IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'A', MUMBAI

BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 6340/Mum/2009
(Assessment Year: 2001-02)

Income Tax Officer
Ward 20(1)(1)
R No.702, 7th fl.,
Piramal Chamber
Parel,
Mumbai-400012 ......Appellant

Vs

AVON Appliances,
53, Aram Nagar-II, J P Rd,
Andheri (W)
Mumbai-400061 . ... Respondent

Assessee by : Shri Sumeet Kumar
Revenue by : Shri Paras S Savla

<u>O R D E R</u>

PER VIJAY PAL RAO,JM

This appeal by the revenue is directed against the order dated 30.09.2009 of CIT(A) for the assessment year 2001-02

2. The revenue has raised the following grounds :

> *"I. .The learned CIT(A) has erred on facts and in law and in the circumstances of the case in directing the AO to consider the DEPB credit as its income assessed u/s 28(iiib) of the Act and allowed deduction u/s 80HHC as per the various provisions of the Act. He has further directed that the profit on transfer or sale of DEPB credit shall be assessed in the year in which the transfer/sale takes place and the said income shall be assessed accordingly;*

II. .The learned CIT(A) has erred on facts and in law and in the circumstances of the case in directing the AO to work out the profit on the sale of DEPB being the difference between its sale proceeds and the face value and accordingly, reduced only 90% of the profit on sale of DEPB llicense, instead of 90% of the entire DEPB amount of Rs.1,92,60,973/- from the profit of the business while computing the deduction u/s 80 80HHC of the Act.

III. The learned CIT(A) has erred in not taking cognizance of the recent Supreme Court decision in the case of Liberty India, wherein the Apex Court has held that the assessee is not entitled to deduction u/s 80HHC/80IB on DEPB"

3. We have heard the learned AR as well as the learned DR and considered the relevant record.

4. At the outset, we note that the issue involved in this appeal stands covered by the decision of the jurisdictional High Court in the case of CIT V/s Kalpatharu Colours and Chemicals in Income tax Appeal (Lodg) No.2887 of 2009 order dated 28/29 June 2010.

5. The learned AR of the assessee further contended that the transfer of DEPB in the case of the assessee has to be considered u/s 28(iiid) and not under section 28(iiib). We note that the Hon'ble Jurisdictional High Court in the above said decision has held in paragraphs 29 to 31 as under :

"29. To get over this difficulty, the assessees contends 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. There is no merit in the above contention for the following reasons :

a) what is received on transfer of the DEPB credit is the profit, because DEPB credit under the DEPB scheme 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 product. The DEPB credit is also given to an exporter who has exported goods without importing raw material required for the export. DEPB credit is given for paying customs duty on import of goods which may or may not be utilized in the export goods. When the DEPB credit is not utilized for paying customs duty but is transferred for any sum, then such sum would be profits on transfer of DEPB covered under section 28(iiid);

b) Even the assessee has not disputed before the court that the entire amount received on transfer of DEPB is business income chargeable to tax as profits of business. However, it is contended that the face value of the DEPB would not be covered under section 28(iiid) because it is a credit earned by the assessee. Where the duty paid is received back as duty drawback it is also an amount earned by the assessee, but such a receipt is still consider as profits of business. Similarly, the amount realized in transfer of DEPB, be it equivalent to the face value of the DEPB; more than the face value of DEPB, or less than face value of DEPB, would be profit on transfer of DEPB cov4ered under section 28(iiid);

c) the fact that the assessee had accounted for DEPB credit immediately after making an application seeking SEPB credit would make no difference to the taxability of the entire amount received on transfer of the DEPB credit under section 28(iiiD0. What constitutes profits under section 28(iiid) is the amount received on transfer of the DEPB credit and not the amount of credit which the assessee was entitled to under the DEPB scheme. In other words, the amount equivalent to the face value of DEPB as well as the amount received in excess of the DEPB would *constitute profits of business under section 28(iiid) ;and merely because, a part of such profits of business (face value) was offered to tax in the year in which the credit accrued to the assessee would not be a ground to hold that such profit was not covered under section 28(iiid). Where the face value of the DEPB credit is offered to tax as business profits under section 28(iiid) in the year in which the credit accrued to the assessee, then any further profit arising on transfer of DEPB credit would be taxed as profits of business under section 28(iiid) in the year in which the transfer of DEPB credit took place. Therefore, the arguments of the assessee that if the face value of the DEPB credit is held to be covered under section 28(iiid), it would amount to double taxation is without any merit.*

30. There is another perspective from which the issue can be looked at. The DEPB credit to which an exporter is entitled is a form of an export incentive. The Supreme Court in Ravindranathan Nair's case has held that all the incomes which fall within clauses (iiia) to (iiie) of section 28 are 'incentive incomes'. As an incentive, that is made available to the exporter there is no cost that is attached to the grant of the incentive. The incentive, as we have already noted, is calculate as a percentage of the FOB value of the goods exported. The tribunal in the present case recognized the difficulty in reducing the face value of the DEPB credit from the sale consideration when it observed, in paragraph 48 of its judgment, that "no doubt the exporter does not directly purchase the DEPB from the market by incurring any cost". Having so observed, the Tribunal still considered it appropriate to hold that clause (iiid) would only refer to the difference between the sale consideration and the value of he DEPB credit. We find no basis or justification for the tribunal to have done so.

31. We do not find any logical justification in bifurcating the value of the sale consideration realized by the exporter on he transfer of the DEPB credit. For one thing clause (iiid) of section 28 must cover within its purview, the entirely of the sale consideration which is realized by the exporter on the transfer of the DEPB credit since that represent the profit which the exporter obtains on the transfer of the credit. No part of the credit that is available under the DEPB scheme can fall for classification under *clause (iiib) of section 28 which deals with cash assistance, received or receivable against any scheme of the Government of India. As the legislative history of the provision would show clause 9iiib) was enacted by Parliament at a time when the export incentives that were available were (i) Import entitlement licenses ; (ii) cash compensatory support; and (iii) duty drawback. The DEPB scheme was not even in existence when clause (iiib) came to be enacted into section 28 by the Finance Act of 1990. The DEPB scheme was brought into existence with effect from 1st April 1997. Clause (iiid) of section 28 was inserted by the Amending Act 2005 lwith effect from `1 April 1998. The value of the DEPB credit can by no means be regarded as a cash assistance which is received or receivable by a person against exports under any scheme of the Government of India"*

6. Respectfully following the decision of the Hon'ble Jurisdictional High Court, we set aside the order of the learned CIT(A) and direct the AO to decide the issue in the light of the decision of the Jurisdictional High Court. The issue is accordingly remitted to the record of the AO.

7. In the result, the appeal of the revenue is allowed for statistical purposes.

Pronounced in the Open Court on13.08.2010

Sd	sd
(P.M.JAGTAP)	(VIJAY PAL RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 13 th Aug 2010
SRL:9810

copy to:

1. Appellant
2. Respondent
3. CIT Concerned
4. CIT(A)XXXII
5. DR “E” Bench

BY ORDER

True copy

ASSTT. REGISTRAR, ITAT, MUMBAI