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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 390/2017**

PR. COMMISSIONER OFINCOME TAX, DELHI – 12 ..... Appellant
Through: Mr. Ashok Manchanda and Mr. Raghvendra Singh, Advocates

Versus

SHRI KULJEET SINGH KOCHAR ..... Respondent
Through:Mr. Gautam Jain, Advocate

CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

ORDER

% 24.07.2017

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is directed against the order dated 19th September, 2016 passed by the Income Tax Appellate Tribunal, Delhi Bench ('ITAT') in ITA No.845/Del./2011 for the Assessment Year ('AY') 2006-07.

2. Although, while issuing notice on 17th May, 2017 this Court had directed that the instant appeal be listed along with ITA Nos. 141/2017 & 142/2017, however, learned counsel for the Revenue sought to distinguish the present appeal from the facts of those two appeals which have been dismissed by this Court through a separate order today.

3. There are several points of similarity between the two sets of cases. The similarity is that just like the Assessee in the present appeal, the Assessee in

those appeals i.e., ITA Nos. 141/2017 & 142/2017 also had units located at Baddi, Himachal Pradesh as well as in Delhi, engaged in the manufacture of cosmetics. The question in those appeals, as well as in the present one, was whether the Assessee could be denied deduction under Section 80-IC of the Act?

4. The distinction in the cases is that the denial of deduction was by invoking Section 80-IA (8) and (10) of the Act whereas in the present case the denial of the deduction by the Assessing Officer ('AO') by order dated 26th December, 2008 was done by invocation of Section 80-IA (10) of the Act. The said provision, at the relevant time, read as under:

> "80 IA (10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."

5. Mr. Raghvendra Singh, learned counsel appearing for the Revenue, sought to urge that in the present case Commissioner of Income-Tax (Appeals)-III ['CIT(A)'] erred in reversing the order of the AO and the ITAT erred in upholding the order of the CIT(A) on the ground that the AO had to reject the accounts submitted by the Assessee under Section 145 of the Act before proceeding to deny the deduction under Section 80-IC of the Act read with Section 80-IA. It is submitted that this was not even the case

of the Revenue.

6. Mr Singh submitted that once it was shown as a fact that there was a close connection between the Assessee and the other entities through whom sales were made on the consignment basis, then even though the AO may have erred in rejecting the gross profit (GP) ratio, the CIT (A) or the ITAT itself ought to have undertaken the required exercise in terms of Section 80-IA (10) of the Act.

7. This Court is unable to accept the aforesaid submissions. For the purposes of Section 80-IA (10) of the Act, it is not enough for the AO to show that there was a close connection between the Assessee carrying on the eligible business and the other person with whom it has transactions. The AO has to further show that the business between them is so arranged that it produces for the Assessee 'more than the ordinary profits' which might be expected to arise in such eligible business. Section 80-IA (10) of the Act further requires the AO to compute the profits and gains of the eligible business by taking the amount of profits "as may be reasonably deemed to have been derived therefrom". The adjective "reasonably" carries with it the responsibility of the AO to base his conclusion on some empirical data.

8. In the present case the AO's conclusion that the profits of the Assessee were "more than ordinary" was based on surmises and conjectures. During the course of his submission, Mr Singh sought to suggest that a 40% GP ratio by itself should be taken to be "more than ordinary". Neither the Court nor the CIT (A) or the ITAT can take judicial notice of what percentage of

GP ratio should be considered to be ‘more than ordinary’. That decision will hinge upon a variety of factors including the line business, the market conditions, the geographical location, the standard practices peculiar to the line of business and so on. To be fair, Mr Singh pointed out that by a subsequent amendment with effect from 1st April 2013, the legislature has inserted a proviso to Section 80-IA (10) of the Act to acknowledge the complexity of the exercise.

9. It is not in every case that the CIT (A) has to ask for a remand report from the AO to make up for what was missed to be done in the first place by the AO. In the circumstances, the CIT (A) and the ITAT cannot be faulted for not undertaking themselves the required exercise under Section 80-I (10) of the Act.

10. For the aforesaid reasons, the Court finds that no substantial question of law arises from the impugned order of the ITAT.

11. The appeal is accordingly dismissed, but in the circumstances, with no orders as to costs.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 24, 2017
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