IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD 'A' BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and Mahavir Prasad JM]

ITA No.1480/Ahd/2015
Assessment Year: 2009-10

Bisazza India Pvt. Ltd., ***.....Appellant***
Survey No.372/2, Budasan,
Near Gail & GIDC Office,
Kadi – 382 715.
[PAN: AAACB 6284 G]

Vs.

Pr. Commissioner of Income Tax-I,
Ahmedabad. ***.....Respondent***

Appearances by

S.N. Soparkar & Parin Shah *for the appellant*
Aparna Agrawal *for the respondent*

Hearing concluded on: 18.07.2018
Order pronounced on : 15.10.2018

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 13th March 2015, passed by the learned Commissioner under section 263 of the Income Tax Act 1961, for the assessment year 2009-10

2. The grievances raised in the appeal are as follows :-

> ***"1. Learned CIT erred in law and on facts in invoking provisions of section 263 of the Act seeking to revise scrutiny assessment u/s.143(3) of the Act holding it as erroneous and prejudicial to the interest of revenue. The order of CIT directing AO to revise order that is neither erroneous nor prejudicial to the interest of revenue is unjust, untenable and against principles of Natural Justice that deserves to be quashed. It be so held now.***
>
> ***2. Learned CIT erred in law and on facts in directing AO to make fresh assessment on the ground that the AO did not apply provision of section***

145A properly and that resulted into assessment erroneous and prejudicial to the interest of revenue. It be so held now.

3. Learned CIT erred in law and on facts in holding assessment order passed by the AO is without proper inquiry and investigation is erroneous and prejudicial to the interest of revenue ignoring fact that AO on detailed verification of annexure to the tax audit report accepted method of valuation of stock consistently employed by appellant as same is revenue neutral. The erroneous order of ld. CIT ought to be quashed. It be so held now.

4. Learned CIT erred in law and on facts in not considering submission of the appellant dated 03.03.2015 in response to show cause notice u/s 263 dated 12.02.2015."

3. To adjudicate on this appeal, only a few material facts need to be noted. The learned Commissioner has exercised the revision powers under section 263 of the Act in the following backdrop:-

"The undersigned, called for and examined the assessment records for A.Y. 2009-10. He assessment in this case was completed under section 143(3) of the I.T. Act, 1961 on 18.03.2013 determining total income at Rs.3,88,79,210/-. On examination of records, it was found that

(1) the assessee has followed exclusive method of accounting in contravention of the provisions of section 145A of the Act, which mandates inclusive method for valuation of inventory.

(2) since the assessee followed exclusive method of accounting, the closing balance of CENVAT credit relating to the previous year relevant to A.Y. 2009-10 amounting to Rs.45,01,612/- was not considered for computation of income and the income was arrived at without including the unutilised CENVAT credit.

Since the AO completed the assessment without properly examining the applicability of the provisions of section 145A of the Act, a notice dated 12.02.2015 was issued intimating the above ground, and calling upon the assessee to show cause why appropriate order u/s 263(1) of the Act should not be passed.

4. Learned CIT was of the view that "the Assessing Officer was required to include the unutilised CENVAT credit amounting to Rs.45,01,612/- in the income of the assessee for the relevant period by applying provisions of section 145A". He was also of the view that "the AO has simply accepted the aforesaid claim of

the assessee and failed to make an enquiry which was called in the circumstances. He finally concluded as follows :-

> ***"In view of the above, it can be concluded that the Assessing Officer, while finalising the assessment under reference, did not apply the provisions of Section 145A properly which resulted into the assessment erroneous and prejudicial to the interest of r4evenueas envisaged in Section 263 of the Act. Accordingly, it is held that the assessment order passed u/s.143(3) dated 18.03.2013 was erroneous and prejudicial to the interest of revenue. Hence, the said assessment for A.Y. 2009-10 dated 18.03.2013 is cancelled and the AO is directed to make fresh assessment of the total income of the assessee for the said assessment year, after allowing proper opportunity of being heard to the assessee as per law."***

5. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. Learned Representatives have fairly agreed that the issue in appeal is covered, in favour of the assessee by a co-ordinate bench decision in the case of Cadila Pharmaceuticals Limited vs. PCIT (ITA No.1190/Ahd/2015; order dated 26.08.2015), even Departmental Representative relied upon the order of the learned Commissioner. He did not, however, point out any distinguishing features.

8. Vide the order dated 26.08.2015, in the case of Cadila Pharmaceuticals (supra), the co-ordinate bench has, *inter alia*, observed as follows :-

> *"4. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The question which requires for our consideration is whether the ld. Pr.CIT is justified in invoking the provisions of section 263 of Act. The Revenue has not controverted the fact that the AO during the assessment proceedings had raised a specific query in notice dated 26/11/2012 calling upon the assessee to state whether tax, duty, cess, etc. included in turnover and inventory in compliance to provisions of section 145A of the Act. If not, give details of taxes liable to be included in turnover and inventories. In response to this specific query, the assessee had vide reply dated 14/12/2012 submitted that the relevant annexure of tax audit gives the desired details. It is not disputed that the tax audit report was placed before the AO. The contention of the assessee is that the AO had applied his mind and found the compliance of provisions of section 145A in order. Therefore, it cannot be inferred conclusively that the AO failed to examine the applicability of section 145A of the Act. The ld. Pr.CIT was of the view that the assessee has followed the exclusive method for accounting CENVAT as against inclusive method of accounting mandated u/s.145 of the Act and, the total income was determined without the statutory adjustment of the cost of raw-materials and work-in-progress by unutilized CENVAT credits at the beginning and end of relevant year*

as stipulated in section 145A of the Act. Against this contention of the assessee is that there is no understatement in the value of closing stock because the assessee has not debited the value of excise duty to Profit & Loss Account at the time of accounting purchases and the excise duty component has been accounted and recognized separately in the financial statements as current assets for the year under consideration. The grievance of the assessee is that by directing the Dy. Commissioner to make fresh assessment, the ld. Pr.CIT has, in fact, intended to enhance the assessed business income to the extent of unutilized balance MODVAT credit by considering the same as taxable income by invoking the provisions of section 145 of the Act. It is the contention of the assessee that such intention is contrary to the settled principle of law as the Hon'ble Gujarat High Court in the case of CIT vs. Unique Industries reported at (2008) 307 ITR 350 (Guj.) has ruled that MODVAT credit available to the assessee in terms of provisions of Central Excise Act is not liable to be taxed. Before the ld. Pr. CIT a reliance was placed on the judgement(s) of the Hon'ble Supreme Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd. reported at (2003) 261 ITR 275(SC) and of CIT vs. Shri Ram Honda Power Equipment Ltd. reported at (2013) 258 CTR 329(SC). The reliance was also placed on the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Unique Industries reported at (2008) 307 ITR 350 (Guj) and also the decision of the Coordinate Bench of this Tribunal in the case of Bemco Sleepers Ltd. Aurangabad vs. Department of Income Tax in ITA No.715/PN/2011 dated 20/06/2012 In support of the contention that it would not affect the taxable income if the assessee adopts inclusive or exclusive method of accounting. Further, the ld. Pr. CIT did not accept the contention of the assessee on the ground that after amendment in the provisions of section 145A of the Act, it is mandatory for the assessee to include the amount of any tax, duty, cess or fee (by whatever name called), in its valuation; namely, purchase, sale and inventory. The moot question which arises for consideration is even if it is assumed that the assessee was required to include the duty in its closing stock and whether such act has caused evasion of tax liability?. The assessee has stated before the ld.Pr.CIT which is not rebutted by the Revenue that there is no understatement in the value of closing stock because the appellant has not debited the value of excise duty to Profit & Loss Account at the time of accounting purchases and the excise duty component has been accounted and recognized separately in the financial statements as current assets for the year under consideration. There is another aspect of the matter also, the contention of the assessee is that MODVAT Scheme provides for instant credit of the input only on the raw-material consumed. The credit has a direct linkage with the consumption of the raw-material. It is obtained on the date when the raw material is purchased. Hence, it is clear that whether one applies the net method or the gross method the gross profit remains the same. Moreover, there is no dispute with regard to the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd.(supra). The Hon'ble Apex Court has held as under:-

> ***"4.*** *The High Court has taken the several illustrations in the charts placed before it by both sides and demonstrated that there are two possible methods of valuation of stock. The first would be the "gross method", in which the stock is valued at cost price inclusive of the excise duty element. If this method is adopted, then the unconsumed stock also must necessarily be valued in the same manner. The other method is the "net method", in which the raw material purchased is valued at the actual*

cost, that is the actual purchase price and, on this, Modvat credit would be available. If this method is to be adopted, then uniformly the same method must be adopted while valuing the unconsumed stock at the end of the year. Whichever method one adopts, the result would be the same.

5. *We are unable to accept the view of the AO that merely because Modvat credit is an irreversible credit available to the manufacturers upon purchase of duty paid raw material, it would amount to income which is liable to be taxed under the Act."*

4.1. In the light of aforementioned judicial pronouncement, it can be inferred that the assessment order is not erroneous. Moreover, it is undisputed fact that the Assessing Officer raised a specific query and reached to a conclusion that method adopted by the assessee has not caused any prejudicial to the Revenue since there is no understatement of closing stock. This conclusion of AO is not absurd or erroneous. Therefore, the exercise of Jurisdiction u/s.263 of the Act by ld. Pr. CIT fails. The Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT reported at (2000) 243 ITR 83 (SC) has held that the CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent, if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to s.263(1).

4.2. It is not pointed out by the ld. Pr. CIT as to what prejudice has caused to the Revenue. In the absence of specific finding by the ld. Pr. CIT, we cannot confirm his order revising the assessment order. Therefore, in our considered view twin conditions as laid down in Section 263 of the Act, i.e. order being erroneous so far it is prejudicial to the interest of Revenue are not satisfied. Under these facts, we are unable to sustain the findings of ld. Pr. CIT, same are hereby quashed. Therefore, the impugned order is set aside and quashed. Thus, grounds raised in the appeal are allowed."

9. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the same, we quash the impugned revision order. When there is no infirmity in the order of the Assessing Officer on merits, the very foundation of the impugned revision ceases to have legally sustainable basis, and it has to be vacated.

10. In the result, the appeal is allowed. Pronounced in the open court today on the 15th October, 2018.

Sd/-	*Sd/-*
Mahavir Prasad	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Dated: 15th October, 2018
*PBN/**

Copies to:

(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) DR
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad