Peico Electronics and Vs. Inspecting Assistant

Peico Electronics and Vs. Inspecting Assistant

SooperKanoon Citation : sooperkanoon.com/65568

Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Sep-30-1992

Reported in : (1993)44ITD711(Kol.)

Judge : N Pachuau, R Easwar

Appellant : Peico Electronics and

Respondent : inspecting Assistant

Judgement :
What was taken in appeal by the assessee's appeal for additional deduction under section 80HHC was in respect of the Duty Draw Backs and Cash Subsidies which, according to the assessee, should be included as part of the export turnover for the purposes of calculating the deduction. The appeal under section 32A to the Commissioner (Appeals) was in respect of disallowance of the claim relating to the air-conditioners and moulds installed in the Loni Factory of the assessee. The issue whether the assessee was entitled to any deduction under section 80HHC in respect of the value of the marine products included in the export turnover was a separate issue. That issue was not taken up in appeal since it could not have been as the assessee had been given the relief by the assessing officer. Likewise, the question whether the assessee was entitled to investment allowance in respect of the plant and machinery installed in the Loni Factory in view of the relevant entries in Schedule XI to the Act was also a separate issue.

On that issue also there was no appeal since the allowance had been granted to the assessee. Therefore, it cannot be said that it is only an aspect of the deductions under section 80HHC and section 32A that was sought to be interfered with by the Commissioner by resorting to the provisions of section 263.

Singh Mica Mining Co. Ltd. v. CIT (1978) 111 ITR 231 (Cal) and Hamilton & Co. (P) Ltd. v. CIT (1991) 187 ITR 568 (Cal) followed.

Revision under s. 263--JURISDICTION OF COMMISSIONER--Objection on ground that action prompted by audit party's note The assessee was unable to produce any audit opinion or report given in the assessee's case which had allegedly formed the basis of the Commissioner's action under section 263. In the absence of any such evidence or material, the Commissioner had not initiated action under section 263 on the prompting of the audit party. The mere non-advertence in the order of the Commissioner to the assessee's objection is not conclusive of the matter. No such material is available to enable to come to the conclusion that the action under section 263 has been initiated only at the behest of the audit department, excepting the assertion of the assessee.

1. This appeal filed by the assessee is directed against the order of the CIT dated 24-3-1988 passed under Section 263 of the IT Act.

2. The assessee is a public limited company engaged in the manufacture of various electric items like fittings, domestic appliances, music systems, tape recorders, record players, etc. In respect of the assessment year 1983-84, relevant for the accounting year ended 31 -12-1982 the assessee filed its return of income on 27-7-1983. In the return, the assessee inter alia, claimed deduction under Section 80HHC in the sum of Rs. 8,29.739. The assessee also claimed investment allowance under Section 32A of the Act in an amount of Rs. 1,21,49,170 with regard to the plant and machinery installed by it in its Loni Factory. While completing the assessment under Section 143(3) on 24-2-1986, the Assessing Officer disallowed the sum of Rs. 1,13,248 relating to the claim under Section 80HHC and also a sum of Rs. 23,00,552 relating to investment allowance out of which the investment allowance relating to the air-conditioner and moulds installed in the Loni Factory amounted to Rs. 11,90,941.

3. The assessee filed an appeal to the CIT (Appeals) against the disallowance under Section 80HHC and Section 32A of the Act. The CIT(Appeals) passed his order on the appeal on 31-3-1987. As far as the claim of Rs. 1,13,248 under Section 80HHC is concerned, the CIT(Appeals) held that the claim related to that portion of the export turnover which consisted of duty drawback and cash subsidy and was rightly disallowed by the ITO. He upheld the disallowance. As far as the assessee's claim for investment allowance in an amount of Rs. 23,00,552 was concerned, he found that except for an amount of Rs. 10,716 which related to the canteen equipments, the balance of the claim was allowable though they related to the air-conditioners used in the factory, moulds, patterns and dyes and general tools which according to him were very much part of the plant and machinery.

4. On 17-3-1988, the CIT, West Bengal-I, issued a notice under Section 263 of the I.T. Act and proposed to revise the assessment made on 24-2-1986. The grounds on which the assessment was proposed to be revised were (i) that the ITO wrongly granted relief to the assessee under Section 80HHC on the value of export of marine products. In the view of the CIT the assessee was not a direct exporter of marine products and, therefore, was not entitled to the allowance under Section 80HHC on that part of the export turnover; (ii) that the Assessing Officer had allowed the entire claim of investment allowance of Rs. 1,21,49,170 in respect of plant and machinery installed at Loni Factory. According to the Commissioner, the factory at Loni was engaged in the manufacture of record players and tape recorders which were items prohibited as per item VII of the Eleventh Schedule of the I.T. Act and the assessee-company was not also a small scale industrial undertaking. He, therefore, took the view that the allowance of the investment allowance should be withdrawn; and (iii) The CIT also took the view that the contribution made by the assessee in an amount of Rs. 30,90,998 to the staff savings scheme was not admissible under Section 40A(9) or 40A(10) of the Act.

According to the Commissioner, the Assessing Officer was wrong in allowing the contribution as a deduction.

5. On 23rd March, 1988, the assessee wrote a letter to the CIT containing its objections to the revision proposed under Section 263.

The objections were two-fold. The assessee firstly pointed out that since the CIT(Appeals) had disposed of the assessee's appeal by order dated 31-3-1987 the assessment order had merged with the appellate order and, therefore, the CIT had no jurisdiction to revise the assessment order under Section 263. The attention of the CIT was drawn to the decision of the Special Bench of the Tribunal in Dwarkadas & Co.

(P.) Ltd. v. ITO 1 SOT 495 (Bom.). The attention of the Commissioner was also invited to the decision of the Calcutta High Court in the case of General Beopar Co. (P.) Ltd. v. CIT [1987] 167 ITR 86 on the point of merger. The assessee further contended that it had reason to believe that the action proposed under Section 263 was based on audit objections and not on the opinion of the CIT himself and, therefore, on the basis of the decision of the Calcutta High Court in Jeewanlal (1929) Ltd. v. Addl CIT [1977] 108 ITR 407, the revision was without jurisdiction. The assessee also made submissions on the merits of the claim both under Section 80HHC and Section 32A of the Act. It was further pointed out that the contribution to the staff savings scheme was actually disallowed in the assessment and, therefore, there could be no revision on this aspect.

6. These objections were considered by the CIT while passing the order under Section 263 on 24-3-1988. He, however, took the view that the doctrine of merger was not applicable since the issues proposed for revision were not considered by the CIT(Appeals) or adjudicated upon by him. He did not advert to the assessee's contention that the provocation for the action under Section 263 was an audit objection. As far as the merits of the claim was concerned, he stuck to his original proposal to disallow the claim under Section 80HHC, insofar as it related to the value of the export of marine products during the year.

As far as the investment allowance is concerned, he noticed that tape recorders were no longer a prohibited item mentioned in the Eleventh Schedule to the Act having been removed by Finance Act, 1981 with effect from 1-4-1982. He, however, felt that neither the assessee nor the Assessing Officer had made any bifurcation of the plant and machinery in the Loni Factory utilised for the manufacture of record players and tape recorders. Ultimately, he set aside the

assessment to be refrained afresh keeping in mind the discussion made by him in the order under Section 263 and after allowing reasonable opportunity to the assessee of being heard.

7. It is against the above order of the CIT passed under Section 263 of the Act that the assessee has preferred an appeal before us. Mr. K.Ray, the learned counsel for the assessee, repeated the contentions of the assessee made before the CIT in response to the show-cause notice issued by the latter. He referred to the decision of the Calcutta High Court in Jeewanlal (1929) Ltd.'s case (supra) and submitted that as far as the assessee's objection to the action under Section 263 as having been based on an audit objection is concerned, the non-denial or the non-advertence by the CIT would clearly show that the assessee's objection was valid. He elaborated by stating that it was for the Commissioner to show when the issue is specifically raised by the assessee before him that the action under Section 263 was initiated on the basis of the CITs own judgment and the CIT not having said so, the assessee's objection should be upheld. Regarding the doctrine of merger which was relied on by the assessee in support of its objection to the revision, the learned counsel for the assessee referred to the decision of the Calcutta High Court in the case of Singho Mica Mining Co. Ltd. v. CIT [1978] 111 ITR 231 and also the decision in General Beopar Co.

(P.) Ltd. 's case (supra). He also drew our attention to the decision of the Bombay High Court in the case of Ritz Ltd. v. Union of india [1990] 184 ITR 599, in support of his stand that the order of the Commissioner having been passed before 1-6-1988, i.e., prior to the amendments made by the Finance Act, 1988 as well as the Finance Act, 1989 to Section 263 of the Act, the doctrine of merger must be held to be applicable. He also drew our attention to the decision of the Kerala High Court in the case of CIT v. M.A. Unneerikutty [1992] 194 ITR 546, wherein the Kerala High Court has held that Clause (b) of the Explanation to Section 263 was not retrospective in nature but was applicable only with effect from 1st June, 1988. Our attention was also invited to a decision of the Bombay High Court in the case of CIT v. P.Muncherji & Co. [1987] 167 ITR 671, wherein the doctrine of merger was held to be applicable. The learned counsel for the assessee was at pains to point out that the order under Section 263 in the present case having been passed

on 24-3-1988 the Explanation (c) to Section 263 inserted by the Finance Act, 1988 with effect from 1-6-1988 and expanded by the Finance Act, 1989 with retrospective effect from 1-6-1988 cannot be pressed into service to uphold the order of the Commissioner.

8. Mr. Biswas, the learned departmental representative, countering the arguments of the learned counsel for the assessee, pointed out that the object of Section 263 itself is to set right the errors and wrongs committed in the assessment and a narrow interpretation of the powers of the Commissioner under Section 263 would defeat the very purpose of the said provision. He submitted that there was nothing in the order of the CIT to show that there was an audit objection which was the provocation for the revision. He pointed out that the decision of the Calcutta High Court in Jeewanlal (1929) Ltd.'s case (supra) is not applicable inasmuch as in that decision there was a clear statement in the affidavit filed on behalf of the department that the action under Section 263 was prompted by the opinion of the audit party. As far as the question with regard to the merger is concerned, Mr. Biswas submitted that there cannot be a total merger of the assessment order with the appellate order and that the doctrine of merger should be applied with due regard being had to what was the point considered by the appellate authority and what was the point that was decided by him.

He submitted that the question with regard to the investment allowance in respect of the plant and machinery in the Loni Factory was no doubt before the CIT(Appeals) but it was only with regard to the air-conditioners and moulds, investment allowance on which had been disallowed by the Assessing Officer. He submitted that the claim of the assessee for investment allowance in respect of the other items of plant and machinery in Loni Factory was allowed by the Assessing Officer and, therefore, was not the subject-matter of appeal before the CIT(Appeals) and, therefore, the CIT(Appeals) had not decided the issue. Therefore, he submitted that there can be no question of any merger. Similarly, Mr. Biswas submitted that as far as the deduction under Section 80HHC was concerned, the assessee's claim for deduction under the said provision on the amount of Duty Draw Back and cash subsidy, taking these items as part of the export turnover, was the issue before the CIT(Appeals), having been disallowed by

the Assessing Officer. The deduction under Section 80HHC in respect of the value of the marine products which formed part of the export turnover was granted by the Assessing Officer and could not, therefore, have been the subject-matter of any appeal. Since the CIT(Appeals) had no occasion to consider this issue, his order did not merge with the order of the Assessing Officer and, therefore, the CIT was within his jurisdiction to revise the assessment order on this point. Mr. Biswas also presented arguments on the merits of the assessee's claim.

9. On a consideration of the rival submissions and on a perusal of the relevant authorities on the question, we are of the view that the order of the CIT under Section 263 has to be upheld. We shall deal with the first objection of the learned counsel for the assessee to the order under Section 263. It was submitted that the action under Section 263 having been based on an audit objection, the order should be struck down as unsustainable. However, the assessee was unable to produce any audit opinion or report given in the assessee's case which had allegedly formed the basis of the CIT's action under Section 263. In the absence of any such evidence or material, we cannot imagine that the CIT had initiated action under Section 263 on the prompting of the audit party. The mere non-advertence in the order of the CIT to the assessee's objection is not conclusive of the matter. In the decision of the Calcutta High Court cited by the learned counsel for the assessee in support of the contention that the CIT's action, if based on the opinion of the audit party, would be bad in law, the High Court found that from the affidavit filed on behalf of the department it was clear that the action under Section 263 in that case had been initiated at the instance of the audit. The High Court, therefore, found that the order under Section 263 cannot be upheld. No such material is available in the present case to enable us to come to the conclusion that the action under Section 263 has been initiated only at the behest of the audit department, excepting the assertion of the assessee before us. We are, therefore, unable to uphold this objection.

10. The objection based on the doctrine of merger cannot also be upheld. The two decisions of the Calcutta High Court relied on by the learned counsel for the assessee in support of the contention that there would be a total merger of the assessment order with the appellate order were considered by the Calcutta High

Court subsequently in the decision in the case of Hamilton & Co. (P.) Ltd. v. CIT [1991] 187 ITR 568. In this decision it was held by the Division Bench of the Hon'ble Calcutta High Court that a narrow construction of the powers of the Commissioner under Section 263 of the Act will defeat the very purpose for which the provision was enacted. It was held that the order of the ITO will merge with the order of the appellate authority only with respect to that part of the assessment order which relates to the matters considered and decided by the appellate authority. In other words, the Hon'ble High Court held that there will be only a partial merger of the assessment order with the appellate order and not a total merger of the entire order. While arriving at this conclusion the Hon'ble High Court referred to the decision of the earlier Division Bench in the case of Singho Mica Mining Co. Ltd. (supra), which was relied on by the learned counsel for the assessee before us. The Hon'ble High Court also noticed the decision of the earlier Division Bench in 167 ITR 86 cited supra which was also relied on by the learned counsel for the assessee before us. After noticing both the decisions at page 576 of the report, the Hon'ble Calcutta High Court observed that even in General Beopar Co. (P.) Ltd. 's case (supra) the court had recognised the exceptions where there will be no merger of the assessment order with the appellate order. It was further observed that though there is an apparent conflict between the earlier two decisions, such conflict should be resolved harmoniously. Thereafter the court proceeded to hold as under: In our view, this apparent conflict has to be resolved harmoniously.

That apart the recent amendments to which we shall presently refer have set at rest the controversy or conflict, if any.

Where the assessee is not aggrieved by any part of the assessment order and in fact derives a benefit from an erroneous assessment order, he will not prefer an appeal to the Appellate Assistant Commissioner. The Department has got no right to prefer an appeal against the order of the Income-tax Officer. The only way in which an erroneous order insofar as it is prejudicial to the interests of the Revenue as made by the Income-tax Officer either in not charging interest or by not including some income, which ought, to have been included or by allowing deductions or reliefs which ought not to have been allowed can be set right by the

Commissioner of Income-tax by resorting to his revisional power. The power of rectification under Section 154 or reopening of the assessment under Section 147 has to be exercised by the Income-tax Officer. It is not open to the Commissioner of Income-tax to direct the Income-tax Officer either to rectify the assessment or reopen the assessment. In such a case, in our view, when the order of assessment passed by the Income-tax Officer is made the subject-matter of an appeal before the first appellate authority and an order is passed by the appellate authority, the Commissioner of Income-tax is not competent to set aside the entire assessment order in exercise of his revisional jurisdiction. He can only revise the assessment to the extent which was not the subject-matter of appeal before the first appellate authority. The omission to charge interest is a matter which the Commissioner of Income-tax may hold to be erroneous insofar as it is prejudicial to the interests of the Revenue. An assessee would not prefer an appeal against that part of the order which was in his favour. In such a case, preferring an appeal regarding the order of assessment before the Appellate Assistant Commissioner would not take away the jurisdiction of the Commissioner to revise the assessment. The doctrine or merger can only operate on matters which are subject-matters of decision by the first appellate authority. It cannot have any application to matters which are not being taken on appeal either by the assessee or which had been considered by the Income-tax Officer which, in other words, have not or could not have been touched by the appellate authority.

A narrow construction of the power of the Commissioner under Section 263 will defeat the purpose for which the provision was enacted. In our judgment, the order of the Income-tax Officer will merge with the order of the first appellate authority only with respect of that part of the order of the Income-tax Officer which relates to the matter considered and decided by the appellate authority. Thus, there will be partial merger and not the merger of the whole order.

11. The judgment of the Calcutta High Court in General Beopar Co. (P.) Ltd.'s case had earlier been noticed by the same High Court in its judgment in the case of Hindustan Aluminium Corpn. Lid. v. CIT [1989] 178 ITR 74. This latter decision is the decision of His Lordship Justice S.C. Sen sitting singly. After referring to the earlier decision in General Beopar Co. (P.) Ltd. 's case (supra) it was held by the

Court that the issue before the Calcutta High Court in the former case was only whether, after the ITO had reopened the assessment proceeding, the Commissioner could exercise his revisional power during the pendency of the reopening proceeding. It was observed that the ratio of the earlier decision of the Calcutta High Court was that when notice under Section 148 is issued the previous assessment is set aside entirely and the whole assessment proceeding starts afresh. It was further noticed by the Hon'ble High Court that in the earlier case it was really not necessary for the Court to examine the scope of the doctrine of merger in the context of the observations made in that decision. It was further pointed out that the attention of the High Court was not drawn to the judgment of the Supreme Court in the case of State of Madras v. Madurai Mills Co. Ltd. [1967] 19 STC 144. It was held in the judgment of the Supreme Court referred to above that what merges in the order of the appellate authority is not the entire appealable order of the lower authority but only that part of the order of the lower authority which was under consideration of the appellate authority.

12. In view of the above two judgments of the Calcutta High Court rendered subsequent to the decision of the Calcutta High Court in General Beopar Co. (P.) Ltd. 's case (supra) it is not possible for us to accept the contention that there is a total merger of the assessment order with the appellate order. We cannot understand the decision of the Calcutta High Court in the above cited case as authority for the proposition that whenever an assessment order is carried in appeal by the assessee and an order is passed on appeal by the appellate authority, all points, whether decided or considered by the appellate authority or not, merged with the order of the appellate authority and that it is thereafter not possible to initiate proceedings for revision under Section 263 of the Act in respect of any point even though not covered by the order of the appellate authority. In view of the subsequent two decisions of the Hon'ble Calcutta High Court explaining the decision in General Beopar Co. (P.) Ltd.'s case (supra), the only way in which we can understand the earlier decision is in the manner in which the subsequent two decisions have directed us to understand and in no other way.

13. That apart, the following observations at page 91 of the decision in Hindustan Aluminium Corpn. Ltd. 's case (supra) are very relevant.

The Court referred to three Supreme Court decisions on the question of merger. These decisions are as under:Gojer Bros. (P.) Ltd. v. Ratan Lal Singh MR The aforesaid three judgments of the Supreme Court leave no room for doubt that unless it can be established that the subject-matter of the appeal and the subject-matter of the order by the Court of first instance are identical, the lower Court's order cannot be said to have merged entirely in the order of the appeal Court. If the appeal Court could not have dealt with a part of the order of the lower Court because it was non-appealable, then the question of merger of the non-appealable part of the order in the appellate order cannot arise at all. But even if the entire order is appealable but an appeal is preferred only on certain issues and the appellate order has not travelled beyond those issues which have actually been raised before it, it cannot be said that even in such a case, the lower Court's order has entirely merged in the appeal Court's order and lost its identity.

In view of the aforesaid principles of law laid down by the Supreme Court and also having regard to the scheme of the Income-tax Act, I am unable to uphold the first contention advanced on behalf of the assessee in this case.

14. The same view was taken by the Kerala High Court in CAT v.Travancore Tea Estates Co. Ltd. [1988] 172 ITR 733. It is pertinent to note that the Tribunal in that case had followed the Special Bench decision of the Income-tax Appellate Tribunal in Dwarkadas & Co. (P.) Ltd. 's case (supra). After a review of the entire case law on the subject the Kerala High Court preferred to follow the view taken by the Gujarat High Court in Karsandas Bhagwandas Patel v. G.V. Shah, ITO [1975] 98 ITR 255.

15. The learned counsel for the assessee had referred to the decision of the Bombay High Court in P. Muncherji & Co.'s case (supra). That decision supports his stand. However, in view of the decisions of the Hon'ble Calcutta High Court referred to above, we are unable to follow the judgment of the Bombay High Court. The judgments of the Hon'ble Calcutta High Court are binding on us. Respectfully following these judgments we reject the assessee's contention that there is a complete merger of the assessment order with the appellate order in the present case.

16. The learned counsel for the assessee submitted that the amendment made to Section 263 of the Act by inserting a new Explanation with effect from 1-6-1988 by the Finance Act, 1988 and the further amendment made by the Finance Act, 1989 extending the scope of the Explanation with retrospective effect from 1-6-1988 applied only in respect of the orders passed by the Commissioner on or after 1-6-1988 and the present order passed by the Commissioner under Section 263 having been passed on 24-3-1988, the doctrine of merger was still applicable and, therefore, the Tribunal should hold that the order of the CIT was unsustainable. We are unable to agree with this submission. The Calcutta High Court had occasion to refer to and consider the Explanation inserted by the Finance Act, 1988 as amended by the Finance Act, 1989. In Hindustan Aluminium Corpn. Ltd.'s case (supra), at page 92, the Hon'ble High Court, after referring to the Finance Bill, 1988 by which the Explanation to Section 263 was sought to be substituted with effect from 1-6-1988, held that the said amendment will not have the effect of introducing something which was not already there in the Act and that the proposed amendment had only tried to make explicit what was already implicit in the Act. Again, in the case of Hamilton & Co. (P.) Ltd. (supra), the Hon'ble High Court had referred to the amendments at page 579 of the report and held that the Explanation inserted by the Finance Act, 1988 and amended by the Finance Act, 1989 only clarified the position and must be deemed to have always been in existence. This decision would show that even prior to 1-6-1988, the law prevailing in the State of West Bengal was that there was no complete merger of the assessment order in the appellate order and that only those points which were taken up in appeal, considered and decided by the first appellate authority could not be touched by proceedings under Section 263 and that in respect of all other matters the CIT was competent to initiate action under Section 263 of the Act. In fact, in the case of Premcnand Sitanath Roy v. Addl. CIT [1977] 109 ITR 751 (Cal.), his Lordship Sabyasachi Mukharji, J. (as His Lordship then was), after referring to the decision of the Supreme Court in Madurai Mills Co. Ltd.'s case (supra) held that the doctrine of merger can be invoked only in respect of matters that were the subject-matter of an appeal before the first appellate authority and did not extend to the matters that were left untouched by the first appellate authority. In view of these decisions, it is not possible to accept the contention of

Mr. Ray that prior to 1 -6-1988 the doctrine of merger operated to invalidate the action of the CIT under Section 263 even in respect of matters not taken up in appeal by the assessee.

17. In the present case, as narrated earlier, what was taken in appeal by the assessee and decided by the CIT (Appeals) on 31-3-1987 was the deduction of Rs. 1,13,248 under Section 80HHC of the Act and the claim for investment allowance under Section 32A in respect of the air-conditioners and moulds installed in the Loni Factory of the assessee. In respect of the deduction under Section 80HHC on the value of marine products which was included as part of the export turnover, there was no appeal taken by the assessee. Similarly, in respect of the claim of investment allowance of the balance of the amount the ITO had accepted the assessee's claim and there was no appeal to the CIT (Appeals). Therefore, the CIT was free to initiate action under Section 263 in respect of these two matters. Where the assessee is not aggrieved by a part of the order of the Assessing Officer, that part of the assessment order would naturally not be the subject-matter of any appeal. As held by the Hon'ble Calcutta High Court in Hamilton & Co.

(P.) Ltd. 's case (supra), in such a case if it is to be held that the Commissioner loses his jurisdiction to revise the assessment simply because the order of the CIT (Appeals) has been passed without touching on the matters - in the present case the claims under Section 80HHC and Section 32A - in respect of which the assessee did not prefer any appeal, the very intention of the Legislature in enacting Section 263 would be frustrated. Such a narrow construction of the power of the CIT under Section 263 will defeat the very purpose for which the provision was enacted. As held by the Kerala High Court in Travancore Tea Estate Co. Ltd. 's case (supra), the doctrine of merger, whatever be its scope in general law, when considered in the context of the provisions of a taxing statute, can have application only in respect of matters falling outside his decision.

18. The decision of the Hon'ble Calcutta High Court in the case of Oil India Ltd. v. CIT [1982] 138 ITR 836, was referred to and it was submitted that what was before the CIT (Appeals) was only the quantum of deduction under Section 80HHC and

the quantum of investment allowance under Section 32A and, therefore, the doctrine of merger operated in full. We have gone through the decision cited by the learned counsel for the assessee. In that decision, as the facts would show, the percentage of depreciation directed to be allowed by the AAC in appeal and the question whether such depreciation should be calculated for a period of 11 months or 12 months were inter-linked, so that any direction by the Commissioner under Section 263 that the depreciation should be confined to 11 months only and not 12 months would only be another aspect of the entire claim regarding depreciation and will not be a separate issue by itself. Therefore, it was on those facts that the High Court held that where an appeal is preferred and the particular point in appeal before the AAC is also touched upon by the CIT by initiating action under Section 263 then such action cannot be upheld. It was held that the doctrine of merger would operate. It was held by the High Court that the only dispute before the AAC in that case was the quantum of depreciation and the CIT had no jurisdiction to issue any direction touching upon the quantum of depreciation on the ground that a different aspect of the matter was being revised.

However, that is not the position in the present case. The assessee's appeal for additional deduction under Section 80HHC was in respect of the Duty Draw Backs and Cash Subsidies which, according to the assessee, should be included as part of the export turnover for the purposes of calculating the deduction. The appeal under Section 32A to the CIT (Appeals) was in respect of disallowance of the claim relating to the air-conditioners and moulds installed in the Loni Factory of the assessee. The issue whether the assessee was entitled to any deduction under Section 80HHC in respect of the value of the marine products included in the export turnover was a separate issue. That issue was not taken up in appeal since it could not have been as the assessee had been given the relief by the Assessing Officer. Likewise, the question whether the assessee was entitled to investment allowance in respect of the plant and machinery installed in the Loni Factory in view of the relevant entries in the Eleventh Schedule to the Act was also a separate issue. On that issue also there was no appeal since the allowance had been granted to the assessee. Therefore, it cannot be said that it is only an aspect of the deductions under Section 80HHC and Section 32A that was sought to be interfered with by the CIT by resorting to the provisions of Section 263. The

principle of the decision in Oil India Ltd. 's case (supra) cannot have any application to the present case.

19. For these reasons we are of the considered opinion that the CIT had jurisdiction to initiate proceedings under Section 263 of the Act.

20. As far as the merits are concerned, no serious arguments were raised before us, presumably because of the fact that the CIT had set aside the assessment and directed the Assessing Officer to examine the claims after giving the assessee an opportunity of being heard.

However, we have to refer to some papers filed before us at the time of hearing. An affidavit from the General Manager of the Loni Factory along with a petition for amendment of ground No. 8, were filed before us. The amended ground reads as under : That the appellant states that Investment Allowance claimed in respect of the Loni Factory was for new plant and machinery installed during the year for production of articles other than electronic components, plastic and metal ware products and electric materials for record-players.

The affidavit also states that the Loni Factory was previously engaged in the production of electronic components, plastic and metal ware products and electric materials for record-players and tape-recorders and that the new plant and machinery installed during the accounting year ended 31-12-1982 relevant for the assessment year under appeal were not used for the manufacture of record-players or component parts thereof. It was explained that such plant and machinery installed during the year ended 31-12-1982 were used for the manufacture of pot meters, loudspeakers, resistors, ceramics, polycos and elcos. The very fact that the assessee has sought for an amendment of Ground No. 8 and has sought to explain the factual position now before us show that the assessment made on 24-2-1986 has to give a second look at least to ensure that it has been made on correct facts. It is therefore all the more necessary that the points on which the CIT has initiated proceedings under Section 263 of the Act have to be re-examined by the Assessing Officer after eliciting the correct information with regard to the facts from the assessee. Even on this ground the order of the CIT has to be upheld. We are not at this juncture prepared to go into

the correctness of the claim of the assessee in the affidavit as well as the amended Ground No. 8. Since we have upheld the action of the CIT under Section 263 of the Act and since the CIT has only set aside the assessment to be reframed after giving an opportunity to the assessee, it will be for the assessee to make out its case on the basis of correct facts before the Assessing Officer.

21. The learned counsel for the assessee made out a grievance that the CIT should not have set aside the entire assessment, but should have set aside only the issues on which he considered that proper enquiry should be made by the Assessing Officer. This submission has force.

Since the CIT had raised two specific issues regarding Section 80HHC and Section 32A, it is not open to him to set aside the entire assessment on that ground and direct the Assessing Officer to re-do the entire assessment. His directions are, therefore, modified to read that the assessment with regard to the two issues on which action under Section 263 of the Act was taken would be set aside. The other issues will not be set aside and they will stand undisturbed. The ITO will re-examine only these two issues and reframe the assessment.