IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'C', MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTAT MEMBER AND
SHRI VIVEK VARMA, JUDICIAL MEMBER

I.T.A. NO.6218/M/2011
ASSESSMENT YEAR:2003-2004

M/s. Creative Outerwear Ltd., (Now amalgamated with Creative Garments Pvt. Ltd.) 119, Cama Industrial Estate, Sun Mill Compound, Lower Parel, Mumbai – 400 020.	Vs.	ITO, Ward-6(2)-1, 5th Floor, Aayakar Bhavan, Mumbai-400020.
(Appellant)		(Respondent)

Appellant by	:	Written Submissions
Respondent by	:	Shri A.B. Koli, Sr.DR

Date of Hearing: 1.11.2012 **Date of order: 7.11.2012**

O R D E R

Per D. KARUNAKARA RAO, AM:

This appeal filed by the assessee on 8.9.2011 against the order of CIT (A)-12, Mumbai dated 7.7.2011 for the assessment year 2003-2004. The main issue in this appeal relates to allowability of deduction under section 80-HHC in respect of DEPB licenses of Rs. 1,83,78,301/-, export incentives under section 28(iiid) of the Act. There are consequential issues relating to the levy of charging of interest u/s 220 and u/s 234-D of the Act.

2. Relevant facts of the case are that the assessee is engaged in the business of export of readymade garments. This is the second round of proceedings before us. In the first round of the proceedings, AO did not allow the deduction u/s 80HHC in respect of export incentives in view of the proviso to section 80-HHC of the Act as the assessee's turnover is more than Rs. 10 Crores. The matter travelled to the Hon'ble ITAT which set aside the proceedings to the files of the AO with a direction to decide the issue afresh after considering the judgment of the Special Bench in the case of Topman Exports vs. ITO (318 ITR 87), which was decided in favour of the assessee and the assessee did not file an appeal before the Hon'ble High Court. In

the set aside proceedings, the AO did not follow the directions of the ITAT in view of the jurisdictional High Court judgment in the case of Kalpataru Colours and Chemicals (328 ITR 451) which, in fact, has the impact of the reverse decision on the said Special Bench in the case of Topman Exports (supra). Therefore, the matter has come back to the Tribunal for adjudication against the order of the CIT (A).

3. During the proceedings before us, none appeared to represent the case of the assessee. However, assessee filed written submissions duly signed by the Authorized Representative of the assessee who is duly authorized. In the said submissions, Ld Counsel made the following assertions and they are read as under:

> "*The present appeal is arising from assessee's appeal in respect of deduction under section 80-HHCof the Income Tax Act.*
> *Upon passing the order dated 24.8.2009 by the Hon'ble ITAT for Assessment Year 2003-2004 following the judgment of Special Bench in the case of Topman Exports, the Tribunal directed the AO to give the relief.*
> *However, the AO and CIT (A)* ***on account of the judgment of jurisdictional High Court in the case of Kalpataru Colours & Chemicals (328 ITR 451) (Bom)*** *did not follow the judgment of Hon'ble ITAT in the appellant's own case.*
> *Be that so, the* ***present matter is now settled by the Hon'ble Supreme Court in the case of Topman Exports (342 ITR 49) and the controversy is set right by the Apex Court.***
> *In view of the above, the appellant prays that the appeal be disposed off on the basis of the written submission.*"

4. From the above, it is evident that the Apex Court has confirmed the Special Bench decision in the case of Topman Exports (supra) for the proposition that *the assessee having turnover of over Rs. 10 crores, would get a benefit of exclusion of smaller figure from the profits of business* and the decision of Bombay High Court in the case of Kalpataru Colours & Chemicals reported in 328 ITR 451, which was relied upon by the Revenue Authorities, stands **reversed** by the said Apex Court judgment vide 342 ITR 49 (SC). Considering the settled nature of the issue, we are of the opinion that the issue stands covered in favour of the assessee and the relevant grounds are therefore, **allowed**.

4. Regarding the other issues relating to chargeability of interest u/s 220 and u/s 234-D, there are no written submissions on this issue from the assessee's side. On the perusal of the order of CIT(A), we find that the CIT (A) treated them as consequential in nature vide the discussion given in para 4.1 of the impugned order. Therefore, considering the reasonableness of the discussion given by the CIT (A), we are of the opinion that the decision of CIT (A), mentioned in para 4.1, does not call for any interference. Therefore, the matter being consequential, relevant grounds are **dismissed** as such. Accordingly, the grounds raised by the assessee are partly allowed.

5. In the result, the appeal of the assessee is **partly allowed.**

Order pronounced in the open court on this 7th day of November, 2012.

Sd/-	Sd/-
(VIVEK VARMA)	(D. KARUNAKARA RAO)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Date : 7 .11. 2012
At :Mumbai
Okk

Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR " C", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai