

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1257/Kol/2014
Assessment Year :2010-11

DCIT, Circle-7, P-7, Chowringhee Square, 5th Floor, Room No.15, Kolkata-69	V/s.	M/s Madras Elastomers Ltd.32, Ganesh Chandra Avenue, Kolkata-13 [PAN No.AACCM 8669 A]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Md. Usman, CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Miraj D Shah, AR
सुनवाई की तारीख/Date of Hearing	22-02-2018
घोषणा की तारीख/Date of Pronouncement	20-04-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-VIII, Kolkata dated 12.03.2014. Assessment was framed by DCIT, Circle-7 Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 28.03.2013 for assessment year 2010-11. The grounds of appeal raised by the Revenue, are reproduced as under:-

- “(a) “Whether under the facts and in the circumstances of the case, was the action of Ld. CIT(A) justified in allowing relief in respect of 50% of the claim disallowed by the AO in respect of section 80IC of the Act.”?
- (b) “Whether under the facts and in the circumstances of the case, was the action of Ld. CIT(A) justified in admitting details in respect of unit-wise receipt and expenditure, which were not filed before the AO.?”
- (c) “Whether under the facts and in the circumstances of the case, was the action of Ld. CIT(A) justified in allowing relief when the AO had rejected the books of the assessee u/s. 145(3) of the Act, quoting valid reasons for the same”?

(d) "Whether under the facts and in the circumstances of the case, was the action of Ld. CIT(A) justified in allowing relief in respect of commission paid to a company, when under the rules of Indian Railways, orders were issued through open tender"?

(e) Any other point to be raised at the time of hearing."

Md. Usman, Ld. Departmental Representative appeared on behalf of Revenue and Shri Miraj D Shah Ld. Authorized Representative appeared on behalf of assessee.

2. Ground No. (a) to (c) are inter-related and therefore being taken up together for the purpose of adjudication. The issue raised is that Ld. CIT(A) erred in allowing relief @ 100% by way of deduction u/s.80IC of the Act.

3. Briefly stated facts are that assessee is limited company and engaged in manufacturing business of rubber products. The assessee has four manufacturing units located at Chennai, Lucknow, Dehradun and Haridwar. The assessee originally had registered office at Chennai in earlier years but subsequently transferred to Kolkata vide order dated 11.02.2013 u/s 127(2) of the Act. The assessee in respect of its Dehradun unit has claimed deduction u/s 80IC of the Act for ₹ 11,67,62,013/ only. The Assessing Officer during the assessment proceedings observed certain fact as detailed under:-

- i) The assessee claimed deduction u/s 80IC of the Act in respect of its manufacturing unit located at Dehradun in the Assessment Year 2008-09 which was allowed by AO but after apportioning the expenses on the basis of turnover pertaining to eligible and non-eligible units for deduction u/s 80IC of the Act. Accordingly, the deduction claimed u/s. 80IC of the Act in the AY 2008-09 was reduced by the then AO in the assessment order framed u/s 143(3) of the Act. The assessee against such order of AO preferred an appeal before Ld. CIT(A) who reversed the order of AO and allowed the claimed made by assessee u/s. 80IC of the Act vide order dated 31.01.2011. However, against such order of Ld. CIT(A) Revenue has gone in appeal before Tribunal. But the

fate of such appeal before the ITAT Kolkata is not known to the Assessing Officer.

- ii) Similarly, the AO also observed that the deduction claimed by assessee in the AY 2009-10 u/s 80IC of the Act was disallowed by the AO vide order dated 11.12.2011 passed u/s 144 of the Act. The deduction was disallowed in the AY 2009-10 for the reasons that the assessee has not filed separate profit and loss account of all the units as well as Form 10CCB in respect of Dehradun unit. The AO also observed that assessee has diverted most of its expenses of eligible unit to non-eligible unit for the deduction under section 80IC of the Act. The assessee has not brought any development to the notice of AO subsequent to the assessment framed u/s 144 of the Act for AY 2009-10.
- iii) Similarly, assessee for the year under consideration has not filed individual trading and profit and loss account of all its units. Rather, assessee has filed consolidated profit and loss account and therefore from the consolidated profit and loss account it was not possible to verify the amount of profit eligible for deduction in respect of Dehradun unit u/s 80IC of the Act.
- iv) The income tax cases of assessee for different AYs are pending before the different Appellate Forum in connection with the deduction claimed by it under section 80IC of the Act and as such, there is no information available with regard to deduction claimed u/s 80IC of the Act by the order of any higher Forums.
- v) The assessee has shown turnover of Dehradun Unit for ₹40,47,36,097/- and declared net profit of ₹11,67,62,013/- only. The assessee in its consolidated profit and loss account has shown total turnover of ₹84,52,80,211/- and net profit of ₹14,19,93,868/- only. This information reveals that the assessee has earned net profit of Rs. 2,52,31,855.00 from non-eligible unit against the turnover of Rs. 44,05,44,114.00 from non-eligible

units. This act of the assessee reveals that amount of expenses incurred in connection with eligible unit have been diverted to non-eligible units in order to reduce the profit.

In view of the above, AO came to the conclusion that assessee has diverted expenses pertaining to Dehradun unit being eligible unit to other manufacturing units not eligible for deduction u/s 80IC of the Act with a view to minimizing the tax liability. Accordingly, AO disallowed the deduction claimed by assessee u/s 80IC of the Act by ₹5,83,81,006/- being 50% of ₹11,67,62,013/- only. Thus, AO disallowed the claim made u/s 80IC of the Act for an amount of ₹5,83,81,006/- which was added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted as under:-

- a) Higher amount of profit was shown in respect of Dehradun Unit as there was no excise duty payable on the manufacturing of goods;
- b) The AO during the course of assessment proceedings did not ask for the unit-wise profit and loss account;
- c) There is no finding of AO referring the specific instances suggesting that the expenses of eligible units have been diverted to non-eligible units.
- d) A report in Form 10CCB from the qualified Chartered Accountant was filed before the AO regarding the deduction claimed u/s. 80IC of the Act. A separate profit and loss account of Dehradun unit was duly filed before AO at the time of assessment proceedings.
- e) The Ld. CIT(A) has allowed the deduction claimed by assessee u/s 80IC of the Act in respect of Dehradun unit.
- f) The assessment AY 2009-10 was framed u/s 144 of the Act on the ground that necessary details were not furnished. As the order was framed as *ex parte*, therefore, no reference / cognizance can be made to such assessment order.

- g) The manufacturing units are based in different geographical location and manufacturing different products which are supplied to different customers. Therefore, no comparison among the units can be made.
- h) The ages of the factories are different and accordingly there are different technologies used by these manufacturing units. Thus, the overhead cost is also different of all the manufacturing units. Thus, no inference can be drawn based on the performance of manufacturing units on individual basis.
- i) The goods manufacturing in Dehradun unit are mostly supplied to the Indian Railways. There is less competition and it enjoyed higher sales realization. There is no excise duty in respect of Dehradun unit. Therefore it enjoyed the higher profitability in respect of Dehradun unit.
- j) Similarly, there are few break-downs which resulted in less wastage of raw materials. The factory located at Lucknow is very old unit and therefore it is not equipped with the latest production facilities. The operations at Haridwar and Chennai are very minuscule in comparison to the other factories. Therefore no adverse inference can be drawn against the assessee.

The Ld. CIT(A) after considering the submissions of assessee granted partly relief to assessee by observing as under:-

“4.3 I have carefully gone through the assessment order and the detailed submissions made by the AO. It is a true that devices adopted to reduce/inflate the profits of non eligible business/ eligible business has to be checked. However there must be a finding that some expenses which were incurred in respect of 80IC units have been debited in the accounts of non 80IC units, to show higher profit of 80IC unit. Here in present case though the appellant submitted separate profit & loss account of 80IC unit, the AO without bothering to verify the P&L account of eligible unit chose to reject books of accounts u/s 145(3). The act of Rejection of books of accounts has been dealt in detail in para 3 of this order. The AO went ahead to allow 50% of the profit earned from eligible undertaking on estimate basis.

4.4 It is not disputed by the AO that 80IC unit of the appellant is eligible for deduction u/s 80IC. It is also not disputed by the AO that the appellant had submitted separate P&L account for 80IC unit and appellant also submitted form 10CCB signed by a qualified Chartered Accountant.

4.5 The very premise of the AO for doubting the correctness of 80IC unit is wrong owing to wrong facts mentioned by him in para (vii) in page 6 of his order. Profit of the appellant is Rs. 16,59,93,868/- and not Rs. 14,19,93,868/- as mentioned by him. He himself has taken this figure while computing taxable income of the appellant in page 10 of his order. Thus the net profit margin of the appellant as whole is 19.63% and not 16.5% as mentioned by him. Also from the P&L of 80IC unit it is seen that commission of Rs. 5 crore has been debited to 80IC unit and not to non 80IC units to reduce profit of non eligible units.

4.6 It is also not disputed by the AO that the 80IC unit (Dehradun) of the appellant company enjoys excise exemption and therefore gross profit of that unit is bound to be higher in comparison to non 80IC units.

4.7 It is also not disputed by the AO that cost of production in Dehradun unit is lower as compared to other units because the new unit is newer one and has employed latest production technology.

4.8 In the case of the appellant for the assessment year 2008-09, a similar issue had been raised by the AO. The matter has been examined by the CIT(A)- V Chennai in detail in his order dated 4th February, 2014. For the said assessment year the AO had made a similar reduction in the claim made by the appellant u/s 80IC for the same unit. The said reduction was made on an estimate basis as has been done by the AO for the current year. The CIT(A)-V has based on the circumstances (which are the identical with the circumstances for the current year) and the decision of the Delhi ITAT in the case of Indo Asian Fusegear Ltd. (quoted above) held that such reduction on claim based on some apportionment etc. cannot be upheld and has accordingly allowed the claim for the full amount less miscellaneous income.

4.9 In the case of DCIT Versum Indo Asian Fusegear Ltd. (2010-TIOL-741-Del) the Delhi Tribunal has held that where the assessee was maintaining separate books of accounts for eligible unit (Parwanoo Unit.) which aspect had been established by the report of the auditor, assessee was enjoying tax exemption from Central Excise duty for eligible unit which had led to the higher rate of profit for this unit, the higher rate of profit was also on account of exemption from payment of excise duty & differentiation in the product, the unit located at Jalandhar, Noda and Murthal were old units which were having old machinery in comparison to the newly established units at Parwanoo which has also given higher rate of profitability and the revenue had not brought any positive material on record to show that there was over or inflated billing for enhancing the profit for which 80IC Deduction was allowed.

4.10 From the above facts and reasons, including the judicial precedent and following the order (in the case of the appellant) of the CIT(A) for the

assessment year 2008-09, I hold that the AO erred in allowing only 50% of the net profit without having found any evidence of increase in expenses of non 80IC units suggesting shifting of expenses of 80IC unit to non 80IC units to claim higher deduction. Therefore such ad-hoc reduction in claim is not upheld. However from details of income it is seen that appellant has claimed deduction in respect of other income also for which he is not eligible. Therefore, the AO is directed to allow deduction u/s 80IC on entire net profit of Dehradun Unit as claimed by the appellant after deducting other income, as taken in the P&L Account. Ground 1 & 2 are therefore partly allowed."

The Revenue, being aggrieved is in appeal before us.

5. Before us Ld. DR submitted that assessee has not furnished the accounts of all the manufacturing units individually. But it has filed only consolidated profit and loss account. Accordingly, it was not possible for the AO to determine the amount of deduction u/s 80IC of the Act without the examination of the books of account of assessee. He vehemently relied on the order of AO.

On the other hand, Ld. AR for the assessee has filed paper book which is containing pages from 1 to 13 and stated that Co-ordinate bench of this Tribunal in assessee's own case in ITA No.48/Kol/2015 pertaining to AY 2009-10 dated 20.09.2017 has decided the issue in favour of assessee. Accordingly, Ld. AR submitted that assessee was eligible for deduction u/s 80IC of the Act for the year under consideration.

In rejoinder Ld. DR submitted the facts of one year can be different with another year. Therefore, no reliance on the order of this Tribunal in assessee's own case (supra) can be made.

6. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the deduction claimed by assessee u/s 80IC of the Act in respect of its manufacturing unit located at Dehradun. At the outset, we find that Co-ordinate Bench of this Tribunal, in assessee's own case for AY 2009-10 involving identical facts and circumstances has decided the issue in favour of assessee. The relevant extract of order is reproduced below:-

4. We have heard rival submissions and gone through the materials available on record. We note that the AO has passed the assessment order i.e the best

judgment assessment u/s. 144 of the Act. The assessee has brought to the knowledge of the Id. CIT(A) that its Dehradun operation and Chennai office were virtually closed down because of the labour unrest. And since the office at Chennai was closed down, it did not receive any notice issued by the AO from her Chennai office. Citing the reason that there was unrest at Chennai and since the Chennai office was non-functional, the assessee applied for transfer of assessment to Kolkata next assessment year. It was brought to the knowledge of the Ld. CIT(A) that Form 10CCB was obtained in time, however, it could not be submitted before the AO during the hearing stage. It was brought to the notice of the Ld. CIT(A) that in the earlier AY 2008-09 the AO gave proportionate deduction which order was challenged by the assessee before the Ld. CIT(A)-V, Chennai who by his order dated 31.03.2011 allowed the assessee's full claim for deduction u/s. 80IC of the Act. First of all, we note that the main grievance of the Revenue is that there is a violation of Rule 46A of the Rules while passing the impugned order. In this context firstly, we note that while passing the impugned order, the Ld. CIT(A) has sought the remand report from the AO and the remand report obtained from AO has been reproduced by Id CIT(A) at pages 5, 6, 7 and 8 of the order, so the ground of challenge of revenue is per-se weak. However, we would like to discuss the brief facts of the case. We note that the assessee is in the business of manufacturing tailor-made rubber molded and metal bonded items. The assessee supplies to Indian Railways and to approved wagon builders as per the drawings and specification of Indian Railways under the category of exclusive commodity. Assessee has declared a total turnover of Rs.62,51,97,114/- for this assessment year. During assessment proceedings, the AO noticed that the assessee had units at Lucknow, Kolkata, Chennai and Dehradun. For the Dehradun unit, the assessee has claimed deduction u/s. 80IC of the Act from the profits derived from the unit at Dehradun. The AO noted that the assessee has declared total profit from the business a sum of Rs.6,30,26,047/- and after claiming deduction u/s. 80IC of the Act for a sum of Rs.4,70,63,306/- has arrived at a total income of Rs.1,59,62,740/-. According to the AO, since the assessee did not produce the Form 10CCB and has not kept the separate books for the unit at Dehradun, the claim was not accepted by the AO. In the remand report also the AO reiterates that the assessee has not kept separate accounts for its unit at Dehradun. However, we wonder as to how the AO is able to get the figures of profit from each unit in his remand report without going through the separate accounts maintained for its different units.

5. We note that it is not the case of the revenue that the unit at Dehradun of the assessee is not eligible for deduction u/s. 80IC of the Act. The Ld. CIT(A) also took note of the fact that unit wise break up of sales and profit statement along with duly signed Form 10CCB by a Chartered Accountant was also submitted though at the first appellate stage. The reason for non-submission of the Form 10CCB was attributed to the closing down of the offices at Chennai due to labour unrest. We note that there was a reasonable cause for the assessee not to produce the document before the AO during assessment stage. However, during the remand proceedings before the AO, the assessee has placed the 10CCB and other books separately maintained for different

units and the AO has taken out figures from very same books separately maintained by the assessee for different units located at different places.

6. We note that the first year of Sec. 80IC deduction was claimed by the assessee was in the previous AY 2008-09 which claim was allowed in part by the AO. However, on appeal, the Ld. CIT(A) has allowed the entire claim of sec. 80IC deduction of the Dehradun unit for A.Y 2008-09. Let us have a look at the previous year and compare with this relevant assessment year under appeal; we note that in the previous assessment year i.e. AY 2008-09 the assessee's turnover was Rs.34.82 cr. whereas in the assessment year under consideration the total turnover was Rs.62.10 cr. The net profit of AY 2008-09 was Rs.2.50 cr. and in this assessment year is Rs.6.24 cr. We note that the net profit percentage was 7.18% for AY 2008-09 and net profit percentage for this year was 10.84%. The turnover of Dehradun unit for AY 2009-09 was Rs.5.59 cr. whereas in the relevant assessment year it is Rs.17.51 cr. Dehradun profit for AY 2008-09 was Rs.2.52 cr. whereas in the relevant assessment year it was Rs.4.70 cr. Thus, the Dehradun net profit percentage for AY 2008-09 was 48.04% and for the relevant AY it is only 26.84%. Thus, we note that the Dehradun units net profit percentage in the previous assessment year was 45.08% whereas in the relevant assessment year it is 26.84% which is less than the previous year and in the previous assessment year the AO himself has allowed proportionate deductions which was later given full deduction by Ld. CIT(A) on appeal by assessee. The assessee explained the reason for better turnover and production of goods by stating that the production facility at Dehradun comprises of new machines and it can produce double quantity at the same time. Further, there are fewer breakdowns resulting in savings in raw materials wastage and also lower cost. The assessee also brought to the knowledge of the Ld. CIT(A) that savings on account of excise duty, higher realization due to sales to end user and also on account of savings in cost, which resulted in a profit margin of 26.84% of turnover cannot be termed as unnatural. Whereas it was pointed out to the Ld. CIT(A) and AO (during remand proceedings) that in the other units of assessee located at Chennai and Lucknow, old machines were used and there was irregular production and, therefore, there was less profit. It has brought to the notice of the Ld. CIT(A) that the work at Haridwar and Chennai units are too miniscule in comparison to the operation of the company at Dehradun. It was brought to the notice of the Ld. CIT(A) that Dehradun unit is under Excise exemption which is 14.42% of the sale value and as such the net profit increased by such percentage has the relevance of increase in prices. The Ld. CIT(A) took note of all these factors and noted that the assessee is maintaining separate accounts and books of account for each of its units located at different locations and no defects whatsoever could be detected by the AO in the books of account submitted before him. The Ld. CIT(A) has taken note of Form 10CCB which was duly signed by the Chartered Accountant in accordance to law and took note of the audited copy of account of the eligible unit i.e. Dehradun unit which was filed before the AO during the remand proceedings. The Ld. CIT(A) took note of the fact that the assessee's units are situated in different states which are subject to different local laws. The Ld. CIT(A) took note of the statement of sales and profits of each unit. The Ld. CIT(A) took note of the fact that the AO was unable to bring

any material or evidence to suggest inflated expenses of non-eligible units which could suggest shifting of expenses of eligible unit to non-eligible units thereby claim higher deduction. The Ld. CIT(A) took note of the fact that the net profit margin in the relevant AY 2009-10 was lower at 24.84% of turnover as against 45.08% in AY 2008-09 and the AO unlike the present AO allowed deduction but on proportionate basis.

7. Taking all these facts into consideration, the Ld. CIT(A) has allowed the claim of the assessee and directed the AO to allow deduction under section 80IC of the Act on the net profit of the Dehradun units as declared by the assessee after reducing the misc. income as taken in the P&L Account. We concur with the view expressed by the Ld. CIT(A) taking into consideration the fact that the AO could not point out any defects in the books of account maintained separately for the Dehradun unit and during remand proceedings when the Form 10CCB was produced before the AO, he could not point out any fault. We also note that there was no material to allege that there was shifting of expenses of eligible unit to non-eligible unit so that higher deduction can be claimed for 80IC unit at Dehradun. The Dehradun unit had new machineries and there were excise exemption also and thus, the profits generated at Dehradun unit cannot be termed as unnatural without any material to suggest the other way; and taking into consideration the results of the previous year also we do not find any infirmity in the order of the Ld. CIT(A) which warrants our interference. In such a scenario, we concur with the view of the Ld. CIT(A) and we are inclined to dismiss the appeal preferred by the revenue on this issue.”

We respectfully following the consistent view of the Tribunal decline to interfere with the order passed by the Ld. CIT(A) on this account and accordingly the ground taken by the Revenue is regretted.

As we have decided the issue in favour of assessee therefore we are not inclined to adjudicate the issue raised by Revenue for rejection of books of account u/s 145(3) of the Act. The ground raised by Revenue does not require any separate adjudication and it becomes infructuous. Thus the grounds of appeal of the Revenue are dismissed.

6. Next issue raised by Revenue in ground No.(d) is that Ld. CIT(A) erred in deleting the addition made by AO for ₹ 5 crores on account of commission expenses.

7. The assessee, during the year has incurred commission of ₹5,01,67,682/- only which was claimed in the profit & loss account. Out of

such commission expenses a sum of ₹ 5 crores was paid to Narsingh Ispat Ltd. (NIL for short) and the balance amount of commission of ₹ 1,67,882/- was paid to three different parties. On being confronted for the commission expenses paid to NIL by it, the assessee submitted that it was paid for making contracts, for procuring orders, generating demand and creating indent with all the railways authorities and other companies / firm located in whole of India. The assessee also filed the copy of agreement with NIL in support of its claim. The amount of commission was paid after deducting the amount of TDS to NIL. Similarly, NIL was charging the service tax on the amount of commission on the bills raised to assessee. The assessee accordingly prayed that expenses were incurred in connection with the business and accordingly eligible for deduction u/s 37 of the Act. However, AO disregarded the contention of assessee by observing that assessee failed to substantiate the nature of services provided by NIL. It was also observed that there is no documentary evidence suggesting that NIL was coordinating and liaising with the Indian Railways. In view of above, AO disallowed the commission of expense of ₹ 5 crores and added to the total income of assessee.

8. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that services rendered by NIL were duly explained to AO at the time of assessment proceedings which were also supported with necessary evidences. The assessee has been paying commission for the last several years but no disallowance on account of commission expense was made. The Ld. CIT(A) after considering the submission of assessee deleted the addition made by the AO by observing as under:-

“... .. I however find that the assessee paid the Commission in relation to sale of goods manufactured by Dehradun Unit of the assessee whose profits were entirely eligible for deduction under Section 80IC of the Act/ from the audited accounts of Dehradun Unit, I find that the entire Commission paid to M/s Narshigh Ispat Ltd was charged to the Profit & Loss Account of Dehradun Unit. The deduction under Section 80IC at the rate of 100% of profits was claimed in respect of the sum which was arrived at after setting off the expenditure of Rs. 5 crores. In the circumstances even if the Assessing Officer's hypothesis is

accepted at its face value the disallowance of commission would only result in increase in the profits of the eligible unit which would then qualify for deduction under Section 80IC. If the profits of the undertaking in any case qualified for full deduction under a beneficial provision of the Income-tax Act, 1961 there was no incentive for the assessee to deflate the profits of such undertaking by accounting bogus expenditure. had it been the case that the assessee debited the commission payment to its Profit & Loss Account in respect of its non-80IC units, one could appreciate the Assessing Officer's allegation that the Commission payment was a device adopted to evade payment of tax. On the contrary the facts on record shows that the entire Commission paid was debited to the Profit & Loss Account of the undertaking which enjoyed 100% tax exemption. In the circumstances I find merit in the A/R's submissions that there was no motive of either tax evasion or tax avoidance in making payment of commission. The assessee's contention stands fortified because of the fact that no tax benefit was availed by the assessee as a consequence of commission paid. In fact if the Assessing Officer's assumption is accepted at its face value then it would only mean that by incurring such non-genuine expenditure the assessee reduced its eligible deduction by the corresponding amount which is quite against human probabilities. I therefore do not find merit in Assessing Officer's conclusion that commission was paid as a measure of tax evasion or tax avoidance.

5.7 For an expense to be disallowed u/s. 37 it is a sine qua non to show that the expenditure has not been incurred for business purposes. In other words, it has to be proved that the expenditure has no nexus with the business of the assessee. In the given case, the AO has not placed any material on record to show that the Commission expenditure is not connected with the business of the appellant.

5.8 Hon'ble Gujarat High Court in the matter of DCIT vs. Parth Laboratories Pvt. Ltd. 2013 (4) TMI 137 has observed that,

'when the agent was engaged for influencing various parties for early release of payment and for giving information and it appears that the payments were actually made to them by account aye cheque, in our view, in absence of any evidence that the alleged agent was a fake person, the same should not be disbelieved. In the case before us, the Revenue could not place any evidence before us to the extent that the actual payment was not genuine or that the agent has not disclosed such payment in its return. In absence of such evidence, once it is proved that there existed a written agreement and consequent to such agreement payment were actually made from time to time by account aye cheques, having regard to the nature of work the agent was required to perform, in our opinion, the Tribunal below was quite justified in deleting the addition.'

5.9 From the above facts and reasons, including the judicial precedent, I hold that the AO erred in not allowing the commission. Accordingly the AO is directed to delete the disallowance of Rs.5,00,00,000/- made on account of commission. Ground No. 3 is therefore allowed.”

The Revenue being aggrieved by this order of Ld. CIT(A) is in appeal before us.

9. Ld. DR before us submitted that the assessee failed to justify the service rendered by NIL to the assessee and he vehemently relied on the order of AO.

On the other hand, Ld. AR submitted that said expenses were incurred only connection with the business of assessee and therefore same is allowable as deduction u/s 37(1) of the Act.

Ld. AR alternatively submitted that even if the expenses of commission are disallowed then also the assessee should be allowed higher amount of deduction u/s 80IC of the Act. In this regard, Ld. AR in support of assessee's claim relied on the Circular No. 37 of 2016 issued by CBDT dated 02.11.2016.

In rejoinder Ld. DR submitted that the assessee has not furnished necessary details suggesting that the Commission expense was claimed in connection with the Dehradun unit. Therefore, it is not clear whether the commission expense was claimed against Dehradun unit. Accordingly, Ld. DR for the assessee prayed before us to restore the matter back to the file of AO for fresh adjudicating in accordance with law.

The Id. AR in rejoinder further submitted that Commission expense was claimed against Dehradun Unit as evident from the profit and loss account of Dehradun unit which was filed before the Authorities Below. The Id. AR vehemently supported the order of the Id. CIT(A).

10. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the present case relates to the allowability of Commission expense claimed by assessee in its profit and loss

account. It is settled proposition of law that the expense disallowed in respect of unit eligible for deduction under Chapter VI-A then the deduction will be available on the enhanced amount of profit i.e. disallowance made by the Authorities Below. In this regard, we find relevant to reproduce the necessary portion of Circular No.37 of 2016 issued by CBDT dated 02.11.2016 which is reproduced below:-

“3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.”

Now the issue arises before us whether the Commission expense has been claimed by the assessee in respect of eligible unit or non eligible unit. In this connection, we find that Ld. CIT(A) in his order has given the finding as detailed under:

4.4 It is not disputed by the AO that 80IC unit of the appellant is eligible for deduction u/s 80IC. It is also not disputed by the AO that the appellant had submitted separate P&L account for 80IC unit and appellant also submitted form 10CCB signed by a qualified Chartered Accountant.

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*“I find that the entire Commission paid to M/s Narshigh Ispat Ltd was charged to the Profit * & Loss Account of Dehradun Unit.”*

Besides the above we also note that the assessee before Ld. CIT has filed the certificate in Form 10CCB from the chartered accountant showing the amount of deduction claimed in respect of Dehradun Unit along with separate profit and loss account of Dehradun unit. On question put to the Ld. DR by the Bench that Ld. CIT(A) has given a clear-cut finding that the consolidated profit and loss account was given along with separate profit and loss account of Dehradun unit, the Ld. DR has not advanced any argument against the finding of Ld. CIT(A). In view of the above, we are of the view that even the amount of

Commission expenses of ₹ 5 crores is disallowed then the assessee would be eligible for deduction u/s. 80IC of the Act for the enhance amount. In view of above proposition, we do not find any reason to interfere in the order of Ld. CIT(A). We uphold the same. Hence, this ground of Revenue's appeal is dismissed.

11. Last ground raised by assessee is general in nature and does not require any separate adjudication.

12. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 20/04/2018

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:-20/04/2018

कोलकाता ।

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

(Accountant Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Circle-7, P-7, Chowringhee Sq. 5th Fl, Room No.15, Kol-69
2. प्रत्यर्थी/Respondent-M/s Madras Elastomers Ltd., 32, Ganesh Ch. Avenue, Kolkat-13
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।