inspecting Assistant Vs. Reliance Textile Inds. Ltd.

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-27-1992

Reported in : (1992)43ITD165(Mum.)

Judge : U Shah, V Sinha

Appellant : inspecting Assistant

Respondent : Reliance Textile Inds. Ltd.

Judgement :

1. This is an appeal filed by the revenue. The first ground of appeal is reproduced below: On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in deleting the addition of Rs. 15,80,94,850 made by the IAC (Assessment) on account of suppression of production by showing higher wastage of raw materials by relying on the examination of Sri Sasidharan, Dy. Collector of Audit and of Sri B. Prasad, Chief Chemist for Central Excise on 7-10-1987. The CIT (Appeals) further erred in not giving an opportunity to the IAC (Assessment) to cross-examine Sri Sasidharan and Sri B. Prasad thereby contravening the provisions of Rule 46A of the IT Rules.

2. The assessee-company manufactured synthetic fabrics from yarn. These activities were carried out at its plant at Ahmedabad. The previous year for the plant in Ahmedabad was the calendar year ending 31-12-1983. The assessee-company also had a unit at Sidhpur in Gujarat where blended yarn and cloth were manufactured. The previous year in this case also ended on 31-12-1983. In

addition, a new unit was started at Patalganga from 1-11-1982. The previous year for the new unit was 1-11-1982 to 31-10-1983. At the Patalganga Unit, the assessee-company manufactured Polyester Fibre Yarn and also had a separate trading department. The dispute before us relates to the manufacture of Polyester Fibre Yarn at the Patalganga Unit.

3. In the course of assessment proceedings, the Assessing Officer found that the Assistant Collector of Central Excise had issued a show-cause notice to the assessee on 28-10-1985 alleging suppression of production of Partially Oriented Yarn (hereinafter called TOY"). The suppression was worked out in two ways. Firstly, a chemical formula for the ideal yield of polymer per unit of DMT or TPA introduced as raw material was worked out. The ideal percentage of yield was applied to the consumption of raw material and the yield, according to the formula, was worked out as 'X'. The actual yield shown by the assessee was 'X-l'. The difference between the two was alleged to be suppressed production removed by the assessee without recording the same in the books. Secondly, it was stated in the show-cause notice that the total wastage accounted for during the period of 14 months from October 1982 to December 1983 was 11.8 per cent whereas the assessee itself had shown wastage of only 3.6 per cent and 3.7 per cent in 1984 and 1985 respectively. In this connection, it was also stated that the accounting of the wastage was highly irregular during the year 1982-83.

No account of wastage was kept in RG-1 register from October 1982 till February 1983 when a consolidated entry of 528 M.T. was made.

Subsequently, another consolidated entry of 1593 M.T. was made in October 1983 in respect of the wastage for the period February 1983 to October 1983. It was stated in the show-cause notice that there was no reason for such high percentage of wastage when the assessee had its own captive power generator and did not have to face any shut down on account of power shortage.

4. The Assessing Officer referred to the above show-cause notice dated 28-10-1985 issued by the Central Excise authorities in a letter to the assessee on 9-3-1987 and asked for necessary details as to why the value of the suppressed production should not be included in assessee's total income. The assessee

replied by two letters dated 23-3-1987 and 24-3-1987, denying all the allegations made in the show-cause notice.

5. It was submitted by the assessee that it was the first year of production and for any new process, it would take six to eight months to stabilise. The trial run during the start-up of production generated large quantities of wastage and sub-standard,production. The assessee had also employed labourers from nearby villages who were unskilled and inexperienced. They also had to face frequent shut-down due to power problem. Lastly, it was explained that during the year, the assessee was using DMT as its raw material which produced greater wastage and, in later years the assessee switched over to TPA as its raw material, which gave far better yield.6. The Assessing Officer was not satisfied with the reply. He observed that the percentage of wastage was abnormally high and, in any case, the assessee had used DMT as one of the raw materials at least upto 13-2-1984. Further, the yield was low even according to the chemical formula. According to him, the difference in yield when DMT was used as raw material instead of TPA was not substantial. He referred to absence of day-to-day record of wastage in RG-1 register and, came to the conclusion that the books of accounts had not been properly maintained with reference to the production and the correct profits could not be computed from the assessee's books. He, therefore, held that the wastage to the extent it was excessive represented unaccounted production and the same had been sold by the assessee at the average selling price of the year outside the books. He worked out the average rate of wastage at 3.65 per cent, which was acceptable and, on that basis, the quantity of POY short-accounted by inflating the wastage came to 1370 MT from October 1982 to December 1983. The proportionate quantity from October 1982 to October 1983 came to 1174.29 MT. This quantity was treated as unaccounted production sold by the assessee outside the books at the average selling price and the addition thus made was Rs. 15,80,94,850.

7. The Assessing Officer also mentioned in the assessment order that the assessee had filed a writ petition before the Bombay High Court against the show-cause notice issued by the Excise Department and an interim stay order had been passed by the High Court. It was directed that Collector of Central Excise may

proceed with the hearing of the show-cause notice, but he should not pass any order on the show-cause notice till the hearing and final disposal of the petition. The Assessing Officer stated in the assessment order that he was passing the assessment order after appreciating the evidence available on record and had come to his independent finding. In the circumstances, it was not material that the show-cause notice issued by the Central Excise Department was yet to be adjudicated upon.

8. When the matter went to the CIT (Appeals), the assessee submitted before him that the explanation given to the Assessing Officer had not been properly appreciated. In particular, it was explained that physical existence of higher wastage was certified by the Central Excise authorities themselves on 3-1-1984 and its subsequent sale, after payment of excise duty had been completely overlooked by the Assessing Officer. The addition had been made on the basis of theoretical assumptions and not according to the world-wide experience of production. There was no evidence whatsoever for the p'roducts having been sold outside the books without accounting for the same.

Actual stock taking of was done by the Excise Officers from time to time and they had certified that there was no difference between the physical stock and the book stock and this had also been ignored by the Assessing Officer. The RG-1 register was periodically scrutinised and checked by the Central Excise authorities and no objection was raised for passing the consolidated entries. It was reiterated that the unit was new, labour was unskilled, and there was frequent power failure.

There was also loss of raw materials due to pilferage and short supply and the concerned store records in respect of the same, had not been given due weightage. It was also emphasised that the Central Excise authorities had merely issued a show-cause notice which was not the same thing as a decision and the Assessing Officer had not made any enquiries on his own.

9. The assessee gave a detailed paper book and record to the CIT (Appeals) and according to para 11 of the order of the CIT (Appeals) .they were shown to the Assessing Officer as well for his comments.

However, the Assessing Officer did not raise any objection to the admission of the supporting evidence contained in the paper book.

10. The paper book contained a copy of the cross-examination before the Central Excise authorities of Sri Sasidharan, Deputy Collector of Audit, who was instrumental in the preparation of the show-cause notice. It was revealed during the cross-examination that the officer did not remember the book from which the formula mentioned in the show-cause notice was taken out. The assessee was not confronted with the formula prior to the issue of the show-cause notice. The officer had no experience of the working of DMT or TPA waste polyester plant.

He could not answer whether a new plant would take six to eight months to stabilise. He was not aware of the quantity of waste arising during the formation of polymer as well as during the subsequent stage. He could not say whether there was material difference in wastage when TPA was used as raw material instead of DMT. No enquiry was made from the assessee's staff regarding the actual difficulties faced.

11. The paper book also contained a copy of examination of Sri B.Prasad, Chief Chemist of the Central Excise Department, who was a technical expert and on whose advice, the formulae had been worked out.

He stated that he did not have any experience of work in polyester plant and the formulae were borrowed from the Encyclopaedia of Polymer Science and Technology, and Encyclopaedia of Chemical Technology. He did not remember whether POY was analysed from TPA or DMT.12. The paper book also contained particulars of actual physical stock taking of wastage on 3-1-1984, which was three days after the conclusion of the calendar year and it showed existence of physical quantity of wastage to the extent of 2334.017 MT. The Inspector of Central Excise Department had certified that there was no reason for difference in the stock. The production during 1984 was 724 MT bringing the total to 3,058 MT. The waste of 2523 MT was sold to nine parties, leaving a balance of closing stock of 535 MT on 31-12-1984. The sale of wastage was made after payment of excise duty and were made to M/s.

J.K. Synthetics Limited, M/s. Nylon Waste Trading Corporation, M/s.

Veetex Synthetics, M/s. Shri Krishna Woollen Mills, M/s. Bhilad Textile Ind. (P) Ltd., M/s. A.K. Enterprise, M/s. India Shoddy Mills, M/s.

Synthetic Traders Agency and M/s. Jayantilal Lakshmichand and Company, and they were not related parties.

13. It was emphasised by the assessee that the excise duty on sale of waste was Rs. 11.25 per Kg and there was no buyer at this rate.

Subsequently, the excise duty was reduced from 17-4-1984 to Rs. 9 per Kg or 50 per cent of the price, whichever is less and, therefore, the waste was cleared subsequently at this rate. This item was also dutiable and duty had been duly paid. The sale was made prior to the issue of show-cause notice. There was, therefore, adequate proof regarding the existence of waste but this strong evidence had not been commented upon by the Assessing Officer.

14. The assessee explained further that the consolidated entries for wastage on two occasions were made because of the process of settling down and on account of dispute regarding classification of waste.

However, contemporaneous record was available in any case. The assessee had produced RG-12 register and the entry was stated to have been made on the basis of bills of two contractors engaged in removing the waste and their bills contained the quantity of waste removed. The bills in original were produced before the CIT (Appeals). There were date-wise details giving quantity of waste lifted on the basis of which transportation had been charged and on which tax had been deducted at source. The assessee had also filed quarterly return before the Income-tax Department regarding the tax deducted at source.

15. It was next submitted that the chemical formula could be applied only to ideal working but not to practical working where the conditions were less than ideal.

16. It was next submitted that it was an admitted fact that there was difference between the norm of production per unit of DMT and TPA. In case of DMT. the

production was 99 per cent and in case of TPA it was 115 per cent. Even according to the theoretical formula of the Excise department, the conversion factors were 99.29 per cent for DMT and 116.036 per cent for TPA. This accounted for the difference in wastage to a substantial degree.

17. It was next submitted that it was not a fact that there was no power failure, as stated in the show-cause notice issued by the Central Excise Department. There were 37 major events of power failure apart from minor events and, a day-to-day account had been kept in a log book. The own captive power plant was set up subsequently. The waste generated due to power failure was as high as 148.356 MT as against only 73.325 MT in 1984 and 38.831 MT in 1985 upto 7-5-1985.

18. The assessee also pointed out that complete stock of finished goods as well as waste was a dutiable item and there was not a single instance shown by the Excise authorities for removal of goods without payment of duty.

19. The assessee also gave a comparative statement of polyester yarn manufacturers, other than the assessee, which indicated that the wastage in case of assessee was less than the wastage shown by other manufacturers.

20. The assessee also relied on the decision of the Supreme Court in the case of Oudh Sugar Mills Ltd. v. Union of India [1978] ELT J 172, in which it was held that in the absence of any evidence for removal of goods without payment of duty, the average production cannot be made the basis for issue of show-cause notice for suppression of production.

The Additional Secretary to the Government of India had also held in the case of Gupta Woollen Mills, In re [1979] ELT (J. 106A), that in the absence of any material evidence suggesting clearance of goods without payment of duty, no action can be taken just on presumption.

21. Based on the above submissions and appraisal of the evidence before him, the CIT (Appeals) held that sufficient reason had been given for excess waste in this year compared to subsequent years and the physical existence of waste disproved the contention of the department that there was suppression of

production and sales. He, therefore, deleted the addition of Rs. 15,80,94,850. The revenue is now in appeal before us against the order of the CIT (Appeals).

22. Before going to the main dispute, we will refer to a preliminary objection raised by the revenue, that the CIT (Appeals) erred in not giving an opportunity to the Assessing Officer to cross-examine Sri Sasidharan and Sri B. Prasad and,thereby contravened the provisions of Rule 46A of the Income-tax Rules, 1962. The preliminary objection is based on Clause (3), of Rule 46A of the Income-tax Rules, 1962, which is produced below: The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced Under Sub-Rule (1) unless the Assessing Officer has been allowed a reasonable opportunity (a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or (b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

23. We have heard the rival submissions and, we would like to observe that Sri Sasidharan and Sri B. Prasad were not produced by the assessee before the CIT (Appeals) at all. Their examination and cross-examination were done in the course of hearing before the Collector of Central Excise and only copies of their statements were produced by the assessee in the paper book submitted to.the CIT (Appeals). It is recorded in para 11 of the order of the CIT (Appeals) that the assessee gave a detailed paper book which was examined and shown to the Assessing Officer as well for his comments. However, the Assessing Officer did not raise any objection. In the circumstances, we hold that the CIT (Appeals) allowed a reasonable opportunity to the Assessing Officer as contemplated in Clause (3), of Rule 46A of the Income-tax Rules, 1962. The preliminary objection is, therefore, without any merit, and it is, accordingly, rejected.

24. We now come to the main dispute regarding the addition on account of sale of suppressed production. The learned Departmental Representative took us through the show-cause notice, dated 28-10-1985 issued by the Central Excise Department and, emphasised that the percentage of waste of 11.8 per cent was far too high even for the first year of manufacture, considering that it was only 3.6

per cent and 3.7 per cent in the subsequent two years. He submitted that the chemical formulae employed may not be an essential test but it was a good supporting evidence that the wastage was too high. He highlighted the absence of daily entries in RG-12 register for the wastage and submitted that this was also a pointer to the things being not what they were made to appear. He further relied on the assessment order and submitted that the addition on account of sale of suppressed production was fully justified and should be confirmed.

25. The learned counsel for the assessee, on the other hand, relied on the detailed reasoning given by the CIT (Appeals). He emphasised that the Assessing Officer did not carry out any independent enquiries on his own and had only relied on the show-cause notice, dated 28-10-1985, issued by the Central Excise Department. In this connection, he submitted that the first letter in this regard was issued by the Assessing Officer only on 9-3-1987 when the limitation available to him for completion of the assessment was upto 31-3-1987 only. The replies were given by the assessee by letters dated 23-3-1987 and 24-3-1987 and, obviously, the Assessing Officer could not have made any independent enquiries as the assessment came to be completed on 30-3-1987. He also submitted that not only the Assessing Officer did depend exclusively on the show-cause notice issued by the Central Excise authorities, but had gone one step further than the allegation contained in the show-cause notice, inasmuch as, a finding had been given that suppressed production had actually been sold outside the books of account.

26. The learned counsel thereafter invited our attention to a reply dated 31-12-1985 to the Central Excise authorities, a copy of which is available on page 17A of the paper book. It was brought out that as per Rule 173E of the Central Excise Rules, 1944, the Central Excise Department was required to fix a norm of production considered normal and the actual production or short-fall was to be explained with reference to the norm. However, in assessee's case, it was submitted, no such norm had been fixed Under Rule 173E of the said Rules and, therefore, the very basis for the show-cause notice was invalid.

27. The learned counsel also invited our attention to the stock taking done on 3-1-1984, for the waste, which was duly attested by the Inspector, Central Excise

Department. He also referred to a detailed record or power failure available on page 238 of the paper book. He also invited our attention to a copy of the lease deed, where it was laid out that in employing skilled and unskilled labour, the lessee shall give first preference to the persons who are able-bodied and whose lands are acquired for the purpose of industrial area.

28. The learned counsel for the assessee, thereafter, invited our attention to case law on the subject. The decision of the Bombay High Court in the case of R.B. BansilalAbirchand Spg. & Wvg. Mills v. CIT [1970] 75 ITR 260 was cited first, wherein it was held that the Officer's right under proviso to Section 13 of the Indian Income-tax Act, 1922 (corresponding to proviso to Section 145(1) of the Income-tax Act, 1961) arises only after a finding is recorded as to the unacceptability of the method and the irregularity of accounts kept.

The mere fact that the percentage of dead loss of cotton was high in a particular year, the court held, cannot lead to an inference that thereby there has been suppression of the production in a spinning mill.

29. The judgment of J & K High Court in the case of Internal tonal Forest Co.v. CIT[1975] 101 ITR 721 was next relied upon. In the said case, it was held that in the case of a forest coupe, mere lowyield of out-turn compared to earlier years was not sufficient to make an addition.

30. The judgment of the Kerala High Court in the case CA1T v. M.J.Cherian [1979] 117ITR371 was also relied upon, wherein it was held that the Agricultural Income-tax Officer was justified in fixing the yield from paddy at a price higher than the statutory price only when there was evidence to show that the assessee did sell at higher price. In view of these decisions also, the learned counsel submitted, there was no justification for the addition made by the Assessing Officer.

31. For the above reasons, the learned counsel submitted that the addition made by the Assessing Officer had been rightly deleted by the CIT (Appeals) and the orders of the CIT (Appeals) should be confirmed.

32. We have considered the submissions of both sides carefully. The addition made by the Assessing Officer is based on certain matters contained in the show-cause notice dated 28-10-1985, issued by the Central Excise Department to the assessee, though those matters may have been considered independently by him. It is also seen that the Assessing Officer had asked for the necessary details very late on 9-3-1987 when limitation was available upto 31-3-1987 only for passing the assessment order. He did not carry out any independent enquiries nor did he take into account fully the replies given by the assessee by way of letters dated 23-3-1987 and 24-3-1987.

33. We will now examine the reasons given by the Assessing Officer for making the addition. The wastage of 11.8 per cent was stated to be unreasonably high compared to the assessee's own results of wastage of 3.6 per cent and 3.7 per cent in the subsequent two years. It was also stated to be high on the basis of a chemical formula given by the Central Excise authorities. As far as the chemical formula is concerned, we are of the opinion that it can, at best, be applied to ideal working conditions. It cannot be applied to a situation where the production has just started and there are teething troubles along with compulsory employment of unskilled labour and power break-downs. The cross-examination of Sri B. Prasad, Chief Chemist, also shows that he had borrowed the formula from an encyclopaedia and he was not conversant with actual functioning of a plant. The chemical formula cannot be properly applied to the facts and circumstances of the present case. However, comparison with the assessee's own results in subsequent years would be a valid comparison in a normal situation, but the situation was not normal in the assessment year under consideration. It is not in dispute that the production was commenced at the Patalganga unit only in this year. Some teething troubles in the beginning are inevitable, particularly during the trial run during the startup of production. The assessee has produced sufficient evidence to show that it was obliged to employ unskilled labour from the nearby villages, as per the terms of the lease deed. According to the show-cause notice issued by the Central Excise Department, the assessee had a captive power generator and did not have to face any shut-down on account of power shortage and, the Assessing Officer had also proceeded on this basis. However, the assessee has produced sufficient evidence in the form of actual record of power

failures to show that it was affected by it. It is stated on page 22 of the assessee's letter dated 31-12-1985 to the Central Excise Department (page 38 of the paper book), that it was not right to assume that the assessee had a captive power generator and the plant did not face any shut-downs on account of power shortage. The assessee depended upon the MSEB power to the maximum extent for economic reasons. It was only in July 1983, after having bitter experience of power failures that the assessee started using own generated power regularly and that too for critical part of the plant. The captive generator was used only in emergency to keep the critical process alive and not to run the entire plant. It was stated that eveiy power failure generated a minimum of about 2 MT poly waste and 3 MT sub-standard yarn. The record of the actual power failures has also been produced. In the circumstances, we are satisfied that the assessee had to face frequent power failures during this year. The record for subsequent years shows that the power failure was lesser in those years. The assessee has also rightly pointed out that raw materials used in this year were DMT where the production of POY was 99.2 per cent as against 115 to 116 per cent in case of use of TPA as raw material, which was used in subsequent years. In our opinion, these are good reasons for excess wastage in the first year compared to the wastage in subsequent years.

34. The revenue has emphasised the absence of day-to-day record of wastage in RG-12 register, but the assessee has produced bills of contractors who were engaged in removing the waste and the bills contain date-wise details of quantity of waste lifted. The authenticity of these bills has not been challenged, particularly in view of the fact that tax was deducted at source by the assessee on these payments and the assessee also filed quarterly returns before the Income-tax Department regarding tax deducted at source.

35. Over and above, what has been mentioned already, there is evidence of the quantity of actual waste as on 3-1-1984, duly authenticated by the Central Excise Department. The quantity shown therein supports the claim of the assessee fully that the extent of wastage was as claimed in the books. There is also evidence of sale of the above waste to parties who were not related to the assessee-company and excise duty was also paid on the clearance of the above-mentioned waste for

sale.

The authenticity of this sale has not been challenged by the revenue.

All that has been done is to ignore this evidence altogether, which is certainly not fair. This evidence, in our opinion, is overwhelmingly in favour of the assessee. When physical existence of waste is established in this manner, we are unable to see how an inference can be drawn that the waste was really finished goods and, to go even a step further, i.e., suppressed production was sold. We may observe that, on the other hand, the revenue has not been able to produce any evidence of physical sale of any suppressed production.

36. We now corne to the law applicable to the issue before us. It is laid down in Section 145(1) of the Income-tax Aet, 1961, that the income chargeable under the head "Profits and gains of business or profession" shall be computed in accordance with the method of accounting regularly employed by the assessee. Two exceptions have been given thereafter. The first proviso below Section 145(1) lays down that in any case where the accounts are correct and complete to the satisfaction of the Assessing Officer but the method employed is such that in the opinion of the Assessing Officer the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Assessing Officer may determine. It is also laid down in Clause (2) of Section 145, that where the Assessing Officer is not satisfied about the correctness or the completeness of the accounts of the assessee, or where no method of accounting has been regularly employed by the assessee, the Assessing Officer may make an assessment in the manner provided in Section 144. If the assessee's case falls under any of the two exceptions, then the Assessing Officer is not only within his right but also it is his duty to proceed as laid down therein. The case law cited before the CIT (Appeals) (see para 20 above) relates to the law applicable to proceedings under the Central Excises & Salt Act and not under the Income-tax Act and, therefore, it cannot help the assessee. Similarly, the submissions made by the learned counsel before us regarding Rule 173E of the Central Excise Rules, 1944 (see para 26 above) cannot help the assessee since those rules also do not take into account Section

145 of the Income-tax Act, 1961.

37. The Assessing Officer gave a finding that not only was the wastage shown by the books excessive but also the day-to-day record of wastage had not been kept in Rt3-l register and, therefore, the books of accounts had not been properly maintained with reference to the production and the correct profits could not be computed from the assessee'.s books. In view of this, he rejected the book results under proviso to Section 145(1) of the Income-tax Act, 1961, though the relevant provision of law was not mentioned by him. However, we have come to the conclusion that contemporaneous record of wastage was available and there was overwhelming evidence of the actual existence of wastage as claimed by the assessee. In the circumstances, the unacceptability of the method of accounts and the irregularity of accounts have not been established and the assessee has rightly relied on the decision of the Bombay High Court in the case of R.B. Bansilal Abirchand Spg. & Wvg. Mills (supra), wherein it was held that the mere fact that the percentage of dead loss of cotton was high in a particular year cannot lead to an inference that thereby there has been suppression of production in a spinning mill. The assessee has also rightly relied on the decision of the Jammu & Kashmir High Court in the case of International Forest Co. (supra) wherein it was held that in the case of forest coupe, mere low yield of out-turn compared to earlier years was not sufficient to make an addition. We need not go into the third case cited by the assessee in the case of CAIT v. M. J.Cherian (supra) since we are considering the provisions of Section 145 of the Income-tax Act, 1961 and not the provisions of Agricultural Income-tax Act.

38. For the above reasons, we are satisfied that the order of the CIT (Appeals) is fair and reasonable and we hereby confirm the same. The appeal filed by the revenue in the first ground before us is rejected.

On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in directing the IAC (Assessment) to work out the disallowance from salary and perquisites of employee-directors under the provisions of Section 40(c) and not under the provisions of Section 40A(5) of the IT Act, 1961.

40. We have heard the rival submissions and, we find that the matter is covered in favour of the assessee by the decision of the Special Bench of the Tribunal in the case of Geoffrey Manners and Co. Ltd. v. ITO [1983] 3 SOT 40. (Bom.). Respectfully following the said decision of the Special Bench, this ground of appeal is rejected.

On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) erred in directing the IAC (Assessment) to allow ex-gratia payment of Rs. 3,11,612 being the payment in the nature of bonus paid over and above the amount of bonus payable.

42. The assessee paid an amount of Rs. 3,11,612 as ex-gratia payment to its employees. The amount was disallowed as a deduction by the Assessing Officer, on the ground that it was not covered by the proviso to Section 36(1)(ii) of the Income-tax Act, 1961, r.w. Section 23 of the Payment of Bonus Act, 1976, and it could not be considered under the provisions of Section 37(1) since it was nothing but a bonus payment.

43. When the matter went to the CIT (Appeals), it was explained that the payments were not in the nature of bonus and, were actually payments by way of gratuity to those employees who left the services before completing five years when they would have become eligible for gratuity payment. Even when the assessee was having a gratuity fund, these employees were not covered by it. It was not a provision but actual payment made by crossed cheques. The CIT (Appeals) held that in the facts and circumstances, the payments should be considered pot under Section 36 or under Section 40A(7) but under Section 37 itself and it was allowable as a deduction.

44. We have heard the rival submissions and are of the opinion that, in the facts and circumstances of the case, the CIT (Appeals) was justified in allowing the deduction Under Section 37 of the Act, since it was actual payment to the employees who left the service before completing five years. This ground of appeal filed by the revenue is also rejected.

On the facts and in the circumstances of case and in law, the learned CIT (Appeals) erred in directing the LAC (Assessment) to allow the expenditure of Rs. 1,23,202 incurred on stamp duty in connection with the sale of property by the assessee-company as a revenue expenditure.

46. The Assessing Officer noticed that the assessee had paid Rs. 1,23,202 as stamp duty and registration charges and legal fees for the conveyance deed executed for transfer of immovable property on 2-8-1983. The property was purchased in the joint names of Sri V.R.Ambani, R.H. Ambani HUF and Smt. Padma Ambani and sold during the assessment year 1979-80 when the profit on sale of assets was shown.

The stamp duty was paid during the year under consideration and it was claimed out of the income of this year. The Assessing Officer held that since the amount pertained to immovable property, it was capital expenditure and disallowed the same.

47. It was explained before the CIT (Appeals) that the expenditure was in respect of sale of property and not purchase of property and, therefore, it could not be taken as capital. Further, the property was a business asset and the surplus was taxed under Section 41 (2) of the Act in the assessment year 1979-80, on the basis of agreement for sale.

The conveyance deed was executed in this year and, therefore, the expenditure was claimed. In the circumstances, the CIT (Appeals) directed that deduction should be allowed for the sum of Rs. 1,23,202 as claimed by the assessee.

48. We have heard the rival submissions and find that the decision of the CIT (Appeals) is quite reasonable. The expenses were incurred on sale of property and not on purchase and, the surplus has already been taxed under Section 41 (2) of the Act. In the circumstances, we confirm the order of the CIT (Appeals) on this point and reject this ground as well.