IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

INCOME TAX APPEAL No.958 of 2008 (O&M)
DATE OF DECISION: 02.09.2016

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

2. INCOME TAX APPEAL No.700 of 2009 (O&M)

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

3. INCOME TAX APPEAL No.701 of 2009 (O&M)

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

4. INCOME TAX APPEAL No.714 of 2009 (O&M)

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

5. INCOME TAX APPEAL No.11 of 2012 (O&M)

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

6. INCOME TAX APPEAL No.340 of 2013 (O&M)

The Commissioner of Income-tax, Panchkula

…..Appellant

versus

M/s Micro Instruments Company

.....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Yogesh Putney, Advocate for the appellant

Mr. Salil Kapoor, Advocate,
Mr. Sumit Lalchandani, Advocate and
Mr. Ananya Kapoor, Advocate for the respondents
..

S.J. VAZIFDAR, CHIEF JUSTICE:

Appeal Nos.958 of 2008, 700 of 2009 and 701 of 2009, pertain to the assessment years 2003-04, 2005-06 and 2004-05, respectively. We have held that the tax effect of each of these three appeals being less than Rs.20 lacs, they are liable to be dismissed in view of Circular No.21 dated 10.12.2015 issued by the Central Board of Direct Taxes. Despite the same it is necessary to deal with the facts and the proceedings in ITA No. 958 of 2008 which pertain to the assessment year 2003-04 as the orders passed by the authorities i.e. the Assessing Officer, CIT (Appeals) and the Income Tax Appellate Tribunal for the subsequent assessment years are based on their respective orders passed in respect of the proceedings pertaining to the assessment year 2003-04. ITA Nos.714 of 2009, 11 of 2012 and 340 of 2013 are in respect of the assessment years 2006-07, 2008-09 and 2009-10,

respectively. The tax effect in these three appeals is higher than the amount stipulated in Circular No.21 of 2015.

2. Each of the appeals has been admitted on the same questions of law. We will, however, refer to the facts and the proceedings relating to ITA No.958 of 2008 which is in respect of assessment year 2003-04 as it is on the basis of the orders passed in respect of this assessment year that the orders have been passed by the authorities in respect of the subsequent years.

3. ITA No.958 of 2008 pertaining to the assessment year 2003-04 is an appeal against the order of the Income Tax Appellate Tribunal setting aside the order of the Commissioner of Income Tax (Appeals) [for short, CIT (A)] affirming the order of the Assessing Officer on the issues under consideration. According to the appellant, the following substantial questions of law arise:-

> "1. Whether the Ld. ITAT was right in holding that deduction u/s 80-IB of R.16,22,661/- in respect of Unit-II was admissible notwithstanding that the conditions laid down u/s 80-IB are not satisfied and no deduction has been claimed in A.Y. 2000-01 the initial assessment year.
>
> 2. Whether the Ld. ITAT was right in deleting the addition made u/s 145(3) at Rs.14,75,940/- by ignoring the facts that invoking of provisions u/s 145(3) were valid as the assessee did not maintain inventory of opening and closing stock and stock register without which it is not possible to determine the correct income of the assessee for the year."

The appeal raises the substantial questions to the above effect but are modified as under:-

1. Whether the Ld. ITAT was right in holding that the assessee was entitled to the deduction u/s

80-IB of R.16,22,661/- in respect of Unit No.II.

2. Whether the Ld. ITAT was right in deleting the addition made u/s 145(3) at Rs.14,75,940/-?

The contentions raised in the questions framed by the appellant in the appeal will be considered while dealing with the questions reframed by us.

4. The respondent/assessees filed a return declaring an income of Rs.86,21,400/- which was processed under Section 143(1) of the Income Tax Act, 1961. The assessees claimed a deduction of Rs.16,22,661/-. under Section 80-IB in respect of a new unit viz. Unit No.II. The assessee's trading account as per their profit and loss account showed a gross profit of about Rs.2.80 crores on total sales of about Rs.9.83 crores yielding a gross profit rate of 28.50%. The Assessing Officer rejected the books of account under Section 145(3) and computed the gross profit by applying a G.P. rate of 30% on the total sales of about Rs.9.83 crores. The gross profit so computed amounted to about Rs.2.94 crores resulting in an addition of about Rs.14.76 crores. The Assessing Officer completed the assessment by making the said addition of Rs.16,22,661/- after refusing the deduction under Section 80-IB and Rs.14,75,940/- on account of the trading results.

Re: Question 1:

5. The relevant part of Section 80-IB, as it stood at the relevant time, read as under:-

"80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings

(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-section(3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:-

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence.

….. ….. ….. …..

(ii) It is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

….. ….. ….. …..

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power or employs twenty or more workers in a manufacturing process carried on without the aid of power.

(3) The amount of deduction in the case of an industrial undertaking shall be twenty-five percent (or thirty per cent where the assessee is a company), of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) beginning with the initial assessment year subject to the fulfillment of the following conditions, namely:-

(i) it begins to manufacture or produce, articles or things or to operate such plant or plants at any time during the period beginning from the 1st day of April, 1991 and ending on the 31st day of march, 1995 or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular undertaking;

(ii) where it is an industrial undertaking being a small scale industrial undertaking, it begins to manufacture or produce articles or things or to operate its cold storage plant not specified in sub-section (4) or sub-section (5) at any time during the period beginning on the 1st day of

April, 1995 and ending on the 31st day of March, 2002.

….. ….. ….. …..

(14) For the purposes of this Section,-

….. ….. ….. …..

(c) "initial assessment year"-

(i) in the case of an industrial undertaking or cold storage plant or ship or hotel, means the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the cold chain facility or the ship is first brought into use or the business of the hotel starts functioning;"

6.(A) The Assessing Officer came to the conclusion that the assessees were not entitled to the deduction under Section 80-IB for the following reasons:-

"(a) No separate books of accounts have been maintained.

(b) The workers/employees are common in respect of Unit I and Unit II there is no demarcation of employees/workers as per Attendance Register Produced

(c) Job work charges of Rs.78,09,320/- has been claimed, its unit-wise bifurcation has been give (sic) as under:-

As per unit-wise P&L a/c filed			As per job-work lodger produced		
Unit-I	Unit-II	Total	Unit-I	Unit-II	Total
1866580	5942740	7809320	3866580	3942740	7809320

This shows the manipulation of job-work charges. Job work charges amounting to Rs.23,65,462/- to M/s Micro Motion Pvt. Ltd. (sister concern) is an attempt to evade the tax.

(d) There is no power connection in unit-II.

(e) Bank accounts of Unit-I & Unit-II is same.

(f) Telephone connections/numbers are common.

It is splitting up or re-construction of business already in existence. As such deduction u/s 80IB is not admissible in respect of Unit-II as claimed and the same is hereby rejected."

The Assessing Officer held that the manufacturing activities carried out in Unit-II, which the assessees claim

was a new unit for the purpose of Section 80-IB, was nothing but an extension of the business of the assessee's industrial undertaking being Unit-I already in existence. Unit-I was in existence from the year 1989 and Unit-II came into existence in March, 2000. It is necessary to note the Assessing Officer's observations that preceded these conclusions in the assessment order. They are as follows:

No separate trading account or profit & loss account had been filed. The assessee, in reply to the Assessing Officer's letter calling upon them to furnish information, stated that they were manufacturing electric motors (2-Pole) and electric fans in Unit-I and electric motors (4-Pole) inlet and outlet valves in Unit-II. The assessee also stated that its claim under Section 80-IB had been discussed by the Assessing Officer in the earlier assessment proceedings and had been allowed. The assessee further stated that the law did not mandate separate trading and profit & loss accounts being kept. It is important to note that the assessment order referred to the report prepared by the Inspector of the office of the Assessing Officer who was deputed to make a spot enquiry in respect of the assessee's claim for deduction under Section 80-IB. As recorded in the assessment order, the Inspector reported as under:-

> "(i) The premises of unit-1 & 2 is the same i.e. 8, Industrial Area, Ambala Cantt. However the unit-2 is working in two halls constructed separately on the same plot.
>
> (ii) Administrative block for both the unit is same.
>
> (iii) Partners of both the units are same.

(iv) No separate register for wages/salary had been maintained for the accounting year 2002-03 relevant to A.Y. 2003-04, in respect of Unit-I & Unit-II. The wages have been debited in the percentage of turnover/sale basis.

(v) There is no power connection- two generators have been installed but the storage tank of diesel is one. The consumption of diesel is debited in %age of raw material consumed. There is one godown for raw materials.

(vi) Bank account of both the unit is one."

From the assessment order, it is not clear as to which part is a reference to the Inspector's report and which part is the finding of the Assessing Officer. Be that as it may, we will deal with what is stated in the assessment order for, in any event, the Inspector's report was relied upon by the Assessing Officer.

(B) The CIT (A) upheld the Assessing Officer's rejection of the assessee's claim for deduction under Section 80-IB on the ground that the business complex was one. There was no separate power connection. There was no separate sales-tax number/licence. There were common purchases, a common store, common diesel consumption, common employees, common job-work charges, and the product manufactured was electric motors. There was no addition in the machinery of Unit No.2 and Unit No.2 was not distinct from Unit No.1 and did not function independently. The CIT(A) held that this amounted to splitting up and restructuring of business already in existence. The finding that there were common employees was in view of the fact that there was no demarcation of the employees of the said Unit-I and Unit-II.

7. The Tribunal, however, set aside the order of the CIT(A) and held that the assessees were entitled to the

deduction under Section 80-IB. This was on the ground that the assessee's claim for this deduction was allowed for the previous assessment years being Assessment Years 2001-02 and 2002-03. The same has not been withdrawn. The revenue did not deny the same. The Tribunal, therefore, held that the claim for deduction stood admitted in the initial assessment years and that there was, therefore, no justification to deny the same for the year in question, namely, 2003-04. This was especially in view of the fact that the assessment for the earlier years was made under Section 143(3) where it was found that the assessees had fulfilled all the conditions necessary for the grant of the deduction under Section 80-IB. The Tribunal held that it was thereafter not open for the Assessing Officer to re-examine the issue all over again and to come to a different conclusion in a subsequent year without justifying such departure. The Tribunal further held that the onus was, therefore, on the revenue which the revenue had not discharged and that there was no discussion in this regard in the assessment order or in the order of the CIT(A) despite the contention having been raised by the assessee.

8. Mr. Kapoor at the outset contended, on behalf of the assessee, that the deduction under Section 80-IB having been allowed to the assessee for the Assessment Year 2001-02 under Section 143(3), the same ought to have been allowed in subsequent years. The issue, as Mr. Kapoor's submission itself suggests, is the effect of the assessee having been allowed the deduction in the previous assessment year.

This, therefore, was a general submission which applied to the entire matter relating to the assessees' claim

for the deduction under Section 80-IB. We will deal with this submission first and then deal with each of the grounds on the basis of which the Assessing Officer and the CIT (A) rejected the assessee's claim for a deduction under Section 80-IB.

9. Sub-section (1) of Section 80-IB entitles an assessee to a deduction for a specified number of years. Sub-section (2) provides that the section applies to an industrial undertaking that fulfills all the conditions enumerated therein. The deduction is, therefore, for each of the years. It follows, therefore, that the conditions stipulated in the section must be fulfilled or remain fulfilled for each of those years. A view to the contrary would render the section meaningless and confer a benefit upon an assessee which the legislature could never have intended.

10. Take for instance, a case where an assessee forms a new undertaking without splitting up or reconstructing one already in existence. It must for each of the years for which the deduction is claimed and not merely for the year of formation be so formed to be eligible for the deduction. If it were not so, the entire purpose of Section 80-IB would be defeated rendering it nugatory. The assessee would be able to form the new undertaking in accordance with the section and from the very next financial year avoid the condition by splitting up its existing undertaking by taking it into the new undertaking such that the split up portion of the existing undertaking is far in excess in its productive capacity than the new undertaking even as it was initially formed. The profits from the "new undertaking" would then be attributable

also to the assets of the existing undertaking which is precisely what the legislature intended avoiding.

Let us take another illustration. An assessee could have, in the initial assessment year, employed the number of workers stipulated in sub-section (2)(iv) or more and in the subsequent year discharged them and availed the services of the workers engaged earlier in the existing undertaking. This would defeat the entire purpose of Section 80-IB which is to encourage setting up new undertakings which in turn would generate further employment.

Further still, an assessee would be entitled then, in the subsequent years, to dispose of the new plant and machinery and use the plant and machinery already in use by an existing undertaking.

11. In our view, therefore, an assessee must fulfill each of the conditions stipulated in Section 80-IB in each of the years in which the deduction thereunder is sought. The Assessing Officer would be entitled to ascertain in each of the assessment years whether or not the conditions of Section 80-IB remained fulfilled. In other words, even where an assessee is found to have fulfilled all the conditions of Section 80-IB in the initial assessment year and has on account thereof been granted the deduction thereunder, an Assessing Officer assessing the assessee's income in subsequent years would be entitled to ascertain whether in that assessment year the conditions in Section 80-IB remained fulfilled or not. If not, he is bound to deny the deduction.

12. However, while undertaking this exercise, the Assessing Officer is not entitled to reopen an issue that had been decided in respect of a previous assessment year. In other words, an Assessing Officer is not entitled to question the validity of the grant of a deduction under Section 80-IB in a previous assessment year on any ground. The Assessing Officer would not be entitled to say that a particular condition was not fulfilled in an earlier assessment year if the assessee had been granted the deduction in that year. The Assessing Officer, therefore, cannot deny a deduction in the assessment year in question before him on the ground that the assessee had failed to fulfill a condition precedent to the grant of a deduction in another assessment year. That would amount to an Assessing Officer reopening an assessment in respect of another assessment year without following the provisions of the Act.

13. Mr. Putney relied upon a judgment of the Gujarat High Court in Commissioner of Income Tax, Gujarat-I vs. Satellite Engineering Ltd.,[1978] 113 ITR 208 (GUJ) wherein Section 84(2)(ii) read with the explanation to sub-section (3) of the Income Tax Act, 1961, as it then stood, fell for consideration. Section 84, as it stood at the time relevant to the case, provided that income tax shall not be payable on so much of the profits and gains derived inter alia from any industrial undertaking to which the section applies as did not exceed 6 per cent per annum on the capital employed in such undertaking or business. Sub-section (2) in so far as it is relevant for the purpose of our judgment read as under:-

> "84. Income of newly established industrial undertakings or hotels.-

….. ….. ….. …..

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:- …

(ii) It is not formed by the transfer to a new business of a building, machinery or plant previously used for any purpose."

It was firstly contended that the taxing authority was required to determine whether in the year of its formation i.e. coming into existence by incorporation or otherwise the newly established industrial undertaking satisfied the conditions stipulated in Section 84. Alternatively, it was contended that the latest point of time, by reference to which the applicability could be ascertained, was the date of commencement of manufacture or production by such an undertaking. It was submitted then that if the condition prescribed in the section was satisfied either in the year of formation or latest in the year of commencement of the manufacture or production by the new undertaking then the tax holiday would be available in the assessment year relevant to the previous year in which the manufacture started and in the immediately four succeeding years. If, however, the condition was not satisfied in either of these years, the benefit would not be available even if conditions were satisfied in the subsequent years. The Division Bench rejected the contention that the year of formation of the undertaking was relevant. The Division Bench held that in relation to a new industrial undertaking the section is firstly attracted in the assessment year relevant to the previous year in which the undertaking began to manufacture or produce articles.

The Division Bench then held:-

" ….. ….. ……. ….. …..

The alternative submission, in our opinion, proceeds upon an assumption which is not warranted by the language of the relevant statutory provisions. As explained earlier, the scheme of the statute is to make available the benefit of tax holiday for a period of consecutive years, the commencement point of such period being the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles. According to this scheme, there are two limitations on the claim of a new industrial undertaking to the benefit of tax holiday: first, that the benefit will be available for a total period of five consecutive years only and, secondly, that the starting point of such period would be the year in which the manufacture or production of the article begins. We find nothing in the language of the relevant statutory provisions which, however, imposes a further limitation, namely, that if the condition laid down in section 84(2)(ii) is not satisfied in the very year of commencement of manufacture or production, the benefit of tax holiday will not be available, even if such condition is satisfied in the course of any of the subsequent four years. It cannot be overlooked in this connection that the profits and gains derived from business are assessable in each assessment year. Therefore, in each assessment year falling within the five-year period, the question will arise whether the new industrial undertaking, which claims the benefit of tax holiday, satisfies the conditions laid down in clause (ii) of sub-section (2). In other words, according to the legislative scheme, it is apparent that in each assessment year commencing from the assessment year relevant to the previous year in which such new industrial undertaking begins manufacture or production the taxing authority will have to consider whether the industrial undertaking was formed by the transfer to its new business of building, machinery or plant previously used for any purpose, and, if so, whether the total value of such transferred asset exceeded 20% of the total value of the building, machinery or plant used in the business of such undertaking during the relevant year. If the new industrial undertaking, which has not satisfied such test in any one of the earlier assessment years comprised in the five-year period, acquires new building, machinery or plant during any one of the succeeding assessment years and as a result of such acquisition the condition prescribed in clause (ii) of subsection (2) is fulfilled, then, as from the assessment year in which such condition is satisfied,

the benefit of tax holiday will be available to it for the remaining period of the five-year term. This appears to us to be the only reasonable construction possible having regard to the plain words of the statutory enactment.

The view which we are inclined to take as aforesaid on the plain language of the statute is supported also by the object behind the enactment and avoids the frustration of such object. We have already adverted to the object of the enactment, namely, to encourage the setting up of new industrial undertakings in which there is substantial investment of fresh capital. The legislature could not have intended that the outlay of substantial capital for the purpose of new machinery, plant or building should necessarily be in the very first year of the commencement of manufacture or production. In fact, there are many industrial units which add to their building, machinery or plant as the business grows and more capital becomes available. If the construction for which the revenue contends were accepted, such industrial units would be denied the benefit of tax holiday, even though they are still going through the teething trouble and are still in their infancy. Such a construction would totally nullify the object of the enactment. A converse case than the one illustrated above would, however, still clearly show how the construction for which the revenue contends will lead to a manifest contradiction of the apparent purpose of the enactment. Take the case of an industrial undertaking which in the year in which it undertakes or begins manufacture or production, satisfies the condition enacted in section 84(2)(ii) read with the Explanation but in the immediately succeeding year adds to its manufacturing unit building, machinery or plant which has been previously used and thereby varies the ratio of the new and old assets. If the only point of time at which the condition as to the applicability of the relevant provisions has to be satisfied is when the new undertaking starts the manufacturing activity, such an industrial undertaking which subsequently adds used assets to its new business will continue to have the tax holiday for the full period of five years even though it has in fact and reality ceased to be a new industrial undertaking. Could it ever have been intended by the legislature that the benefit of tax holiday should still be available to such an industrial undertaking in all the subsequent years even though the essential condition for earning the tax holiday is not satisfied in those assessment years? It is well settled that even if the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the

> apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentences (See Tirath Singh v. Bachittar Singh, AIR 1955 SC 830). This is not a case where the meaning of the word is to be modified or the structure of the sentence is to be changed to achieve the legislative object. At the highest, this is a case where the language employed by the legislature might be capable of bearing more than one construction and, in such a case, in arriving at the true meaning, regard must be had to the fact that such construction is not adopted which defeats the very purpose for which the enactment was made. In our opinion, therefore, even the alternative submission made on behalf of the revenue must be rejected."
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> (emphasis supplied)

We are in respectful agreement with the observations of the Division Bench. The converse case discussed in the judgment especially supports the view taken by us.

14. Mr. Kapoor, on the other hand, in support of his contentions, relied upon the judgment of another Division Bench of the Gujarat High in the case of Saurashtra Cement & Chemical Industries Ltd. vs. Commissioner of Income Tax, [1980] 123 ITR 669 (GUJ). The appellant was granted relief under section 80J for the assessment year 1968-69. The issue was whether the relief should be continued for the subsequent year. The Division Bench held:-

> " The ITO disallowed the assessee's claim as in his opinion the expansion of cement manufacturing unit did not amount to setting up a new industrial undertaking, inasmuch as the activities of the expanded part of the unit as well as those of the original units were much interconnected. He, therefore, held that the assessee could not be said to have set up a separate unit from the existing one. He also disallowed the claim on the ground that no separate books of accounts were maintained for the business activities pertaining to the expanded unit and, therefore, it could not be precisely ascertained as to how much capital had been invested in the expanded unit.
>
> ….. ….. ….. …..

6. This takes us to the questions referred to us in IT Reference No. 239 of 1975 at the instance of the revenue. We do not find any justifying reasons to interfere with the order of the Tribunal so far as both these questions are concerned. The Tribunal was perfectly justified in taking the view that if the relief of tax holiday was granted to the assessee-company for the asst. yr. 1968-69, the assessee was entitled to continuance of that relief for the subsequent four years and the ITO would not be justified in refusing to continue the allowance for the assessment year under reference, i.e., 1969-70, without disturbing the relief for the initial year. At this stage, it should be noted that for purposes of entitlement to the relief under s. 80J, which is corresponding to s. 15C of the 1922 Act, an industrial unit claiming such relief must be new, in the sense, that new plants and machineries are erected for producing either the same commodities or some distinct commodities (vide Textile Machinery Corporation Ltd. v. CIT, [1977] 107 ITR 195 (SC): TC25R.490 and CIT v. Indian Aluminium Co. Ltd., [1977] 108 ITR 367 (SC): TC25R.547. It should be emphasised that it was common ground between the parties that the assessee-company has increased the capacity of its cement manufacturing plant from 600 tonnes per day to 1,600 tonnes, per day by setting up new machinery and plant necessary for that purpose. In our opinion, the Tribunal was right when it expressed its view that the question involved was not a question whether there would be no bar to the view which the ITO has taken on the principle of res judicata. The next question to which the Tribunal addressed itself, and in our opinion rightly, was whether the ITO was justified in refusing to continue the relief of tax holiday granted to the assessee-company for the asst. yr. 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80J similar to the one which we find in the case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the initial year of assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted. The learned advocate for the revenue, invited our attention to certain observations made by this court in CIT v. Satellite Engineering Ltd., [1978] 113 ITR 208 (Guj): TC25R.635, where the court was concerned with the question, whether an industrial undertaking which did not satisfy the prescribed conditions so as to entitle itself to the relief under s. 80J in the initial year can successfully claim the relief, if the prescribed conditions are satisfied in the subsequent years. We do not think that this decision of this court in Satellite Engineering Ltd.'s case (supra)

> can be of any assistance to the cause of the revenue, because the question with which this court was concerned in that case was altogether a different one in the context in which the Division Bench was speaking. It should be understood that this is subject to the right of the ITO to adjust the relief by fixing the quantum having regard to the respective capital employed in the new undertaking in the year with which he is concerned. In that view of the matter, therefore, the Tribunal was perfectly justified in taking the view as it did and we answer question No. 1, in the affirmative, that is, against the revenue and in favour of the assessee."

15. There is no inconsistency between the two judgments. As we held earlier, an assessee would be entitled to a deduction under Section 80-IB only if it fulfills all the conditions in each of the years in which it is sought. The Assessing Officer would, therefore, be entitled to be satisfied that the assessee has fulfilled all the conditions in the assessment year which is the subject matter of the assessment proceedings before him. He would be entitled, therefore, to raise queries and seek information to ascertain whether the assessee fulfilled all the conditions prescribed in Section 80-IB in the assessment year in question. In doing so, he cannot disturb an assessment order passed in respect of the previous assessment year. It is in this respect that the Division Bench in Saurashtra Cement & Chemical Industries Ltd. vs. Commissioner of Income Tax (supra) observed that the ITO would not be justified in refusing to continue the allowance for the assessment year under reference without disturbing the relief for the initial year. The Assessing Officer cannot, for instance, refuse a deduction in respect of the assessment year in question before him on the ground that the assessee was wrongly granted a deduction under the section in a previous assessment year. He can, however, refuse a deduction for non-compliance with the provisions of the section in respect of

the assessment year being dealt with by him. That is why the Division Bench observed:

> " ….. ….. ….. ….. ..
> But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted.
> ….. ….. ….. …..
> It should be understood that this is subject to the right of the ITO to adjust the relief by fixing the quantum having regard to the respective capital employed in the new undertaking in the year with which he is concerned. In that view of the matter, therefore, the Tribunal was perfectly justified in taking the view as it did and we answer question No. 1, in the affirmative, that is, against the revenue and in favour of the assessee."

The Division Bench also proceeded on the basis that there was no provision in the scheme of Section 80J similar to the one found in the case of a development rebate which could be withdrawn in the subsequent year for breach of certain conditions. Whether that observation is correct or not is irrelevant. What is important is that the Division Bench was of the view that Section 80J does not have a provision by which the benefit thereunder once given can be withdrawn in a subsequent year for breach of certain conditions. The case would then be clearly distinguishable from the one before us for, as we observed earlier, an assessee would be entitled to a deduction in the year subsequent to the initial assessment year only if it fulfills/continues to fulfill the conditions stipulated in Section 80-IB. If it fails to do so in any particular assessment year, it would not be entitled to the rebate. Thus, in any event, the judgment is distinguishable.

16. A Division Bench of the Kerala High Court in Commissioner of Income Tax vs. Seeyan Plywoods, [1991] 190 ITR 564 concurred with the decisions of the Gujarat High Court in

Satellite Engineering Limited, [1978] 113 ITR 208 (GUJ) and CIT vs. Suessin Textile Bearing Ltd., [1982] 135 ITR 443 and disagreed with the decision of the Karnataka High Court in CIT vs. Nippon Electronics (India) Pvt. Ltd, [1990] 181 ITR 518.

17. A Division Bench of the Bombay High Court, in Commissioner of Income-Tax v. Paul Brothers, [1995] 216 ITR 548, observed:-

> "Either in section 80HH or in section 80J, there is no provision for withdrawal of special deduction for the subsequent years for breach of certain conditions. Hence unless the relief granted for the assessment year 1980-81 was withdrawn, the Income-tax Officer could not have withheld the relief for the subsequent years. [See Gujarat High Court decision in the case of Saurashtra Cement and Chemical Industries Ltd. v. CIT [1980] 123 ITR 669]."

We are with respect unable to agree with this view assuming that it applies to cases under Section 80-IB. We express no opinion in so far as it is in the context of the provisions dealt with therein. Merely because the relief granted for a previous assessment year is not withdrawn, it does not follow that the assessee is entitled to the relief for the subsequent years even if during the subsequent years the assessee fails to comply with the provisions of Section 80-IB or a condition precedent to a claim for deduction under Section 80-IB ceases to exist in the subsequent years for any reason.

18. Before dealing with the grounds on which the deduction was denied by the Assessing Officer and the CIT (Appeals), it would be convenient to deal with Mr. Kapoor's contention that ITA Nos.958 of 2008, 700 of 2009 and 701 of 2009 ought not to be entertained on the ground that the tax effect is less than the amount prescribed in Circular

No.21/2015. The circular, which is dated 10.12.2015, contains a revision of the monetary limits for filing appeals by the department before the Tribunal, the High Court and the Special Leave Petition before the Supreme Court. Paragraph-3 provides that appeals shall not be filed before the High Court where the tax effect does not exceed Rs.20 lakhs. The tax effect in respect of these three appeals, namely, ITA Nos.958 of 2008, 700 of 2009 and 701 of 2009 does not exceed Rs.20 lakhs. Paragraphs 5 and 10 of the circular, relied upon by Mr. Kapoor, read as under:-

> "5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/ judgement involves more than one assessee, each assessee shall be dealt with separately.
>
> …… ……. ……. ……
>
> 10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed."

19. The circular firstly applies retrospectively even to the pending appeals. It, therefore, applies to these three appeals. Although the disputed issues arise in more than one assessment year, in view of Paragraph-5 of the circular, the appeals could be filed only in respect of such assessment years in which the tax effect in respect of the disputed issue exceeds Rs.20 lakhs. As per paragraph-10 pending appeals below the specified tax limit are to be withdrawn. Further, separate orders for each assessment year have been passed in the present case. Moreover, in view of the submissions advanced by Mr. Putney himself, each assessment year is a separate year and, in view of what we have held, the entitlement to the deduction would depend upon the facts and circumstances obtaining in a given year. Thus, whereas an assessee may be entitled to a deduction in respect of one or more years, he may not be entitled to the deduction for another year or other years. Further, the composite order referred to in paragraph-5 is of another High Court or appellate authority. Although the issue of law is common in respect of each of the assessment years, the issues of fact are not.

20. Mr. Putney, on the other hand, relied upon the following observations in the judgment of the Supreme Court in the case of Commissioner of Income-tax vs. Surya Herbal Ltd., [2013] 350 ITR 300 (SC):-

> "Liberty is given to the Department to move the High Court pointing out that the Circular dated February 9, 2011, should not be applied ipso facto particularly, when the matter has a cascading effect. There are cases under the Income-tax Act, 1961, in which a common principle may be involved in subsequent group of matters or a large number of matters. In our view, in such cases if attention of the High Court is drawn the High Court will not

> apply the Circular ipso facto. For that purpose, liberty is granted to the Department to move the High Court in two weeks.
>
> The special leave petition is, accordingly, disposed of."

21. The judgment would have no application for more than one reason. In the cases before us the matter in one year, namely, the assessment year 2003-04 does not have a cascading effect on the subsequent years. At the cost of repetition, the application for deduction would have to be determined in view of the facts and circumstances obtaining in each of the assessment years in which the deduction is sought. The decision in respect of one assessment year, therefore, does not necessarily effect the decision in the next.

22. Appeal Nos.958 of 2008, 700 of 2009 and 701 of 2009 are, therefore, dismissed in view of the Circular No.21/2015.

23. This brings us back to the other appeals. Although ITA No.958 of 2008 is dismissed in view of Circular No.21/2015, we will refer to the facts in that case for it is based on the decisions in respect of the assessment year 2003-04 that the authorities passed the orders in the subsequent years.

24. We will first deal with the Assessing Officer and the CIT(A)'s decision to disallow the deduction on the ground that the assessee had not maintained separate books of account.

25. The assessment order for the earlier assessment year i.e. Assessment Year 2001-02 was under Section 143(3). That assessment order records that Unit-II had started commercial

production in March, 2000, i.e., eleven years after Unit-I came into existence. The order further refers to the audit report filed by the assessee with the return in Form 10-CCB and that on verification it had been noticed that no separate books of account for Unit-II had been maintained and that the net profit of Unit-II had been arrived at on pro-rata basis in view of its net sales as compared to the net sales of Unit-I. What follows in the assessment order on this issue is important. Paragraph-3 of the assessment order reads as under:-

> "3. In response to query on the subject, the assessee submitted that this is the first year of full operation of Unit-II, as such inadvertently separate books of accounts have not been maintained. The assessee further submitted that section 80 IB of the Income-tax Act, 1961 does not envisage any such requirement for maintaining separate books of accounts. In support, the assessee relied upon various case laws in this regard. In view of the fact that Unit-II of the assessee firm has been registered with the Sales Tax Department, Haryana as an independent Unit as "Expansion Unit-II, Micro Instruments Co. Ambala Cantt" with separate registration No. and as per the rules of the Central Excise and Customs Department to the effect that no separate registration is required if a new Unit is set-up in the existing premises, the claim of deduction of the assessee u/s 80 IB for the Unit-II is considered."

26. Mr. Putney submitted that the Assessing Officer has not applied his mind to this aspect and that this was not a reasoned order. He submitted, therefore, that the Assessing Officer was, for the assessment year in question, entitled to go into this aspect even in respect of the previous assessment years. We do not agree.

27. Paragraphs 2 and 3 read together make it clear that the Assessing Officer had applied his mind to the very issues that are sought to be raised in the present proceedings. That the Assessing Officer had applied his mind before passing the

assessment order for the year 2001-02 is clear from the queries raised by him and the assessee's answers thereto. A separate compilation of the same was handed over by Mr. Salil Kapoor. For instance, the assessee's Chartered Accountants, by their letter in reply to the Assessing Officer's queries raised on 11.12.2003, stated as under:-

> "Your Honour has raised the objection that no separate accounts for the new Industrial undertaking has been maintained. We wish to submit that this is first year of full operation of Unit-II as such inadvertently assessee has not maintained the separate books of accounts. However, from next year onward separate books of account are maintained. However, assessee firm is fulfilling all the conditions of section 80-IB as stated above.
>
> Further, we wish to submit that section 80-IB does not envisage any such requirement for maintaining separate books of accounts. We have worked out the profit of new unit from the books of accounts produced before your honour and calculation have already been enclosed in the return filed by us. There is no infirmity in the working of the profit of new unit. Our claim is being supported in the following decided cases:"

This letter is not dated but as the opening paragraph indicates it was in continuation of an earlier submission contained in a letter dated 22.12.2003 which in turn stated that it was in respect of the information sought by the Assessing Officer on 11.12.2003.

28. The issue regarding the assessee not having kept separate books of account in respect of the two units was, therefore, specifically raised by the Assessing Officer and was specifically answered by the assessee. Further, as is evident from paragraph-3 of the assessment order set out earlier, the assessment order itself expressly referred to and dealt with this aspect. The assessment order specifically referred to the assessee's reply and dealt with the issue of the assessee not having kept separate books of account for the

two units. It was only thereafter that the Assessing Officer passed the assessment order where, in paragraph-3, he made the observations we set out earlier. The Assessing Officer noted and accepted the assessee's explanation that they had not done so only inadvertently as it was the first year that Unit-II was in full operation. The Assessing Officer also noted the assessee's contention that the law, in any event, did not require them to maintain separate books of account and that the assessees had relied upon authorities in this regard. The Assessing Officer also recorded that in respect of Unit-II, the assessees had been registered with the Sales Tax Department, Haryana as an independent unit with a separate registration number as well as as per the rules of the Central Excise & Customs Department to the effect that no separate registration is required if a new unit is set up in the existing premises. The claim for deduction was, therefore, considered, to wit, was allowed. There can be no doubt, therefore, that the Assessing Officer was conscious of this issue and had dealt with the same after taking into consideration the assessee's response in respect thereof.

29. Even as a matter of law, keeping separate books of account is not a condition precedent to a claim for a deduction under Section 80-IB. There was no statutory provision making it mandatory for an assessee to maintain separate books of account. That it may be easier for an assessee to establish a claim for deduction under Section 80-IB in the event of separate books of account being maintained is another matter altogether. That is a question of evidence and not a legal obligation.

30. Section 80-IB itself does not expressly require an assessee to maintain separate books of account to maintain a claim for a deduction thereunder. Nor do we find anything in the section that implies such a requirement. So long as an assessee fulfills all the conditions stipulated in sub-section (2), the section would be applicable. These conditions do not require an assessee to maintain separate books of account in respect of the new undertaking. Nor does sub-section (3), stipulate such a condition. As we will shortly see, where an assessee is required mandatorily to fulfill a particular condition, the legislature expressly included a condition to that effect.

31. As we mentioned earlier, where an assessee keeps separate books of account that fact would, along with other facts, be relevant while considering whether the assessee fulfills all the conditions of Section 80-IB and, in particular, sub-section (2) thereof. It would be relevant, for instance, while considering whether the industrial undertaking concerned is formed by splitting up or a reconstruction of a business already in existence or not. If separate books of account are kept in respect of the new industrial undertaking, it would certainly be a factor in favour of the assessee. That, however, relates to the question of evidence in support of the claim and not to the statutory requirement to maintain separate books of account.

32. Mr. Kapoor’s reliance upon the following judgments in support of his submission to this effect is well-founded.

33. The Supreme Court in Commissioner of Income-tax, Guwahati vs. Bongaigaon Refinery and Petrochemical Ltd., [2012] 349 ITR 352 (SC) while dealing with a claim under Sections 80-HH and 80-I held:-

> "9. At the outset, it may be stated that the impugned order of the High Court is cryptic. Ordinarily, we would have remitted the case to the High Court for de novo consideration. The High Court has relied upon its earlier judgment, which, in our view, is not applicable on all fours to the facts of the present case. However, to put an end to the litigation, we are of the view, that though neither Section 80-HH nor Section 80-I (as it then stood) statutorily obliged BRPL to maintain its accounts unit-wise and that it was open to BRPL to maintain its accounts in a consolidated form in order to put an end to the litigation between the Tax Department and the public sector undertaking we remit the case to the Assessing Officer to ascertain whether the assessee had correctly calculated its net profits for the assessment year 1992–1993 in respect of its petrochemical unit for the purposes of claiming deduction under Sections 80HH and 80-I of the Income-tax Act, 1961. In the present case, BRPL has prepared its financial statements on consolidated basis from which it has worked out unit-wise net profits. If not done, it could be done by the auditors even today from the Consolidated Books of Accounts. Once such working is certified by the auditors the net profit computation (unit-wise) could be placed before the Assessing Officer who can find out whether such profit(s) is properly worked out and on that basis compute deduction under Sections 80-HH/80-I." [Emphasis supplied]

The Supreme Court held that neither Section 80-HH nor Section 80-I statutorily oblige the assessee to maintain its accounts unit-wise. It was open to the assessee to maintain its accounts in a consolidated form. The ratio of the judgment applies to this effect to Section 80-IB as well.

34. A similar view was taken by the Andhra Pradesh High Court in Commissioner of Income Tax vs. Sree Krishna Pulverising Mills, (2000) 241 ITR 262 (AP) and by the Gauhati High Court in Commissioner of Income Tax vs. Technotive Eastern (P) Ltd., (2002) 255 ITR 253 (Gau).

35. The Gauhati High Court framed the following question of law and proceeded to answer it as follows:-

> "(i) Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that no separate accounts are required to be maintained for claiming deductions under ss. 80HH and 80-I of the Income-tax Act, 1961?
>
> …. …. ……. ……. …….
>
> 5. Regarding the first question we find that the law does not require that a separate accounts are required to be maintained for claiming deduction under ss. 80HH and 80-I of the IT Act, 1961. Of course, there is a provision of sub-s. (5) which is quoted below:
>
> "(5) Where the assessee is a person other than a company or a co-operative society, the deduction under sub-s.(1) shall not be admissible unless the accounts of the industrial undertaking or the business of the hotel for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below sub-s. (2) of s. 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."
>
> That will not help the revenue in this case as in this case the assessee is a company."

It is pertinent to note that Section 80-IB does not even have a provision similar to sub-section (5) of Section 80-I of the Act as it then stood. The absence of a provision in Section 80-IB similar to sub-section (5) of Section 80-I, in fact, supports the view that Section 80-IB does not require an assessee to maintain separate books of account in order to entitle it to claim a deduction thereunder. It indicates that where the legislature required an assessee to maintain separate books of account, it provided for the same.

36. Moreover, in these appeals it would make no difference even if keeping separate books of account was required. As we noted earlier the appeals for the assessment years 2003-04 to 2005-06 are liable to be dismissed in view of

the circular No. 21 of 2015. In respect of the subsequent assessment years separate books of account were kept.

37. The contention that the assessees are not entitled to the deduction under Section 80-IB as they did not maintain separate books of account is, therefore, rejected.

38. It was next contended that the products are the same. Although a new undertaking may manufacture the same products, this contention was raised only to substantiate the contention that the Unit No.II was only an extension of the existing unit. The assessee is a partnership firm with two partners. Unit No.1 has been in existence since the year 1989 and Unit No.2 commenced production in March 2000. The Assessing Officer, in the assessment order, referred to the assessee's reply dated 10.11.2005 stating that the assessee had been manufacturing electric motors (2-Pole) and electric fans in unit Number-1 and electric motors (4-Pole) inlet and outlet valves in Unit No.2. Different products are, therefore, indicated. The Assessing Officer did not suggest that the products are the same. The Assessing Officer raised queries in the course of the assessment proceedings but did not seek any clarification to this effect. It is not possible in this appeal to consider the appellant's suggestion that the products are the same and, in any event, very similar.

39. The contention that the two units are in the same premises is also erroneous. The inspection report, called for by the Assessing Officer, did mention that the premises of the two units are in the same industrial area. It is important to note that the report further stated: "However the unit-2 is

working in two halls constructed separately on the same plot." The report, therefore, indicates that although the units are in the same industrial area and on the same plot, new Unit-II was constructed separately in two halls. Thus, the premises were different as per the Inspector's report.

40. The finding of the Assessing Officer that job-work charges have been claimed in respect of the two units separately and as per the profit and loss account in respect of each of them, in fact, supports the assessee's case that the two units are separate. The job-work ledger produced by the assessees also indicated the same.

41. The assessment order also cannot be supported in so far as the Assessing Officer denies the deduction on the ground that there was no separate power connection in Unit-II, that the bank account of the two units was the same and that the telephone connections are common.

The mere fact that there is no power connection in Unit-II would make no difference. That by itself would not disentitle the assessees to the deduction. It is important to note that there is no suggestion, much less a finding, that Unit-II used the power supplied to Unit-I. Had that been even suggested, the assessee could have met the case. In fact, the assessee's case before us was that both the units were using generators. It is important to note in this regard that while dealing with the point that arises under the second question of law framed by us, it was noted by the Tribunal that the assessee had explained that the manufacturing process required uninterrupted regulated electric power supply and that,

therefore, the assessee had not availed of any regular power connection but was entirely dependent on the power supplied by its own generator. The assessee also explained that the prices of the diesel had increased. The attention of the Tribunal was also invited to the paper books wherein an analysis of the factors reflecting upon the GP rates were mentioned.

42. For administrative convenience, it is understandable that the assessees would maintain the same bank account in respect of both the units. The section does not make it mandatory to maintain separate bank accounts.

43. For the same reason, the assessee cannot be denied a deduction merely because the telephone numbers are common. There is no reason for the assessees to have separate telephone connections in respect of each unit, if they can otherwise function with common telephone numbers. The section does not require the same either.

44. The Assessing Officer also disallowed the deduction on the ground that the workers/employees were common in respect of Unit-I and Unit-II and that there was no demarcation of employees/workers as per the attendance register produced. As per Section 80-IB(2)(iv), where the industrial undertaking manufactures or produces articles or things, the section would apply if the undertaking inter alia employs ten or more workers in a manufacturing process carried on with the aid of power. The assessees, admittedly, carry on their activities with the aid of power.

45. As recorded in the assessment order, the Assessing Officer, by letters dated 29.09.2005 and 21.10.2005 required

the assessees to furnish, inter alia, attendance and wage registers of the new and old units. The assessment order also records that the said wage and attendance registers were produced. It is not clear whether they were produced before the Assessing Officer or before the Inspector appointed by him. However, it makes no difference who they were produced before. The assessment order records that there is a common register for both the units which records that there are 93 employees but without any demarcation of the employees of Unit-I and Unit-II.

46. Let us first examine the provisions of Section 80-IB(2)(iv). It requires the industrial undertaking to employ ten or more workers in a manufacturing process carried on with the aid of power. The assessee would have employees if it is already in business. To be entitled to a deduction under Section 80-IB, the assessee must, in addition to such employees, employ for and with respect to the new undertaking the number of workers stipulated in sub-section (2)(iv) which, in the present assessee's case, is not less than ten. The workers indeed would be employed by the assessee but they must be employed for the new undertaking. The contractual relationship would be between the workmen and the assessee and not between the workmen and the undertaking for the undertaking has no independent legal existence.

However, the assessee must employ the workmen for the new undertaking. Further, the undertaking must employ ten or more workers throughout the period in respect of which the deduction is claimed. The section applies to industrial undertakings which fulfill, inter alia, this condition. Sub-

section (1) provides that where the gross total income of the assessee includes any profits and gains derived from the eligible business, there shall be allowed, in computing the total income of the assessee, a deduction from such profits or gains of an amount equal to such percentage and for such number of assessment years as specified in the section. It cannot be that an eligible business employs ten or more workers in the first year and not for the remaining years. That could never have been the intention of the legislature. The conditions stipulated in sub-section (2) must be fulfilled in the year in which the deduction is sought. If any of the conditions is not fulfilled during a particular assessment year, the assessee would not be entitled to the deduction for that year. The issue as to whether the assessees had fulfilled the provisions of sub-section (2)(iv) for the assessment year in question or not could not be decided merely with reference to the assessment orders passed in any of the previous years.

47. Mr. Putney's argument to this effect which we accept turns against him on facts. The Assessing Officer did ask for the particulars with respect to the Assessment Year 2003-04. ITA No. 958 of 2008, however, stands dismissed in view of the Circular No. 21 of 2015. The Assessing Officer and the CIT(Appeals), however, denied the deduction in respect of the assessment years 2006-07 to 2009-10 only on the basis of the assessment order for the assessment year 2003-04. That could not be so on the force of Mr. Putney's argument itself that each assessment year is to be considered separately. The assessee seeks the deduction. It would, therefore, have been for the assessee to produce evidence that the undertaking employs ten or more workers provided it was called for. The

Assessing Officer did not seek any information regarding the number of workers employed by the assessee for these years. Mr. Kapoor infact stated that separate wage registers were not maintained only in the initial years but that, thereafter including for the assessment year 2006-07 onwards separate wage registers were maintained. It would be unfair then in any event to hold against the assessee with respect to the assessment year 2006-07 onwards on the basis of the finding for the assessment year 2003-04. The deduction, therefore, was wrongly denied on this ground for the assessment year 2006-07 onwards.

48. Issue No.1 in the result is answered against the department on facts.

Re: ISSUE No.2

49. CIT (Appeals) sustained the Assessing Officer having added Rs.14,75,940/- on account of trading results after rejecting the assessee's books of account. The Assessing Officer noted that the GP rates for the years 2001-02, 2002-03 and 2003-04 was 33.28%, 34.04% and 28.5%. The Assessing Officer was not satisfied with the assessees' explanation for the fall in the GP rate and therefore adopted the GP rate at 30%. The entire exercise was essentially one of facts. The question is whether the decision of the Tribunal is perverse or absurd. We do not think it is.

50. The Tribunal took into consideration various aspects including the assessee's explanation for the fall in the GP rate. The assessee had explained, as is evident from the assessment order itself, that the fall in the GP rate was on account inter-alia of stiff competition from China. Sales

bills of the respective years showing a fall in the prices of the assessee's finished products were filed. Further it was also contended that there was an increase in proportionate generator expenses, manufacturing expenses and job work charges. A detailed summary of these expenses was furnished. Moreover the assessee also drew the attention of the authorities to the effect that they were maintaining an excise register for the excisable stock. These were undoubtedly relevant factors and the Tribunal cannot be faulted for having relied upon the same. The decision of the Tribunal relying upon the fact that there were no adverse findings by the Excise Authorities cannot be said to be absurd either. The Tribunal's satisfaction was based on the material on record. The Tribunal's finding that the GP rate as suggested by the assessee is plausible warrants no interference. This was essentially a question of fact and not a substantial question of law.

51. In the circumstances, issue No.2 is also answered against the appellant-department and in favour of the assessee.

52. In the result, both the questions are answered in favour of the assessee. The appeal is dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

02.09.2016 (DEEPAK SIBAL)
parkash* JUDGE

Note:
Whether non-speaking/reasoned√
Whether reportable: YES