



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI NABIN KUMAR PRADHAN, ACCOUNTANT MEMBER

ITA no.4780/Mum./2013
(Assessment Year : 2007-08)

M/s. Raychem RPG Pvt. Ltd.
RPG House, 463 Dr. A.B. Road
Worli, Mumbai 400 030
PAN – AAACR8032L

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Range-7(2), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

..... Respondent

ITA no.5064/Mum./2013
(Assessment Year : 2007-08)

Dy. Commissioner of Income Tax
Range-7(2), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

..... Appellant

v/s

M/s. Raychem RPG Pvt. Ltd.
RPG House, 463 Dr. A.B. Road
Worli, Mumbai 400 030
PAN – AAACR8032L

..... Respondent

Assessee by : Shri Manish Shah
Revenue by : Shri Prakash R. Mane

Date of Hearing – 02.08.2016

Date of Order – 12.08.2016

ITA no.4780/Mum./2013
ITA no.5064/Mum./2013

ORDER

PER SAKTIJIT DEY, J.M.

These cross appeals are directed against the order dated 4th April 2013, passed by the learned Commissioner (Appeals)-13, Mumbai, for the assessment year 2007-08.

ITA no.4780/Mum./2013 – Assessee's Appeal

2. The only effective ground raised in the memorandum of appeal is as under:-

"Ground I: Non-granting setoff of loss made in the eligible unit, u/s. 10B of the Act.

1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in non-granting set-off of loss made in the eligible unit u/s 71 of the Act before computing the total income of the appellant."

3. Brief facts are, assessee a company is engaged in the business of manufacturing and distribution of cable accessories and electrical & electronic components. For the assessment year under consideration, assessee filed its return of income on 28th October 2007, declaring total income of ₹ 38,90,62,620. During the assessment proceedings, the Assessing Officer after verifying the accounts of the assessee,

noted that the assessee has not included excise duty in the valuation of its closing stock. The Assessing Officer referring to the provisions of section 145A, observed that the assessee should include excise duty component of purchase price of raw material while valuing the closing stock of raw material, work-in-progress and finished goods. In this regard, he sought an explanation from the assessee. In reply, though, the assessee claimed non-inclusion of excise duty will have no effect in the profit but the Assessing Officer did not find merit in the submissions of the assessee. Accordingly, the Assessing Officer held that an amount of ₹ 2,13,43,000 is to be treated as excise duty / VAT component in the closing stock / intermediaries. As an adjustment of ₹ 64,52,860 under section 145A was made in the preceding assessment year the Assessing Officer reducing the same from the value of excise duty / VAT component of the impugned assessment year made an addition of ₹ 1,48,90,312 to the income of the assessee. Being aggrieved of the addition so made, the assessee preferred appeal before the learned Commissioner (Appeals). The learned Commissioner (Appeals), however, following the order passed by him in assessee's own case for assessment year 2006-07, upheld the addition.

4. Learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted, the assessee had been

following the same method of accounting consistently, therefore, the addition made is not justified. Referring to the working made in terms of section 145A, learned Authorised Representative submitted even after adjusting the CENVAT credit to the stock the net effect on the profit is nil. Learned Authorised Representative submitted, while deciding identical dispute in assessment year 2005-06 and 2006-07, the Tribunal has restored the matter back to the file of the Assessing Officer for deciding afresh keeping in view the decision of the Hon'ble Delhi High Court in ITO v/s Mahavir Aluminium Ltd., [2008] 297 ITR 77 (Del.). Learned Authorised Representative also relied upon the following decisions:-

- i) Hawkins Cocker Ltd. v/s ITO, 26 DTR 206;*
- ii) Alpanil v/s ACIT, ITA no.169 and 170/Ahd./2005;*
- iii) Ramratan Wires v/s ACIT, ITA no.2180/Mum./2012; and*
- iv) DCIT v/s Wartsila India Ltd., ITA no.7926/Mum./2014.*

5. Learned Departmental Representative submitted, the matter can be restored back to the file of the Assessing Officer in terms of the order passed by the Tribunal in assessment years 2005-06 and 2006-07.

6. We have considered the submissions of the parties and perused the material available on record. As could be seen, the issue before us

is adjustment to be made to the value of purchase and sale of goods and inventory by including the amount of tax, duty, cess, etc., actually paid or incurred by the assessee. We have also noted, identical dispute in assessee's own case arose in earlier assessment years. In fact, as noted by us, learned Commissioner (Appeals) has followed his own order passed for assessment year 2006-07. As could be seen, the adjustment made under section 145A was challenged by the assessee before the Tribunal in assessment years 2005-06 and 2006-07. In both the aforesaid assessment years, the Tribunal has restored the matter back to the file of the Assessing Officer with a direction to decide afresh in the light of the decision of the Hon'ble Delhi High Court in Mahavir Aluminium Ltd. (supra) as well as other decisions of the Tribunal on the issue. Facts being materially same, consistent with the view expressed by the Tribunal in assessee's own case for assessment year 2005-06 and 2006-07, we restore the matter back to the file of the Assessing Officer for deciding afresh keeping in view the principle laid down by the Hon'ble Delhi High Court in Mahavir Aluminium Ltd. (supra) and other decisions relied upon by the learned Authorised Representative as referred to above. This ground is allowed for statistical purposes.

7. Besides the above ground, the assessee has raised one more issue by way of additional ground pertaining to set-off of loss of

eligible unit against the profits of non-eligible units under section 71 of the Act.

8. Praying for admission of the additional ground, learned Authorised Representative submitted that all primary facts relating to issue raised in additional ground are already before the Assessing Officer, therefore, the issue raised being purely a legal issue, the ground raised may be admitted. In support of such contention, learned Authorised Representative relied upon the following decisions:-

- i) *Jute Corporation of India Ltd. v/s CIT, 187 ITR 688 (SC);*
- ii) *National Thermal Power Co. Ltd. v/s CIT, [1998] 229 ITR 383; and*
- iii) *CIT v/s Prithvi Brokers & Shareholders Pvt. Ltd., 349 ITR 336 (Bom.).*

9. As far as merits of the issue is concerned, the learned Authorised Representative submitted, assessee has two units out of which one is eligible to avail exemption under section 10B being a 100% export oriented unit. Assessee has one more unit which is not eligible for exemption. Learned Authorised Representative submitted, during the year assessee has incurred loss in respect of eligible unit which can be set-off against the profits of non-eligible unit under section 71 of the Act. In support of such contention, learned Authorised Representative relied upon the following decisions:-

- i) *Hindustan Uniliver Ltd. v/s DCIT, 325 ITR 102; and*
- ii) *CIT v/s Galaxy Surfactants Ltd., 343 ITR 108;*

10. Learned Departmental Representative opposing the admission of additional ground submitted, as the assessee has not claimed the loss in the return of income or at the stage of assessment or even before the learned Commissioner (Appeals), it should not be permitted to raise a completely new issue at the second appellate stage. In this context, he relied upon the decision of Hon'ble Supreme Court in *Goetze India Ltd. v/s CIT, [2006] 284 ITR 323 (SC)*. Alternatively, it was submitted by the learned Departmental Representative as the issue has been raised for the first time it may be restored back.

11. We have considered the submissions of the parties and perused the material available on record. As far as the admission of additional ground is concerned, we have noted that in the course of assessment proceedings, the assessee in response to the query raised by the Assessing Officer has in fact shown the loss from the export oriented unit. Further, in the computation of income filed along with return of income of the impugned assessment year, the assessee has added back the loss from the export oriented unit. Further, in the report to submitted in Form no.56G in respect of EOU unit under section 10B, the assessee has furnished the details of computation of loss. Thus,

the aforesaid facts and documentary evidences clearly demonstrate that the assessee has disclosed all primary facts relating to loss incurred by the export oriented unit before the Assessing Officer, except, claiming the set-off of loss either in the return of income or otherwise. Thus, the primary facts relating to issue of set-off of loss of EOU unit is available on record. That being the case, the issue raised in the additional ground being a purely legal issue can be decided on the basis of facts and material already available on record. Therefore, we are of the opinion that the additional ground raised by the assessee deserves to be admitted. As far as the decision of the Hon'ble Supreme Court in Goetz India Ltd. (supra) relied upon by the learned Departmental Representative, we may observe, it only restricts the power of the Assessing Officer to entertain a claim of the assessee otherwise than by way of a return of income or revised return of income. As made clear by the Hon'ble Supreme Court itself in the said judgment, it does not impinge upon the powers of the Tribunal. We, therefore, admit the additional ground raised by the assessee. As could be seen, the only issue raised in the additional ground is whether the loss incurred by the export oriented unit eligible for exemption under section 10B can be set-off against the profit / income of other units or business of the assessee. As it appears, the Hon'ble Jurisdictional High Court in decisions relied upon by the

assessee, have taken a view favourable to assessee. However, since this issue was not raised by the assessee either before the Assessing Officer or before the learned Commissioner (Appeals), in all fairness, in our considered opinion, it should be restored back to the file of the Assessing Officer for examining assessee's claim keeping in view the relevant statutory provisions as well as the decisions relied upon by the assessee. Accordingly, we restore the matter relating to the issue raised in additional ground to the file of the Assessing Officer for deciding on merit after providing due opportunity of being heard to the assessee. Ground is allowed for statistical purposes.

12. In the result, assessee's appeal is allowed for statistical purposes.

ITA no.5064/Mum./2013 – Department's Appeal

13. In this appeal, the Department has challenged the partial relief granted by the learned Commissioner (Appeals) by deleting certain additions made by the Assessing Officer.

14. At the very outset, learned Departmental Representative fairly submitted, before us that the tax effect pertaining to the amounts disputed by the Department is less than the monitory limit of ₹ 10 lakh fixed by the CBDT in Circular no.21 of 2015 dated 10th December 2015, in relation to appeal before the Income Tax Appellate Tribunal.

Taking into consideration the aforesaid submissions of the parties and also finding that the CBDT circular under reference applies retrospectively, even to pending appeals, we dismiss the appeal of the Department as not maintainable.

15. In the result, Department's appeal is dismissed.

Order pronounced in the open Court on 12.08.2016

Sd/-
NABIN KUMAR PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 12.08.2016

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai