

Minda Huf Ltd. Vs. Additional Commissioner of

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SooperKanoon Citation : sooperkanoon.com/72689

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-25-2003

Reported in : (2004)82TTJ(Delhi)305

Judge : S Yadav, T Chopra

Appellant : Minda Huf Ltd.

Respondent : Additional Commissioner of

Judgement :

1. This appeal by the assessee is directed against the order of the CIT(A) on various grounds with are as under : "1. The CIT(A) erred on facts and in law in confirming the action of the AO in disallowing a sum of Rs. 65,95,132 under Section 43B of the Act, claimed by the appellant as per sales-tax deferral scheme.

1.1 The CIT(A) erred on facts and in law in holding that the date of the order on which the Industrial Department sanctions the loans to PICUP will be considered the date on which the trader has deposited the trade tax for purposes of Section 43B of the Act.

1.2 The CIT(A) erred on facts and in law in confirming the action of the AO in disallowing a sum of Rs. 29,18,459 under Section 43B of the Act, claimed by the appellant as unpaid sales-tax liability of earlier years holding that the order of DDAC for disposal of application of the appellant unit for eligibility certificate was passed on 19th May, 1999, i.e., beyond the previous year.

2. The CIT(A) erred on facts and in law in confirming the action of the AO in disallowing royalty amounting to Rs. 70,87, 102 paid by the appellant to foreign collaborator, M/s Futures GmbH, Germany, under Section 40(a)(i) of the Act.

2.1 That the CIT(A) erred on facts and in law in holding that Section 40(a)(i) of the Act requires both the conditions to be fulfilled i.e. deduction of tax at source and payment of tax to the credit of the Government within the relevant previous year before deductions admissible for payment made to non-resident.

2.2 That the CIT(A) erred on facts and in law in sustaining the disallowance made by the AO in respect of a sum of Rs. 9,23,227 representing the loss incidental to business on account of material not received by customers alleging that the CIT(A) erred on facts and in law in commercial prudence demanded the appellant to make efforts for claiming the aforesaid amount from the insurance company.

4. That the CIT(A) erred on facts and in law in confirming the action of the AO in making an ad hoc disallowance of Rs. 1,00,000 out of telephone expenses of Rs. 12,22,335 on account of personal use by directors.

5. That the CIT(A) erred on facts and in law in not allowing deduction under Section 80-IA of the Act holding that the profits of eligible unit are to be taken on stand alone basis and there are no profits available with reference to which deduction under Section 80-IA of the Act can be computed.

5.1 That the CIT(A) erred on facts and in law in holding that the ground whether the eligible unit was a mere expansion of the existing business does not survive as eligibility of the unit for deduction under Section 80-IA will need to be adjudicated only in the year when there are profits on stand alone basis.

6. That the CIT(A) erred on facts and in law in confirming the action of the AO in not allowing deduction under Section 80-HHC of the Act on the ground that the appellant had not furnished the auditor's report in form 10CCAC along with the return of income as required under Section (4) of that section.

7. That the CIT(A) erred on facts and in law in confirming the action of the AO in levying interest under Section 234B of the Act holding that collection of statutory

interest under the said section is mandatory." 2. During the course of hearing, the learned counsel for the assessee moved an application for admission of additional evidence under Rule 29 of the ITAT Rules, 1963 with the submission that the copy of letter dt.

16th July, 2003, issued by the Pradeshia Industrial & Investment Corporation of UP Ltd. (PICUP), certifying that a loan amounting to Rs. 65,69,132.02 was sanctioned by PICUP under Sales-tax Deferment Scheme (STDS) on 30th March, 1998, and therefore, the said loan was deposited in trade tax account of State Government on behalf of the assessee, is a relevant document to clinch the controversy whether deferment of sales-tax was converted into a loan liability within the impugned financial year. With regard to the other document which is a copy of order issued by the Industrial Department for sanction of loan under Deferment Scheme, the learned counsel for the assessee has also submitted that this document is also relevant to resolve the controversy regarding the sanction of loan within the impugned financial year. Since these documents are very material and go to the root of the case, the same may be admitted in the interest of justice. learned Departmental Representative raised a formal opposition to the admission of these aforesaid documents.

3. On careful perusal of the record in the light of rival submissions, we are of the considered view that since these documents are essential in order to adjudicate the controversy regarding the claim of deferment of trade tax and its payment, we admit the same. Accordingly, these documents are placed on record.

4. We have heard the rival submissions and carefully perused the orders of the authorities below and documents placed on record.

5. Apropos ground No. 1, it is noticed from the record that during the course of assessment proceedings, the AO noticed that the assessee claimed deduction of Rs. 95,13,591 under Section 43B of the IT Act (hereinafter referred to as an Act). This sum comprises of two amounts i.e., Rs. 65,95,132 which was claimed by the assessee as paid by PICUP to the Sales-tax Department on assessee's behalf under the Sales Tax Deferment Scheme and the sum of Rs. 29,15,459 was claimed by the assessee on the basis of sales-tax Tribunal. The AO did not allow

the claim of the assessee. The AO was of the view that the sanction letter for Rs. 65,95,132 was issued by PICUP during the financial year 1998-99 and since this liability neither pertained to the year under consideration nor was it deemed to have been paid during the year, this amount could not be allowed. With regard to a sum of Rs. 29,18,459, the AO held that the order of the Tribunal was passed during the financial year 1998-99 and, therefore, deduction under Section 43B was not allowable during the year. The assessee preferred an appeal before the CIT(A) with the submission that the PICUP vide letter dt. 7th April, 1998, in terms of scheme formulated by the State Government accorded sanction for treating the sales-tax collection by the assessee as interest-free loan w.e.f. 31st March, 1998. He placed reliance upon the CBDT Circular No. 496 dt. 25th Sept., 1987, and Circular No. 674 dt.

29th Dec., 1993, in support of his contention that deferral sales-tax payment under Deferral Scheme would be regarded as payment and the amount of sales-tax liability converted into loan would be allowed as deduction in the assessment year relevant to the previous year in which such conversion was permitted under Government order. It was further contended before the CIT(A) that since the assessee was notified to be entitled to Sales Tax Deferment Scheme w.e.f. 31st March, 1998, through the letter of PICUP dt. 7th April, 1998, the amount collected should be regarded as having been actually paid for purpose of Section 43B of the Act. It was also urged that the fact of the financial institution having paid the amount to Sales Tax Authority after due date of furnishing the return of income should not militate against the admissibility of the claim for deduction under Section 43B of the IT Act. He relied upon the order of the Tribunal in the case of *Cosmo Films Ltd v. IAC* (1994) 50 TTJ (Del) 54 wherein the Tribunal held that the process of deferment and issuance of the eligibility certificate were procedural matters which could not postpone under the availability of deduction under Section 43B of the IT Act.

6. The CIT(A) re-examined the issue in the light of scheme and the rival submissions. Being not satisfied with the contentions of the assessee, the CIT(A) confirmed the disallowance. With regard to other claim of appeal of Rs. 29,15,459, the CIT(A) has observed that as per the order of the Trade Tax Tribunal dt. 20th

Oct., 1998, the case was remanded to DDAC for disposal of an application of the assessee unit for eligibility certificate within three months from the date of receiving certified copy of the order. Thus, the very event which decided the eligibility of the assessee for tax exemption, occurred beyond the previous year under consideration. The date of deemed payment of sales-tax in this case would also be the date on which industrial department sanctioned the loan to PICUP and deemed the assessee to have made sales-tax payment. The assessee had neither given the date on which the loan was sanctioned by PICUP nor specified the date on which the order of the industrial department directed he book adjustment. Since the deemed payment was not made during the previous year relevant to the impugned assessment year, the CIT(A) rejected the claim, of the assessee.

7. Now, the assessee has preferred an appeal before the Tribunal and reiterated his argument. The learned counsel for the assessee invited our attention to the fact that the assessee received the order of the State Government sanctioning deferral of the amount of sales-tax.

Having compliance thereto, PICUP, vide letter dt. 7th April, 1998, has also accorded sanction for treating the sales-tax collected by the assessee as interest free loan w.e.f. 31st March, 1998. The PICUP has also paid a sum of Rs. 65,95,132 to the Treasury on 31st March, 1998, within the relevant previous year, In support of his contention, the learned counsel for the assessee has relied upon the letter of the Government dt. 7th April, 1998, appearing at p. No. 56 to 61 of the compilation.

8. He has also invited our attention to a letter dt. 16th Jan., 2003 appearing at page No. 247 of the compilation through which the PICUP has certified that the loan of Rs. 65,95,132.02 was sanctioned by PICUP under Trade Tax Deferment Loan Scheme on 30th March, 1998, and a proposal was sent on that very day to Govt. for release of funds from the budget of Industries Department, Government of UP, who released the same by order dt. 31st March, 1998, and after obtaining the said GO, the said loan of Rs. 65,95,132.02 was deposited in trade tax account of the State Government on behalf of the assessee on 31st March, 1998.

Since the tax liability has been converted into a loan liability under Trade Tax Deferment Loan Scheme within the relevant previous year, the assessee is entitled for the claim of deduction under Section 43B of the IT Act. The learned counsel for the assessee has also placed reliance upon the CBDT Circular No. 496 reported at (1988) 169 ITR 53 (St) and Circular No. 674 dt. 29th Dec., 1993, reported at (1994) 205 ITR 119 (St) according to which the amount of sales-tax liability converted into loans would be allowed as deduction in assessment for previous year in which such conversion has been permitted by or under Government orders. He also placed reliance upon the Tribunal's orders in the following cases : 2. Morvi Horological Industries v. ITO (1991) 39 TTJ (Ahd) 4 : (1991) 36 ITD 115 (Ahd) 9. With regard to the other claim of Rs. 29,18,459 on account of trade tax paid by the assessee pursuant to the order of the Trade Tax Tribunal, the learned counsel for the assessee has submitted that the assessee was granted eligibility certificate for tax exemption under Section 4A of UP Trade Tax Act, 1948, for a period from 30th June, 1989 to 29th June, 1985. The assessee has moved an application for its extension which was later on rejected by the DDAC and the assessee preferred an appeal before the Sales Tax Tribunal and the Tribunal decided the appeal in favour of the assessee and on the basis of this aforesaid order, the PICUP sanctioned the loan to the assessee in the relevant assessment year. But the financial institution has paid the amount of sales-tax to the Sales Tax Department after the due date of furnishing the return of income for the impugned assessment year i.e., 1998-99. The learned counsel for the assessee submits that this payment after the due date should not militate against the admissibility of the claim for deduction under Section 43B to the assessee for asst. yr.

1998-99. The payment of sales-tax by the financial institution to the sales-tax authorities under the deferral scheme is not on behalf of the assessee but by way of adjustment between the different Government authorities. This is a matter of internal arrangement with the two Government authorities without any recourse to the eligible unit. The date of payment by the financial institution cannot, therefore, determine the entitlement to the deduction under Section 43B in the hands of the assessee. What is relevant for the assessee's claim is the date on which the assessee was sanctioned the determent of sales-tax; if such sanction is before the

due date of filing the return of income, the sales-tax collected has to be treated as actually paid for purposes of Section 43B in terms of Board's circulars referred to above. The subsequent payment of sales-tax by the financial institution not on behalf of the assessee but as per directive of the State Government, cannot affect the assessee's claim for deduction under Section 43B of the Act. In support of his contention, he has relied upon the following judgments : 3. CIT v. Shree Talal Taluka Sahakari Khand Udyog Mandli Ltd. (2002) 125 Taxman 248 (Guj).

10. Learned Departmental Representative, on the other hand, has placed heavy reliance upon the order of the lower authorities. It was contended on behalf of the learned Departmental Representative that the circular and the judgments referred to by the assessee talk about the enforcement of deferment of sales-tax scheme. The Board has clarified through these circulars that deferment of sales-tax scheme can be enforced through a notification without bringing the amendment in the Sales-tax/Trade tax Act. He has also invited our attention to the Sales Tax Deferment Scheme appearing at page No. 52 to 55 of the compilation of the assessee according to which the assessee was required to undergo certain procedures for obtaining the eligibility certificate and also for getting the sale-tax liability converted into loan liability.

Unless and until sales-tax liability is converted into loan liability, the sales-tax cannot be deemed to have been paid under the Deferral Scheme for the purpose of Section 43B of the IT Act. In the instant case, the final letter for conversion of sales-tax liability into a loan was received by the assessee in the succeeding previous year. As such, the sales-tax liability was not converted into loan during the previous year. In these facts, the CIT(A) was justified in rejecting the claim of the assessee.

11. Having considered the rival submissions and from a careful perusal of record, we find that under the Deferral Scheme, once the tax liability is converted into a loan liability of some financial institution, the sales-tax is deemed to have been paid and the assessee is entitled to claim deduction of the same under Section 43B in that previous year in which the tax liability was discharged by the financial institution. We have also carefully examined the Board's circular and the

judgments referred to by the parties and we find that they all relate to the enforcement of deferment of sales-tax scheme. It has been repeatedly held or clarified by the Board that the scheme can be enforced through the notification without bringing any amendment to this effect in the Sales-tax Act. But the issue when the sales-tax is deemed to have been paid, whether it is on the date when the eligibility certificate is granted or the date when the tax liability is finally converted into a loan liability of some financial institution who have taken over the tax liability after making the payment to the sales-tax or trade tax to Department, was examined by the Tribunal in the case of Eicher Ltd v. Dy. CIT in ITA No. 1161/98 dt. 4th June, 2003, in which we have held that the assessee is not entitled for claim of deduction under the Department of Sales Tax Scheme for the purpose of Section 43B of the IT Act unless and until the sales-tax liability is finally converted into a loan liability of some financial institution. Deduction of the same would only be allowed in those previous years in which the sales-tax liability is finally converted into the loan liability.

12. In the light of the aforesaid propositions, we have examined the facts of the instant case and we find that the sanction of loan of Rs. 65,95,132 was accorded by PICUP for treating the sales-tax of the same amount collected by the assessee as paid on 30th March, 1998, and a proposal to this effect was sent on that very day to Government for release of funds from the budget of Industries Department who later on released the same by an order dt. 30th March, 1998. After obtaining the said GO and bill, relevant challans were prepared by PICUP and submitted to the Treasury, Lucknow. From the relevant challans, it is abundantly clear that the above transaction was completed on 31st March, 1998, itself when apart from the other formalities, the loan of Rs. 65,95,132.02 was deposited in the trade tax account of the State Government on behalf of the assessee, A letter to this effect was issued by the Jt. Director, Industries, Lucknow and PICUP. We have also carefully perused the letter dt. 7th April, 1998, and find that through this letter that the assessee was simply informed that the tax liability was converted into loan liability on its payment to sales-tax Department by PICUP on 31st March, 1998. Since it has been made abundantly clear from these documents that the sales-tax liability has been converted into loan liability within the previous year relevant to the impugned assessment year, the assessee is entitled for a claim of deduction

for the purpose of Section 43B of the IT Act. We, therefore, set aside the order of the CIT(A) on this count and direct the AO to allow the claim of deduction of Rs. 65,95,132.

13. With regard to the other claim of Rs. 29,18,459, the Trade Tax Tribunal has passed an order in succeeding previous year restoring the matter to the lower authorities and the assessee was directed to meet the requirements. From these facts it appears that after the Tribunal order, the assessee was required to complete certain formalities in order to obtain the eligibility certificate and to get this tax liability converted into loan liability of any financial institution within the previous year relevant to the impugned assessment year. In these circumstances, we do not find any merit in the contention of the assessee. We, therefore, uphold the order of the CIT(A) on this count, 14. Apropos ground No. 2, it is noticed from the record that the assessee has claimed the payment of royalty amounting to Rs. 70,87,102 to its foreign collaborator under Section 40(a)(i) of the Act. The claim was disallowed by the AO on the ground that the assessee has not fulfilled the twin conditions envisaged under Section 40(a)(i) of the Act that the deduction and payment of tax deducted at source be made within the previous year in which the tax has been deducted. He was of the view that since the assessee had deducted the tax and has not paid the same to its German collaborator within the previous year relevant to the impugned assessment year, the assessee has not fulfilled the requisite conditions. In support of his decision, he has relied upon the decision of the CIT(A) in the case of Subros Ltd. for the asst. yr.

1997-98. The assessee carried the matter before the CIT(A), who did not find favour with him.

15. Now, the assessee has carried the matter before us with the submission that the assessee had deducted tax at source on the amount of royalty of Rs. 70,87,102 on 31st March, 1998 during the previous year relevant to the assessment year in question i.e., 1998-99. The assessee had time for depositing the same upto 31st May under r. 30 of the IT Rules and the amount was, however, paid to the account of the Central Government on 30th June, 1998. The learned counsel for the assessee further submitted that according to Section 40(a)(i) of the

IT Act, the assessee is required either to pay tax or deduct tax at source within the previous year to raise a claim of deduction of payment of royalty but he was not required to fulfil both the conditions of deduction and payment within the previous year. If the payment of tax has not been made within the due time, the Revenue could have levied interest under Section 201(1A) of the Act but deduction of royalty under Section 40(a)(i) could not be disallowed. He has placed reliance on the judgment of the Rajasthan High Court in the case of Asstt. CIT v. Farasol Ltd (1987) 163 ITR 364 (Raj), In which it was held that disallowance under Section 40(a)(i) of the Act could not be made where tax has not been deducted at source but the same had been voluntarily paid by the nonresident. He, further placed reliance upon the Tribunal's order in the case of Nestle India Ltd. in ITA No. 3862/D/96, copy of which is placed on record with the submission that the Tribunal has allowed deduction to the assessee under Section 40(a)(i) of the Act in case where tax was deducted in the provisions year but was paid to the credit of the Government in the next assessment year. The learned Departmental Representative, on the other hand, has relied upon the order of the CIT(A).

16. We have carefully examined the facts of the case in the light of rival submissions and provisions of law. Before dwelling upon the main issue, we would like to examine the provision of Section 40 of the Act according to which amounts specified in various sub-sections shall not be deducted in computing the income chargeable under the head "profit and gains of business or profession" notwithstanding anything to the contrary in Sections 30 to 38 of the Act. For the sake of brevity, we extract the relevant portion of section which is as under : .

"40. Notwithstanding anything of the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession", (i) any interest (not being interest on a loan income for public subscription before the 1st day of April, 1938), royalty, fees for technical service or other sum chargeable under this Act, which is payable outside India, on which tax has not been paid or deducted under chapter XVII-B: Provided that where in respect of any such sum, tax has been paid or deducted under Chapter XVII-B in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which

such tax has been paid or deducted." 17. From a bare reading of Sub-clause (i), we are of the view that any payment of royalty for technical services which is payable outside India, shall not be deductible in computing the income chargeable under the head "profits and gains of business and profession" unless tax on such sum has been paid or deducted under Chapter XVII-B in relevant previous year. It has also been clarified in the proviso that deduction of such royalty amount shall be allowed in computing the income of the previous year in which such tax has been paid or deducted. The legislature has used the conjunction as or which means if any - one of the conditions is fulfilled, the assessee is entitled to claim deduction of the payment of royalty. Had the legislature ever intended to make both the conditions imperative they would have used the conjunction 'and'. In this backdrop, we find force in the contention of the assessee that if the tax is deducted at source, during the year and is deposited before the due date which lies in the succeeding year, the assessee is entitled to claim deduction of the payment of royalty in that previous year in which the tax at source was deducted. We also find force in the contention of the assessee that if the payment was made late, the Revenue may take recourse of charging interest under Section 201(1A) of the Act but the deduction of royalty under Section 40(a)(i) could not be disallowed. We have also carefully examined the judgment of the Rajasthan High Court and the Tribunal's order which supports the aforesaid view. We, therefore, do not find ourselves in agreement with the findings of the CIT(A). We, accordingly, set aside the order of the CIT(A) and direct the AO to allow the claim of the assessee.

18. Apropos ground No. 3, it is noticed from the record that the assessee has written off a sum of Rs. 9,23,227 on account of material not received by the customers. The claim was disallowed by the AO on the ground that such stock would have come back to the assessee if not received by the customer and as such, it should have been shown as part of the closing stock. The assessee preferred an appeal before the CIT(A) with the submission that such material was neither received by the customer nor was returned to the assessee and was apparently lost in transit. As such, it could not be reflected in the closing stock.

The assessee, therefore, contended that its claim be allowed under Section 28 of the Act as loss incidental to business. The CIT(A) noticed that neither the

assessee has made any efforts to recover the material from the customer nor made an insurance claim for the material lost in transit. Considering the nature of business of the assessee and the amounts involved, the CIT(A) formed a view that commercial prudence demanded purchase of insurance claim and the loss could be held to be incidental to business only in the year when the results of negotiations with the insurer are available, he, accordingly, confirmed the disallowance.

19. Now, the assessee is before us and reiterated its earlier contentions. It was also contended on behalf of the assessee that he did not insure the material while dispatching it to the customer.

Moreover, the assessee was not timely informed about the short delivery of the material. When they refused to make the payment of short delivery, the assessee realized that the material was not received by the customers. Since this material was neither received by the customer nor returned to the assessee and was apparently lost in transit, the same could not be reflected in closing stock of finished goods.

Accordingly, the same was allowable under Section 28 of the Act as loss incidental to business. The learned counsel for the assessee further submits that the aforesaid amounts also include the advances made by the assessee to vendors against the purchase orders for the supply of raw material. The pending advances from the aforesaid vendors have become irrecoverable due to the following reasons : (a) The advances had been paid to the vendor against the purchase orders issued for supply of raw material but the vendors neither supplied the material nor returned the money.

(b) The advances were paid to the vendors and vendors also supplied the material but the material was rejected due to quality problems.

The amount of debit note issued for the recovery of cost of rejected material could not be recovered.

(c) Payment to vendors was made against delivery but subsequently, the assessee discovered shortage of material for which the assessee had raised the debit note in favour of the vendors, which could not be recovered.

20. Learned Departmental Representative, on the other hand, has submitted that before the Tribunal, the assessee has taken a new stand that the aforesaid amounts include advance made by the assessee to vendors against the purchases whereas before the lower authorities it was consistently argued on behalf of the assessee that this amount represents the cost of the material supplied by the assessee but not received by the customers. Since this new story of facts has been raised first time before the Tribunal, it cannot be entertained at this stage because it requires further investigation. So far as the original stand of the assessee is concerned, the learned Departmental Representative contended that whenever the material is dispatched or sent to the customers, the vendor always obtains the acknowledgement of the receipt of material and on the basis of that receipt/challan invoices are raised by the vendor. In the instant case, no documentary evidence is placed in support of the contention of the assessee that short delivery was effected upon the customers or the material was lost in transit. Had it been lost in transit assessee could have raised actionable claim against the transporters or the person who was engaged as a carrier of the material. But nothing has been placed on record in support of the contention of the assessee.

21. Having considered the rival submissions and from a careful perusal of the record, we find that the assessee has not placed sufficient material on record to prove that there was a short delivery upon the customers or the short material was lost in transit. We find force in the contention of the Revenue that whenever goods or consignment are dispatched and delivered upon the customer, the vendor either obtains the receipt or challen of consignment and on the basis of which invoices are generally raised. Had the customer received the short delivery, he could have intimated the vendor or deducted the proportionate cost of material from the bill/invoice but nothing is apparent from the record. Had it been a fact that the short material was lost in transit, why the assessee did not take any action against the transporter or the carrier who has not delivered the entire material upon the customers? If the assessee claims the short delivery as loss incidental to the

business, he is required to place some documentary evidence on record to this effect but we do not find any concrete evidence in support of the contention of the assessee. So far as second limb of the argument of the assessee is concerned that the aforesaid amount includes the advances to the vendors against the purchase orders issued for supply of material, we are of the view that this a new plea raised first time before the Tribunal. Since this factual aspect requires investigation and no evidence is placed in support of this stand before us, we find no justification to entertain this new limb of the argument. In these circumstances, we do not find any merit in the contentions of the assessee. We, therefore, decide this ground against the assessee. Accordingly, the order of the CIT(A) is hereby confirmed.

22. Apropos ground No. 4, it is noticed from the record that the AO has disallowed a sum of Rs. 1 lakh out of telephone expenses of Rs. 12,22,335 on account of personal use by the directors on the ground that use of the cell phone provided to various personnel for personal purpose cannot be ruled out. The assessee preferred an appeal before the CIT(A) that these telephones are provided for official purpose only and even if it is argued that these were used for personal purpose, the same may be treated as perquisites in the hands of such directors or employees. He further contended that the assessee being a company could not make personal use of the said cell phones. It was also contended that these telephone expenses were never disallowed in earlier years.

The CIT(A) re-examined the issue in the light of Judgment of the Madras High Court in the case of New Ambadi Estates (P) Ltd v. State of Tamil Nadu (2002) 256 ITR 64 (Mad) in which Hon'ble High Court has upheld the action of the AO and disallowed 25 per cent of cash expenditure in the absence of trip sheets in the hands of the assessee. The CIT(A) has also observed that no call records were kept by the assessee and nothing was placed on record to show that the perquisite value had been added in the hands of directors/employees. He accordingly, confirmed the disallowance. Now, the assessee has preferred an appeal with the submission that in case of a company, no disallowance can be made on account of personal use of the telephone etc. because they are always used for the purpose of business. In support of his contention, he has relied upon

the following judgments : 1. Daks Copy Services (P) Ltd. v. ITO (1989) 34 TTJ (Bom) 604 : (1989) 30 ITD 223 (Bom) 3. Banco Products (India) Ltd. v. Dy. CIT (1997) 59 TTJ (Ahd) 387 : (1997) 63 ITD 370 (Ahd) 5. ITO v. Ashoka Betelnut Co. (P) Ltd. (1985) 21 TTJ (Mad) 465 : (1984) 10 ITD 788 (Mad) 6. Usha Rectifier Corporation (I)(P) Ltd. v. IAC (1989) 35 TTJ (Del) 602 Dy. CIT v. Gujarat Filaments Ltd. (2000) 108 Taxman 287 (Ahd)(Mag) 9. Dy. CIT v. Haryana Oxygen Ltd. (2001) 73 TTJ (Del) 575 : (2000) 76 ITD 32 (Del) 23. The learned Departmental Representative, on the other hand, has relied upon the order of the CIT(A).

24. Having considered the rival submissions and from a careful perusal of the orders of the authorities below and various judgments referred to by the parties, we are of the considered opinion that the impugned issue is squarely covered by the aforesaid judgment in favour of the assessee. We, therefore, set aside the order of the CIT(A) and delete the addition.

25. Apropos ground No. 5, it is noticed from the record that the assessee has filed return declaring loss of Rs. 35,45,020 for the relevant assessment year. A note was appended in the statement of computation of income to the effect that the assessee was eligible for the benefit under Section 80-IA of the Act which was, however, not claimed on account of loss returned by the assessee but in case the assessment resulted in a positive income, the deduction under Section 80-IA of the Act should be allowed to the assessee. The AO, however, did not allow deduction under Section 80-IA, both while computing the income under the normal provisions of the Act and also while computing book profit under Section 115JA of the Act on the ground that the brought forward losses relating to eligible unit were to be set off prior to allowing deduction under Section 80-IA of the Act. The AO further held that the eligible unit was a mere expansion of the existing business and therefore, deduction under Section 80-IA of the Act could not be allowed.

26. In appeal, the CIT(A) confirmed the action of the AO holding that the profit of the eligible unit are to be taken on stand alone basis and as per the details of loss for unit No. 1 on stand alone basis, the loss for the asst. yrs. 1996-97 is Rs. 53,92,466 and loss for the asst.

yr. 1997-98 is Rs. 54,06,840. For the assessment year under consideration, the returned loss is Rs. 19,83,493, therefore, on stand alone basis there was no profit available with reference to which deduction under Section 80-IA can be computed. With regard to an issue whether it was an expansion or a new unit, the CIT(A) held that this issue will only arise in the year in which there are profits available for deduction. He, accordingly, upheld the order of the AO on the ground that deduction under Section 80-IA is not available on account of insufficiency of profit, Now the assessee is in appeal before us.

He, however, has no grievance against the disallowance of claim of deduction because he did not claim the deduction under Section 80-IA on account of loss returned by it. He is, however, interested in adjudication of an issue whether it was a new unit or an expansion of an old unit but in this regard it is noticed from the record that the assessee has not raised a specific ground before the CIT(A). As such, the CIT(A) was not under any obligation to give a specific finding on this issue. Keeping in view the totality of the facts and circumstances of the case, I find that the CIT(A) has properly adjudicated the issue in right perspective. Since we do not find any infirmity in his order, I uphold the same.

27. Apropos ground No. 6, on perusal of record, we notice that the AO has not allowed deduction claimed under Section 80HHC of the Act on the ground that the assessee had not furnished the report of an auditor in Form No. 10CCAC as provided under Section 80HHC(4) of the Act along with return of income. The CIT(A) confirmed the aforesaid action of the AO holding that filing of audit report in Form 10CCAC is a condition precedent for allowing the deduction under Section 80HHC of the IT Act.

Now, the assessee has approached the Tribunal with the submission that the requirement of filing the audit report along with the return of income in Sub-section (4) of Section 80HHC found in Sections 127(b), 32AB, 80HH/80-I has been held directory. He further contented that it has been repeatedly held by various High Courts that if the audit report is filed before the completion of the assessment or even for the first time before the appellate authorities, it meets the requirement of law. In support of his contention, he has relied upon the following judgments : (i)

CIT v. Rai Bahadur Bissesswarlal Motilal Malwasie Trust (1992) 195 ITR 825 (Cal) Monarch Foods (P) Ltd. v. Asstt. CIT (1996) 54 TTJ (Ahd) 405 : (1996) 86 Taxman 126 (Ahd) (vi) Mrs. Sudha Sharma v. ITO (1993) 46 TTJ (Del) 276: (1993) 44 ITD 351 (Del) Dhanooolal & Sons v. Dy. CIT (1996) 55 TTJ (Cal) 250 : (1996) 57 ITD 426 (Cal) (ix) Nemco Enterprises v. CIT (1993) 46 TTJ (Pune) 110 : (1992) 65 Taxman 307 (Pune) (x) ITO v. Manav Hitkari Trust (1987) 28 TTJ (Del) 169 : (1987) 20 ITD 42 (Del) 28. Learned counsel for the assessee had invited our attention to the order of the Tribunal in the case of M.P. Rajya Vikas Nigam v. Dy. CIT (1997) 57 TTJ (Ind) 296 : (1997) 60 ITD 39 (Ind) in which the Tribunal has allowed the claim of deduction under s. 32AB of the Act when this audited report was filed first time before it. Similar view was also taken by the Tribunal in the case of Dhannoo Lal & Sons v. Dy. CIT (supra).

29. We have carefully perused the orders of the lower authorities in the light of rival submissions and we notice that the audit report was filed during the course of assessment proceedings. As held by the various High Courts and the Tribunal in aforesaid judgments that if the audit report is filed either before the completion of the assessment or before the appellate proceedings, it meets the requirement of law, we find merit in the contention of the assessee. Following the aforesaid judgment, we set aside the order of the CIT(A) and direct the AO to allow the claim of deduction under Section 80HHC to the assessee as per law because the audit report was admittedly filed before the completion of assessment.

30. Apropos ground No. 7 it is noticed that the AO has not passed a specific direction for charging of interest under Section 234B. He has charged interest in ITNS 150. This fact was admitted by the learned counsel for the assessee during the course of argument. The learned counsel for the assessee has relied upon the following judgments in support of his contention that no interest can be charged under Section 234B without issuing a specific direction in this regard in the assessment order. Mum Chemicals v. Asstt. CIT (2001) 73 TTJ (Del) 124 : (2001) 76 ITD 367 (Del) 8. H.G. Malik v. Asstt. CIT (2003) 79 TTJ (Del) 844 : (2003) 85 ITD 79 (Del) Centex Publication (P) Ltd v. Dy. CIT 31. During the course of hearing, our attention was invited to the order of this Bench in the case of Asstt. CIT v. Comex Corporation in ITA No. 5221/Del/97 in which identical issue was

examined in detail in.

the light of various judgments quoted by the parties and it was held that if the interest is charged in ITNS 150 which is an integral part of assessment order, it amounts to direction to charge interest under Section 234A, 234B and 234C of the Act. Since we have already adjudicated the impugned issue in the aforesaid case, after making a threadbare analysis of relevant provisions in the light of various judgments, we find no justification to take a different view in this appeal. We, therefore, following our earlier order, decide the issue against the assessee. Accordingly, the order of the CIT(A) is upheld.

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