

Nucheml Ltd. Vs. Dy. Cit

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SooperKanoon Citation : sooperkanoon.com/707185

Court : Delhi

Decided On : Jul-29-2003

Reported in : (2004)87TTJ(Del)166

Appeal No. : In the ITAT, Delhi 'B' Bench Phool Singh, J.M. & Keshaw Prasad, A.M. ITA No. 7368/Del/1992, A.Y.

Appellant : Nucheml Ltd.

Respondent : Dy. Cit

Judgement :

ORDER

Keshaw Prasad, A.M.

The cross-appeals have been directed by the assessed as well as by the revenue against the order of Commissioner (Appeals), dated 3-8-1992, pertaining to assessment year 1988-89. For the sake of convenience, we will first take up the appeals directed by the assessed.

2. In ground No. 1, the assessed has challenged the observations of the Commissioner (Appeals) to the effect that the ground No. 1 raised before him was general in nature whereas he ought to have rejected the observations made by the assessing officer to the effect that delay in finalizing the assessment was due to the fault of the assessed.

3. After hearing the rival submissions, we feel that the ground raised by the assessed is merely academic in nature and does not need any adjudication.

4. In ground No. 2, the assessed has challenged the findings of the Commissioner (Appeals) to the effect that the assessing officer was justified in refusing to allow the carry forward of the loss to the subsequent years.

5. Briefly, the facts of the case are that the return of income was due to be filed on 31-7-1988. On an application by the assessed, the assessing officer allowed time up to 31-8-1988, for filing the return of income. As the audit of the accounts could not be completed, the assessed again moved an application for extension of time for filing the return up to 30-9-1988. However, the same was rejected by the assessing officer. The assessed filed its return of income on 29-9-1988. The assessing officer, therefore, invoking the provisions of section 80 of the Act held that as the return of income was not filed within time allowed under section 139(1) or within the time allowed by him, the determined loss will not be allowed to be carried forward and set off against the income of the subsequent years. On appeal, the Commissioner (Appeals) upheld the findings of the assessing officer against which the assessed is in appeal before us.

6. It is argued by the learned Commissioner of Income Tax that the assessing officer/Commissioner (Appeals) were legally wrong in denying the claim of the assessed. It was stated that prior to 1-4-1989, section 80 provided that no loss which has not been determined in pursuance of a return filed within the time allowed under section 139(1) or within such further time as may be allowed shall be carried forward and set off against the income of the subsequent years. The learned counsel stated that the assessed being a company had to get its account audited. Such audit was completed on 28-9-1988. Thus, the return of income could not have been filed prior to this date. While relying on the decision CIT v. V. Ramakrishna & Sons (P) Ltd. : [1982]135ITR56(Mad) and CIT v. Sulekha Works (P) Ltd. : [1985]156ITR190(Cal) , the learned counsel stated that delay in audit report was a reasonable cause in filing the return late. The learned counsel also relied on the decision CIT v. Dogar Tools (P) Ltd. : [1998]232ITR616(MP) , CIT v. Kulu Valley Transport Co. (P) Ltd. : [1970]77ITR518(SC) and MT Bearings Ltd. v.

CIT : [1988]173ITR597(AP) . On the other hand, learned Departmental Representative supported the order of the Commissioner (Appeals).

7. We have considered the rival submissions. We find that the assessed was following calendar year as its previous year. It changed the accounting period from calendar to financial year. Thus, the relevant accounting period of the assessed was 15 months i.e., 1-1-1987 to 31-3-1988. For such change, the assessed had also applied to the assessing officer who was pleased to approve such change. Even the Inspecting Assistant Commissioner directed the assessing officer to allow depreciation proportionately for 15 months. Naturally, as the accounting period was of 15 months, the audit could have been initiated only after 31-3-1988. As the assessed found that its audit will not be completed by 31-7-1988, it applied for extension of time up to 31-8-1988, which was granted by the assessing officer. But as the audit could not be still completed, it made an application for extension of time for filing the return of income up to 30-9-1988. The request in Form No. 6 were made accordingly. The request for extension of time for filing the return of income up to 30-9-1988, therefore, was quite reasonable and the assessing officer was not justified in rejecting the same. As there was a reasonable cause in filing the return late and the return of income has been filed within time for which the extension of time was sought, we direct the assessing officer to carry forward to determine loss of the year under consideration to the subsequent years. This ground of appeal is accordingly allowed.

8. In ground No. 3, the assessed has challenged the Commissioner (Appeals)'s order in not only disallowing the deduction on account of net refund of excise duty but also in withdrawing the deduction allowed by the assessing officer.

9. Briefly, the facts of the case are that the assessed is the manufacturer of various items which were subject to Central excise duty. The assessed claimed that one item, namely, prescol glue manufactured by it was covered under tariff item 68 of the Central excise tariff on which a particular rate of excise duty was leviable. However, the Assistant Collector of Central Excise held that this item manufactured by the assessed was covered under item 15-A on which the higher rate of excise duty was leviable. The assessed filed a writ petition before the High

Court of Delhi on 24-10-1978. The High Court directed the assessed to clear the goods by furnishing bank guarantee to the Central Excise department every month of the extra amount which was livable on the assessed due to such classification. The assessed followed the same and started clearing the goods by furnishing the requisite bank guarantee in favor of the Central Excise Department.

10. The assessed also preferred an appeal before the Collector(Appeals) of Central Excise who accepted the claim of the assessed. In view of the Hon'ble High Court order, the assessed has furnished bank guarantee. In view of the order of the Collector(Appeals), Central Excise, the amount paid by way of bank guarantee became refundable to it. The Assistant Commissioner, Central Excise, vide various orders addressed to the various bank directed the release on bank guarantee. However, the said order of the Collector (Appeals), Central Excise, was not accepted by the Central Excise Department who filed the appeal before CEGAT on 27-11-1987. The assessed was also informed of the same. Subsequently, vide order dated 8-5-1990, the CEGAT reversed the order of the Collector(Appeals), Central Excise. The assessed's appeal before the Hon'ble Supreme Court of India against the order of CEGAT was pending. During the year, the bank guarantee to the extent of Rs. 1,88,96,358 were released. The assessed also paid additional duty and escalation charges to the extent of Rs. 74,16,096. It credited the balance amount of Rs. 1,14,59,912 to its profit and loss account after correcting the calculation mistake. However, during the course of assessment proceedings, when the assessed claimed the amount realized by way of bank guarantee was not taxable income of the assessed in the year under consideration because the order of the Collector(Appeals), Central Excise, has not been accepted by the Central Excise Department and the appeal has been preferred before CEGAT, the assessing officer did not accept the contention of the assessed and held that the gross refund received by the assessed was Rs. 1,88,96,358 and this amount should have been credited by the assessed in its profit and loss account. The assessing officer also observed that the refund pertaining to assessment years 1980-81 to 1983-84 was Rs. 1,37,67,432. The entire amount is includible in the income of the assessed of the year under consideration because the entire amount was allowable deduction to the assessed in these years. The assessing officer held that there was cessation of liability to this extent and he,

therefore, brought the above sum to tax under section 41(1) of the Act. On appeal, the Commissioner (Appeals) upheld the findings of the assessing officer against which the assessed is in appeal before us.

11. It is argued by the learned counsel that the Commissioner (Appeals) was wrong in upholding the application of the provisions of section 41(1) of the Act. While applying the provisions of section 41(1) of the Act, the lower authorities have omitted to consider that it was not a case of refund. It was only a case of release of bank guarantee. It was also stated that merely because assessed has credited the amount to its profit and loss account, it will not make the same as the income of the assessed. While relying on the decision Chief CIT v. Kesaria Tea Co. Ltd. : [2002]254ITR434(SC) Polyflex (India) (P) Ltd. v. CIT : [2002]257ITR343(SC) . CIT v. Polyflex (India) (P) Ltd. : [2001]251ITR527(KAR) , CIT v. Smithkline Beecham Consumer Brands Ltd. , UOI & Anr. v. J.K. Synthetics Ltd. : [1993]199ITR14(SC) , the learned counsel stated that the entries in the books of account were not decisive factor in coming to the conclusion whether the particular amount was taxable or not. Learned counsel further stated that there was no cessation of liability in the year under consideration. As mentioned earlier, the Collector, Central Excise, had accepted the claim of the assessed but the said decision was not acceptable to the Central Excise Department against which the appeal was preferred before the CEGAT. Thus, no finality has been reached and till then the question of any cessation of liability did not arise. The learned counsel also argued that if the same is brought to tax this will amount to double taxation as the assessed has already offered the amount for taxation in the assessment year 1998-99 under KVSS. The Commissioner (Appeals) was, therefore, not justified in sustaining the addition as well as withdrawing the deduction allowed by the assessing officer. On the other hand, learned Departmental Representative stated that the assessed was not at liberty to offer the income in any year. The income has to be taxed in the correct year. In nutshell, he supported the order of the Commissioner (Appeals).

12. We have considered the rival submissions. It is admitted position that the assessed's bank guarantee was revoked due to order of the Collector(Appeals), Central Excise. But the Central Excise Department, did not accept this order and

preferred the appeal before the CEGAT. The CEGAT vide its order pronounced on 8-5-1990, reversed the findings of the Collector (Appeals), Central Excise. Thus, when the Collector(Appeals), Central Excise passed the order, it cannot be said that the issue has reached its finality. No absolute right, therefore, vested in the assessed to claim the refund. It is settled law that the assessed could not be penalized for wrong entries made in the books of account. The tax cannot be levied on hypothetical income. A transaction of entry in the books of account or its treatment therein by the assessed may not always be relevant to decide whether a receipt is liable to income-tax or whether the outgoing was an allowable deduction. Our views find support from the decisions in CIT v. India Discount Co. Ltd. : [1970]75ITR191(SC) CIT v. Shoorli Valabdas & Co. : [1962]46ITR144(SC) State of Kerala v. Vijaya Stores : [1979]116ITR15(SC) . Beni Prasad Sidh Gopal v. CIT : [1984]148ITR760(All) and Nagki Mills Co. Ltd. v. CIT : [1981]131ITR257(Guj) . We have also noted that as the order of the Collector (Appeals), Central Excise, was not accepted by the Central Excise department, it cannot be said that the cessation of liability has taken place so as to attract the provisions of section 41(1) of the Act. It will not be out of place to mention that subsequently the CEGAT has reversed the order of the Collector(Appeals), Central Excise on this issue. Though the CEGAT had denied the claim of the assessed, the assessed had challenged the same before the Hon'ble Supreme Court, the same was still pending. During the pendency of the appeal before the Hon'ble Supreme Court, the assessed thought it fit to offer the same for taxation and ultimately the same was also offered for taxation under KVSS. A copy of the order issued by the Collector, Central Excise is also on record. Under these circumstances, we hold that as there was no cessation of liability, the provisions of section 41(1) of the Act were not applicable. We also hold that sustaining any addition in the year under consideration, will amount to double taxation as the same has already been taxed by the department in the assessment year 1998-99. Under these circumstances, the addition sustained by the Commissioner (Appeals) is not justified and the same is deleted. This ground of appeal is allowed.

13. Ground No. 4 raised by the assessed is against not allowing depreciation on pro rata basis for a period of 15 months.

14. As mentioned earlier, the assessed's accounting period was calendar year which consisted of 12 months. However, on an application made by the assessed, the assessing officer granted permission to change the previous year ending on 31-12-1987 to 31-3-1988. Thus, the relevant accounting period for the assessment year in question consisted of 15 months, i.e., 1-1-1987 to 31-3-1988. While granting permission for the change of the accounting year, the assessing officer had laid down a condition, inter alia, that the depreciation will be allowed on pro rata basis i.e., for 15 months. In its accounts, the assessed, therefore, worked out depreciation on pro rata basis for 15 months and claimed the same as deduction. However, at the time of assessment, the assessing officer allowed depreciation only for 12 months by observing that the Schedule X has been enacted to the Income Tax Act which has withdrawn the provisions for allowing depreciation on pro rata basis. On appeal, the findings of the assessing officer were upheld by the Commissioner (Appeals) against which the assessed is in appeal before us.

15. It is argued by the learned counsel that when the assessed applied for change in the previous year, the assessing officer vide his order dated 3-3-1988, had allowed such change. In the said order, the assessing officer had also, inter alia, imposed a condition that the depreciation will be allowed on pro rata basis for 15 months. The learned counsel stated that on the one hand, while allowing the change of the previous year, the assessing officer had directed to allow depreciation on pro rata basis for 15 months, but on the other hand while framing the assessment order, he has restricted the depreciation for 12 months only. Thus, the department cannot go back from its own order. Regarding assessing officer's observations that the proviso to rule 5(1) of the income tax Rules, 1962, providing depreciation on pro rata basis has been omitted with effect from 2-4-1987, the learned counsel stated that such Schedule was procedural and should be applied to assessment year 1988-89 also. The reliance was placed on the decisions CWT v. Vidyavathi Kapur : [1984]150ITR319(KAR) , CWT v. Lachhmandas Bhatia (1987) 163 NR 586 , CWT v. Kasturbhai Mayabhai : [1987]164ITR107(Guj) and Smt. Manjushree bids was v. CWT : [1988]171ITR348(Cal) . He, therefore, argued that the assessing officer may be directed to allow depreciation on pro rata basis for 15 months. On the other hand, learned Departmental Representative supported the order of the Commissioner (Appeals).

16. We have considered the rival submissions. Even assuming that while allowing change of the previous year, the assessing officer has inter alia, put a condition that the depreciation will be allowable on pro rata basis for 15 months, but if such direction was against the provisions of law, the same could not be binding on the assessing officer. We find that prior to 2-4-1987, there was a proviso under rule 5(1) of the income tax Rules, 1962. This proviso provided that the depreciation will be allowed on pro rata basis. However, such proviso was omitted with effect from 2-4-1987. Consequently, in the year under consideration, no such pro rata depreciation was allowable to the assessed. As regards, learned counsel's observations to the effect that the insertion of Schedule was only procedural, does not find force, the law maker did not provide any such concession on or after 2-4-1987. Under these circumstances, we hold that the Commissioner (Appeals) has rightly upheld the findings of the assessing officer to the effect that depreciation for the period of 12 months, only was allowable to the assessed. This ground of appeal raised by the assessed is, therefore, dismissed.

17. Ground No. 5 raised by the assessed is against the finding of the Commissioner (Appeals) to the effect that the assessed was entitled to depreciation on mould at the rate of 33.33 per cent instead of 50 per cent. It was stated by the learned counsel that the assessed itself was manufacturing moulds. No depreciation on the same was claimed. However, when such moulds were to be used in the manufacture of the items, the same was transferred to the fixed assets. These moulds were used in rubber and plastic goods factory and hence were entitled to depreciation at the rate of 50 per cent. It was further stated that in the earlier years, the depreciation at the rate of 40 per cent was allowable which was also allowed by the assessing officer.

In the year under consideration, the rate of depreciation has been enhanced to 50 per cent and, therefore, on the basis of principles of consistency, the depreciation at the rate of 50 per cent may be allowed to it. On the other hand, learned departmental Representative supported the order of the Crr(A).

18. We have considered the rival submissions. The depreciation at the rate of 50 per cent in respect of moulds has been provided in the income tax Rules. In the

earlier years, such rate of depreciation was 40 per cent which was allowed by the assessing officer. There does not appear to be any apparent reason for not allowing depreciation at the rate of 50 per cent. As the depreciation at the rate of 50 per cent has been provided in the income tax Rules, we direct the assessing officer to allow depreciation at the rate of 50 per cent on moulds. This ground of appeals is accordingly, allowed.

19. Ground Nos. 6 and 7 relate to the disallowance out of entertainment expenses. The assessing officer disallowed a sum of Rs. 2,73,214 on account of entertainment expenses which also comprised the sale promotion expenses. On appeal, the Commissioner (Appeals) allowed the deduction of 25 per cent for employees participation. The assessed is in appeal before us requesting that a deduction of 50 per cent may be allowed on account of employees participation.

20. We have considered the rival submissions. Hon'ble Delhi High Court in the case of CIT v. Expo Machinery Ltd. : [1991]190ITR576(Delhi) has held that a rebate of 35 per cent on account of employees participation may be allowed. Respectfully following the same, we direct the assessing officer to allow rebate of 35 per cent on account of employees participation and compute the disallowance accordingly. Both the grounds of appeal are partly allowed.

21. Ground No. 8 related to the disallowance on account of advertisement expenses. In the tax audit report, an expenditure of Rs. 2,78,888 was mentioned in respect of crockery. The assessing officer held the entire amount as entertainment expenditure and disallowed the same. On appeal, the Commissioner (Appeals) also upheld the findings against which the assessed is in appeal before us.

22. It is argued by the learned counsel that the expenditure in purchase of crockery does not involve any entertainment expenditure. This expenditure related to publicity for moulding power from which the crockery is manufactured. The expenses relate to the gift items whose value was less than Rs. 50. While relying on the decisions of Hon'ble Delhi High Court in CIT v. Associated India Exports : [1991]188ITR125(Delhi) and CIT v. Modi Shining & Weaving Mills Co. Ltd. : [1993]202ITR708(Delhi) , the learned counsel stated that where the gifted items do not maintain any logo of the assessed and the value of each item was below

the prescribed price, no disallowance under rule 6B was warranted. The learned counsel also relied on the decision of Hon'ble Bombay High Court in the case of CIT v. Allana Sons (P) Ltd. : [1995]216ITR690(Bom) . In nutshell, the learned counsel pleaded that the disallowance made by the assessing officer was not justified. On the other hand, learned Departmental Representative stated that this issue has been considered by the Tribunal in assessed's own case in assessment years 1984-85, 1985-86 and 1987-88 wherein the claim of the assessed was denied by the Tribunal. He, therefore, supported the order of the Commissioner (Appeals).

23. We have considered the rival submissions. The issue is squarely covered in favor of the revenue by the decision of the Tribunal in the assessed's own case in the earlier years. Respectfully following the same, we hold that the Commissioner (Appeals) was justified in sustaining the addition made by the assessing officer. This ground of appeal is dismissed.

24. Ground No. 9 related to the disallowance under section 43B of the Act. It was stated that the payment of CST/ST and gratuity was made within the time prescribed in proviso to section 43B of the Act. The evidence for the same was also submitted along with the return. While relying on the decision of the Hon'ble Supreme Court in the case of Allied Motors (P) Ltd. Etc. v. CIT (1991) 224 ITR 677 , the learned counsel stated that amendment to the provisions of section 43B was procedural and will accordingly apply in the assessment year in question. Regarding the gratuity on superannuation, the learned counsel stated that the payment was made within the grace period allowed and hence no disallowance under section 43B was called for. On the other hand, learned Departmental Representative supported the order of the Commissioner (Appeals),

25. We have considered the rival submissions. A proviso was attached to section 43B of the Act with effect from 1-4-1989, which provided that if the payment of taxes have been made within the due date of filing the return of income, no disallowance under section 43B was warranted. Hon'ble Supreme Court in the case of Allied Motors (supra) has held that though the proviso was added with effect from 1-4-1989, the same was procedural in nature and will apply with effect

from 1-4-1984. Respectfully following the same, we hold that the assessed will be entitled to deduction of the payment, if the same has been made within the due date of filing the return of income. The assessing officer is directed to verify the same and allow deduction accordingly.

26. We also find that the payment of gratuity has been made within the grace period. Various Courts have taken the view that if the payment has been made within the grace period, the same may be allowed as deduction. The assessing officer is directed to verify the facts and in case the payment has been made within the grace period, he will allow deduction of the same. This ground of appeal is decided with above directions.

27. Ground of appeal Nos. 10, 11 and 12 have not been pressed, hence the same are dismissed.

28. Ground No. 13 related to the disallowance out of motor car expenses. The assessed is a company and there cannot be any disallowance on account of personal user of the car in the case of a company. The issue is squarely covered in favor of the assessed by the decision of the Delhi Bench of the Tribunal reported in Dy. CIT v. Haryana Oxygen Ltd. . Concurring with the same, we hold that the disallowance sustained by the Commissioner (Appeals) is not justified and the same is deleted.

29. Ground No. 14 related to the disallowance out of miscellaneous expenses. When the assessing officer had disallowed a sum of Rs. 50,000 on ad hoc basis without pointing out any specific reasons, the appeal was filed. The Commissioner (Appeals) also confirmed the same against which the assessed is in appeal before us.

30. We find that the similar disallowance was made by the assessing officer which was adjudicated by the Tribunal in the assessment years 1983-84, 1984-85 and 1987-88. In all those years, the Tribunal had deleted the addition made by the assessing officer. Concurring with the same, the addition sustained by the Commissioner (Appeals) is deleted.

31. Ground No. 15 related to the disallowance of earlier years expenses. We find that the bills for the sum of Rs. 3,376 was received in this year and accordingly the deduction of the same was claimed. As this is a case of contractual liability, the same is allowable in the year in which the demand is raised. We, therefore, hold that the addition sustained by the Commissioner (Appeals) is not justified and the same is deleted.

32. Ground No. 16, the assessed has applied for amendment in the grounds of appeal by way of application dated 18-6-1999. It was stated that the assessed issued the debentures to meet out the cost of a particular project. However, this project was abandoned, the question arose about the allowability of interest under section 35(1) (iv) of the Act. It was stated that in the earlier year also, this issue was admitted by the Tribunal who restored the same back to the file of the assessing officer. The assessing officer adjudicated the issue and allowed relief to the assessed. It was stated that this year also, the claim may be modified and the directions may be issued to the assessing officer to consider the claim of the assessed keeping in view the order of the Tribunal for assessment year 1988-89.

33. After considering the rival submissions, we accept the modification in the grounds of appeal. We, therefore, set aside this issue and restore it back to the file of the assessing officer to consider the claim of the assessed in the light of the order of the Tribunal in assessment year 1988-89. This ground of appeal is allowed for statistical purposes.

34. Ground No. 17 has not been pressed, hence, the same is dismissed.

35. Ground No. 18 related to the disallowance out of conference expenses. The assessed held its conference in a hotel on which certain expenditure was incurred. The assessing officer held that the bulk of the expenditure was in the nature of entertainment and accordingly disallowed a sum of Rs. 1,50,000. On appeal, the same was also confirmed by the Commissioner (Appeals) against which the assessed is in appeal before us.

36. We have heard the rival submissions. We find that the total expenditure of the conference was Rs. 1,69,470. Such expenditure also included the tariff for the

hotel and also the expenditure incurred on the employees of the company. Keeping these facts in view, the disallowance of Rs. 1,50,000 out of Rs. 1,69,470 cannot be said to be reasonable. We, therefore, restrict the disallowance to Rs. 50,000 and delete the addition of the balance amount. The assessed gets partial relief in this ground of appeal.

37. Ground No. 19 has not been pressed, hence the same is dismissed.

38. The appeal filed by the assessed is partly allowed.

39. Now, we will take up the appeal directed by the revenue.

40. In ground No. (a), the revenue has challenged the deletion of the addition of Rs. 30,34,414 on account of excise duty refund credited to profit and loss account on accrual basis.

41. Briefly, the facts of the case are that on the basis of the Hon'ble Supreme Court decision in some other cases relating to the levy of Central excise, the assessed made a claim of refund of Rs. 30,34,414 before the Central excise authorities. However, the same was not received by the assessed on the ground that it was prematured. During the course of assessment proceedings, the assessing officer held that such amount has accrued to the assessed and as it was following mercantile system of accounting, it could have offered the same for taxation. The actual receipt of the amount was immaterial. He also observed that the claim of the assessed for such refund has not been rejected by the Central excise authorities and also the assessed itself has credited the amount to its profit and loss account. The assessing officer, therefore, brought the same to tax. On appeal, the Commissioner (Appeals) deleted the addition by observing that entry of hypothetical income in the books of account does not result in taxable income. He also relied on various cases mentioned by him in para 5 of his order. The revenue is in appeal before us, against the findings of the Commissioner (Appeals).

42. While learned Departmental Representative relied on the order of the assessing officer, the learned counsel for the assessed supported the order of the

Commissioner (Appeals).

43. We have considered the rival submissions. It is settled law that merely because the entry of an amount has been made in the profit and loss account or in the books of account was not enough in holding that an income has accrued to the assessed. The assessed has claimed refund of certain amount of Central excise on the basis of Supreme Court decision in some other cases. Thus, the assessed was not legally entitled to refund in its own case. It is settled law that it was the real income and not the hypothetical income which has to be brought to tax. Our views find support from the decision reported in CIT v. Shoorji Vallabhdas & Co. : [1962]46ITR144(SC) and CIT v. N.D. Radha Kishan & Co. . The Commissioner (Appeals) appreciated these facts and deleted the addition. We do not find any infirmity in his findings and while upholding the same, we dismiss the ground of appeal raised by the revenue.

44. In ground No. (b), the revenue has challenged the relief allowed by the Commissioner (Appeals) under the head 'entertainment expenses'.

45. We have dealt with this issue in the appeal directed by the assessed and in view of our findings therein, the ground of appeal raised by the revenue is dismissed.

46. In ground No. (c), the revenue has challenged the decision of the addition made by assessing officer under section 40(c) of the Act. During the year under consideration, the managing director of the company was paid various amounts aggregating Rs. 1,98,826 which included the perquisites also. The assessing officer allowed deduction to the extent of Rs. 1,02,000 and disallowed the balance amount of Rs. 96,826. On appeal, the Commissioner (Appeals) directed the assessing officer to allow relief to the assessed keeping in view the findings of the Tribunal in the assessment years 1982-83, 1984-85, 1985-86 and 1986-87. The revenue is in appeal before us against the findings of the Commissioner (Appeals).

47. After hearing the rival submissions, we find no force in the ground raised by the revenue. As the issue is covered by the order of the Tribunal in the earlier years, we dismiss the ground of appeal raised by the revenue.

48. In ground No. (d), the revenue has challenged the decision of the addition of Rs. 82,272 made by the assessing officer under section 36(1) (iii) for not charging interest on advance given to (sic) consultants and Novica Investment.

49. The assessing officer noted that the advances to these two concerns have been made out of interest-bearing borrowed funds. As no interest was charged on such advances, the assessing officer calculated interest on such advances at Rs. 82,272 and disallowed the same out of interest payable by the assessed. On appeal, the Commissioner (Appeals) deleted the addition by observing that the assessing officer has failed to prove the nexus between the borrowings of the funds on interest and advancing the same to sister-concerns without interest. Though, he observed that the assessed has failed to prove that there was any business dealing with these two concerns, but he deleted the addition as the assessing officer has failed to prove the nexus. The revenue is in appeal before us against the findings of the Commissioner (Appeals).

50. It is argued by the learned Departmental Representative that once the Commissioner (Appeals) himself has mentioned that the assessed has failed to prove any business relationship with these two concerns, he was not justified in deleting the addition. On the other hand, learned counsel supported the order of the Commissioner (Appeals).

51. We have considered the rival submissions. It is settled law that the onus was on the revenue to prove the nexus of borrowing the funds on interest and advancing the same without interest. Admittedly, this nexus has not been proved by the revenue. Thus, whether the assessed had any business relationship or not with the two parties to whom the advances have been made, becomes irrelevant. The Commissioner (Appeals) appreciated the facts correctly while deleting the addition. While upholding his findings; we dismiss the ground of appeal raised by the revenue.

52. Ground No. (e) relates to the deletion of the addition of Rs. 8,692, on account of unexplained cash credits in the name of industrial training course and M/s. Clean Enterprises. While deleting the addition, the Commissioner (Appeals) has observed that the credits in both the names related to the earlier year and not in

the year under consideration. He also observed that this was also not a case of cessation of liability so as to attract the provisions of section 41(1) of the Act. The revenue has challenged the above findings of the Commissioner (Appeals).

53. We have considered the rival submissions. During the course of arguments before us, the revenue has failed to prove that the amounts were credited to the books of account of the assessed in the year under consideration. These amounts were brought forward from earlier years. It is settled law that the addition under section 68 of the Act could be made only if the amount was credited in the accounts of the assessed in the relevant financial year. As the revenue has failed to prove the same, we hold that the Commissioner (Appeals) has correctly appreciated the facts in deleting the addition. While upholding his findings, we dismiss the ground of appeal raised by the revenue.

54. In ground (f), the revenue has challenged the deletion of the addition of Rs. 63,141 made by the assessing officer out of foreign traveling expenses.

55. During the course of assessment proceedings, the assessing officer noted that Shri Arun Brar, director, has visited Japan for exploring technical collaboration for manufacturing of injection, moulding machine and other items. The assessing officer held that the expenditure of Rs. 63,141 incurred on the Japan visit of Shri Arun Brar was capital in nature and not allowable. On appeal, the same was allowed by the Commissioner (Appeals) against which the revenue is in appeal before us.

56. We have heard the rival submissions. We find that the assessed was already manufacturing and dealing with the same product for which Shri Arun Brar has visited abroad. During his visit, he explored the possibility of technical collaboration for manufacturing of similar items. Any expenditure for modernization or upgradation of the technology of the existing product cannot be said to be capital expenditure. It is settled law that where an expenditure is incurred for setting up of a new factory or a new line of business, such expenditure will be capital expenditure. But where the expenditure is incurred for keeping oneself abreast of the latest technique of his business or for foreign collaboration it has to be held as revenue expenditure. Our views find support from the decision reported

in CIT v. S. Krishna Rao : [1970]76ITR664(AP) , Addl. CIT v. Buckau Wolf New India Engineering Works Ltd. : [1986]157ITR751(Bom) , Antifriction Bearings Corporation Ltd. v. CIT (1978) 114 ITR 335 and CIT v. McGaw Ravindra Laboratories (India) Ltd. : [1981]132ITR401(Guj) . We, therefore, hold that the Commissioner (Appeals) has correctly appreciated the facts in deleting the addition. While upholding his findings, we dismiss the ground of appeal raised by the revenue.

57. In ground No. (g), the revenue has challenged the decision of the addition of Rs. 30,000 out of staff welfare expenses. The assessing officer made an estimated addition of Rs. 30,000 under this head by following his order for assessment year 1987-88. On appeal, the Commissioner (Appeals) deleted the addition by following his order in assessment year 1987-88. The revenue is in appeal before us against the finding of the Commissioner (Appeals).

58. We find that the Commissioner (Appeals) has deleted the addition by following his order for assessment year 1987-88. The revenue has not brought any evidence on record suggesting that such finding of the Commissioner (Appeals) has been reversed by the Tribunal. We, therefore, hold that the Commissioner (Appeals) has correctly appreciated the facts in deleting the addition. While upholding his findings, we dismiss the ground of appeal raised by the revenue.

59. In the net result, the appeal filed by the assessed is partly allowed and that of the revenue is dismissed.