surana vs. ITO in ITA No. 3297/Mum/2012* wherein the Tribunal rejected the condonation of delay of four months in filing the appeal before the CIT(A). Further, he relied on the order of lower authorities to hold that since the issue was debatable at the relevant point of time, the same cannot be said to be mistake apparent from record and, therefore, the same cannot be rectified under Section 154 of the Act.

10. We have carefully considered the rival submissions and pursued the material on record. At the outset, we find that undisputedly there is a delay of 420 days in filing the appeal before us. So, firstly we shall deal with the assessee's request for condonation of delay in filing the appeal. As discussed in the earlier part of the order, the delay in filing the appeal before us was solely on the ground that the CIT(A) has decided the issue against the assessee following the decision of the Jurisdictional High Court in the case of *Kalpataru Colours (supra)*; and, as such, based on the advice of the Consultant, assessee did not prefer further appeal before the Tribunal. On subsequent favorable decision of the Hon'ble Supreme Court in the case of *Topman Exports (supra)*, the assessee was advised to file the appeal before the Tribunal and accordingly assessee filed the appeal before us after a delay of 420 days. The learned Representative for the assessee relied on various decisions of the Tribunal to hold that delay in filing appeal due to subsequent decision of the Hon'ble Supreme Court is a valid ground for condonation of delay. In this regard, we find that the learned DR has not controverted the factual matrix explained by the assessee due to which there was a delay in filing the appeal. We shall thus now examine whether the reason cited

by the assessee is a good ground for delay in filing the appeal and thus, the assessee's delay in filing the appeal before us is condonable.

11. We find that in the case of *Magnum Exports (supra)*, relied upon by the learned Representative for the assessee, the Kolkata Bench of the Tribunal condoned the delay of 2017 days in filing the appeal before it. In that case also, the assessee filed delayed appeal due to the subsequent decision of the Hon'ble Supreme Court. Further, in similar circumstance, in the case of *Pahilajrai Jaikishin (supra)*, wherein also the assessee preferred appeal before the Tribunal on the issue of deduction under Section 80HHC of the Act based on the decision of the Hon'ble Supreme Court in the case of *Topman Exports (supra)* after a delay of 1598 days, the delay was condoned by our co-ordinate bench.

12. Since the facts of the present case and facts in the case of decision of the Kolkata Bench of the Tribunal in the case of *Magnum Exports (supra)* and in the decision of our co-ordinate bench in the case of *Pahilajrai Jaikishin (supra)* are identical, following the said decisions, we hereby, in the interest of the justice, condone the delay of 420 days in filing the appeal and admit the appeal of the assessee.

13. As regard the decision of our co-ordinate bench in the case of *Kunal Surana (supra)* relied upon by the learned DR, we find that the said case is distinguishable on facts in as much as in the said case it was observed by the Tribunal that the delay in filing the appeal by the assessee was on account of gross negligence, inaction and laches on the part of the assessee and his representatives whereas in

the present case, there is no negligence on the part of the assessee. As such, the decision relied on by the learned DR is of no relevance.

14. The next issue that arises is whether denial of deduction under Section 80HHC of the Act on sale proceeds of DEPB license, which is contrary to the subsequent decision of Hon'ble Supreme Court, can be termed as a 'mistake' apparent from record in terms of Section 154 of the Act and can be rectified in the proceeding under Section 154 of the Act.

15. In this regard, it is pertinent to refer to the decision of the Hon'ble Supreme Court in the case of *Saurashtra Kutch Stock Exchange Ltd (supra)* wherein it was held as under:

> "*It is also well - settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, the Judges do not make law; they only discover or find the correct law.The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make a new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite sometime, the decision rendered later on would have retrospective effect, clarifying the legal position which was earlier not correctly understood.[Para 42]"*

It is evident from the above that the decisions rendered by the Hon'ble Courts do not make any new law; they only clarify the legal position which was earlier not correctly understood. Further, such legal position clarified by the courts has retrospective effect as the law was always the same and no

amendment has been made to the law by the decision rendered by the Courts. Once the legal position clarified by the Courts have retrospective effect, it can be inferred that such legal position was always the correct position of law and was always prevailing. It can be said that the said position was also existing at the time of passing of the order by the Assessing Officer and CIT(A). Thus, any order passed in contravention of such legal position can be termed as a mistake apparent from record which can be rectified under Section 154 of the Act.

16. In the present case, there is no dispute with respect to the fact that the subsequent decision of the Hon'ble Supreme Court in the case of *Topman Exports (supra)* has decided the issue of deduction under Section 80HHC of the Act on sale proceeds of DEPB license in favour of the assessee. Once that is so, it can be safely inferred that the legal position on the issue of deduction under Section 80HHC of the Act on sale proceeds of DEPB license has been clarified by the Hon'ble Supreme Court and which decision has a retrospective effect. As such, the legal position clarified by the Hon'ble Supreme Court was existing at the time of passing of the order by the Assessing Officer and the CIT(A). However, the order passed by the Assessing Officer was in contravention of the legal position subsequently clarified by the Hon'ble Supreme Court. Thus, it can be said that the mistake was a patent mistake, and which was apparent from the record. Accordingly, it can be termed as a mistake apparent from record and was very much rectifiable under Section 154 of the Act.

17. As regards merit of the case, we find that the issue of deduction under Section 80HHC of the Act on sale proceeds of DEPB license has been decided by the Hon'ble Supreme Court in the case of Topman Exports (supra). We accordingly direct the Assessing Officer to re-compute the deduction under Section 80HHC of the Act on sale proceeds of DEPB license in light of decision of Hon'ble Supreme Court in the case of Topman Exports (supra). Accordingly, the Ground raised by the assessee in appeal is allowed.

18. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 20th August, 2019.

Sd/-	Sd/-
(RAVISH SOOD)	**(G.S. PANNU)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Mumbai, Date : 20th August, 2019

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "A" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai