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Court : Delhi

Decided On : Jun-30-1994

Reported in : (1995)52TTJ(Del)477

Appeal No. : ITA No. 1134/Del/1988; Asst. yr. 1984-85

Appellant : Modipon Ltd.

Respondent : inspecting Assistant Commissioner. Iac V. Modipon Ltd. (ita No. 1231/Del/1988, Asst. Yr. 1984-85).

Judgement :
ORDER

N. S. CHOPRA, A.M. :

The assessed as also the Revenue is in appeal against order dt. 28th December, 1987, of the learned CIT(A). Both these appeals are consolidated and disposed of by this common order for the sake of convenience.

2. Taking up assessed's appeal first (No. 1134/Del/88) the first ground of appeals is general.

3. Ground Nos. 2.1, 2.2 and 2.3 relate to disallowance of expenditure on maintenance of staff transit houses. The assessed is a limited company engaged

in the manufacture of polyesters filament yarn and Chemicals. It has two transit houses; one at Amrita Shergil Marg and the other in Maharani Bagh which are also used by its managing director, namely, Mr. M. K. Modi and Mr. K. K. Modi. The assessed disputed the basis of the addition made by the Assessing Officer and took up the matter in appeal before the CIT(A), who concurred with the view of the Assessing Officer that the managing directors are making exclusive use of these premises. The learned authorised representative for the assessed has submitted that this very issue was the subject-matter of appeal before the Tribunal for the asst. yr. 1982-83, as also for asst. yr. 1983-84, when at page 11 of the order of the Tribunal (para 10.3 for asst. yr. 1982-83), it was noted that, 'this year with the change, in as much as, two managing directors of the company have also occupied the accommodation for their residences. Expenditure on that part of the accommodation, which is being used towards the residence of the managing director, has to be disallowed in view of the provisions contained in s. 40(c) of the IT Act'. The Tribunal accordingly held that 'the perquisite values towards the residential portion of the accommodation occupied by the managing directors as may be finally determined, should be deducted from the total claim and the balance may be apportioned in the ratio of 1/3rd and 2/3rd towards guest houses and business use respectively'. The facts and circumstances being the same, respectfully following the order of the Tribunal (supra), we direct accordingly. This ground of appeal is partly allowed.

4. This also disposes of ground of appeal Nos. 3.4 and 3.5 of the assessed, which is to the effect that the learned CIT(A) erred in not accepting the assessed's contention that expenses on repairs of residential premises cannot be disallowed under s. 40(5) and that the CIT(A) erred in upholding the disallowance of expenses on salaries, rent, depreciation, electricity, water, miscellaneous stores, telephone, etc., under s. 40A(5).

5. Ground Nos. 3.1 and 3.2 are relating to computation of perquisite value of personal user of car by managing director. The assessed claimed that the provisions of r. 3(c) are attracted while computing such disallowance in its own case. This was not accepted by the Revenue. The Assessing Officer took a sum of Rs. 50,000 for each of the two managing directors as estimated value of perquisite

for the purpose of disallowance in the hands of the assessed-company under s. 40(c). This was reduced in appeal to Rs. 36,000 each. The learned authorised representative for the assessed submitted that the disallowance should have been worked out in accordance with the provisions of r. 3(c). Without prejudice, it is submitted that the disallowance at Rs. 36,000 for each of the two managing directors is highly excessive. The learned authorised representative invited our attention to page 336 of the paper book containing details of such disallowances made in the past right from asst. yrs. 1977-78 to 1983-84 and submitted that in the immediately preceding assessment year the assessed had estimated such expenditure at Rs. 6,600 which was accepted by the Assessing Officer. Even prior to that, the learned authorised representative submitted that as early as in 1977-78, the assessed had estimated such expenditure at Rs. 6,600, when the Assessing Officer adopted the same at Rs. 10,000, but the learned CIT(A) reduced it to Rs. 6,600 and in appeal the Tribunal took it at Rs. 10,000. In this context, it was submitted that the disallowance is highly excessive. As the Department is also in appeal on this, the learned Departmental Representative in turn submitted that the estimate made by the Assessing Officer deserved to be upheld, inasmuch as, the managing directors are using imported cars on which running and maintenance expenses are abnormally high and looking to the escalation in cost of running and maintenance of such cars, the estimate made by the Assessing Officer is fair. We have heard the learned representatives of the parties at length and considered the issue carefully. We are of the view that it would be just and fair to take the estimated value on this account at Rs. 30,000 for each of the managing directors. The assessed, thereforee, partly succeeds on this issue while the Revenue falls.

6. Ground No. 3.3 is that the CIT(A) erred in upholding Assessing Officer's order in not allowing the benefit of provisions of s. 40A(5)(b) in respect of salary payable to employees and managing directors while abroad on tours of company's business. The learned authorised representative for the assessed submitted that the period of employment means service period for which the employees have drawn salaries outside India. In this connection he relied on the order of the Tribunal in the case of Usha International Ltd. The learned authorised representative also relied on Garware Shipping Corpn. Ltd. vs. ITO (1984) 7 ITD 118 (Bom). On the other hand,

the learned Departmental Representative brought to our notice the judgment of Special Bench order in the case of ITO vs. Abbut Laboratories (P) Ltd. (1989) 31 ITD 183 (Bom) and McGaw Ravindra Laboratories (India) Ltd. vs. CIT (1992) 106 CTR (Guj) 24 : (1993) 62 Taxman 394 (Guj).

6.1 We have heard the learned representatives of both the parties and have also perused the relevant record. A similar issue came in for decision before the Tribunal in the case of the assessed itself for asst. yrs. 1982-83 and 1983-84, when the Tribunal in para 4.3 of its order for asst. yr. 1982-83, following earlier orders of the Tribunal, found no merit in the contention of the assessed. This being the position, this ground of appeal is decided against the assessed.

7. Ground No. 4.1 and 4.2 are with regard to change in method of valuation of closing stock, wherein the assessed had excluded excise duty paid on cleared manufactured goods from the value of closing stock of finished goods. The claim of the assessed was negatived by the Assessing Officer and concurrently by the learned CIT(A) and addition Rs. 3,28,11,641 was upheld.

7.1 The learned authorised representative for the assessed has brought to our notice order of the Special Bench (Delhi Bench 'B') of the Tribunal in the case of ITO vs . Food Specialities wherein the assessed was one of the interveners, wherein it has been held as under, at pages 22 and 23 :

HELD

Excise duty is a levy on the 'manufacture' or 'production' of goods and not related to a stage prior to the completion of the manufacturing or production process, but to a stage thereafter, viz., post-manufacture and on coming into existence of a marketable commodity. The very basis of quantification of excise duty is related to the value to be placed on the commodity (i.e., the selling price) and if that be so, then the levy itself cannot enter into the said value but has to remain outside, although for the ultimate consumer both the value and the quantum of excise duty together with the quantum of profit and other incidental items such as packing, forwarding, freight, octroi, sales-tax, etc., would constitute his cost of the commodity in the case of Saraswati Industrial Syndicate Ltd. vs. Union of India

AIR 1975 SC 460, the Supreme Court observed that excise duty is really imposed on goods when they have come into existence in the manufactured form; it could more properly be taken into consideration in determining net profits than in calculating the cost of manufacture. This decision of the apex Court was direct on the subject and was binding. Though the Supreme Court dealt with one of marketable items, namely, sugar, it had to deal with cost of production, as to what it would mean and include and in that context laid down unequivocally the principle that excise duty would more properly be taken into account in determining net profits and not in ascertaining the cost of manufacture. This principle is general in nature and would apply to all items manufactured. No exception can be taken to the enunciation of this principle on the ground that the Supreme Court was dealing with sugar. The point to be noted is that the Supreme Court was dealing with the meaning of the expression 'cost of manufacture' which is of universal application. Thus, the change in the method of accounting effected by the assessed in the assessment year under appeal by excluding excise duty on the unsold goods from the figure of closing stock was a bona fide one, finding support from a direct decision of the Supreme Court as aforesaid, and there being no specific prohibition laid down by the Institute of Chartered Accountants of India and its guidelines being recommendatory in nature. However, in the succeeding asst. yr. 1985-86, the assessed would not get the benefit of the amount in question and the same would become a part of its income in case it was claimed as a deduction in any manner.

The assessed's claim was, accordingly, allowed.'

7.2 Respectfully following the order of the Tribunal this ground of appeal of the assessed is allowed.

8. Ground Nos. 5.1 and 5.2 relate to disallowance of entertainment expenditure as relating to employees. The assessed has two units, namely, Fibre Division and Chemicals Division. In Fibre Division, it booked an expenditure of Rs. 14,76,930, out of which the learned CIT(A) held only 10% as relating to employees and the balance of 90% coming within the ambit of s. 37(2A). The assessed is aggrieved. It has been brought to our notice that in assessed's own case the Tribunal in its

order for the immediately preceding assessment year have held 25% of such expenditure as relating to employees participation. Respectfully, following the order of the Tribunal (supra), we allow a further relief of 15%.

8.1 The assessed booked an expenditure of Rs. 53,765 on this account in its Chemicals Division. As a corollary to above, 25% of such expenditure or Rs. 13,700 is held as relating to employees' participation. We accordingly direct recomputation of disallowance under s. 37(2A) in accordance with our orders above. This ground of appeal is allowed in part.

9. Ground No. 5.3 is against disallowance of Rs. 2,12,247 out of total expenditure of Rs. 8,19,778 incurred by the assessed on presentation for purposes of business. In other words, a sum of Rs. 6,07,491 stands disallowed by the Revenue. The Assessing Officer took the view that presentations may have been required to be given to promote sales in business of the assessed-company but noted that the expenditure is unverifiable and that there is also a limit prescribed under s. 37(2) for such expenditure since entertainment includes expenditure on provision of hospitality of every kind. According to the Revenue, presentation of articles amounted to hospitality. The learned CIT(A) partly allowed the claim of the assessed at Rs. 50,000 when he held that, 'it cannot be denied that occasional presents to business associates is necessary for business, particularly big business'. He took into account the order of the Tribunal in the case of Bharat Commerce India Ltd. for asst. yrs. 1979-80 and 1980-81.

10. The learned authorised representative for the assessed submitted that the disallowance is wholly unjustified, inasmuch as, the entire expenditure is vouched and in presentation articles no element of advertisement is involved and, thereforee, r. 6B is not attracted. It was submitted that the test to be applied in such cases is business necessity and business expediency. It was submitted that all along in the past the claim of the assessed has been allowed. The learned authorised representative referred to the order of the Tribunal for asst. yr. 1982-83 (para 11.1 page 13). On the other hand, the learned Departmental Representative submitted that presentation articles amounted to entertainment and, thereforee, the learned CIT(A) was not justified in allowing a relief of Rs. 50,000 on this

account. He placed reliance on Himachal Pradesh High Court in the case of CIT vs . Mohan Meakin Breweries Ltd. ; Haryana High Court judgment in 181 ITR 81 and Allahabad High Court in Phoolchand Gajanand vs. CIT (1989) 76 CTR (All) 190 : (1989) 177 ITR 265.

9.2 We have heard the learned representatives of both the parties and have also perused the relevant record. The claim of the assessed that r. 6B is not attracted is not dislodged by the Revenue. All the same relevant details are not furnished by the assessed. thereforee, taking into account all the facts and circumstances of the case as also looking to the magnitude of assessed's business, we allow a further relief of Rs. 3,00,000. This ground of appeal is, thereforee, partly allowed. This also disposes of ground of appeal No. 2 of the Revenue.

10. Ground Nos. 6.1 to 6.4 is with regard to computation of disallowance under s. 37(3A) of the IT Act. It is the claim of the assessed that expenditure like repairs and taxes allowable under ss. 30 to 36 cannot be disallowed by having resort to the provisions of s. 37(3A) , as also the commission to selling agents.

11. In so far as assessed's claim for excluding expenditure on repairs and taxes are concerned, we are in agreement with the learned authorised representative for the assessed that such expenditure cannot be considered for disallowance under s. 37(3A) , in view of the judgment of the Tribunal reported in Enkay (I) Rubber Co. (P) Ltd. vs . IAC as also the ratio of Bombay High Court in the case of CIT vs . Chase Bright Steel Ltd. : [1989]177ITR124(Bom) . We direct the Assessing Officer to exclude such expenses for working out disallowance under s. 37(3A).

11.1 With regard to commission, we note that the assessed is engaged in the business of manufacture of polyster yarn and Chemicals. Its sales are effected through its selling agents, with which it has entered into agreements. The commission paid by the assessed to such selling agents was treated as sales promotion by the Assessing Officer and concurrently by the CIT(A) for purposes of working out disallowance under s. 37(3A). The learned authorised representative for the assessed submitted that the authorities below were not justified. He submitted that no element of sales promotion is involved on account of payment of commission to selling agents. He submitted that the assessed effects its sales only

through selling agents who in turn are required to render specific services, before they became entitled to payment of commission. The learned authorised representative referred to specimen copy of the agreement between the assessed and the selling agents which indicates various services required to be performed by the selling agents in effecting day-to-day sales of the assessed and in particular referred to clause Nos. 8, 9 and 10.

On the other hand, the learned Departmental Representative submitted that the primary aim in giving commission to selling agents is to promote assessed's sales. He referred to cls. 9(f) and 15 (page 178 of the paper book) of the agreement and submitted that the sole selling agent is required to promote the sale of assessed's products at its own cost by participating in local fairs, exhibition, advertisement in local newspapers from time to time and a fixed percentage of his commission is required to be spent by the selling agent for such purposes. It was, thus, submitted that the commission paid is nothing but for promotion of sales and, thereforee, was rightly considered by the authorities below for working out disallowance under s. 37(3A).

12. We have heard the learned representatives of both the parties and have also perused the relevant record. We have gone through the specimen copy of the agreement placed in the paper book very carefully. We notice that there is nothing in the agreement which could be said to be as relating to promotion of sales by the selling agents. The agreement stipulates various services required to be rendered by the selling agent before becoming entitled to the amount of commission. The assessed's sales are effected only through selling agents. In other words, payment of commission to selling agents is a part and parcel of effecting routine sales of the assessed. Clause No. 15, which is heavily relied upon by the learned Departmental Representative, in our view, does not hit the assessed's claim when the expenditure on advertisement is to be met by the agent out of his own commission. The assessed in no way is to be reimburse such expenditure. The learned authorised representative also referred to the order of Chandigarh Bench of the Tribunal in the case of ITO vs . Meera & Co. , as also order of Calcutta High Court in CIT vs . Hindustan Motors Ltd. : [1991]192ITR619(Cal) and CIT vs . Sutlej Cotton Mills Ltd. : [1992]194ITR66(Cal) , CIT vs . The Statesman Ltd. :

[1992]198ITR582(Cal) and CIT vs . Bata India Ltd. : [1993]201ITR884(Cal) . We have heard the learned representatives of the parties at length and have perused the relevant records including the agreement and considered the nature of substance of all the relevant clauses thereof. In our view, there is not justification to treat the selling agents commission as sales promotion for the purpose of working out disallowance under s. 37(3A). Payment of commission on the facts of the case is an integral and essential part of normal trading activities of the assessed not involving promotion of sales. The provisions of s. 37(3A) are, thereforee, not attracted. This ground of appeal is allowed.

13. Ground No. 6.3 is that the CIT(A) erred in upholding the Assessing Officer's action estimating Rs. 3 lakhs out of total conveyance expenses of Rs. 4,33,240 for hiring charges for cars for working out disallowance under s. 37(3A).

13.1 We have heard the learned representatives for both the parties and have also perused the details at page 169 of the paper book. The expenditure is related to reimbursement of hiring of taxies, auto-rickshaw to employees (Rs. 1,25,630, Rs. 1,08,173, Rs. 77,413 and Rs. 1,22,021) while the claim is inclusive of taxi hire the same is noticed only in respect of item No. 1, i.e., Rs. 1,25,630. thereforee, we are of the view that the estimate made by the Assessing Officer is rather high. On a consideration of relevant facts and circumstances, we are of the view that it will be just and fair to estimate the expenditure at Rs. 75,000 as relating to taxi hire charges. This ground of appeal is partly allowed.

14. Ground No. 7.1 is against disallowance of foreign tour expenses of Rs. 90,386 treated as capital by the Revenue. The amount of Rs. 90,386 is constituted of (a) expenditure relating to Seth K. K. Modi for going to U.K. and Italy for purchase of machinery for Modipon Expansion Plan and Tyre Cord Project - Rs. 10,728 out of total expenditure of Rs. 32,183 (1/3rd). This was disallowed on the ground that expenditure was related to setting up of a new plant and Shri Modi went abroad for purchase of machinery, which was not ultimately purchased; (b) Rs. 22,608 on account of Swiss tour of Shri V. K. Singhal a senior executive of the company, to explore the readymade garment market. This was disallowed on the ground that the assessed was not engaged in this line of business and the expenditure

involved was, thereforee, not related to the business of the assessed; (c) Rs. 50,278 on travel of Shri I. K. Gupta, another senior executive to USA for discussion for setting up a plant to manufacture of Polyster filament yarn and nylon in Nigeria. This amount was also disallowed as relating to a new project; (d) Rs. 6,772 being 1/3rd of Rs. 20,378 as relating to Shri K. K. Wakil, another senior executive, for going to UK and Italy for discussion for purchase of machinery for Tyre Cord Project.

14.1 The learned authorised representative for the assessed submitted that the disallowance is wholly misconceived, in asmuch as, all the foreign travels are undertaken for the purposes of business. It was submitted that there could not be a distinction between the existing business and the same proposed to be set up when the assessed is already engaged in manufacturing line on a very large scale for manufacture of nylon and Chemicals. He submitted that expansion of its business is a part of assessed's business as also exploring new avenues. Reverting to individual items disallowed, the learned authorised representative submitted that Shri K. K. Modi went to U.K. and Italy for purchase of machinery for proposed expansion of the existing plant as also setting up tyre cord manufacture unit and while 2/3rd of the claim has been allowed, 1/3rd has been disallowed as relating to the tyre cord project. This, according to the learned authorised representative, is wholly unjustified.

14.2 Regarding the travel of Shri V. K. Singhal, here again the learned authorised representatives submitted that as a part of expansion of its business the assessed is always on the look out of new avenues, including export of readymade garments and other textile material.

14.3 As regards travel of Shri I. K. Gupta to USA, the learned authorised representative submitted that the tour is directly related to the existing business of the assessed in India and expansion thereof by setting up a plant for similar purpose in Nigeria.

14.4 Regarding the travel of Shri Wakil it was submitted that it is related to general discussion with suppliers for purchase of machinery, including as relating to the existing plant. It was, thus, urged that none of the items deserve to be disallowed.

The learned authorised representative placed reliance on Hon'ble Supreme Court judgment in the case of Alembic Chemicals Works Co. Ltd. vs. CIT : [1989]177ITR377(SC) in support of his proposition, as also Delhi High Court in the case of CIT vs. Modi Industries : [1993]200ITR341(Delhi) . He also invited our attention to Tribunal's order in the case of the assessed for asst. yr. 1972-73 (page 199 of the paper book) especially to para 49 thereof. The learned authorised representative also referred to the reports submitted by the executives of their visits abroad at pages 189 to 194 of the paper book. The learned authorised representative further submitted that disallowance for traveling expenses has to be computed under r. 6D as s. 37(3) starts with non obstinate clause. It was, thereforee, submitted that it is not to be seen whether the expenses are capital or revenue in nature but only that amount can be disallowed which is in excess of the amount as per r. 6D. Reliance is placed on Himachal Pradesh High Court decision in the case of Mohan Meakins Breweries Ltd. vs. CIT .

14.5 The learned Departmental Representative, on the other hand, submitted that expenditure disallowed is not incurred for the purposes of business of the assessed but was aimed at setting up of new projects and purchase of plant and machinery relating thereto, as also setting up of an altogether new business when some of the foreign travels did not result in any tangible results. He places reliance on Bombay High Court judgment in the case of CIBA of India vs. CIT : [1993]202ITR1(Bom) .

14.6 We have heard the learned representatives of both the parties and have also perused the relevant record. In so far as disallowance of Rs. 10,728 being 1/3rd of expenditure of Rs. 32,183 incurred by Shri K. K. Modi for going to U.K. and Italy for purchase of machinery for Modipon expansion plan and tyre cord project is concerned, we notice that tyre cord project is akin to the existing business of the assessed has already been held so by the Tribunal in their order for asst. yr. 1982-83 in assessed's case (page 6 of the order). thereforee, the disallowance of Rs. 10,728 is deleted. For similar reasons disallowance of Rs. 6,772 as relating to Shri Wakil and Rs. 50,278 as relating to Shri I. K. Gupta are deleted. As regard the disallowance in the case of Shri V. K. Singhal, the traveling undertaken is decidedly not in connection with the business of the assessed, inasmuch as, it is

for exploring the readymade garment market which does not have even proximity to the business of the assessed. The disallowance of Rs. 22,608 is upheld. Relief Rs. 67,778. We are also not impressed with the arguments advanced by the learned authorised representative that the nature of expenditure involved is not to be judged but only the disallowance is to be restricted as per r. 6D. Needless to say that the admissibility or otherwise of the expenditure has first to be seen and then its quantum to be restricted in accordance with r. 6D. As much we do not find any ground to interfere in the disallowance of Rs. 22,608. The judgment rendered in the case of Modi Industries also does not help the assessed since it was given on the facts of the case that in a larger sense the business of the assessed remained the same. No facts exist on record to apply this ratio. As such we do not interfere with the finding of the learned CIT(A) regarding disallowance of Rs. 22,608.

15. Ground No. 7.2 is with regard to disallowance of foreign traveling expenses of the wife of the managing director on a visit to Pakistan. The assessed-company is an associated member of FICCI. Its managing director, Shri K. K. Modi was invited by FICCI to accompany a delegation at the invitation of its counterpart in Pakistan. He was also advised to take his wife along with him. While the expenditure relating to Shri K. K. Modi stands allowed, the same as relating to his wife (Rs. 7,790) is not allowed by the Revenue. The learned authorised representative submitted that the disallowance is unjustified, inasmuch as, it is only at the specific request of the Federation that Mrs. Modi accompanied Shri Modi, who admittedly went on a business trip since his expenditure relating thereto has been fully allowed. He submitted that it is also in the interest of the assessed-company, that the wife of the managing director accompanies him when he went to Pakistan. He refers to the judgment of Bombay Tribunal in the case of ITO vs. R. F. Ferguson & Co. (1986) 19 ITD 620 (Bom). The learned Departmental Representative, on the other hand, places reliance on in the case of Bombay Mineral Supply Co. P. Ltd. vs. CIT : [1985]153ITR437(Guj) and CIT vs. T. S. Haaji Moosa & Co. : [1985]153ITR422(Mad) .

15.1 We have heard the learned representatives and have also perused the relevant record. No material exists on record to justify the business expediency of

the wife of Shri Modi accompanying Shri Modi to Pakistan. The disallowance made is, thereforee, confirmed keeping in view the ratio of Hon'ble Gujarat High Court as also Madras High Court in the case of Bombay Mineral Supply Co. and T. S. Haaji Moosa, as brought to our notice by the learned senior Departmental Representative. This ground of appeal is accordingly dismissed.

16. The next ground, i.e., ground No. 8.1 is that the learned CIT(A) erred in holding that the amount of Rs. 11,91,386 was hit by the provisions of s. 43B and as such was not to be allowed as a deduction.

This amount is constituted of Rs. 2,98,147 as relating to Fibre Division and Rs. 8,93,238 as relating to Chemical Division. The details of Fibre Division are at page 207 of the paper book and composed of cess on water consumption Rs. 32,080 including Rs. 31 by way of interest on arrears of cess, employer's contribution towards provident fund, gratuity fund, etc.-Rs. 6,915 additional sales-tax Rs. 8,175 and Textile Committee Cess-Rs. 2,50,976.

16.1 As regards Chemical Division (Rs. 8,93,238) it is composed of central sales-tax of Rs. 5,72,973, Maharashtra sales-tax Rs. 2,16,440 and gratuity Rs. 1,03,835. The learned authorised representative for the assessed submitted that the provisions of s. 43B do not hit the claim of the assessed with regard to cess, as also assessed's contribution towards provident fund, gratuity fund, etc., for the period relevant to assessment year. As regards its contribution towards EPF and gratuity fund he submitted that second proviso to Expln. to s. 43B is not applicable to cl. (b) thereof and as such the addition made is not justified. Our attention was invited to Delhi Bench order in the case of IAC vs. Indian Aluminium Cables , wherein it has been held that Expln. 2 to s. 43B is not applicable to the sums referred to in cl. (b) of s. 43B. With regard to cess and more particularly the same levied by the Textile Committee, the learned authorised representative took us through the Textile Committee Act, 1963, which provides that the Textile Committee set up under the Act is to render various services to its members, for which the Committee is authorised under s. 12 of the Act to levy such fees as may be prescribed by rules. The learned authorised representative submitted that provisions of s. 43B , as existing on the statute for the relevant assessment year

do not cover fees/cess. He also referred to the order of the Tribunal in the case of IAC vs. Delmia Cement (P) Ltd. .

16.2 We have heard the learned representatives of the parties and have also seen the relevant record. A plain reading of Expln. 2 to s. 43B revealed that for the purposes of cl. (a) any sum payable means a sum, for which the assessed incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law. Examined in this background we find that the sums involved towards EPF and gratuity fund contribution of the assessed are not payable during the relevant previous year under the relevant laws governing provident fund and gratuity fund. thereforee, we find merit in the contention of the assessed.

The judgment of Hon'ble Andhra Pradesh High Court in the case of Srikakollu Subbarao & Co. vs. Union of India : [1988]173ITR708(AP) and order of the Tribunal in the case of Indian Aluminium Cables (supra) fully support the case of the assessed. As such we hold that no disallowance could be made as relating to contribution of the assessed towards provident fund and gratuity fund (Rs. 6,915).

16.3 As regards amount relating to Textile Committee cess, the provisions of s. 43B , as existed on the statute for the relevant assessment year do not bring in its fold such payments. As such we find no basis to sustain the disallowance of Rs. 2,50,976 either, as also cess on consumption of water-Rs. 32,080 minus Rs. 31 or Rs. 32,049.

16.4 In so far as claim for sales-tax is concerned, we are afraid that the judgment of jurisdictional High Court in the case of Sanghi Motors vs. Union of India (1991) 91 CTR (Del HI) 15 : (1991) 187 ITR 703 and Escorts Ltd. vs. Union of India (1991) 93 CTR (Del HI) 169 : (1991) 189 ITR 81 stand in the way of the claim of the assessed and as such were rightly disallowed. However, there is no quarrel that the assessed is entitled to deduction on actual payment basis.

17. Ground No. 8.2 is that the CIT(A) erred in holding that excise duty of Rs. 8,98,967 paid as advance by way of deposit in the personal ledger account is not to be allowed as deduction as per provisions of s. 43B. The amount involved is

related to excisable items lying in excise godown and towards payment of excise duty thereon (bonded warehouse) the assessed paid some amount in advance by way of deposit in its personal ledger account, which is debited as and when goods are cleared. The issue is as to whether the assessed is entitled to claim such payment under s. 43B. It is the case of the Revenue that the assessed is entitled only to those payments which are actually adjusted on clearance of goods. The case of the assessed is that having actually paid the amount to the Excise department under a prescribed scheme/rules the assessed washes its hands off and is in no way entitled to any refund. It was submitted that the amount is paid under a scheme evolved under the relevant excise laws to facilitate payment of excise duty and removal of goods. In this connection our attention is invited to page 341 of the paper book explaining the nature of excise duty. The learned authorised representative also invited our attention to the judgment of Chandigarh Bench of the Tribunal in the case of M/s. Raj & San Deep Ltd. vs. Asstt. CIT ITA No. 1853/Chd/1993. It was also submitted that the excise duty is a levy on manufacture and, thereforee, the liability is statutory. It was submitted that the assessed deposited excise duty on its manufactured goods but kept the same in bonded warehouse and as and when the goods are cleared from the bonded house, the relevant amount of excise duty is adjusted. It was, thus, submitted that the amount paid is excise duty and nothing else and as such is allowable as a deduction under s. 43B , the same having been actually paid.

17.1 The learned Departmental Representative, however, supported the orders of the authorities below and submitted that there was no demand from the Excise department and the payment made is at assessed's own volition and, thereforee, rightly disallowed.

17.2 We have heard the learned representatives and have seen the relevant record. The issue is resolved in the order of Chandigarh Bench of the Tribunal in the case of Raj & San Deep Ltd. vs. Asstt. CIT ITA No. 1853/Chd/1992, asst. yr. 1989-90, date of order dt. 18th February, 1993, wherein on a set of same facts and under similar circumstances it has been held that such excise duty, as is deposited as per r. 173G of the Central Excise Rules, 1944, whether paid in advance or otherwise, retained the character of excise duty and, thereforee,

covered by the provisions of s. 43B. The Tribunal accordingly held that excise duty which is deposited in the account-current, by way of advance excise duty and is actually paid in the treasury qualifies for deduction under s. 43B. The facts and circumstances being the same, respectfully following order of the Chandigarh Bench of the Tribunal (supra), we reverse the findings of the authorities below and allow the assessed's claim at Rs. 8,98,967. We may also fruitfully refer to the observations of the Special Bench (Delhi) in the case of ITO vs. Food Specialities (supra) and Indian Communication Network (P) Ltd. vs. IAC

18. Ground No. 9 is against disallowance of Rs. 5,000 under s. 80VV. The Assessing Officer did not allow statutory deduction of Rs. 5,000 under s. 80VV of the Act. The CIT(A) did not decide the issue. Being a statutory deduction under s. 80VV , we direct that the same be allowed at Rs. 5,000.

19. Ground No. 10 is with regard to computation of disallowance under s. 37(4). The accommodations are identified as, (a) flat in Sham Nivas, Bombay; (b) Sterling flat apartment at Bombay, (c) Cottage at Marve Malad, Bombay, (d) Office-cum transit house, New Delhi at Modi Bhavan and G-11, Maharani Bagh, and (e) Office-cum-transit house at Lucknow. The issue involved is as to whether these accommodations are guest house fully or partly and, if so, the consequential computation of disallowance under s. 37(4). The Assessing Officer and concurrently the learned CIT(A) treated these accommodations as guest houses and disallowed all the connected expenses, including rent, repair, depreciation as also expenditure on telephones.

19.1 The learned authorised representative for the assessed has invited our attention to orders of the Tribunal for the asst. yrs. 1982-83 and 1983-84, wherein on a set of same facts and under similar circumstances disallowance relating to Sham Nivas, Bombay has been upheld; whereas the disallowance made on account of expenditure relating to Sterling Apartment and Cottage at Marve Malad, Bombay, stand deleted, i.e., the stand of the assessed stands accepted by the Tribunal as detailed at pages 8 to 12 of the order of the Tribunal for asst. yr. 1982-83 ending with para 10.4 when the Tribunal held that flat in Sham Niwas, Bombay, is in the nature of guest house and Sterling Apartment and Cottage at Marve

Malad are not in the nature of guest house and that expenditure on Sterling Apartment flat and cottage at Marve Malad, such as expenditure on maintenance, rents, repairs, depreciation was held to be allowable. The facts and circumstances being the same, we respectfully following the order of the Tribunal direct accordingly.

19.2 As regards Modi Bhavan it is noticed that 20% of expense relating thereto have been allowed by the CIT(A) as relating to office use of the premises in the case of Modi Industries Ltd., as also held by the learned CIT(A) in assessed's own case.

19.3 After hearing the learned representatives of both the parties, we are of the view that no interference is called for and as such we endorse the findings of the CIT(A).

19.4 As regards G-11, Maharani Bagh it is submitted that though specific ground No. 16.1 was taken before the learned CIT(A) he did not adjudicate upon the same. After hearing the learned representatives for both the parties, we are of the view that in this case also it would be just and fair to treat 20% of expenses as relating to office use of the premises and rest being relating to guest house.

19.5 As regards Lucknow accommodation, we notice that 50% of expenses stand allowed by the Assessing Officer himself in the case of Modi Rubber Ltd., a sister concern. thereforee, the same standard should have been adopted by the authorities below. We, thereforee, direct that 50% of expenses claimed by the assessed as relating to Lucknow accommodation be treated as allowable, i.e., not coming within the ambit of s. 37(4).

19.6 It is also the grievance of the assessed that the CIT(A) erred in not excluding expenses incurred in connection with the guest houses as on rent, repairs, depreciation, etc., being specifically allowable under ss. 30 to 36 of the IT Act, and thereforee, not coming within the ambit of s. 37(4). The learned authorised representative for the assessed has brought to our notice the order of the Tribunal for asst. yr. 1983-84 (page 327 of the paper book), wherein the Tribunal noted that the issue relating to the provisions of s. 37(1), 37(3) , etc., whether overrules the

provisions of ss. 30 to 36 , stand considered by different Benches of the Tribunal and there are contrary views on the subject. The Tribunal further noted that one view is that s. 37(1) overrules ss. 30 to 36 and the other view is that they do not overrule the earlier sections and accordingly the amounts, which are otherwise allowed under ss. 30 to 36, cannot be disallowed under s. 37. The Tribunal giving the benefit of doubt to the assessed decided this issue in favor of the assessed. Accordingly in consistency with the order of the Tribunal, we also direct accordingly and hold that the expenses coming under ss. 30 to 36 of the IT Act cannot be considered for purposes of disallowance under s. 37(4). [See also American Bureau of Shipping vs. ITO (1986) 19 ITD 793 (Bom) and CIT vs. Chase Bright Steel Ltd. (supra).

19.7 As regards expenses on telephone, in order of the Tribunal for asst. yr. 1982-83 as also asst. yr. 1983-84 it has been held that expenditure on telephone installed at Sham Nivas is to be considered for purposes of disallowance under s. 37(4) to the extent of 50%.

19.8 With regard to expenses on telephone at Modi Bhavan, Delhi, 20% of this accommodation has already been held as not in the nature of guest house. thereforee, 80% of expenses on telephone will be disallowed.

19.9 For similar reason accommodation at G-11, Maharani Bagh has been treated as guest house to the extent of 80% and accordingly 20% is for office, which shall not be included for working out disallowance under s. 37(4).

19.10 As regards Lucknow accommodation, 50% of expenses booked by the assessed on telephone will be treated as for office purpose on the same line as held above. thereforee, this ground of appeal is partly allowed, as indicated above.

20. Ground No. 11 is against disallowance of Rs. 74,242 out of miscellaneous expenses. This was disallowed being fines and penalties as expenses incurred on release of imported items. The learned authorised representative for the assessed submitted that the authorities below failed to appreciate the true nature of the expenditure and they were mainly guided by the nomenclature of fines and penalties. The learned authorised representative took us through the details at

page 256 of the paper book and pointed out that the major items of Rs. 10,000, Rs. 20,000, Rs. 3,000 and Rs. 40,000 are by way of expenses on release of imported items and do not involve any breach of law. He submitted that the expenditure involved is by way of additional duty paid to Customs department for getting the imported items released. He invited our attention to the order of the Tribunal in para 86 for asst. yr. 1977-78 and again to para 18 for asst. yr. 1983-84, wherein on a set of same facts and under similar circumstances the claim has been allowed. The learned Departmental Representative, on the other hand, supported the orders of the authorities below.

20.1 We have heard the learned representatives of the parties and have also perused the relevant record. On a consideration of relevant facts and circumstances we are of the view there is no justification for the impugned addition with the exception of Rs. 1,242 being for violation of traffic laws. The rest of the expenditure represent the same by way of additional duty for getting the imported items released. This ground of appeal is partly allowed and assessed gets relief of Rs. 73,000.

21. Ground No. 12 relating to expenses on salary, wages and traveling (Rs. 2,77,050) is not pressed.

22. Ground No. 12.2 relating to assessed's claim for investment allowance amounting to Rs. 40,97,700 is not pressed, since already allowed under s. 154.

23. Ground No. 13 is that CIT(A) erred in not accepting the assessed's claim that traveling comes to an end when the employees reach destination and expenses incurred thereafter cannot be disallowed under r. 6D. This issue already stands discussed and decided against the assessed by the Tribunal in its order for asst. yr. 1982-83 (page 8, para 9) as also for asst. yr. 1983-84 (para 11, page 5). The facts and circumstances being the same, we reject this ground of appeal.

24. The next grievance of the assessed is that the CIT(A) erred in upholding the action of the Assessing Officer treating expenditure of Rs. 3,61,874 incurred on different projects as capital expenditure. The amount is constituted of two items, i.e., Rs. 3,57,174 on nylon tyre cord project and Rs. 4,700 on soyabean project. As

regards expenditure of Rs. 3,57,174, this issue already stands covered in favor of the assessed by the order of the Tribunal for asst. yrs. 1982-83 and 1983-84 (at pages 5 and 6 for asst. yr. 1982-83). The assessed gets relief of Rs. 3,57,174.

24.1 As regards the amount of Rs. 4,700 this is not pressed without prejudice to the contention to be raised as and when required in the following years.

25. Ground No. 15 is that the learned CIT(A) erred in not accepting the assessed's contention that the excise duty paid (to the extent included in closing stock) has to be reduced from value of closing stock in order to give full effect to s. 43B. This issue was considered by Delhi Bench 'B' (Special Bench) in the case of Indian Communication Network Pvt. Ltd. vs. IAC (supra), where the assessed was also an intervener, when it was held that the custom duty paid to the extent included in closing stock is to be reduced from the value of closing stock in order to give full effect to s. 43B and as a corollary in the subsequent assessment year the assessed's opening stock would stand reduced by corresponding figure since it could not avail of a double deduction. We, thereforee, respectfully following the order of the Special Bench (supra) allow this ground of appeal.

26. Ground Nos. 16.1 and 16.2 are not pressed.

27. Ground No. 17 is that the learned CIT(A) erred in wrongly restricting the allowance of expenses incurred by the employees welfare trust under s. 40A(10) to the extent of contribution received by them during the year under consideration, thereby upholding the disallowance of Rs. 30,727 being expenditure incurred out of contributions already disallowed in earlier years. It has been brought to our notice that this issue already stands covered in favor of the assessed by the order of the Tribunal for asst. yr. 1982-83 (para 7 pages 6 and 7) as also in its order for asst. yr. 1983-84 (page 4 para 8). Respectfully following the orders of the Tribunal (supra), we allow this ground of appeal.

28. Ground No. 17.2 does not survive in view of the relief allowed against ground No. 17.1.

29. The remaining grounds of appeal taken by the assessed are general.

30. ITA No. 1231/Del/1988

The first ground of appeal taken by the Revenue is that CIT(A) erred in deleting addition of Rs. 1,55,87,035 made towards under valuation of closing stock. The Assessing Officer noted a change in the method of valuation of closing stock, as indicated in the notes on accounts. He discussed the issue with the assessed when it was explained that the change effected is bona fide and with a view to reflect correct profits as otherwise distortions occurred in the book profits of the assessed. The Assessing Officer did not accept the submissions made by the assessed and held the change in method of valuation of closing stock of goods-in-process and finished goods as unjustified. For the reasons detailed at pages 16 to 20 of his order the Assessing Officer, rejecting the change in method of valuation of closing stock adopted by the assessed, made an addition of Rs. 4,83,19,000. This was constituted of excise duty amounting to Rs. 3,28,11,641 and the rest of Rs. 1,55,07,835 being on account of change of method from cost to direct cost. In appeal, the learned CIT(A) retained the element of excise duty in the addition amounting to Rs. 3,28,11,641 but deleted the remaining amount of Rs. 1,55,07,835 being on account of change in the method of valuation of stock from cost to direct cost. The Revenue is aggrieved.

30.1 The learned Departmental Representative strongly supported the order of the Assessing Officer and submitted that the change in method of accounting of closing stock is not bona fide. The learned authorised representative, on the other hand, submitted that the change was justified and bona fide necessitated by correct principles of accounting since the earlier method had brought in its wake distortions in assessed's profits, as reflected in the books of accounts. It was submitted that the change was effected in accordance with the guidelines issued by Institute of Chartered Accountants, wherein it was suggested that direct cost method was the correct method as against the total cost method adopted earlier. In this connection, the learned authorised representative invited our attention to the order of the Tribunal, Delhi Bench 'D' in ITA No. 3869/Del/85-ITO vs. Modi Industries Ltd. date of order dt. 30th December, 1988 (pages 6 to 17) and ITO vs. Modi Rubber Ltd. , wherein on a set of same facts and under similar circumstances the change in method of valuation of closing stock has been

allowed by the Tribunal.

30.2 We have heard the learned representatives for both the parties. We find that the facts and circumstances in the case of the assessed are same as prevailed in the case of Modi Industries (supra) when the Tribunal after going deep into the issue involved, upheld the order of the learned CIT(A) allowing the change in method of valuation of closing stock introduced by the assessed. Further, in the case of ITO vs. Modi Rubber Ltd. (supra) (at 400) the Tribunal held : 'It is well settled proposition of law that a taxpayer is free to employ, for the purpose of his trade, has own method of keeping accounts, and for that purpose to value his stock-in-trade in accordance with the established method of stock valuation. A method of accounting adopted by trader consistently and regularly cannot be discarded by the Assessing Officer unless in his opinion the income of the trade cannot be properly deduced there from. It is also well settled that the assessed is permitted to change the method of accounting as well as the method of valuation of closing stock from time to time subject to the condition that the Assessing Officer is satisfied that the change effected by the assessed is bona fide for meeting the changed situation or changed circumstances and provided the change is for regular adoption. In the instant case, the assessed had adopted the direct cost method in respect of goods in process and finished goods. Three facts are to be taken into account, namely, (a) cost of purchase, (b) cost of conversion, and (c) other costs incurred in the normal course of business in bringing the inventories up to their present location and conditions. It was nobody's case that cost of raw material had not been correctly taken by the assessed. In the cost of conversion direct labour, direct expenses and sub-contracted work are to be taken into account and in addition to that production overheads are to be ascertained in accordance with other direct costing or absorption costing method. The assessed, in the instant case, had taken into account salary, wages, bonus, ex gratia payments, etc., to staff and workers. It had taken into account power and fuel consumed, repair and maintenance to plant and machinery, repairs and maintenance to factory buildings. The items that had been excluded were administration overheads, selling and distribution overheads, interest and depreciation. There was no doubt about the exclusion of administrative, selling and distribution overheads. The doubt was in relation to interest and depreciation.

Since in taking production overheads direct costing is permissible, the fixed costs are to be excluded in determining the cost. Fixed costs are defined to be those costs of production which by their very nature remain relatively unaffected in a definite period of time by variations in the volume of production. Depreciation would be such of the items which is charged on fixed percentage irrespective of volume of production, and could be excluded in working out the production overheads for determination of cost of conversion of goods. As to the interest on finance, since the expenditure on finance had specifically been provided to be excluded in determining the cost of production, it was permissible to exclude the interest in respect of the finances. If the system of accounting was regularly followed in the subsequent assessment years, there would not be any loss to the Revenue. Once a uniform system of accounting was adopted the determination of correct profit by such method would be fair and reasonable. Hence, the CIT(A)'s decision in allowing the change in the method of accounting was confirmed.'

30.3 thereforee, respectfully following the orders of the Tribunal (supra), we uphold the order of the learned CIT(A) and dismiss this ground of appeal.

31. The next grievance of the Revenue is with regard to relief of Rs. 50,000 allowed by the learned CIT(A) towards expenditure on presentation articles. This is common to assessed's ground of appeal No. 5.3. For the reasons given therein (page 8, para 9.2 of this order), we find no merit in this ground of appeal. It is dismissed.

32. Ground No. 3 is that the learned CIT(A) erred in holding that hotel expenses of employees of the assessed-company on foreign tours cannot be considered in computing the disallowance under s. 37(3A). The assessed incurred a total expenditure of Rs. 3,66,000 in foreign currency on foreign travels of its executives. For the purpose of working out disallowance under s. 37(3A) the Assessing Officer estimated a sum of Rs. 3 lakh out of the expenditure of Rs. 3,66,000 as relating to hotels. On appeal the learned CIT(A), agreeing with the assessed, took the view that there is no basis for estimating hotel expenses out of foreign exchange allowed by the Reserve Bank of India. He, thus, directed exclusion of the expenditure estimated. The learned Departmental Representative submitted that

the action of the learned CIT(A) is not justified. He submitted that it has not been brought on record by the assessed that the expenditure did not include any expenditure by way of hotels. On the other hand, the learned authorised representative for the assessed supported the order of the learned CIT(A) and submitted that the assessed spent the foreign exchange allotted by the RBI on foreign travels and it could not be said with certainty as to whether any expenditure was incurred on hotels or not.

32.1 We have heard the learned representatives and have gone through the relevant record. We do not accept the view put forward by the learned authorised representative for the assessed that there is no element involved in the expenditure as relating to hotels when it is not brought on record as to where the employees stayed in foreign countries. The RBI allotted a composite allowance for foreign travels and unless there is evidence to establish that no part of such amount was spent on hotels, an estimate has to be made for the purpose of working out of disallowance under s. 37(3A). However, we are of the view that the estimate made by the Assessing Officer at Rs. 3 lakh is highly excessive. thereforee, on a consideration of relevant facts and circumstances, we are of the view that it will be just and fair to attribute 40% of the expenditure as relating to hotels. We, thereforee, direct that a sum of Rs. 1,46,400 would be taken into consideration for working out of disallowance under s. 37(3A) as against Rs. 3 lakh taken by the Assessing Officer. This ground of appeal is, thus, partly allowed.

33. The next grievance of the Revenue is that the CIT(A) erred in directing the Assessing Officer for taking income from shops in the Alok Market as income from business instead of income from house property and in allowing deductions for repairs and depreciation. The assessed has constructed a market in the township known as Modi Nagar, mainly for the use of its employees and workers. Income from shops in the market has been offered as business income and accepted as such in the past. During the relevant assessment year the Assessing Officer treated the same as property income. The learned CIT(A) allowed the assessed's claim following his earlier order. The Revenue is aggrieved.

33.1 We have heard the learned representatives. The issue is already discussed and decided in favor of the assessed by earlier orders of the Tribunal for asst. yr. 1982-83 (para 16, page No. 16) and for asst. yr. 1983-84 (para 25). The facts and circumstances being the same, respectfully following the orders of the Tribunal (supra), we dismiss this ground of appeal.

34. Ground No. 9 is with regard to disallowance of Rs. 43,000 under s. 80VV. It is the case of the Revenue that the nature of expenditure involved is related to proceedings before the IT authorities and, thereforee, the same is liable to be disallowed in full under s. 80VV. On the other hand, the learned authorised representative for the assessed has referred to details of the amount of Rs. 43,000 at page 240 of the paper book, which show that amount involved is paid as retainership to Shri O.P. Vaish - Rs. 21,000, Smt. Manju Vaish Rs. 18,000 and M/s. Salve & Salve Rs. 4,000. It is contended that no part of this amount can be said as relating to proceedings before the IT authorities, for which separate amount of Rs. 28,698 is provided for and has been disallowed. The learned authorised representative has also referred to the order of the Tribunal in the case of ITO vs. J. K. Synthetics Ltd. and ITO vs. Dalmia Dairy Industries Ltd. .

34.1 After hearing the learned representatives and after going through the relevant details, we are of the view that the learned CIT(A) was fully justified in holding that the amount is not covered by the provisions of s. 80VV. We endorse his findings and dismiss this ground of appeal.

35. Ground No. 11 is that the CIT(A) erred in holding that for the purpose of s. 40A(5) a person who was employee for part of a year and retired for the remaining part, separate limit of Rs. 5,000 p.m. and Rs. 60,000 are applicable. The CIT(A) noted that the dispute could be resolved in favor of the assessed by following the ratio of Hon'ble Calcutta High Court in the case of Hindustan Motors vs. CIT : [1985]156ITR223(Cal) , the facts and circumstances being identical. The Revenue is in appeal.

35.1 We have heard the learned representatives of the parties. The ratio in the case of Hindustan Motors (supra) is clearly applicable to the facts of the case. thereforee, we find no merit in this ground of appeal. Endorsing the findings of the

CIT(A), we reject this ground.

36. Ground No. 12 is with regard to computation of disallowance under s. 40A(5) in respect of HRA exempt under s. 10(13A). The case of the Revenue is that HRA constitutes a part of salary and, thereforee, it should be taken into account for working out disallowance under s. 40A(5). The learned CIT(A), however, took the view that, 'As regards the appellant's contention that house rent allowance is neither part of salary nor perquisite, it cannot be accepted because it has been held to be part of salary by the Delhi High Court judgment in the case of CIT vs. Installment Supply Pvt. Ltd. : [1984]149ITR457(Delhi) . However, the other contention of the appellant that house rent allowance to the extent it is exempt under s. 10(13A) is not part of salary appears to be correct. Salary is defined by Expln. 2 to 40A(5). This definition is the same as given in cl. (1) r/w cl. (3) of s. 17 subject to certain modification which are not relevant to the issue at hand. According to s. 17(3) , salary excludes the house rent allowance exempt under s. 10(13A). In view of these facts, it is directed that house rent allowance will not be computed as part of salary to the extent it is exempt under s. 10(13)'.

36.1 The learned Departmental Representative supports the order of the Assessing Officer. On the other hand, the learned authorised representative for the assessed submits that HRA is specifically exempt under s. 10(13A) and, thereforee, would not constitute an element for consideration under the provisions of s. 40A(5). He also referred to the definition of salary in sub-cl. (iv) and referring to the term profits in lieu of or in addition to any salary or wages, took us to sub-cl. (iii) of s. 17 , where profits in lieu of salary has been explained in sub-cl. (ii). It is provided that profits in lieu of salary includes any payment other than payment referred to in s. 10(13A). Obviously, thereforee, the amount involved, i.e., rent being specifically to the extent exempt under s. 10(13A) would not constitute part of salary as elaborated in s. 17(3)(ii). We accordingly uphold the finding of the learned CIT(A) and dismiss this ground of appeal.

37. Ground No. 13 is that the learned CIT(A) erred in allowing payment of Rs. 2 lakh made by the assessed to one Shri T. M. Sen. The relevant facts are that the Assessing Officer disallowed a sum of Rs. 2 lakh out of miscellaneous expenditure

of Rs. 4,47,756 as entertainment. There was no discussion as to what led the disallowance of this amount except that the same fell within the head entertainment. When the matter was taken in appeal before the learned CIT(A) he noted that out of Rs. 4,47,746, only a sum of Rs. 97,756 represented miscellaneous, which was allowable and the balance of Rs. 3,50,000 was the amount paid to one Shri T. M. Sen, a retired employee of the appellant company, to prevent him from entering into competitive activities. The learned CIT(A) called for a report from the Assessing Officer when it was claimed by the Assessing Officer that the amount is capital and, thereforee, needed to be disallowed. The learned CIT(A) on a consideration of relevant facts and circumstances, as also taking into account the background of Shri T. M. Sen and the agreement between the assessed and Shri Sen took the view he was paid lump sum of Rs. 3,50,000 in consideration of not engaging in India in any line of business or undertake any activity similar or competitive with the business activities of the assessed or accept any employment in any organisation engaged in such activities or dealing in the products dealt with by the assessed-company. The learned CIT(A) considering the relevant facts and circumstances of the case thus held that the claim was allowable as revenue. He took into account the judgment of Bombay High Court in the case of Champion Engineering Works vs. CIT : [1971]81ITR273(Bom) , as also CIT vs. G. D. Naidu (1986) 51 CTR (Mad) 256 : 24 Taxman 255 and further the Supreme Court judgment in the case of Empire Jute Co. vs. CIT : [1980]124ITR1(SC) . The learned CIT(A) accordingly held that the payment made to Shri T. M. Sen was in the nature of revenue. Since an addition of Rs. 2 lakh was made, he granted relief to the extent only. The Revenue is aggrieved.

37.1 The learned Departmental Representative submitted that the expenditure is capital, the assessed having enjoyed an enduring benefit. He placed reliance on Madhya Pradesh High Court judgment in the case of New Precision (India) Pvt. Ltd. vs. CIT : [1969]72ITR657(MP) , Supreme Court judgment in the case of CIT vs. Coal Shipment Pvt. Ltd. : [1971]82ITR902(SC) and CIT vs. Indian Overseas Bank Ltd. : [1963]50ITR725(Mad) . In the alternative, it was submitted that the expenditure be allowed for the period of currency of agreement, i.e., 3 years. The learned authorised representative, on the other hand, supported the order of the learned CIT(A) and submitted that the expenditure which is in lump sum is

incurred towards preventing Shri Sen from entering into competitive activities, Shri Sen having acquired trade secrets of the assessed-company being in the employment of the company for over 20 years and a whole time director for more than 12 years.

37.2 We have heard the learned representatives and have also perused the relevant record. There is no dispute that Shri Sen having worked for a very long period in the company in different capacities had acquired considerable knowledge relating to company's trade secrets, know-how, processes and business information. The company in order to avoid Shri Sen from entering into any independent business activity which could be detrimental to the assessed, paid him the amount of Rs. 3,50,000 under an agreement which was to run for three years. It was a simple and straight business transaction solely aimed at preventing an otherwise potential business competitor which could prove inconvenient to the assessed causing it considerable damage. thereforee, in our view the learned CIT(A) rightly allowed the claim of the assessed, more so when the ratio relied upon by him squarely covered the claim of the assessed in its favor. The ratios relied upon by the learned Departmental Representative are not applicable to the facts of the case. We, thereforee, find no merit in this ground of appeal.

38. Ground No. 14 is that CIT(A) erred in observing that unauthorised and occasional user of the guest house by the managing director would not amount to perquisite granted by the assessed. This ground is covered in terms of para 3 of this order.

39. Ground Nos. 15 and 16 are consequential to ground No. 14.

40. Ground No. 17 is constituted of two portions, one the club subscription being treated as perquisite in the hands of the managing director. The remaining limb of this ground of appeal is treating premium paid on accident policies of the managing director being treated as perquisite for the purposes of disallowance under s. 40A(5)/40(c) . In so far as club subscription is concerned, the issue is already decided in favor of the assessed in earlier order of the Tribunal for asst. yr. 1982-83 (page 2, para 4.1). We accordingly respectfully following the order of the Tribunal hold that the club subscription would not constitute perquisites for the

purposes of s. 40A(5).

40.1 As regards personal accident insurance premium, a similar issue arose in the case of the assessed in asst. yr. 1983-84 when the Tribunal restored the issue to the Assessing Officer to determine as to who is the beneficiary under the policy. The facts and circumstances being the same we restore this issue accordingly again to the Assessing Officer in the light of directions contained in order of the Tribunal for asst. yr. 1983-84.

41. Ground No. 18 is that CIT(A) erred in reducing disallowance of car expenses of managing director from Rs. 50,000 to Rs. 36,000 on estimate basis. This ground is common to ground of appeal Nos. 3.1 and 3.2 of the assessed and in terms of para 5 of this order, this ground of appeal is dismissed.

42. The last ground is that CIT(A) erred in reducing disallowance of expenses on repair of premises occupied by the managing director on estimate. This ground of appeal is consequential to ground of appeal No. 14 and is answered accordingly.

43. In the result, the appeal of the assessed as also appeal of the Revenue are partly allowed.

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