IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI S. S. VISWANETHRA RAVI, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./**ITA No.356& 338/Kol/2016**

(**निर्धारणवर्ष** / Assessment Year: 2001-02&2006-07)

DCIT, Cir-8(1), Kolkata Aayakar Bhawan, 5th Floor, P-7, Chowringhee Sq., Kolkata- 69.	**Vs.**	**M/s EIH Ltd.** 4, Mangoe Lane, Kolkata – 1.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAACE 6898 B		
(APPELLANT)	**..**	**(RESPONDENT)**

Appellant by : Shri Arindam Bhattacharjee, Addl. CIT
Respondent by : Shri Asim Chaudhury, Advocate.

सुनवाईकीतारीख/ **Date of Hearing : 12/10/2017**

घोषणाकीतारीख/**Date of Pronouncement : 15/12/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned two appeals filed by the Revenue, pertaining to Assessment Years2001-02 & 2006-07, are directed against the orders passed by the ld Commissioner of Income Tax (Appeals)-16,Kolkata.

2.The grounds of appeal raised by the Revenue (in ITA No.338/Kol/2016) are as under:

> *"1. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) has the power u/s 251 of the Income Tax Act to accept the claim of the assessee for amending the return except otherwise than by filing a revised return.*
>
> *2. That the appellant reserves the right to amend, alter or add to any ground(s) of appeal before or at the time of hearing of the appeal."*

3.The brief facts qua the issue are that theassessee filed its return of fringe benefits on 27.11.2006 showing value of fringe benefit at Rs.8,28,82,508/- and the same was processed u/s 115WE of the I.T. Act, 1961. Thereafter, notice u/s 115WE(2) r.w.s 142(1) of the Act, was issued to the assessee. During the assessment proceedings, the assessee claimed that expenditure of Rs.2,24,48,941/- was incurred on uniform of employees on office duty is not liable to be considered for

determination of value of fringe benefit. This claim of the assessee was not allowed by the assessing officer stating that the said amount was not considered by the assessee in the Return of Fringe Benefit.The Assessing Officer held that since the assessee did not claim in the return of income therefore, he would not be entitled to claim as reduction in the value of fringe benefitand he relied on the decision of Hon'ble Supreme Court in Goetze(India) Ltd. (284 ITR 323) wherein it was held if the assessee does not claim any amount in the return of income then the AO need not to consider the same.

4.Aggrieved by the order of the AO, the assessee filed an appeal before the ld. CIT(A). Before ld. CIT(A), the assessee has raised this issue stating that AO was erred in not considering the assessee's claim about uniform expenses of Rs.2,24,48,941/- for hotel staff on duty, which was not subject to Fringe Benefit under the head "Workmen & Staff Welfare Expenses" u/s 115WB(2) of the Act and the same should be excluded. The ld. CIT(A) after taking into account all the aspects including the submissions of the assessee before the AO, came to conclusion that Decision of Hon'ble Supreme Court in the case of Goetze(India) Ltd. Vs. CIT (supra) has only limited application and the Appellate Authorities have the power to allow deduction/claim for expenditure to assessee to which he was otherwise entitled, even though no claim was made by the assessee in the return. During the hearing, the assessee also emphasized on the order of Hon'ble Kolkata ITAT in assessee's own case in ITA Nos.2182/Kol/2006 wherein the assessee claimed prior period expenditure of Rs.1,00,000/-, during the assessment proceedings of that assessment year. In this case, the claim of the assesseewas rejected by the AO but the same was allowed by the ld. CIT(A) and on further appeal to the ITAT by Revenue wherein the Hon'ble ITAT upheld the order of ld. CIT(A) dismissing the appeal of the Revenue. In this order at para 20.2 the Hon'ble ITAT held as follows:

> *"We are aware at this juncture that any claim could be made only by filing a valid return as has been held by the Hon'ble Apex Court in the case Goetz India Ltd reported in 284 ITR 323 (SC). But the same judgment states in the last para that the said finding is not applicable to appellate authorities more especially to Tribunals. Hence, respectfully following the judgment of the Hon'ble Apex Court (supra) and in view of the fact that the said expenditure of Rs.1,00,000/- is genuinely incurred by the assessee for the purpose of its business, we hold that the action of the ld. CIT(A) does not require any interference in this regard. Hence the ground no.10 raised by the revenue is dismissed."*

Therefore, in the present case, considering the above, the ld. CIT(A) allowed the claim of fringe benefit which was not claimed by the assessee in the return of income.

5.Not being satisfied with the order of the ld. CIT(A), the Revenue is in appeal before us. The ld. DR for the Revenue has submitted before us that ld. CIT(A) does not have power u/s 251 of the Income Tax Act to accept the claim of the assessee which was not claimed by the assessee in his original or revised return of income. Therefore, the order passed by the ld. CIT(A) is in violation of the provision of section 251 of the I.T. Act. The ld. DR also submitted that the order passed by the ld. CIT(A) accepting the new claim which was not made by the assessee in his original or revised return of income, was wrong on the part of the CIT(A) in entertaining the new claim of the assessee.

6.On the other hand, the ld. Counsel for the assessee had submitted before us that judgment of the Hon'ble Supreme Court in the case of Goetze(India) Ltd. Vs. CIT (284 ITR 323) clearly says that appellate authorities have the power to allow deduction or claim for expenditure of the assessee to which he was otherwise entitled even though no claim was made by the assessee in the return of income and accordingly, he had made a claim before the ld. CIT(A) who had allowed the claim of the assessee. The ld. Counsel stated that intheassessee's own case in ITA No.2182/Kol/2006 (supra)wherein at Para 20.2 the Hon'ble ITAT held that the appellate authorities may admit the claim of the assessee even though no claim was made by the assessee in the return of income.

7.Having heard the rival submissions and perused the materials available on record, we are of the view that in the present case under consideration, the assessee had already raised the claim before the AO in respect of expenditure of Rs.2,24,48,941/- incurred on uniform of employees on office duty but the AO rejected the claim of the assessee but the ld. CIT(A) allowed the case of the assessee. We are of the view that judgment of the Hon'ble Supreme Court in the case of Goetze(India) Ltd. Vs. CIT (284 ITR 323) clearly says that appellate authorities have the power to allow deduction or claim for expenditure of the assessee to which he was otherwise entitled, even though no claim was made by the assessee in the return of income and accordingly, he has made a claim before the ld. CIT(A) who has allowed the claim of the assessee. Therefore, considering factual position, we are of the view that the order passed by the ld. CIT(A) accepting the new claim which was not

made by the assessee in his original or revised return of income, was not wrong on the part of the CIT(A) in entertaining the new claim of the assessee. Therefore, we hold that the order passed by the ld. CIT(A) does not have any infirmity. Therefore, we confirm the order passed by the ld. CIT(A).

8. In the result, the appeal filed by the Revenue is dismissed.

9.Now, we deal with the Revenue's appeal in ITA No.356/Kol/2016 wherein the Revenue has raised the following grounds of appeal:

> *"1. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in deleting the interest u/s 234D of the I.T. Act, 1961 whereas as per Explanation 2 of the Section 234D of the Act that the provisions of this section shall also apply to an assessment year commencing before the 1st Day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date.*
>
> *2. That the appellant reserves the right to amend, alter or add to any ground(s) of appeal before or at the time of hearing of the appeal."*

10.The brief facts qua the issue are that the assessing officer, gave the appeal effect of the judgment pronounced by the Hon'ble Calcutta High Court dated 28.03.2012 in ITA No.408 of 2006, in assessee`s own case, allowing the assessee's claim for deduction u/s 80HHC.As per the order of the Hon'ble Calcutta High Court, the assessee was entitled for deduction u/s 80HHC of the Act. The Assessing Officer gave the appeal effect and had charged interest u/s 234D at Rs.47,98,261/-.Section 234D-"Interest on excess refund", was inserted by the Finance Act, 2003, with effect from 1st June, 2003, which provides for charging of interest on excess refund, if any, refund granted pursuant to intimation u/s 143(1) and is found to be excessive upon passing of the assessment order u/s 143(3).

11.Aggrieved by the order of AO, the assessee filed an appeal before the CIT(A), who deleted the interest charged under section 234D of the Act. During the appellate proceedings, the assessee submitted before the CIT(A) that assessing officer gave the appeal effect of the order passed by the Hon`ble High Court, and framed the assessment Under Section 260 of the Act, wherein the assessing officer charged interest U/s 234D of the Act amounting to Rs.47,98,261/-. The assessee

submitted that his case relates to assessment year 2001-02,whereas section 234D was inserted by the Finance Act, 2003, with effect from 1st June, 2003, therefore, section 234D does not apply to the assessee under consideration.

The ld CIT(A) held that in theassessee`s case under consideration, which related to A.Y.2001-02, and the refund pursuant of the intimation was received on 19th December, 2012 i.e. prior to introduction of section 234D and accordingly, provisions of section 234D were not applicable to the assessee. The ld CIT(A) also relied on the judgment of Van Oord Dredging and Marine Contractors BV (2008) 297 ITR 0115 ITAT (Mum) wherein it has been held that *" the provisions of section 234D were not in the statute book during the relevant period and were inserted by the Finance Act, 2003, w.e.f June1, 2003. In this case the processing u/s 143(1)(a) was made on February 25, 2003, wherein the order was passed granting refund to the assessee and on which date the provision of section 234D had not come on the statute book. Interest u/s 234D of the Act was not chargeable."*

Therefore, ld CIT(A) deleted the interest charged U/s 234D of the Act at Rs.47,98,26*1/-.*

12. Not being satisfied with the order of CIT(A), the Revenue is in appeal before us.Theld Counsel for the assesee has defended the order passed by the ld CIT(A). Whereas, ld. DR for the Revenue has submitted before us that as per Explanation 2 of the Section 234D of the Act, the provisions of this section shall also apply to an assessment year commencing before the 1st Day of June, 2003, if the proceedings in respect of such assessment year is completed after the said date.

13. We have heard both the parties and perused the materials available on record, we note that in the assessee's case under consideration relates to A.Y. 2001-02, and original assessment under section 143(3) was completed on 29.03.2004. In the assessee`s case, the Hon`ble Calcutta High Court passed the judgment on dated 28.03.2012 in ITA No. 408 of 2006, allowing the assessee`s claim for deduction under section 80HHC of the Act. The assessing officer passed an order giving effect to High Court`s order and passed the order dated 21.05.2012.

Explanation 2 of section 234D(2) reads as under:

"Explanation 2- For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st

day of June, 2003, if the proceedings in respect of such assessment year is completed after the said date"

Now the limited question before us is that whether assessing officer was right in charging interest on excess refund or not? Considering the above factual position, we are of the view that assessing officer was right in charging the interest under section 234D of the Act.

The explanation 2 of section 234D clarifies that section 234D(2) shall apply to an assessment year commencing before the 1st day of June, 2003 and we find the A.Y under consideration is commenced before 01.06.2003 and if the proceedings in respect of such assessment year is completed after the said date i.e. 29.03.2004, therefore, we hold that the ld. CIT(A) was not justified in allowing the ground raised by the assessee challenging the charging of interest, therefore, we quash the order passed by CIT(A). Hence, we confirm the order passed by AO U/s 234D of the Act.

14. In the result, the appeal filed by the Revenue is allowed.

Order pronounced in the open court on this 15/12/2017.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(DR. A.L.SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata; दिनांक Dated 15/12/2017

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant – DCIT, Cir-8(1), Kolkata
2. प्रत्यर्थी/ The Respondent-M/s EIH Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), :Kolkata.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

//True Copy// By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.