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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI J BENCH, MUMBAI

Before Shri D K Agarwal (Judicial Member), and
Shri Pramod Kumar (Accountant Member).

ITA Nos. 6477 and 6478/Mum/07
Assessment years 2003-04 and 2004-05

Jewel Enterprises ……………….***Appellant***
12 A, Satyam Mehta Industrial Estate
Navghar Road, Bhayander (E), Thane 401105
(PAN : AACFJ2700J)

Vs.

Income Tax Officer
- Ward 2 (1), Thane ………..… ***Respondent***

Appellant by : Dr K Shivram
Respondent by : Shri N K Balodia

O R D E R

Per Pramod Kumar:

ITA No. 6477/Mum/07
Assessment year : 2003-04

1. This is an appeal filed by the assessee and is directed against the order dated 21st August 2007, passed by the Commissioner of Income Tax – I, Mumbai, under section 263 of the Income Tax Act, 1961, for the assessment year 2003-04.

2. In the grounds of appeal , as set out in the memorandum of appeal, the assessee has raised as many as four very detailed grounds of appeal, but, as learned representatives fairly agree, the sole issue requiring our adjudication is whether, on the facts and in the circumstances of the case, the Commissioner was indeed justified in

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exercising his powers under section 263.

3. The relevant material facts are as follows. The assessee is a partnership firm engaged in the business of manufacture and exports of stainless sheet utensils and other products. On 12th November, 2003, the assessee filed its income tax return disclosing a taxable income of Rs 1,51,330, after claiming deduction under section 80 HHC, in respect of export profits, amounting to Rs 49,16,854. The income tax return was duly accompanied by the profit and loss account and other financial statements, audit report, certificate under section 10CCAC etc. This income tax return was picked up for scrutiny assessment. The assessee attended these scrutiny assessment proceedings, produce the books of accounts in response to notice under section 142(1) dated 25th October 2004, and complied with the requisitions of the Assessing Officer from time to time. On 31st January 2006, the Assessing Officer finally passed an assessment order accepting the income returned by the assessee, and, in the assessment order so passed, *inter alia*, observed as follows:

> **On going through the profit and loss account, it is seen that the assessee has earned an amount of Rs 61,53,537 on Export Licences sales. As per section 28(iiia) of the Income Tax Act, profit on sale of licences granted under the Import (Control) Order 1955, made under the Imports & Exports (Control) Act, 1947 (18 of 1947), is chargeable to income tax under the head – "Profits and Gains of Business or Profession". However, due to later amendments of Section 28 and Section 80 HHC of the Income Tax Act, 1961, exporters having turnover of less than Rs 10.00 crores will now be eligible for deduction in respect of Duty Entitlement Passbook Scheme.**
>
> **In view of the above, the deduction, claimed by the assessee firm, of Rs 49,16,854 is allowed under section 80HHC and return of income is accepted as it is.**

4. The matter, however, did not rest at that. On 21st June 2007, the

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successor Assessing Officer intimated the assessee that, in response to a revenue audit objection, he proposes to refer the matter to the Commissioner for exercise of powers under section 263 so as to revise the order since the "deduction was incorrectly computed as the loss incurred in export of goods was not set off against export incentives before allowing the deduction". In his letter, the Assessing Officer, inter alia, stated as follows:

> **In this case, assessment for AY 2003-04 has been completed under section 143(3) on 31.1.2006 assessing the total income at Rs 1,51,330. While completing the assessment, the AO has considered the contention of the assessee as regards deduction under section 80 HHC claimed at Rs 49,16,854.**
>
> **2. However, the Revenue Audit (para 2 of LAR ITRA/ LAPXXIII/ 46th Cycle/AQ No. 2 dated 9.4.2007) pointed out that the deduction was incorrectly computed as loss incurred in export of goods was not set off against export incentives before allowing the deduction. This has resulted in short levy of tax of Rs 8,81,612 including interest under section 234 B (detailed working of deduction is enclosed)**
>
> **3. The Revenue Audit Report appears to be correct as the claim of the assessee under section 80HHC is erroneous in so far as it is prejudicial to the interest of the revenue. Hence, I propose this case to the Hon'ble CIT-I, Thane, for revision under section 263. ………….**

5. The assessee made detailed submissions to the Assessing Officer as to why it is not a fit case for exercise of revision powers by the Commissioner. It was also pointed out that at the point of time when the income tax return was filed by the assessee, "there was divergence of opinion among the various High Courts and Tribunals" and that

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"there was no judgment of the Hon'ble jurisdictional High Court". It was also pointed out that "the claim of the assessee was in accordance with one of the views expressed by various benches of the Tribunal". A list of Tribunal decisions, which supported the computation by the assessee, was also filed. These submissions of the assessee did not dissuade the Assessing Officer and he apparently referred the matter to the Commissioner for exercising powers under section 263. On 31st July 2007, the assessee was required to show cause as to why the Commissioner should not exercise his revision powers under section 263 and thus revise the deduction granted to the assessee under section 80 HHC. In response to this show cause notice, the assessee once again referred to and mainly relied upon his rather elaborate written submissions dated 16th July 2007 filed before the Assessing Officer. None of these submissions impressed the learned Commissioner either. Learned Commissioner set out the amended provisions of Section 80 HHC, and noted that while the assessment was completed on 31st January 2006, the process of retrospective amendment in section 80 HHC was completed in December 2005. The Assessing Officer was thus required to apply the amended provisions of law. The Assessing Officer ought to have adjusted 90% of incentives against the profits or losses of the assessee, which he failed to do. He was thus of the opinion that the order so passed by the Assessing Officer was clearly erroneous and prejudicial to the interests of the

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revenue inasmuch as deduction of Rs 22,03,757 was allowed in excess. Accordingly, in exercise of his powers under section 263, learned Commissioner directed an addition of Rs 22,03,757. Aggrieved by the order so passed by the learned Commissioner, the assessee is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position. Broadly, the challenge to assumption of jurisdiction under section 263 is on the ground that the Commissioner could not have invoked his revision jurisdiction, as the Assessing Officer had passed the assessment order after taking into account all the relevant facts, including retrospective amendments in law, and the order so passed by the Assessing Officer cannot be construed as erroneous and prejudicial to the interests of revenue. It is pointed out that the Commissioner in error in observing that the Assessing Officer has not taken into account the retrospective amendments made in section 80 HHC in December 2005, as the Assessing Officer has specifically referred to the same in the assessment order. It is also contended that the Assessing Officer had examined the claim of deduction under section 80 HHC, and, therefore, the decision thereon cannot be reviewed in the garb of revision proceedings. It is further contended that it is at best a case of substitution of opinion by the

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Assessing Officer, by that of the Commissioner – something which is not permissible under the scheme of the Act. Reliance is placed on Hon'ble Supreme Court's judgments in the case of CIT Vs Max India Limited (295 ITR 282) and in the case of Malabar Industrial Co Ltd Vs CIT (243 ITR 83), Hon'ble Bombay High Court's judgment in the case of CIT Vs Gabriel India Limited (203 ITR 117), Hon'ble Gujrata High Court's judgments in the case of CIT Vs Arvind Jewellers (259 ITR 502) and CIT Vs Nirma Chemical Works Pvt Ltd (309 ITR 67), Hon'ble Delhi High Court's judgment in the case of CIT Vs Ashish Rajpal (180 Taxman 623), and various decisions of the coordinate benches including in the cases of Honda Siel Power Products Ltd Vs CIT (22 DTR 164) and Usha Martin Industries Limited Vs DCIT (86 ITD 261). It is contended that when Assessing Officer has taken a possible view of the matter, the view so taken by him cannot be disturbed merely because the Commissioner does not agree with that view. It is also contended that view of the audit party cannot be a basis for exercise of powers under section 263, and that merely because the assessment order does not refer to the queries raised by the Assessing Officer,it cannot be said that there was no enquiry and the assessment is erroneous and prejudicial to the interests of the revenue. On the strength of these erudite arguments, Dr Shivram, learned counsel for the assessee, urges us to quash the revision proceedings. Shri Balodia, on the other hand, painstaking takes us through the amended legal provisions with a view

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to demonstrate that the Assessing Officer did not correctly apply the correct law. It is also stated that once the view taken by the Assessing Officer is not based on correct reading of simple legal provisions, that error cannot be allowed to be perpetuated on the ground that the Commissioner cannot substitute Assessing Officer's views by his views. It is also pointed out that all these judicial precedents which have been relied upon by the assessee were with regard to pre amendment law, but, so far as post amendment legal position is concerned, the same is beyond any dispute or controversy. By no stretch of logic, therefore, the view taken by the Assessing Officer can be justified or supported. It is submitted that referring to the amended law is one thing, and following it is another. While the Assessing Officer has indeed referred to the amendments in law, he did not really bother to understand, analyze or apply the amendments in the law. It is this mistake which has rendered the order passed by the Assessing Officer erroneous and prejudicial to the interest of the revenue. We were thus urged to confirm the impugned order, and decline to interfere in the matter. In rejoinder, learned counsel for the assessee reiterated his submissions and pointed out that revision is not a remedy for all kind of mistakes, even if there be a mistake, of the Assessing Officer, and an error of judgment, as at best the mistake before could be, is not one of the mistakes which can be remedied under section 263. We are thus urged to appreciate the limitations of Commissioner's powers under section

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263 and hold that the impugned order did indeed go beyond the mandate and limited scope of these powers. We are once again urged to quash the impugned revision order.

7. In our considered view there can indeed be no quarrel with the legal proposition, canvassed by the learned counsel for the assessee, that as long as an Assessing Officer has taken a possible view of the matter after applying his mind to the facts of the case and the legal provision, the view so taken can not be subjected to revision proceedings under section 263 merely because the Commissioner has a different view of the matter. The true test, therefore, must lie in whether or not the view taken by the Assessing Officer could be said to be a possible view of the matter, upon due application of mind to facts of the case as also the applicable legal provisions. In the proceedings before the Commissioner, the assessee had sought to justify the view taken by the Assessing Officer on the basis of certain judicial precedents on the issue, but then none of those judicial precedents relate to the legal position post the retrospective amendments made in 2005, in Section 80 HHC. It is also contended by the assessee that as at the time of filing of the income tax return, there were conflicting views of different judicial authorities, but when we are examining whether or not the order of the Assessing Officer was erroneous, it has to be *qua* the legal position prevailing at the time of order being passed

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and not *qua* the legal position prevailing at the time of filing of income tax return. The legal position prevailing at the point of time when order sought to be revised was passed did not, in our considered view, admit any ambiguity or controversy that the profits computed under clause (a) or clause (b) or clause (c) under Section 80 HHC(3) or after giving effect to the first proviso, as the case may be, "shall be further increased by the amount which bears to ninety per cent. of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee". That was not done by the Assessing Officer in the assessment order. The Assessing Officer has referred to the amendment in Section 80 HHC in December 2005, but so far as computation of deduction is concerned, he has simply followed the pre amendment legal position. Referring to an amendment is one thing, and applying it is another. The Assessing Officer has referred to the amendment but did not apply the same in the computation part. In our humble understanding, the view taken by the Assessing Officer in the order subjected to the revision proceedings is a view which no reasonable person, with understanding of the amendment legal provision, could take. In this view of the matter, we see no infirmity in Commissioner's assumption of powers under section 263 of the Act.

8. By way of the additional grounds of appeal, the assessee has also

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raised grievance against the conclusions arrived at by the CIT(A) on merits, in asmuch as, according to the assessee, "the Commissioner erred in reducing 90% DEPB from profits of the business for the purpose of deduction under section 80 HHC without appreciating that only profit element on the transfer of DEPB licence has to be reduced." Having heard the rival contentions on admission of this additional ground of appeal, and having regard to the fact that it is purely a legal issue, we admit the additional ground of appeal and proceed to decide the same on merits. As learned representatives agree, this issue is covered in favour of the assessee, by Special Bench decision in the case of Topman Exports Vs ITO (318 ITR AT 87). To this extent, therefore, we modify the order of the Commissioner – so far as the quantum of adjustment is concerned.

9. In the result, appeal of the assessee is partly allowed in the terms and manner indicated above.

ITA No. 6478/Mum/07
Assessment year : 2004-05

10. Learned representatives agree that whatever be the outcome of the assessee's appeal for the assessment year 2003-04, the same will apply for this assessment year as well. Respectfully following the view taken by us above for the assessment year 2003-04, while we approve the assumption of jurisdiction by the CIT under section 263 in

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principle, we modify the order of the Commissioner – so far as the quantum of adjustment is concerned.

11. In the result, appeal of the assessee for the assessment year 2004-05 is also partly allowed in the terms and manner indicated above. To sum up, both the appeals are partly allowed in the terms and in the manner indicated above. Pronounced in the open court today on 31ST day of May, 2010.

Sd/xx	***Sd/xx***
(D K Agarwal)	**(Pramod Kumar)**
Judicial Member	**Accountant Member**

Mumbai; 31st day of May, 2010.

Copy forwarded to :

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2. *The respondent*
3. *CIT, , Mumbai*
4. *Commissioner (Appeals) , Mumbai*
5. *Departmental Representative, J bench, ITAT, Mumbai*
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By Order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai

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