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

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

ITA No.6936/M/2016	-	AY 2006-07
ITA No.6937/M/2016	-	AY 2007-08
ITA No.6938/M/2016	-	AY 2008-09
ITA No.6940/M/2016	-	AY 2010-11
ITA No.6941/M/2016	-	AY 2011-12

ACIT 31(1), Mumbai	vs	M/s Diamond Tool Industries 108, Udyog Bhavan, Sonawala Road, Goregaon (W), Mumbai-63 PAN : AAAFD4673L
APPELLANT		**RESPONDENT**

Appellant by	Shri Hari Om Tulsian
Respondent by	Shri Ram Tiwari

Date of hearing	24-05-2018
Date of pronouncement	13-06-2018

O R D E R

Per G Manjunatha, AM :

These five appeals filed by the revenue are directed against two separate, but identical orders of CIT(A)-42 dated31-08-2016 for the assessment years 2006-07, 2007-08, 2008-09, 2010-11 & 2011-12. Since facts are identical and issues are common, these appeals were heard together and are disposed of by this common order, for the sake of convenience.

2. The revenue has raised more or less common grounds of appeal for

AYs 2006-07 to 2008-09 in which the revenue has taken two grounds, i.e. (i) challenging the order of the Ld.CIT(A) in holding that the assessment order passed u/s 143(3) r.w.s. 147 was bad in law; and (ii) deletion of deduction claimed u/s 80IB(4) of the Income-tax Act, 1961. For AY 2010-11, revenue has raised common grounds of appeal in which it has challenged the order of CIT(A) in directing the AO to allow deduction u/s 80IB(4) of the Income-tax Act, 1961. For the sake of brevity, grounds of appeal taken by the revenue for AYs 2006-07 are reproduced below:-

AY 2006-07

> "1) "Whether on the fact and in the circumstances of the case and in law, Ld. CIT(A) erred in holding that the assessment was bad in law ignoring the fact that as per section 147, the Assessing Officer had reason to believe that the income had escaped assessment, and that the issue had not been considered in the original assessment.
> 2) Whether on the fact and circumstances of the case and in law, Ld. CIT(A) erred in directing to allow the deduction u/s 80-IB of Rs. 76.73.482/- of Unit-II ignoring the fact that the assessee failed to prove that both the units are independent one during the course of reassessment proceedings.
> 3) Whether on the facts and in the circumstances of the case and in law. the Ld. CIT(A) erred in directing to allow the deduction u/s 80-IB of Rs. 76,73,482/- of Unit-II ignoring the fact that the registration number as per 10CCB report filed with the return of income clearly states that the sales tax number and excise number are same for both the units.
> 4) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing to allow the deduction u/s 80IB of Rs. 76,73,482/- of Unit-II ignoring the fact that Unit-11 is nothing but extension of the existing unit and the assessee had tried to differentiate the units only to get the benefit of deduction u/s 80-IB."

2. The brief facts of the case are that the assessee is a partnership firm, engaged in the business of manufacturing and trading of stone

cutting tools. The assessee has filed return of income for AY 2006-07 on 27-10-2006 declaring total income of Rs.50,12,811. The assessment was originally completed u/s 143(3) on 12-05-2008 determining total income of Rs.70,53,050. Subsequently, the assessment was reopened u/s 147 of the Act, and accordingly a notice u/s 148 dated 26-03-2013 was issued. The AO has reopened the assessment for the reason that income chargeable to tax had been escaped assessment on account of wrong claim of deduction u/s 80IB(4) for Unit No.2 which is nothing but an extension of an existing unit No.1. The AO further observed that according to the provisions of section 80IB(4), one of the conditions which needs to be fulfilled for claiming deduction is that the industrial undertaking has to come into existence on its own as a new entity without forming or splitting or reconstruction of a business already in existence. The AO further observed that on perusal of record it was seen that the assessee has a common central excise licence and service tax licence numbers for both the units and which are functioning from the same premises where the unit No.1 is located. Therefore, he opined that the assessee has set up Unit No.2 by splitting up of an already existing business; hence, the conditions stipulated u/s 80IB(4) was not fulfilled so as to claim deduction for profit derived from the undertaking and accordingly issued notice u/s 148 of the Act.

Subsequently, the case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, the authorized representative of the assessee appeared from time to time and furnished details, as called for. During the course of assessment proceedings, the AO, after considering relevant submissions of the assessee, denied deduction claimed u/s 80IB(4) of the Act, on the ground that the Unit No.2 on which deduction u/s 80IB(4) was claimed, was nothing but an extension of existing unit and also which is formed by splitting up already existing business.

3. Aggrieved by the assessment order assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has challenged the validity of reopening of assessment on the ground that the AO has reopened the assessment on mere 'change of opinion' without any new material which suggests escapement of income. The assessee also challenged the disallowance of deduction claimed u/s 80IB(4) of the Actg. The assessee has filed elaborate written submissions on both issues which have been reproduced by the Ld CIT(A) at para 4 on pages 5 to 16 of his order. The sum and substance of the arguments of the assessee before the Ld. CIT(A) insofar as merits of the issue was concerned, that it has fulfilled all the conditions specified u/s 80IB(4) with necessary evidences, therefore, the AO was erred in disallowing

deduction claimed on the ground that Unit No.2 is nothing but an extension of already existing unit only for the reason that both units carry common sales-tax and service tax registration numbers without appreciating the fact that sales-tax and service tax numbers are issued to an assessee but not to individual units. `

4. The Ld.CIT(A), after considering relevant submissions of the assessee and also relying upon various judicial precedents allowed appeal filed by the assessee, wherein he has quashed re-assessment order passed by the AO u/s 143(3) r.w.s.147 on the ground that the AO has reopened the assessment on mere change of opinion without there being any tangible material which suggested escapement of income which is evident from the fact that in the original assessment proceedings, the AO had made specific enquiries concerning the allowability of deduction claimed u/s 80IB(4) of the Act. The assessment order was passed after considering the replies / evidences filed by the assessee. The reopening of the case after the end of 4 years from the assessment order can be done only if the assessee failed to disclose fully and truly all material facts necessary for assessment. In the present case, the AO has not pointed out any failure on the part of the assessee to disclose fully and truly all material facts. Therefore, the action of the AO in reopening assessment is a mere change of opinion

which is not permissible under law. Accordingly, the Ld.CIT(A) quashed notice issued u/s 148 of the Act. Consequently re-assessment order has been annulled.

5. As regards deduction claimed u/s 80IB(4) of the Act, the CIT(A) observed that the assessee has claimed deduction u/s 80IB(4) of the Act for AY 2003-04 onwards. The claim was duly supported by the requisite documents and the audit report as per Rule 18BBB of Income-tax Rules, 1962. When the AO has accepted the claim of the assessee in earlier year, there is no reason for the AO to deny such claim in subsequent years without any material changes in facts. The AO has denied the benefit only on the ground that the assessee has common registration numbers for sales-tax and excise duty and also both units are functioning from same premise. But fact remains that sales-tax number and excise registration number are issued to the entities, but not to each unit located in different places or at same place. The assessee has filed necessary details to prove that each unit is independent of one another and which are separately functioning from AY 2003-04 onwards. The assessee has maintained separate set of books of account which has been audited under the provisions of section 80IB(4) of the Act. Under these circumstances, it appeared that the action of the AO was more in the nature of suspicion but suspicion cannot take the place of facts.

Therefore, allowed the claim of deduction u/s 80IB(4) of the Act. Relevant portion of the order of CIT(A) is extracted below:-

"5.1 : Ground of appeal No. 1

In this ground of appeal the assessee has assailed the assumption of jurisdiction u/s 147 of the Act by the AO. The facts of the case are elaborated in detail in the earlier part of the order and the comprehensive submissions of the assessee are also elaborated above. After considering the same! it is seen that the claim of the assessee is correct. In the original assessment proceedings the then AO had made specific inquiries concerning the allowability of the deduction as per section 80IB of the Act. The assessment order was passed after considering the replies/evidences of the assessee. The re-opening of the case after assessment after the end of 4 years from the assessment year could have been done only if the assessee had not made a full and true disclosure. In the present case the AO has not pointed out what disclosure was not made. The statement of the AO regarding both the Units having the same address or excise/sales tax numbers etc are not relevant. They[1] may the start of an enquiry but by themselves they mean nothing. The conditions prescribed under section 80IB(2) do not require a different plot of land or excise registration. In the original assessment the assessee has provided sufficient proof that the new Unit is distinct and separate from the old unit. The assessee had provided details of the new building and the new machineries acquired to make the new Unit. It is also seen that the AO did not consider the objections raised by the assessee to the notice u/s 148. The AO was to give reasonable reply to the objection which was not done.

5.2 , After considering the case laws relied upon by the assessee and the facts of the case and also the order of the CIT(A) 34 in the case of the assessee for A.Y. 2005-06 it is held that the notice issued u/s 148 of the Act was bad in law and therefore it s quashed. The ground of appeal no. 1 is allowed."

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5.9 In A.Y. 2006-07 has also observed that the registration number of SSI authorities is same both the units and Sales Tax Number and Excise Number of both the units is same. The assessee has challenged this argument claiming that no such condition have been stated in section 80IB for claiming deduction under this section. The assessee has explained that these numbers are allotted to the assessee and not to the unit just like PAN No in case of Income Tax. The assessee also claimed that though its Excise and Service Tax registration is the same but separate records for both the units were being maintained and filed with the authorities and even the MODVAT Credit for both the units were being availed separately. The assessee argued that this fact is available in Audited Profit and Loss Account for Unit I and Unit II respectively. It is also claimed that separate manufacturing and production stock registers are being maintained by it and even the consumption of raw material records for both the

> Units are recorded separately. It is seen that the arguments of the assessee have considerable force and are accepted.
>
> 5.10 Under the above circumstances and in view of the case laws discussed above it is held that the AO has not made a case for disallowance of the deduction u/s 80IB(4) of the Act. The action of i the AO was more in the nature of suspicion but suspicion cannot take the place of facts. It is held that the assessee has been able to establish the bona fides of its claim and the assessee is allowed the deduction u/s 80IB(4) of the Act from the profits of Unit-II. The ground of appeal no. 2 of the assessee is allowed."

6. The first issue that came up for our consideration from revenue's appeal for AY 2006-07 is deduction claimed u/s 80IB(4) of the Act in respect of profit derived from Unit II. The Ld.DR submitted that the Ld.CIT(A) was erred in directing the AO to allow deduction u/s 80IB(4) towards profit derived from Unit II, ignoring the fact that the assessee failed to prove that both the units are independent and Unit II has fulfilled all conditions specified u/s 80IB(4) of the Income-tax Act, 1961. The Ld.CIT(A) failed to appreciate the fact that both units are having common registration number of sales-tax and excise which is clear as per form 10CCB filed alongwith return of income. The AO has brought out clear facts to the effect that Unit II which is claiming exemption u/s 80IB(4) is nothing but extension of Unit I and also formed by splitting up of already existing business. Therefore, the CIT(A) was completely erred in directing the AO to allow deduction u/s 80IB(4) of the Act.

7. On the other hand, the Ld.AR for the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of

ITAT, Mumbai Bench “D” in assessee’s own case for AY 2005-06 in ITA No.3903/Mum/2014 dated 08-03-2017, wherein the ITAT, under similar set of facts has allowed the claim of deduction u/s 80IB(4) in respect of profit derived from Unit II. The CIT(A), after rightly considering relevant facts has allowed the claim of deduction u/s 80IB(4) and his order should be upheld.

8. We have heard both the parties and perused the material available on record. The AO has disallowed deduction claimed u/s 80IB(4), on the ground that both the units functioning from the same premise, they have same registration number assigned by SSI authorities, sales-tax authorities and central excise authorities. According to the AO , Unit II is nothing but an extension of Unit I and also formed by splitting up of an already existing business. Therefore, he opined that the assessee has not fulfilled conditions specified u/s 80IB(4) of the Income-tax Act, 1961 so as to claim deduction for profit derived from unit II. The AO proceeded mainly on the premises that both units are functioning from same premise and also both units are having common registration number of all the authorities. We find that the above issue has already been considered by the co-ordinate bench of ITAT, Mumbai Bench “D” in assessee’s own case for AY 2005-06 and after apprising relevant facts has come to the conclusion that the assessee has maintained separate

books of account for both the units and Unit II has been set up by making investment in new plant & machinery. The co-ordinate bench further observed that the revenue failed to bring on record any evidences to demonstrate that Unit II has been set up by splitting up of an existing business or by using old machinery by an existing business. Moreover, assessee's claim of deduction u/s 80IB(4) in respect of Unit II was examined in detail in the initial year of claim i.e. AY 2003-04. The AO, after making necessary enquiry and verifying the documentary evidence submitted by the assessee, and also being satisfied that Unit II has fulfilled all the conditions has allowed assessee's claim of deduction in respect of Unit II. That being the case, in the absence of any material difference in facts in the impugned assessment year, the assessee's claim of deduction u/s 80IB(4) on the same set of facts cannot be denied. The relevant portion of the order of the ITAT is extracted below:-

> 9. Insofar as merits of the issue is concerned, it is evident from the order that the Assessing Officer has denied assessee's claim of deduction primarily for the reason that both the units function from the same premise, they have the same registration number SSI authorities, sales tax authorities and central excise ities. However, on a perusal of the order passed by the learned Commissioner (Appeals), we have noticed that the assessee has maintained separate books of account for both the units, Unit-II has been set-up by making investment in new plant and machinery and supporting details and vouchers were also produced. It has employed separate set of employees for both the units and most importantly there is no material brought on record by the Department to demonstrate that Unit-II has been set-up by splitting

> up of or reconstruction of an existing business or by using old machinery of an existing business. Moreover, as already stated, assessee's claim of deduction under section 80IB in respect of Unit-II was examined in detail in the initial year of claim i.e., assessment year 2003-04. The Assessing Officer after making necessary enquiry and verifying the documentary evidence submitted by the assessee the Assessing Officer being satisfied that Unit-II has fulfilled all the conditions has allowed assessee's claim of deduction in respect of Unit-II. That being the case, in the absence of any material difference in fact in the impugned assessment year, assessee's claim of deduction under section 80IB on the same set of facts and circumstances cannot be jn view of the ratio laid down by the Hon'ble Jurisdictional High Court in Western Outdoor Interactive Pvt. Ltd. (supra). Therefore, on merits also, the assessee is bound to succeed. Thus, grounds no.2, 3 and 4 are also dismissed."

9. In this view of the matter and being consistent with the view taken by the co-ordinate bench, we are of the considered view that the assessee is eligible for deduction u/s 80IB(4) in respect of profit derived from unit II. The CIT(A), after considering relevant facts, has rightly deleted addition made towards disallowance of deduction claimed u/s 80IB(4) of the Act. We do not find any error in the order of the CIT(A). Hence, we are inclined to uphold the findings of CIT(A) and reject ground raised by the revenue.

10. The next issue that came up for our consideration is reopening of assessment under section 147 of the Act. The AO reopened the assessment on the ground that income chargeable to tax had been escaped assessment in view of wrong claim made u/s 80IB (4) of the Act. The Ld.CIT(A) quashed the re-assessment order passed by

the AO on the ground that the AO has reopened the assessment on mere change of opinion without there being any new material which suggests escapement of income and also the assessment has been reopened after a period of 4 years without any allegation on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The revenue has failed to bring on record any evidence to controvert the finding of facts recorded by the Ld.CIT(A) to quash re-assessment order. Therefore, we are of the considered view that the CIT(A) was right in quashing re-assessment order for the reason stated in his order at para 5.1 and 5.2. There is no error or infirmity in the order of the CIT(A). Hence we are inclined to uphold the finding of CIT(A) and reject ground raised by the revenue.

11. In the result, the appeal filed by the revenue for A.Y. 2006-07 is dismissed.

AYs 2007-08 & 2008-09

12. The issues involved in ITA Nos 6937 & 6938/Mum/2016 are identical to the issues discussed in ITA No.6936/Mum/2016, but for figures. The reasons given by us in ITA No.6936/Mum/2016 shall mutatits mutandis apply to these appeals also. Therefore, for the detailed reasons given by us in ITA No6936/Mum/2016, we dismiss the appeals filed by the revenue for AYs 2007-08 and 2008-09.

AYs 2010-11 & 2011-12

13. In these two appeals, except the issue of reopening of assessment u/s 147, the issue on merit is similar to ITA No.6936/Mum/2016. The reasons given by us in preceding paras in appeal No.6936/Mum/2016 shall mutatis mutandis apply to these appeals also. . Therefore, for the detailed reasons given by us in ITA No6936/Mum/2016, we dismiss the appeals filed by the revenue for AYs 2010-11 and 2011-12.

14. As a result, all the five appeals filed by the revenue are dismissed.

Order pronounced in the open court on 13th June, 2018.

Sd/-	sd/-
(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 13th June, 2018
Pk/-
Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Sr.PS, ITAT, Mumbai