

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.862 of 2010 (O&M)
Date of decision:14.3.2016**

Commissioner of Income Tax I, Ludhiana

.....Appellant

M/s Superman Knitters (P) Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr. Rajesh Katoch, Advocate for the appellant.

Ms. Radhika Suri, Sr. Advocate with Ms. Rinku Dahiya, Advocate
for the assessee.

Ajay Kumar Mittal, J.

1. Delay in refiling the appeal is condoned.
2. This appeal has been preferred by the revenue under Section
260A of the Income Tax Act, 1961 (in short, "the Act") against the order

dated 22.9.2009, Annexure A.3 passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A' Chandigarh (in short, “the Tribunal”) in ITA No.491/CHANDI/2009, for the assessment year 2004-05, claiming following substantial questions of law:-

- (i) Whether on the facts and circumstances of the case, the Hon'ble Income tax Appellate Tribunal is justified in law in holding that the CIT has erred in invoking the provisions of Section 263 of the IT Act, 1961 ignoring the fact that the order of the Assessing Office passed under section 143(3) on 21.4.2006 was erroneous in so far as it was prejudicial to the interest of the revenue?
- (ii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in law in observing that the order of CIT does not contain any firm decision as to how the debit of administrative expenses amounting to ₹ 9,77,010/- in the P&L account of Unit I has rendered the assessment as erroneous and prejudicial to the interest of revenue, whereas a firm decision and reasoning on this issue was given in the order passed under section 263 of the IT Act, 1961?
- (iii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in law in not appreciating the fact that the assessee is not eligible for deduction under section 80IB on fabrication charges of ₹ 62,28,012/- as these fabrication receipts had no nexus with the business of the industrial undertaking?
- (iv) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal is justified in law in observing that the assessment was framed

with due application of mind whereas the Assessing Officer has nowhere discussed these two specific issues during assessment proceedings or in the assessment order?

3. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The respondent assessee is a company engaged in the business of manufacturing and sale of hosiery goods. Return of income for the assessment year in question was filed by the assessee on 30.10.2004 showing income of ₹ 8,27,306/- which was processed under section 143(1) of the Act on 14.1.2005. The case was selected for scrutiny and assessment was finalized by the Assessing Officer under section 143(3) of the Act on 21.4.2006, Annexure A.1 at a total income of ₹ 9,77,306/-. While framing the assessment, the Assessing Officer re-computed deduction under section 80IB of the Act which was not allowed to the assessee on miscellaneous income of ₹ 5 lacs surrendered on account of cash during survey under section 133A of the Act conducted at the business premises of the assessee on 19.3.2004. Accordingly, deduction under section 80IB of the Act was allowed at ₹ 8,36,167/- against the claim of ₹ 9,86,167/- made by the assessee. Later on, it was observed by the Commissioner of Income Tax-I, Ludhiana (CIT) that the company had claimed deduction under section 80IB of the Act on the amount of ₹ 62,28,012/- credited on account of inter unit fabrication charges in the Profit and loss account of its Unit II. These fabrication receipts had no nexus with the business of the industrial undertaking and deduction under section 80IB of the Act was not allowable on these receipts. It was also noticed by the CIT that administrative expenses amounting ₹ 9,77,010/- pertained to both

the units i.e. Unit I and Unit II of the assessee but these were debited to the profit and loss account of Unit I only. No such expenses were debited to Unit II. Thus, this issue was remanded to the Assessing Officer with the direction to ascertain amount of profits as may reasonably deemed to be derived from the industrial undertaking i.e. Unit II as far as administrative expenses of ₹ 9,77,010/- were concerned. It was further observed by the CIT that the assessee company had been doing the business of manufacturing and sale of hosiery goods and section 80IB of the Act clearly laid down that deduction was allowable only on income derived from such industrial undertaking. Accordingly, provisions of section 263 of the Act were invoked in this case. Vide order dated 24.3.2009, Annexure A.2, under section 263 of the Act, the CIT held the assessment framed by the Assessing Officer to be erroneous and prejudicial to the interest of the revenue on both the issues and directed the Assessing Officer to re-compute deduction under Section 80IB of the Act. Aggrieved by the order, the assessee filed appeal before the Tribunal. Vide order dated 22.9.2009, Annexure A.3, the Tribunal allowed the appeal holding that the CIT erred in invoking the provisions of section 263 of the Act on both the issues. Hence the instant appeal by the revenue.

4. We have heard learned counsel for the parties.

5. Learned counsel for the appellant-revenue submitted that the administrative expenses amounting to ₹ 9,77,010/- were in respect of Unit No.2 also and could not have been taken to be in respect of Unit No.1 alone. On the aforesaid premises, it was urged that the Tribunal was in error in setting aside the order of revision passed under section 263 of the Act. The

claim of the assessee under Section 80IB of the Act on ₹ 62,28,012/- on account of job work charges was also disputed.

6. On the other hand, learned counsel for the assessee relying upon judgment of this Court in ***Commissioner of Income Tax vs. Impel Forge and Allied Industries Limited***, (2010) 326 ITR 27 submitted that the Assessing Officer in the initial assessment had rightly allowed deduction under Section 80IB of the Act on the job work charges amounting to ₹ 62,28,012/-. It was also submitted that the CIT in exercise of revisional jurisdiction under section 263 of the Act was required to prima facie record that the assessment was erroneous and administrative expenses amounting to ₹ 9,77,010/- related to both the units and it was required to be on the basis of material on record.

7. After hearing learned counsel for the parties, we do not find any merit in the appeal.

8. It has been categorically recorded by the Tribunal that no finding had been given by the CIT under Section 263 of the Act as to how the debit of administrative expenses of ₹ 9,77,010/- made in the profit and loss account of Unit No.1 prima facie resulted in excess profit in Unit No.II and how any of such expenses were relatable to Unit No.II. The CIT merely set aside the issue without finding any error in the assessment made by the Assessing Officer. The two conditions for invoking the provisions of Section 263 of the Act were not fulfilled i.e. firstly how debit of administrative expenses in the profit and loss account of Unit No.1 rendered the assessment as erroneous and secondly how the same was prejudicial to the interest of the revenue. The relevant findings recorded by the Tribunal

read thus:-

“9. In the above situation, now we may examine the impugned order of the Commissioner dated 24.3.2009. We may consider the second aspect taken by the Commissioner at the outset. According to the Commissioner, the profit and loss account of Unit 1 showed administrative expenses amounting to ₹ 9,77,010/- while no such expenses have been debited in the profit and loss account of Unit II. The Commissioner has further observed that such administrative expenses are on account of administration of the business of the assessee company as a whole i.e. for Unit I as well as Unit II. Therefore, he set aside the issue to the file of the Assessing Officer with the direction to ascertain the amount of profits as may be reasonable deemed to be derived in Unit II as far as the administrative expenses of ₹ 9,77,010/- are concerned. In this regard, we may notice the reply furnished by the assessee to the Commissioner, a copy of which has been placed in the paper book. The assessee contended that whatever expenses were relatable to the activities of Unit II, the same have been debited to the profit and loss account of the said unit and it was further submitted that the expenses amounting to ₹ 9,77,010/- “are directly relatable to the activities of Unit I”. In the context of such a categorical assertion by the assessee, we find that there is no finding recorded by the Commissioner as to how the debit of administrative expenses of ₹ 9,77,010/- made in the Profit and Loss Account of Unit 1 resulted in excess profit in Unit II in as much as there is no finding of the Commissioner that any of such expenses was relatable to Unit II. The Commissioner has discussed this aspect in para 3.2 of the impugned order and the only observation made is that such expenses are “over all expenses” on account of the business of the company as a whole. The Commissioner had the entire

records before him and also the assertion of the assessee that none of the expenses comprised in ₹ 9,77,010/- was relatable to Unit II. Under these circumstances, the Commissioner has chosen to merely set aside the issue without first establishing any error in the assessment made by the Assessing Officer on this count. It is also trite law that before an order can be termed as erroneous, it has to be established as to what is the error of fact or law that is sought to be made out by the Commissioner. Infact, the Commissioner is expected to examine the record and furnish his opinion precisely to justify the provisions of section 263 of the Act. This approach is conspicuous by its absence in the impugned order vis a vis the issue of administrative expenses, which has been set aside by the Commissioner back to the file of the Assessing Officer. In the context of the said approach of the Commissioner, the following observations of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Kanda Rice Mills*, 178 ITR 446 (P&H) are worthy of notice:-

“A reading of the entire order of the Commissioner clearly goes to show that he did not furnish his opinion or consider the cited cases or the argument raised and merely observed that these were the points which deserved consideration and after setting aside the order of the Income Tax Officer, issued direction for making assessment afresh. This is not permissible under the provisions contained in section 263 of the Act. The Commissioner had to come to a firm decision that the order of the Income Tax Officer was erroneous and was prejudicial to the interests of the revenue. Since no decision about the erroneous nature of the order was firmly taken, the Tribunal was right in vacating the order. Accordingly, we answer the question in favour of the assessee, that is, in the affirmative, with no order as to costs.”

10. Considered in the light of the aforesaid observations of the Hon'ble Punjab and Haryana High Court, the order of the Commissioner on this aspect, in our view, is unsustainable as it does not contain any firm decision as to how the debit of administrative expenses amounting to ₹ 9,77,010/- in the profit and loss account of Unit 1 has rendered the assessment as erroneous and prejudicial to the interests of the revenue within the meaning of section 263 of the Act. Thus, on this aspect, the order of the Commissioner is set aside.”

9. The Tribunal had also held the revisional order passed by CIT under Section 263 of the Act to be legally unsustainable with regard to deduction allowed by the Assessing Officer under Section 80IB of the Act of fabrication charges of ₹ 62,28,012/- with the following observations:-

“11. In so far as the issue relating to the claim of deduction under section 80IB of fabrication charges of ₹ 62,28,012/- is concerned, herein also, we find the order of the Commissioner unsustainable. Quite clearly, the only point made by Commissioner is that the fabrication charges do not constitute income derived from the industrial undertaking. On this point also, we may again appraise the explanation furnished by the assessee before the Commissioner. Firstly, the assessee submitted that it has set up the industrial undertaking for the manufacture of cloth during the assessment year 1999-2000 and has been claiming deduction under section 80IB since then. The assessee further contended that since the very beginning it is doing job work and has been in receipt of fabrication charges, has been claiming deduction under section 80IB on such income. It was also submitted that such claim has been allowed even in the earlier years and that too in an assessment framed under section 143(3) of the Act in the immediately preceding assessment year. The assessee

further submitted, an identical issue has been decided by the Tribunal in the case of *New Era Machines (P) Limited* (supra) in favour of the stand of the assessee.

12. Having noted the aforesaid submissions of the assessee, we find no cogent reasoning brought out by the Commissioner to deny the claim of the assessee for deduction under section 80IB of the Act. According to the Commissioner, the principle of resjudicata is not applicable to the proceedings under the Act. While in principle, the Commissioner may be right, so however it is equally important to adopt a consistent view in the income tax proceedings. It is imperative for the Commissioner to make out a case that there was an error in the law or on facts which justified his action to deny deduction under section 80-IB of the Act on fabrication charges and depart from the past. No such error of fact or in law has been established by the Commissioner. In our considered opinion, in similar situation, the Hon'ble Madras High Court in the case of *Taj Fireworks Industries* (supra) has held that the job charges earned for carrying out manufacturing activity for outside concerns were eligible for 80IB benefits. In this case. the Commissioner has been swayed merely by the fact that the assessee was undertaking job work and for that reason he has been proceeded to deny the deduction. There is no allegation, much less a finding by the Commissioner that the activity undertaken for earning job work charges was not a manufacturing activity. Therefore, under such circumstances, the action of the Assessing Officer in allowing deduction under section 80IB of the Act on fabrication charges as in the past, cannot be said to be erroneous in law. Even if we accept that two views are possible on this aspect, then in the context of the provisions of section 263 of the Act, the impugned action of the Commissioner is rendered unsustainable. Quite clearly, the

Hon'ble Supreme Court in the case of ***Malabar Industrial Co. Limited*** (supra) has held that where two views are possible and one of possible view has been adopted by the Assessing Officer while framing assessment, such order is not amenable for revision within the meaning of section 263 of the Act. Having regard to the aforesaid discussion, in our considered opinion, even on the aspect of allowability of deduction under section 80IB on fabrication charges, the Commissioner erred in invoking the provisions of section 263 of the Act.”

Learned counsel for the appellant-revenue has not been able to show any error in the findings recorded by the Tribunal.

10. Further, a Division Bench of this Court (to which one of us – Ajay Kumar Mittal, J., was a member) in ITA No.324 of 2013 (***Commissioner of Income Tax I, Ludhiana vs. M/s Saimbhi Cycles & Auto Industries, Focal Point, Ludhiana***) decided on 28.4.2014 relying upon the judgment of this Court in ***Impel Forge and Allied Industries Limited's*** case (supra) recorded as under:-

“9. In so far as second issue is concerned, the matter stands concluded by judgment of this Court in ***CIT vs. Impel Forge and Allied Industries Limited***, (2010) 326 ITR 27 wherein while discussing identical issue, it was noticed as under:-

“5. Reference to section 80IB of the Act shows that only requirement for its applicability is deriving of income from business referred to in sub sections (3) to (11), (11A) and (11B) of the Act, apart from other conditions with which we are not concerned. It is not the case of the revenue that the business of the assessee does not fall under sub sections (3) to (11), (11A) or (11B) of the Act. The assessee is at liberty to do manufacture for itself or for others, which makes no difference for purposes of

section 80IB of the Act. The Tribunal has also relied upon similar view taken by Delhi High Court in *CIT vs. Northern Aromatics Limited*, (2005) 196 CTR (Del.) 479.”

11. In view of the above, the substantial questions of law are answered against the revenue. The appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

March 14, 2016
'gs'

(Raj Mohan Singh)
Judge