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

+ ITA 1015/2018

THE PR. COMMISSIONER OF INCOME TAX -4

..... Appellant

Through: Mr. Sanjeev Menon, Jr.SC.

versus

HENKEL TEROSON INDIA LTD

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Neeraj Jain, Mr. Aniket D.
Agrawal, Ms. Mansha Sharma
and Mr. Abhisek Singhvi, Advs.

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+ ITA 1016/2018

THE PR. COMMISSIONER OF INCOME TAX -4

..... Appellant

Through: Mr. Sanjeev Menon, Jr.SC

versus

HENKEL TEROSON INDIA LTD.

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Neeraj Jain, Mr. Aniket D.
Agrawal, Ms. Mansha Sharma
and Mr. Abhisek Singhvi, Advs.

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+ ITA 1019/2018

THE PR. COMMISSIONER OF INCOME TAX -4

..... Appellant

Through: Mr. Sanjeev Menon, Jr.SC

versus

HENKEL TEROSON INDIA LTD.

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Neeraj Jain, Mr. Aniket D.



Agrawal, Ms. Mansha Sharma
and Mr. Abhisek Singhvi, Advs.

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ITA 223/2019

THE PR. COMMISSIONER OF INCOME TAX -4

..... Appellant

Through: Mr. Sanjeev Menon, Jr. SC

versus

HENKEL TEROSON INDIA LTD. Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Neeraj Jain, Mr. Aniket D.
Agrawal, Ms. Mansha Sharma
and Mr. Abhisek Singhvi, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR

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ORDER

29.04.2024

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1. These appeals pertain to Assessment Years ["AY"] 2009-2010, 2010-2011, 2011-2012 and 2012-2013 and raise common questions. Consequently, we propose to take note of the questions which are proposed in ITA 1015/2018 and which are the following: -

"2.1 Whether Id. ITAT is legally justified in quashing the order of the CIT under section 263 of the Income Tax Act, 1961 by ignoring the fact that recorded by the CIT that the Assessing officer in his assessment order had allowed deduction under section 80IC without complying provision of section 80IA (7) read with section 80IC of the Act?

2.2 Whether the order of the AO allowing deduction under section 80IC in contravention to provision of section 80IA(7) read with section 80IC can legally be held as erroneous and prejudicial to the interest of revenue under section 263 of the Act?

2.3 Whether Id. ITAT is legally justified in allowing deduction under section 80IC even when the assessee had not filed mandatory



Tax Auditor's Report in Form 10CCB U/r 18BBB of the Income Tax Rule 1962 r.w.s. 80IA(7) and section 80IC

during the course of assessment proceedings, by ignoring that mandatory requirement under section 80IA(7) cannot legally be held as director requirement and by not considering the legal jurisprudence laid down by Hon'ble Apex Court that provisions of exemption is subject to strict interpretation?

2.4 Whether the Id. ITAT legally justified in allowing deduction U/s 80IC even when Assessee had not filed mandatory tax Auditor's Report in Form' 10CCB U/r 18BBB of the Rule r. w.s. 80IA(7) and section 80IC during assessment proceedings and without tax Report, quantum of deduction U/s 80IC could not be legally computed?

2.5 Whether the Id. ITAT is legally justified In deleting disallowance of Rs.4,31, 15,254/- U/s 80IC r.w.s. 80IA(8) by ignoring a finding of fact that even though both the units of the assessee were engaged in manufacturing of identical items, exempted unit had disclosed higher gross profit as compared to nonexempt unit and there was no credible and reliable evidence to prove earning of high gross profit by exempt unit?

2.6 Whether the Id. ITAT is legally justified in holding that royalty payment was revenue expenditure by not considering as per sub clause (b) of clause (ii) of Explanation below section 92B of the Income Tax Act 1961?"

2. We note that Questions 2.1 to 2.4 deal with a purported failure on the part of the assessee in submitting the Auditor's Report in Form 10CCB in accordance with Rule 18BBB of the Income Tax Rules, 1962 along with E-return of Income. It is however admitted before us that the said Form was placed before the Commissioner of Income Tax [**"CIT"**].

3. While examining the correctness of the view take by the Commissioner while exercising powers of revision, the Income Tax Appellate Tribunal [**"ITAT"**] had taken the following view:

"9. On a reading of the decision in Kewal Kishan. Clothing P. Ltd. (supra) we find that the facts are almost identical. In that case also form 10 CCB was not filed and the Assessing Officer allowed the claim made by the assessee for earlier nine years. While placing reliance on the decision of Hon'ble Gujarat High Court in Zenith Processing Mills (219 ITR 721), the Mumbai tribunal held that the Audit Report in prescribed form no.10CCB could be filed even if



revision jurisdiction is exercised by the CIT u/s 263 of the Act. Relevant portion of the decision of in Kewal Kishan Clothing (supra) is as follows:

Facts of the case were that while framing the assessment for the AY.1976-77 of the assessee- firm, the AD allowed the claim for deduction u/s. 80J of the Act, in respect of profit and loss arising from Its newly established undertaking. With effect from 01.04.1976, sub-section (6A) was inserted in section 80J, vide the Finance Act, 1975 which required the assessee to file audited report of an accountant, as defined by the explanation below sub section 2 of the section 288 of the Act, along with the return of income. The CIT, exercising his powers u/s.263, considered the allowance of deduction under section 80J, inter alia, along with the allowance of initial depreciation in so far as it is against the interests of the Revenue and issued notice to the assessee. While the assessee did not contest the notice under section 263 with respect to initial depreciation the assessee contested the withdrawal of relief under section 80J. According to the CIT, subsection (6A) of section 80J laid down the mandatory requirement that before a claim under section 80J was admissible for any assessment year, the assessee must have his accounts of the relevant previous year audited by an accountant and it must furnish along with his return of income the report of such audit in the prescribed form duly signed and verified by such accountant. According to the CIT, the assessee had not furnished the report of such audit in the prescribed form duly signed and verified by the accountant, the assessee was not entitled to relief under section 80J(emphasis supplied). The assessee claimed that furnishing the report of such audit in the prescribed form which is Form No. 100 under the rules read with rule 18C, was not mandatory but a directory provision and, therefore, when the question of disallowance on that ground is considered, the assessee could be permitted to furnish them. This contention did not find favour with the CIT and he directed that the AD should make the necessary amendment in the assessment order for the year 1976-77. When the matter travelled to the Hon'ble Court, it held as under:

“From a perusal of sub-section (6A), it is apparent that compliance with two things is necessary. The first requirement is that the statement of accounts for the previous year relevant to the assessment year for which deduction is claimed must have been audited by an accountant and the second part is that the assessee must furnish along with his return of income the report of such audit in the prescribed form duly signed and verified by



such accountant. It can be stated without fear of contradiction that the former is the requirement which furnishes substantial foundation for claiming allowance and the latter is the requirement of furnishing proof that foundation for claiming such deduction has been laid. In our opinion, while compliance with the former before the deduction is claimed is mandatory and so far as manner of submitting proof of such compliance of filing along with the return is concerned, is directory because such requirement falls in the realm of procedure for furnishing evidence in support of the claim and which can be furnished at the time while allowance or disallowance under section 80J is being considered by the concerned authority.

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In view of the aforesaid discussion, question No. referred to above is to be answered in the negative by holding that the provision of section 80J(6A) to the extent it requires furnished of the auditor's report in the prescribed form along with the return is directory in nature and not mandatory.

Coming to the first question, we are of the Opinion that as the provision of furnishing of the report in the prescribed form is held to be directory, the assessee can be permitted to produce such report at a later stage when the question for disallowance arises during the course of the proceedings in a given case, it will depend upon the facts and circumstances of each case and, therefore, the assessee may be permitted to produce such report, if it has not been produced earlier (emphasis supplied). The learned advocate for the Revenue vehemently contended on the basis of the observations made in Gujarat Oil and Allied Industries' case [1993] 201 ITR 325 (Guj) that the requirement of furnishing of auditors' report in the prescribed form has to be complied with before the assessment is completed and the assessee cannot claim deduction under section 80J by producing the report later on (emphasis supplied). We are unable to sustain his contention. In Gujarat Oil and Allied Industries' case [1993]201 ITR 325 (Guj), the "proof of the accounts being audited" was not furnished along with the return in support of the claim. However, during the course of the proceedings when the Income tax Officer was considering the claim, he disallowed the assessee's request for furnishing the auditors' report in the prescribed form at that stage and the claim was disallowed. It was in these circumstances, the



claim for disallowance was being considered by the Income tax Officer. The Income tax Officer had made it known, that he is not to allow deduction under section 80J unless a certificate is accompanied with the form and the assessee having known for no reasons for the said disallowance has promptly submitted report which was not submitted earlier. It is in these circumstances, that observations were made that a report should be made available to the Income tax Officer. We may notice that it has been held by this court with which we agree that the requirement of furnishing the auditors' report is In the realm of furnishing proof about the fact that accounts have been audited and substantial compliance with this provision has been held to be sufficient compliance. During the course of assessment, the assessee has furnished accounts stamped with the auditor's seal as noticed above which were treated by the assessee as well as the Assessing Officer to be sufficient compliance of giving proof of the fact that accounts have in fact been audited and on that basis the assessment was framed. It was only during the course of proceedings before the Commissioner of Income-tax under section 263 that the question was considered whether the document furnished by the assessee amounted to sufficient compliance of furnishing such proof or not and that having been negatived the occasion arose to furnish the proof which according to the Commissioner of Income-tax was wanting in declaration that the accounts have been duly audited which is required by sub-section (6A) of section 80J and if the assessee requires production of evidence before the allowance made by the Income tax Officer under section 80J was withdrawn. In our opinion, that would have been sufficient compliance with the requirement and the assessee ought not to have been visited with the disallowance or withdrawal of the allowance already made without affording opportunity to do so. It may be not that in a given case, the assessee's return having a claim of deduction under section 80J may be accepted by the Income tax Officer without holding an inquiry, though it may not have been accompanied with proof of accounts being audited in the manner prescribed. The question of furnishing proof of such audited accounts in the prescribed form at a later stage arises only when the matter is being actively considered for disallowance by the concerned authority. If the assessee does not offer to furnish proof even at the stage when it is pointed out to him that requirements of law are not fulfilled to sustain the claim made by him and he fails to fulfil the requirements of law at that stage, it can be said that the assessee had failed to rectify the defect at the



earliest opportunity offered to him.

It is an inherent part of section 143(3) that where the Assessing Officer is not inclined to accept the return submitted by the assessee and if he wants to modify the assessment from the return a show-cause notice is required to be given to the assessee. Giving of this opportunity will include opportunity to erase procedural defect, if any, which is directory in nature. If we examine the matter from that point of view we are satisfied that in the present case, the claim made by the assessee though not admissible for want of the auditor's report on record, yet the same was allowed under a mistake by the Assessing Officer leaving no opportunity to the assessee to complete the requirements. The condition of non-fulfilment of the requirement under sub-section(6A) was made known to the assessee during the proceedings under section 263 although the assessee asked for an opportunity to produce the auditor's report to fulfil the requirements under section 80J(6A), the Commissioner of Income-tax ought to have afforded an opportunity to the assessee to furnish that proof and then examined the admissibility of the claim in the light of the proof furnished.
"(emphasis supplied).

We also find that the basic issue as to how the order of the AO was erroneous and prejudicial to revenue has not been discussed by the CIT. It is also a fact, as stated earlier, that the issue of 80IB deduction was agitated by the assessee before the CIT. In these circumstances the CIT should not have issued notice 263 of the Act. Secondly, the CIT had totally ignored the fact that the AO had in earlier nine years allowed the claim made by the assessee. It is true that the rule of res judicata is not applicable to the income tax proceedings. But, the rule of consistency demands that without bringing distinguishing fact of the year under appeal with the facts of earlier years an opposite stand to the stand of earlier years should not be taken. The only difference noted is that in the year under appeal the assessee had not filed Audit Report before the AO. But the report was made available to the CIT and for disallowing the claim allowed in the earlier years he should have pin pointed the reasons for refusing it as to how same was different from the reports of earlier years. We have perused the cases relied upon by the DR. We find that those principles are not applicable to the facts of the case under consideration. Here, the basic issue is validity of 263 proceeding. An issue deliberated upon by the CIT partially or fully, is out of preview of proceedings to be initiated u/s.263 of the Act. In our opinion, the order of the CIT fails on



touchstone of the merger doctrine and therefore is not valid. We hold that the assessee is required to file audit reports, but filing it before the CIT would not disentitle it from, claiming the deduction. The purpose behind filing the report is that no fictitious claim is made and the activities of the assessee are certified by a professional. Deductions, including 80IB of the Act are considered to be benevolent provisions. It is a fact that no fault has been pointed out by the CIT about correctness of the report, while passing the revisionary order. His whole emphasis is on not filing it before the AO. Considering the purpose behind the legislation the Hon 'ble Courts have held that if the report is submitted at the time of active consideration of the claim it has to be taken as sufficient compliance of the provisions of the Act.

Respectfully following the judgments of Zenith Processing Mills(supra), we decide the effective ground of appeal in favour of the assessee.

10. Since the facts of these two cases are similar, while respectfully following the decision of the Mumbai tribunal in Kewal Kishan Clothing (supra) we hold that non-Submission of the form 10 CCB or the non-verification of the eligibility of the product to claim deduction under section 80 IC of the Act, in view of the fact that such a deduction was allowed for 5 years earlier, do not constitute valid grounds to exercise jurisdiction under section 263 of the Act. We therefore find it difficult to sustain the order dated 10/02/2013 passed under section 263 of the Act by the Commissioner of income tax, Delhi. We therefore allow the grounds of appeal in ITA No. 1742/del/2014.”

4. Before us, Mr. Menon, in the absence of instructions, was unable to point out whether the decision rendered by the ITAT, Mumbai on the exact same questions had been assailed or not.

5. However, and independent of the above, we find that here too the case of eligibility of the assessee who claimed deduction under Section 80IC of the Income Tax Act, 1961 [“Act”] had not been questioned in the preceding years. In view of the aforesaid, we find that the view ultimately taken by the ITAT does not give rise to any substantial question of law.

6. In ITA 223/2019, an additional question has been proposed



pertaining to whether the items of manufacture would fall in Schedule XIII and thus, within the ambit of the list of negatives items not eligible for deduction under Section 80IC of the Income Tax Act, 1961.

7. While dealing with this aspect, the ITAT has held as follows:

“18. On this aspect, we have gone through the record including the impugned order passed by the learned CIT(A). At page NO.100 and 101, there is audit report' of the Central Excise wherein in unequivocal term it is stated that at the unit at Parwanoo, the assessee has been manufacturing prepared glue and other adhesives, parts and accessories of motor vehicles parts, Anti freezing preparations and Deicing fluid falling under Chapter 35069999, 87089900, 38200000 of the 1 st schedule to the Central Excise Tariff Act, 1985. Nowhere this report reads that the assessee been manufacturing any product falling within the excise classification of 39.09 to 39.15 as per Schedule XIII to the Act nor any product of Excise Classification 32 was found to have been manufactured there. We have gone through the entries in the Chapter 35 and 87 and found that entry relating to Series 3506 deal with prepared glues and other prepared adhesive etc. whereas Series 8708 dealt with the parts and accessories of motor vehicles.

19. Learned CIT(A) after having exhaustively dealt with technical details covered by the learned AD in the light of the submissions made on behalf of the assessee coupled with CIPET report opined that inasmuch as CIPET is a highly technical organizations and its findings can never be disputed but the matter does not end there. He submitted that the CIPET dealt with only the chemical composition of the DGX or pillar filler but they could not and rightly did not enter into the aspect of the commercial nature of the products or its name with which it is known in the markets. learned CIT(A) noticed that the manufacturing at the Parwanoo unit has been subjected to excise and audit of accounts wherein products manufactured were found to be falling under the excise classification of 87.08 and 35.06 respectively.

20. learned CIT(A) followed the decision of the Hon'ble Apex Court in *Aspinwall and Co.Ltd. vs CIT*, 251 ITR323 (SC) wherein the Hon'ble Supreme Court observed that the assessee after plucking or receiving the raw coffee berries makes it undergo nine processes to give it the shape of coffee beans. The net product is absolutely different and separate from the input and the change made in the article results in a new and different article which is recognized in the trade as a new and distinct commodity. The



Hon'ble Apex court made the difference between the coffee beans and raw material from which it is manufactured on the basis of the processes the raw material has undergone and the usage of the final product.

21. In so far as this distinction is concerned, the report of CIPET does not throw any light. Learned AO made the report of CIPET the sole basis for his conclusion that the assessee has been manufacturing plastic product and failed to notice the elaborate which the raw materials have undergone to become the finished product which have only one usage i.e. in automobile industry and none else. It is not brought to our notice that these two products either pillar filler or the DGX are generic in their use as plastic or they could be put to use everywhere the plastic could be. The sole and single purpose of the finished goods in the automobile industry sets the raw material of plastic apart from the finished goods which are known as automobile parts in the commercial world. We do not find any perversity either in the approach or, in the conclusions reached by the learned CIT(A) after appreciating the same material which the learned AO made basis for his conclusion. Learned AO stopped at the chemical composition whereas learned CIT(A) took it a little further to its logical conclusion by identifying the products with their usage and their nomenclature in the world where they are made use of. The reasoning given by the learned CIT(A) is impeccable and we find ourselves in agreement with the same. Such findings of learned CIT(A) do not warrant any interference. We uphold the findings of learned CIT(A) and dismiss the ground of appeal relating to this aspect in ITA No 681/Del/2017 and ITA numbers 2496 and 1952/Del.2016 and ITA No. 5198/Del/2017.”

8. We find no justification to interfere with the aforesaid findings of fact.

9. Although in ITA 1015/2018 two additional questions, namely, 2.5 and 2.6 and pertaining to Section 80IA(8) of the Act are also proposed, they clearly do not arise from the order of the ITAT pertaining to that year since the question of Section 80IA(8) of the Act appears to have arisen only after the remit for the consideration by the CIT and the subsequent orders of assessment which were framed.

10. In any case, the questions emanating from Section 80IA(8) of the Act arose out of the cross-objections which were filed by the



assessee and we thus find no justification to interfere with the same at the behest of the appellant herein.

11. That only leaves the issue of royalty and whether it was liable to be viewed as a revenue expenditure, we note that the aforesaid questions stand answered against the appellant by the Court while rendering judgment in ITA 195/2013.

12. The appeals consequently fail and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINdra KUMAR KAURAV, J.

APRIL 29, 2024/p