

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 3623/Del/2008 (A.Y 2002-03)

<p>Sharp Mint Ltd. (Formerly known as Sharp Menthol India Ltd. and thereafter as Sharp Global Ltd.) 1st Floor, Sagar Entre, Plot No. 9, Gujranwalan Town New Delhi- 110009 (APPELLANT)</p>	Vs	<p>DCIT Central Circle-22 New Delhi (RESPONDENT)</p>
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ITA No. 3642/Del/2008 (A.Y 2003-04)

<p>DCIT Central Circle-22 New Delhi (APPELLANT)</p>	Vs	<p>Sharp Mint Ltd. 1st Floor, Sagar Entre, Plot No. 9, Gujranwalan Town New Delhi- 110009 (RESPONDENT)</p>
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C.O No. 230/Del/2009 (A.Y 2003-04)

<p>Sharp Mint Ltd. (Formerly known as Sharp Menthol India Ltd. and thereafter as Sharp Global Ltd.) 1st Floor, Sagar Entre, Plot No. 9, Gujranwalan Town New Delhi- 110009 (APPELLANT)</p>	Vs	<p>DCIT Central Circle-22 New Delhi (RESPONDENT)</p>
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ITA No. 3624/Del/2008 (A.Y 2004-05)

<p>Sharp Mint Ltd. (Formerly known as Sharp Menthol India Ltd. and thereafter as Sharp Global Ltd.) 1st Floor, Sagar Entre, Plot No. 9, Gujranwalan Town New Delhi- 110009 (APPELLANT)</p>	Vs	<p>DCIT Central Circle-22 New Delhi (RESPONDENT)</p>
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Appellant by	Sh. S. D. Kapila, Adv & Sh. R. R. Mauriya, Adv
Respondent by	Sh. S. S. Rana, CIT(DR)

Date of Hearing	13.09.2018
Date of Pronouncement	29.11.2018

ORDER

PER SUCHITRA KAMBLE, JM

These appeals are filed by the assessee and Revenue as well as Cross Objection is filed by the assessee against the order dated 22/09/2008 passed by CIT (A)-III, Delhi for Assessment Year 2002-03, 2003-04 & 2004-05 respectively.

2. The grounds of appeal are as under:-

ITA No. 3623/Del/2008 (A.Y 2002-03)

“1. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in excluding 90% of net surplus received on cancellation of foreign exchange contracts while calculating deduction under section 80HHC of the Income Tax Act, 1961 (“the Act”), in terms of clause (baa) of Explanation thereto.

2. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in treating interest earned on FDRs placed with banks as margin money for obtaining bank guarantee / opening of letter of credits as “income from other sources”.

2.1 That the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in denying deduction under section 80HHC of the Act with reference to the aforesaid interest income.

3. That the Commissioner of Income-tax (A) erred in not following his own orders given in the case of the assessee for the assessment year 2000-01, 2001-02 & 2003- 04 on the same facts and circumstances.”

Additional Ground (A.Y 2002-03)

“That on the facts and circumstances of the case, the Assessing Officer erred in making addition to the returned income with respect to issues, which had attained finality prior to search conducted under section 132 and were unconnected with any material/ documents found during the course of search, which were not sustainable in assessment completed u/s 153A of the Act.”

ITA No. 3642/Del/2008 (Revenue’s appeal) A.Y. 2003-04

- 1. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,25,47,432/- made by the AO on account of disallowance of deduction u/s 80HHC in respect of surplus received on cancellation of foreign exchange contracts and interest income on FDRs, which had been confirmed by the CIT(A) on merit in his appellate order for the A.Ys. 2002-03, 2004-05 and 2005-06 in the assessee’s own case.*
- 2. Whether on the facts and in the circumstances of the case, the CIT(A) was legally correct in deleting the afore mentioned disallowance of deduction u/s 80HHC in the assessment u/s 153A on the ground that the said issue had been considered in the earlier assessment completed u/s 143(3) even though he held that once valid proceedings are initiated u/s 153A the AO has not only the jurisdiction but also the duty to levy tax on the total income of the relevant assessment year.*
- 3. Whether on the facts and in the circumstances of the case, the CIT(A) was correct in law and on facts in holding that the said issues had already been decided in the earlier assessment completed u/s 143(3) when the said issues had neither been considered by the Assessing Officer nor adjudicated upon by the Appellate Authorities.*
- 4. Whether on the facts and in the circumstances of the case, the CIT(A) was legally correct in holding that the aforementioned disallowance of deduction u/s 80HHC in the assessment u/s 153A amounted to a review of the assessment order passed earlier u/s 143(3).*
- 5. Whether on the facts and in the circumstances of the case, the CIT(A) has*

erred in law and on facts in not deciding the issue on merits as the aforementioned disallowance of deduction u/s 80HHC was on account of income from cancellation of foreign exchange contracts and interest income on FDRs which was independent income and had no nexus to the profits derived from export business of the assessee.

6. Whether on the facts and in the circumstances of the case, the CIT(A) was legally correct in deleting the disallowance of deduction u/s 80HHC since the said disallowance was based on the reasoning of the Supreme Court decision in the case of K. Ravindranathan Nair reported in 295 ITR 228.

7. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in law in not considering the decision of the Jurisdictional High Court in the case of Consolidated Photo & Finvest Ltd. Vs ACIT (281 ITR 394) which is squarely applicable to the facts of the case.

8. The order of the CIT(A) is erroneous and not tenable in law and on facts.

9. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.”

C.O No. 230/Del/2009 A.Y. 2003-04

“1. That on the facts and circumstances of the case, the CIT(Appeals) erred on facts and in law in not holding that profit arising on cancellation of forward foreign exchange contracts was not liable to be reduced from 'profit of business', while computing deduction under section 80HHC of the Income-tax Act, 1961 ('the Act').

2. That on the facts and circumstances of the case, the IT(Appeals) erred on facts and in law in not reversing the action of the assessing officer in treating interest income earned on Fixed Deposits placed with banks as margin money for obtaining bank guarantee/opening letter of credits as income from other sources- as opposed to 'business income'.

2.1. That on the facts and circumstances of the case, the CIT(Appeals) erred on facts and in law in not reversing the action of the assessing officer of denying netting of interest expenditure with interest income earned on Fixed

Deposits placed with banks, while computing deduction under section 80HHC of the Act.

The respondent craves leave to add, amend, alter or vary from the above grounds at or before the time of hearing.”

ITA No. 3624/Del/2008 (A.Y 2004-05)

1. that the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in excluding 90% of net surplus received on cancellation of foreign exchange contracts while calculating deduction under Section 80HHC of the Income Tax Act, 1961 (“the Act”), in terms of clause (baa) of Explanation thereto.

2. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in treating interest earned on FDRs placed with banks as margin money for obtaining bank guarantee / opening of letter of credits as “income from other sources”.

3. That the Commissioner of Income-tax (A) erred on facts and in law in confirming the action of the assessing officer in denying deduction under section 80HHC of the Act with reference to the aforesaid interest income.”

3. The Ld. AR submitted that the appeal filed by the Assessee for A.Y. 2002-03 is on the issue of challenging the proceedings initiated u/s 153A and Revenue filed appeal in A.Y. 2003-04 wherein the CIT(A) deleted the addition by holding that there is a case of ‘change of opinion’ and ‘review’ of issues already settled u/s 143(3). The Revenue challenged the order of the CIT(A) for A.Y. 2003-04. Therefore, the Ld. AR argued the case for Assessment Year 2002-03. We are taking up the facts of Assessment Year 2002-03. The Ld. AR

further submitted that for Assessment Year 2004-05, there is no preliminary ground as to the challenge of Section 153A proceedings.

4. Facts for A.Y. 2002-03 are that the assessee company was engaged in the business of manufacturing of Menthol oil and allied products. The return of income for the relevant assessment year was filed on 31.10.2002 at an Income of Rs.1,76,33,949/- which was processed under Section 143(1) of the Act on 18.2.2003 at the returned income. The return of income was not selected for scrutiny assessment, thereafter, and had accordingly attained finality. Subsequently, search under Section 132 of the Act was conducted upon the Assessee on 17th January, 2006. Pursuant to the search, assessment under Section 153A of the Act was completed by the assessing officer vide order dated 20.12.2007. In the said Assessment Order, the Assessing Officer reduced the amount of deduction claimed u/s 80HHC of the Act.

5. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

6. The Ld. AR submitted that in respect of completed assessments, the Assessing Officer cannot revise an opinion in a reassessment u/s 153A on a pure question of law without any reference to any fresh material/ or any incriminating document or statement found/seized during the search on 17.01.2006. The Ld. AR further submitted that this question arises in A.Y. 2002-03 and 2003-04. In A.Y. 2002-03 the assessment was made u/s 143(1) on 26.02.2003, whereas for A.Y. 2003-04 admittedly assessment was made u/s 143(3) on 27.09.2005. The Ld. AR submitted that the Assessing Officer has taken altogether different view from the earlier Assessment Years in the present contested Assessment years. The Ld. AR submitted that before the

Assessing Officer, the assessee surrendered the total value on which the material was found, but the assessment order does not relate to the said material on account of the additions made by the Assessing Officer. In-fact, the CIT (A) treated Section 153A proceedings along with Section 147 which is not as per the prescribed provisions of Income Tax Act, 1961. The Ld. AR submitted that all the facts were disclosed by the assessee before the Assessing Officer in the completed assessment proceeding u/s 143(1) and no new facts were brought by the Assessing Officer during the course of Section 153A proceedings. The Ld. AR further submitted that the Assessing Officer has not used the statement of the Managing Director for making addition. Thus, if there is no fresh facts and the same set of facts were found during search that does not amount to incriminating material so as to attract invocation of Section 153A of the Act. The Ld. AR relied upon the following case laws on merits:

- i. Kabul Chawla 380 ITR 473(Del.)
- ii) Best Infrastructure India (P.) Ltd. 397 ITR 82(Del)
- iii) Aggarwal Entertainment P. Ltd. (2016) 72 Taxmann.com 340(Del. Tri.)
- iv) Ravneet Solutions P. Ltd. (2018) 93 Taxmann.com 59 (HN)

7. The Ld. DR submitted that as mentioned in Para 3 of assessment order, the assessee surrendered an amount of Rs.1,04,16,783/- u/s 132(4) for A.Y.2002-03 & Rs.6,80,35,942/- for A.Y.2003-04. The assessee filed return of income u/s 139(1) disclosing income of Rs. 1,76,33,950/-. In response to notice u/s 153A, the assessee filed return of income declaring income of Rs.2,74,03,496/- for A.Y.2002-03. Similarly, the assessee filed return of income u/s 139(1) disclosing income of Rs.6,80,35,942/-. In response to notice u/s 153A, the assessee filed return of income declaring income of Rs.10,42,52,340/- for A.Y.2003-04. In view of the above facts, decision in the

case of Kabul Chawla (Delhi High Court) is not applicable, particularly in view of following decision:-

- Kishore Kumar Vs CIT (62 taxmann.com 215. 234Taxman771)
- Kishore Kumar Vs CIT (52 taxmann.com 449) Madras High Court confirmed.
- CIT Vs. Raj Kumar Arora [2014] 52 taxmann.com 172(Allahabad) [2014] 367 ITR 517 (Allahabad)
- PCIT vs. Avinash Kumar Setia [2017] 81 taxmann.com 476 (Delhi)
- Conventional Fastners Vs. CIT 2018-TIOL-202-S.C-IT
- CIT vs. Jyoti Apparels [2008] 166 Taxman 343 (Delhi)/ [2007] 209 CTR 288 (Delhi).

8. The Ld. AR submitted that the assessee's revised return of income was specifically dealing with the export turnover and not that of import turnover. The Ld. AR submitted that all the evidences in respect of Ground No. 2 and 2.1 were produced before the Assessing Officer. All contracts were for exports which are revealed from the documents. The Ld. AR submitted that the claim of allowance u/s 80HHC of the Act involving, inter alia, the treatment to be accorded under Explanation (baa) of 80HHC(3) relating to firstly, interest earned on fixed deposits made for securing bank guarantee for obtaining release of consignment of rice from the Food Corporation of India of the same amount for export against confirmed purchase order. The Ld. AR submitted that the same cannot be netted against the interest paid to bank on overdrafts/LC negotiations etc. Secondly, the Ld. AR submitted that gain from cancellation of Forex Forward Contracts made against existing order of export sales is "independent income" or it is inextricably linked that it is integral part of export business and earned in the normal course of carrying on export business was not answered by the Revenue authorities. The Ld. AR relied upon the decision of D. Kishore Kumar.

9. As regards to Ground No. 2 and 2.1, relating to interest margin, the Ld. DR submitted that the issue is squarely covered by the Hon'ble Supreme Court's decision in case of Conventional Fastners vs. CIT 2018-TIOL-SC-IT.

10. The Ld. AR submitted that the issue is different in the case before the Hon'ble Supreme Court as it related to Section 80IC and not that of Section 80HHC. The Ld. AR submitted that in-fact evidence was already given to the Assessing Officer.

11. We have heard both the parties and perused the material available on record. For Assessment Year 2002-03, notice u/s 143(2)/148 was admittedly not issued by the Assessing Officer. For Assessment Year 2003-04, assessment u/s 143(3) had already been made on 27/9/2005. For Assessment Year 2004-05, return was accepted u/s 143(1) and claim of the assessee was accepted. Thus, no assessment proceeding was pending for Assessment Year 2002-03 & 2003-04 on 17/1/2006 i.e. the date of search u/s 132 of the Act. Admittedly there was no incriminating material found during the search or in the post search enquiry. The claim of the assessee u/s 80HHC (4) was duly supported with the evidence placed before the Assessing Officer which was accepted in the completed assessment u/s 143(1). The CIT(A), however, held that since the original assessment was made u/s 143(1) for Assessment Year 2002-03, the Assessing Officer had preliminary power u/s 153A to make assessment on any issue in a case where no assessment was made u/s 143(3). But in the present case, no assessment proceeding was pending for Assessment Year 2002-03 & 2003-04 on 17/1/2006 i.e. the date of

search u/s 132 of the Act. Therefore, Assessment u/s 153A itself is bad in law. The CIT (A) relied on the decision of the Hon'ble Apex court in case of CIT Vs. K. Ravindranathan Nair 295 ITR 228, but the decision clearly does not support this proposition and distinguishable on facts. The Ld. DR also relied upon the decisions in respect of Section 153A with respect to invocation to Section 153A but each judgment has its own facts and are not in consonance with the factual aspect of the present assessee's case. In V. Kishore Kumar though, it was held that loose sheets found during the search is not the sole basis for determining the tax liability. But the said ratio does not apply in the present case as the material found during the search was very much disclosed in the original assessment by the assessee before the Assessing Officer. This aspect, at any point of time, was never doubted while passing the assessment order. In a case, where the assessment is completed, which at no point of time was disputed by the Revenue and if there is no material found which appears to be incriminating Section 153A proceedings will not be sustainable. Section 153A case comes in the picture when the initial assessments proceedings are pending on the date of initiation of search or some incriminating material was found during the course of search. Though the terminology used is incriminating material by the Revenue regarding the documents found during the search from the records of the original assessment u/s 143(1), it appears that all these materials were present during the original assessment proceedings for which entries are available in books of accounts. The decision of the Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla 380 ITR 573 which lays down the entire law with regard to Section 153A has given certain conditions while proceedings with Section 153A proceedings and when there is no incriminating material. The decision in case of Kabul Chawla (supra) clearly

stated that Section 153A cannot be invoked in absence of any incriminating material found /seized during the course of search. Therefore, we are allowing the additional legal ground in A.Y. 2002-03. Since the legal issue is adjudicated upon and decided in favour of the assessee in A.Y. 2002-03, there is no need to adjudicate the issues relating to the merits of the case. Therefore, Ground No. 2 to 2.1 are not adjudicated.

12. In result, ITA No. 3623/Del/2008 for A.Y 2002-03 filed by the assessee is allowed.

13. For Assessment Year 2003-04, the CIT(A) held that Assessing Officer had no jurisdiction to revisit the claim u/s 80HHC allowed in the original assessment u/s 143(3), which was completed well before the search; it was because no incriminating material was found in search or in subsequent enquiry. Since, no evidence was found during search and there is no remote nexus with the determination of claim u/s 80HHC, the Assessing Officer had no jurisdiction to revisit the claim in re-assessment u/s 153A. Thus, for Assessment Year 2003-04, the CIT(A)'s order is in consonance with the judgment of Hon'ble Delhi High Court in the case of Kabul Chawla 380 ITR 573 and therefore there is no need to interfere with the said finding in A.Y. 2003-04. We are not interfering with the findings of the CIT(A) and the same is not challenged by the Revenue in its appeal. Therefore, we are dismissing the appeal of the Revenue for A.Y. 2003-04 and the cross objections filed by the assessee are also stands dismissed.

14. In result, ITA No. 3642/Del/2008 filed by the Revenue and CO

230/Del/2009 for A.Y. 2003-04 filed by the Assessee are dismissed.

15. As regards, Assessment Year 2004-05, the Ld. AR submitted that the CIT(A) agrees with the Assessing Officer with interest on fixed deposit for obtaining release of consignment of rice from the Food Corporation of India as income from other sources which cannot be assessed under the head profits and gains from business as it is not derived from export business. But these facts were ignored by the CIT(A) and also ignored the evidence filed before the Assessing Officer. The CIT(A) held that income from cancellation of forward contract is attributable to export business, but it is not derived from export business as there was no compulsion for the assessee to take out such contract.

16. As regards Assessment Year 2004-05, the CIT (A) and the Assessing Officer has ignored the evidence filed on record, and, therefore, the same may be set aside to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Therefore, the assessee's appeal is partly allowed for statistical purpose.

17. In result, ITA No. 3624/Del/2008 for A.Y. 2004-05 filed by the assessee is partly allowed for statistical purpose

Order pronounced in the Open Court on 29th November, 2018.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER
Dated: 29/11/2018
R.N*

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

ate of dictation	13.09.2018
Date on which the typed draft is placed before the dictating Member	14.09.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	29.11.2018
Date on which the final order is uploaded on the website of ITAT	29.11.2018
Date on which the file goes to the Bench Clerk	29.11.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	