

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA Nos. 5619, 2529/DEL/2011
Asstt. Years 2007-08

M/s. K.T.M INDIA Sector-29, Huda, GT Road, Panipat. PAN AAEFK6502B	Vs.	ACIT Panipat Range, Panipat.
(Appellant)		(Respondent)

ITA No. 1981/Del/2012
Asstt. Year: 2007-08

M/s. K.T.M INDIA Sector-29, Huda, GT Road, Panipat PAN AAEFK6502B	Vs.	ACIT Circle Panipat Haryana
(Appellant)		(Respondent)

ITA No. 3165/Del/2011
Asstt. Year: 2007-08

ACIT, Panipat Circle, Panipat	Vs.	M/s. K.T.M INDIA Opp. Sector-29, Huda, GT Road, Panipat PAN AAEFK6502B
(Appellant)		(Respondent)

Assessee by:	Shri Ashwani Taneja, Advocate, Shri Saurabh Goyal, CA
Department by :	Shri Amit Jain. Sr. DR
Date of Hearing	20/06/2018

Date of pronouncement	/09/2018
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ORDER

PER AMIT SHUKLA

The cross appeals in ITA No. 2529/Del/2011 and ITA No. 3165/Del/2011 have been filed by the assessee as well as by the revenue against impugned order dated 1.3.2011, passed by the Ld. CIT (Appeals) Karnal for the quantum of assessment passed u/s 143(3) for the assessment year 2007-08 ; appeal in ITA No. 5619/Del/2011 has been filed by the assessee against impugned order dated 12.10.2011 passed by the Ld. CIT(Appeals) Karnal u/s 154 ; and appeal in ITA No. 1981/Del/ 2012 has been filed by the assessee against impugned order dated 6.2.2012 passed by the Ld. CIT (Appeals) Karnal in relation to the penalty proceedings u/s 271(1) (c) for the assessment year 2007-08.

2. We will first take up the quantum appeal of the assessee in ITA No. 2529/Del/2011. In the said appeal, the assessee has challenged the disallowance of Rs. 1,14,777/- on account of pro rata interest on loan given to sister concern u/s 36(1)(iii).

3. The facts in brief qua the assessee involved are that, assessee has made interest free advances of Rs. 16 lacs to M/s. FLOTEX India, which was a sister concern. In response the show cause notice by the Assessing Officer as why the proportionate interest should not be disallowed, assessee submitted that the advances were given out of the capital of the partners, wherein the opening capital of the partner

as on 1.4.2006 was Rs. 20,00,93,028/- and closing capital as on 31.3.2007 for Rs. 4,49,79,503/-. Apart from that, profit earned by the assessee during the relevant year was far more sufficient to cover the impugned loan of Rs. 16 lacs. In support, reliance was placed on the judgment of Hon'ble Supreme Court in the case of Munjal Sales Corporation vs. CIT (2008)22CAPJ8(SC). However, the AO has rejected the assessee's contention and after applying the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT vs. M/s. Abhishek Industries Ltd. (2006) 286 ITR 1, he disallowed the proportionate interest @9% which worked out to Rs. 1,14,777/- Ld. CIT(A) held that the judgment of Hon'ble Supreme Court in the case of CIT vs. M/s. Munjal Sales Corporation (supra) is distinguishable on facts, because here in this case the capital of the Partners has already been applied for the business purpose and therefore, the money advance must have been out of interest bearing funds.

4. After hearing both the parties, we find that it is not in dispute that the assessee has given interest free advance to its sister concern. The assessee's case has been that it has given the advance from the interest free funds available out of capital of the partners and the entire loan was used for the purpose of business. The AO following the judgment of Hon'ble P & H High Court in the case of CIT vs. Abhishek (supra) held that on such an interest free advance proportionate interest has to be disallowed. Now the said judgment of Hon'ble P & H High Court in CIT vs. Abhishek (supra) has been overruled by the Hon'ble Supreme Court in the case of CIT vs. Munjal Sales Corporation, wherein the Hon'ble Supreme Court held that if assessee has huge interest free funds including the profit earned by the assessee during the year which is sufficient to cover the advancement of loan, then no interest should be disallowed. The assessee has demonstrated that the huge amount of money was lying in the capital

of the partners and the profit earned during the relevant assessment year itself was approximately Rs.1.19 crores. Therefore, such an availability of funds interest free is sufficient to cover up a small interest free loan of Rs. 16 lacs given to sister concern. Accordingly, the disallowance of Rs. 1,14,777/- is deleted. In the result appeal of the assessee is allowed.

5. In the revenue's appeal the revenue has challenged the allowability the deduction u/s 80IB amounting to Rs. 37,16,691/-. Since the tax effect on such a disputed amount is much less than Rs. 20 lacs, therefore, in view of the CBDT circular No.3/2018 dated 10.07.2018, the appeal of the revenue is treated as non maintainable. The said circular clarified that the said monetary limit could be applicable on the pending appeals also, consequently, revenue's appeal is treated as dismissed.

6. Coming to the appeal of the assessee in ITA No. 5619/Del/2011 the relevant ground raised by the assessee reads as under:-

1. *“That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in passing the order u/s 154 even though there was no error apparent from the record.*
2. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in disallowing the deduction u/s 80IB in respect of purported export incentives even though assessee was supporting manufacturer.*
3. *That in any case and any view of the matter, action of Ld. CIT (A) in passing the impugned order u/s 154 and disallowing the claim u/s 801B in respect of purported export incentives is bad in law and against the facts and circumstances of the case. ”*

7. The brief facts and background of the case are that, Assessee Company derived its income from business of supporting manufacturer and direct export of textile goods, etc. The assessee has claimed deduction u/s 80IB of Rs. 37,16,961/- on the net business income of Rs. 1,48,67,843/- @ 25% which included the export incentives in the shape of duty draw back at Rs. 3,52,05,597/-. Ld. AO had disallowed the same after rejecting the assessee's contention and following the judgment of Hon'ble Supreme Court in the case of Liberty India (2009) 317 ITR 218 (SC). Before the Ld. CIT (A) the assessee's contention was that the ratio of Liberty India pertains to direct exporter whereas in assessee's case is not that of direct exporter but supporting manufacturer and in similar matter, Hon'ble P & H High Court has allowed this issue in favour of the assessee. Apart from that ITAT New Delhi in the case of ACIT vs. M/s. Mittal Overseas (supra) has allowed this issue of deduction of duty draw back in the case of supporting manufacturer. Ld. CIT (A) following the decision of M/s. Mittal Overseas (supra) for the assessment year 2002-03 decided the issue in favour of the assessee.

8. Against such a finding, revenue had come in appeal before us which we had already dismissed on the ground of tax effect. The AO after the passing of the Ld. CIT (A) order had filed an application for rectification u/s 154 before the Ld. CIT (A) on the ground that Hon'ble Jurisdictional P & H High Court in ITA No. 269/2010, vide order dated 4.10.2010 in the case of M/s. Mittal Overseas (supra) for the assessment year 2005-06 has decided the issue in favour of the department and requested to rectify the above mistake to be in line with the judgment of Hon'ble Jurisdictional High Court. Ld. CIT (A) held that, since this issue was decided in favour of the assessee following the decision of CIT vs. M/s. Mittal Overseas (Supra) which was decided by the Jurisdictional ITAT Bench in favour of the

assessee, therefore, now in wake of the binding judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. M/s. Mittal Overseas (supra), which has been brought to his notice by the AO wherein it has been held that deduction u/s 80IA is not allowable to supporting manufacturing in the case of duty drawback, this issue has to be decided against the assessee. Accordingly, he reversed his finding and following the judgment of Hon'ble Jurisdictional High Court he decided this issue in favour of the Revenue after observing and holding as under :-

“1.04 In view of the above, there is no doubt that non-consideration of the binding decision of the Punjab & Haryana High Court in the case of the appellant (referred to above) has rendered decision of this office dated 01.03.2011, where by deduction u/s 80IB of the Act on export incentives has been allowed, erroneous. The said error is now rectified by bringing earlier decision of this office in conformity with the binding decision of the Punjab & Haryana High Court in the case of M/s. Mittal Overseas (supra) & accordingly AO's order in the case of M/s. KTM India, Panipat for the assessment year 2007-08 is upheld. In other words, on this point appeal of the assessee is dismissed and the AO is directed to re-compute the income accordingly.”

9. Before us, Ld. Counsel for the assessee first of all he pointed out that, earlier there was a decision of Hon'ble P & H Court in the case of CIT vs. M/s. Mittal Overseas in ITA No. 544 of 2007 and other appeals, judgment and order dated 13th May, 2008, wherein this precise issue was discussed threadbare and the matter was resolved in favour of the assessee that deduction u/s 80IB on duty drawback/DEPB in the case of supporting manufacturer would be allowed.

Apart from that, in the assessment year 2004-05 also, similar issue has been allowed by the Tribunal in assessee's own case in ITA No. 141/Del/2008 vide order dated 4.11.20015 after following catena of decisions. He admitted that though there is a subsequent judgment of Hon'ble P&H High Court dated 4.10.2010 in ITA No. 269/2010 in the CIT vs. M/s. Mittal Overseas wherein this issue has been decided against the assessee. He pointed out that, since there are two sets of judgment of Hon'ble Jurisdictional High court, one in favour and other against, therefore within the scope of section 154, such a rectification could have not have been carried out, especially when the Tribunal in the year 2015 itself has allowed the similar issue.

10. On the other hand Ld. DR brought to our notice that there are two judgments of Hon'ble Jurisdictional High Court one in the case of CIT vs. M/s. Mittal Overseas and other in the case of CIT-III Ludhiana vs. Jaswand Sons in ITA No. 91/2010, order dated 29.9.2010 which are in favour of the Revenue, then the later judgment of jurisdictional High Court will have a binding precedent and has any order passed not in consonance with said precedent, then it has to be rectified from the retrospective effect. Thus, the action of the Ld. CIT (A) in rectifying his order is in accordance with law.

11. We have heard the rival submissions and also perused the relevant facts of the case. It is an undisputed fact that earlier there were decisions of this Tribunal, especially in the case of CIT vs. M/s. Mittal Overseas, wherein it was held that in case of supporting manufacturers' deduction u/s 80IB on duty drawback / DEPB is allowable. Such an order of the Tribunal was also affirmed by the Hon'ble Jurisdictional High Court of P & H High Court, vide order dated 13.5.2008 after detail analysis and discussion. However, subsequently in an another case of same assessee i.e., CIT vs. M/s.

Mittal Overseas in ITA No.269 of 2010, the Hon'ble High Court had answered similar question against the assessee. The said question of law reads as under:-

“Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in drawing an artificial distinction between the case of an exporter and a supporting manufacturer for allowing claim of deduction u/s 80IB on Duty Drawback and DEPB when, given the inappropriateness of the analogy of the Baby Marine Exports case, there is no such distinction and when, at the level of the Supreme Court, it has been held in the case of Liberty India vs. CIT(Karnal) (2009) 317 ITR 218 that “Duty Drawback receipts/DEPB benefits do not form part of the net profits of eligible industrial undertaking for purposes of Section 80-I/80-IA/80-IB of the 1961 Act?”

11.1 Hon'ble Court had answered this issue against the assessee following other judgments of the same court in the case of CIT vs. Jaswand Sons (supra) wherein the Hon'ble Court after referring to the judgments of Hon'ble Supreme Court in the case of CIT vs. Sterling Foods (1999) 237 ITR 579 and Liberty India vs. CIT has decided the issue against the assessee. Since these decisions were not brought to the notice of the Ld. CIT (A) in the quantum proceedings, therefore the matter was decided in favour of the assessee. The AO in his application filed u/s 154 brought to the notice of Ld. CIT(A) that there was a binding judicial precedent of Hon'ble Jurisdictional High Court, then Ld. CIT(A) has rectified his order and has allowed this issue in favour of the department. Following of such binding judicial precedents of the Jurisdictional High Court in the rectification proceedings has been upheld by the Hon'ble Supreme Court in the case of ACIT vs. Saurashtra Kutch Stock Exchange Ltd. 305 ITR 227

(SC), wherein the Hon'ble Apex Court has held that failure to apply the judgment of the Jurisdictional High Court even rendered subsequently gives rise to a mistake apparent from records and the appellate authority has to rectify its judgment so as to bring in consonance with the judgment of the Hon'ble Jurisdictional High Court. Therefore, we hold that there is no legal infirmity by the Ld. CIT (A) in rectifying his earlier order and same is much within the scope of section 154. Thus, the appeal of the assessee on this issue is dismissed.

12. Now coming to the issue of levy of penalty u/s 271(1)(c), assessee has challenged the levy of penalty on disallowance of deduction u/s 80IB; and also on account of disallowance of pro rata interest of Rs. 1,14,777/-.

13. Since we have already allowed the disallowance of pro rata interest of Rs. 1,14,777/-, therefore, penalty u/s 271(1)(c) on such disallowance is directed to be deleted. In so far as the levy of penalty of Rs. 12,51,129/- on amount of disallowance u/s 80IB of Rs. 37,16,961/- for deduction u/s 80IB on Duty Drawback/DEPB, the relevant facts and background has already been discussed above. The assessee's claim of deduction u/s 80IB on Duty Drawback/DEPB at the time of filing of return was then supported by various judgments of the Tribunal which was also confirmed by the Hon'ble Jurisdictional High court as discussed in the earlier part of the order. Thus, at the time of filing of return of income there could not be any furnishing of inaccurate particulars of income, because till the time of passing of assessment order on 16.12.2009, there was a binding precedent of Hon'ble Jurisdictional High Court by way of judgment in the case of CIT vs. M/s. Mittal Overseas dated 13.5.2008. It was much later on that Hon'ble Jurisdictional High Court decided this issue against the assessee and in favour of the revenue. Under these circumstances it

cannot be held that the assessee's claim at the time of filing of return of income was either not correct or was not bonafide. The Ld. AO had relied upon the judgment of Liberty India vs. CIT (2009) 317 ITR 218 (SC) held that such a claim was not allowable even at the time of filing of return of income. However, such a reasoning is not held to be tenable, because the Hon'ble High Court in its judgment and order dated 13th May, 2008 had considered various judgments of the High Court as well as the Supreme Court in the case of CIT vs. Baby Marine Exports, 290 ITR 323 (SC), wherein deduction u/s 80HHC on duty drawback/DEPB in case of supporting manufacturer was allowed. Thus, assessee's claim was duly supported by the Hon'ble Jurisdictional High Court judgment and even if later on such matter has been decided against in subsequent judgment, then it cannot be held that assessee was guilty of furnishing of inaccurate particulars of income. Therefore, such a levy of penalty of disallowance of deduction cannot be upheld and same is directed to be deleted.

Order pronounced in the Open Court on 14th September, 2018.

sd/-

(G.D.AGRAWAL)
PRESIDENT

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 14/09/2018

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

