

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI
Before Shri Pawan Singh(JUDICIAL MEMBER)

AND
Shri G. Manjunatha (ACCOUNTANT MEMBER)

ITA No. 4947/Mum/2018
(Assessment year : 2013-14)

Johnson & Johnson Pvt Ltd 501, Arena Space, Off JVLR Behind Majas Bus Depot, Jogeshwari (E), Mumbai-60 PAN : AAACJ0866E	vs	Commissioner of Income Tax (LTU) Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri Rajan R Vora
Respondent by	Shri Sushilkumar Poddar

Date of hearing	08-07 -2019
Date of pronouncement	17-07-2019

O R D E R

PER PAWAN SINGH JUDICIAL MEMBER :

This appeal by assessee is directed against the order of Commissioner of Income-tax (LTU), Mumbai passed u/s 263 dated 25-06-2018. The assessee has raised the following grounds of appeal:-

"Based on the facts and circumstances of the case and in law, Johnson & Johnson Private Limited ('the Appellant'), respectfully craves leave to prefer an appeal against the order dated 25 June 2018 passed by the learned Commissioner of Income Tax - LTU ['GIT'] (received by the Appellant on 30 June 2018) under section 263 of the Income-tax Act, 1961 ('Act') on the following grounds which are separate and without prejudice to each other:

On the facts and in the circumstances of the case and in law, the learned CIT has -
On validity of initiation of revision proceedings:

1 erred in initiating revision proceeding under section 263 of the Act, without appreciating that section 263 cannot be invoked unless conjunctive conditions that assessment order passed under section 143(3) r.w.s. 144C(3) of the Act by the Assistant Commissioner of Income Tax, LTU - 1 ('AO') dated 16 February 2017 is erroneous in law as well as prejudicial to the interest of the Revenue, are satisfied;

2 erred in initiating revisionary assessment proceedings under section 263 of the Act, without appreciating that section 263 cannot be invoked in case where the view taken by the learned CIT is based on the presumption that, inadequate enquiry being made at the time of regular assessment proceedings, without pointing out any specific error or defect to show the order is erroneous as well as prejudicial to the interest of the revenue;

3 erred in not appreciating the fact that assessment order cannot be said to be erroneous and prejudicial to the interest of Revenue when there are two possible views on a given issue and the AO, following one of the views, had passed the assessment order;

4 erred in initiating revisionary assessment proceedings under Section 263 of the Act without appreciating the fact that details of expansion of unit was on record and the AO had examined and applied his mind while recomputing deduction claimed by the Appellant under section 80-IC of the Act;

Restricting deduction claimed under section 80-IC for unit of consumer division located at Baddi, Himachal Pradesh

5 erred in restricting the claim of deduction under section 80-IC of the Act in respect of Baddi unit of Consumer division from 100% to 30% in impugned AY (being 4th year) without considering the fact that Appellant has undertaken substantial expansion in AY 2010-11 and is thereby eligible to claim deduction at 100% under section 80-IC for five year period beginning from AY 2010-11;

Initiating penalty under section 271(1)(c) of the Act

6 erred in directing the AO to initiate penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income without appreciating the fact that the claim was made by the Appellant on the basis of judicial precedents, hence the same cannot be termed as furnishing of inaccurate particulars of income."

2. The brief facts of the case are that assessee is a company, engaged in the business of manufacturing and marketing of various consumer care, healthcare and diagnostic product and surgical instruments, etc. The assessee filed its return of income for AY 2013-14 on 13-11-2013 declaring total income of Rs.361,53,36,790 under the normal provisions and book profits u/s 115JB of R.5,48,45,67,693. The return of income was selected for scrutiny. The AO, while passing assessment order u/s 143(3) r.w.s. 144C(3) on 16-02-2017 made various addition on account of transfer pricing adjustment, publicity expenses and other additions. The AO restricted the deduction u/s 80IC at

Rs.180,66,78,506 against the claim of assessee of Rs.192,77,37,410, by disallowing various expenses of Rs.12,10,58,904 as recorded in para 8.15 of the assessment order. The assessment order was revised by Ld.CIT(LTU), vide her order dated 25-06-2018. Before revising the order Ld. CIT (LTU), noted that assessee claimed deduction u/s 80IC. The assessee has three eligible undertakings at Baddi, Himachal Pradesh (which are not related to consumer product and two related to medical division). From perusal of audit report under form 10CCB, the Ld.CIT(LTU), noted that assessee claimed deduction under section 80IC in the following manner:-

Name of Unit (Baddi Plant)	Profit & gains derived from undertakings u/s 80IC	Rate of Deduction u/s 80IC claimed	Deduction claimed u/s 80IC
Consumer Division	142,87,94,072/-	100%	142,87,94,072/-
Hospital Products	9,92,54,866/-	30%	2,92,90,888/-
Ethicon Sutures	74,97,60,944/-	30%	22,49,28,283

3. The Ld.CIT(LTU), further noted that initial assessment from which assessee has claimed the deduction u/s 80IC is assessment order 2008-09. Accordingly, AY 2013-14 is the sixth year of claim. As per provisions of section 80IC, the claim / deduction under this provision is available to assessee @30% from sixth year onwards from its first claim whereas the assessee had claimed deduction @100% of the profit. The Ld.CIT(LTU) further noted that assessee, in

its audit report claimed that there were substantial expansion during financial year 2009-10 in the said unit by installing new plant & machinery, accordingly AY 2010-11 become the initial assessment year and AY 2013-14 being 4th year of claim of deduction u/s 80IC, the Ld.CIT(LTU), by taking her view that assessment year has been defined and the expression “or” has been used in respect of new unit by stating “commences operation” or “complete substantial expansion” and that the expression “or” is to be read as a mutually exclusive expression, which refers to a particular situation by excluding the other situation. Therefore, the initial assessment year would clearly commence either on commencement of operation or at the completion of substantial expansion of existing unit. The word “initial” cannot be used twice by referring to series of events. The Ld.CIT(LTU) took the view that assessee has wrongly claimed deduction u/s 80IC @100% of eligible profit in respect of consumer division in the six year of operation in violation of section 80IC instead of @30% of eligible profit. This omission has resulted in understatement of 70% of Rs.142,87,94,072, i.e. 100,01,55,850 and short levy of tax of Rs.34 Crores (approx.). On the above observation, the Ld.CIT(LTU) issued show cause notice u/s 263 dated 23-01-2018.

4. The assessee filed its reply. In the reply, the assessee, besides other contentions, contended that section 80IC(2)(a)(ii) provides that any

undertaking or enterprises which has taken or taken to manufacture or produce any article or thing as specified in Thirteenth Schedule and undertake substantial expansion during the period, 7th day of January, 2003 to 31st March, 2012 in the state of Himachal Pradesh or State of Uttarakhand is entitled to 100% deduction. The assessee has set up a consumer product unit in Himachal Pradesh and has commenced manufacturing in April 2007 and has undertaken substantial expansion in the financial year 2009-10, i.e.; during the period 07-01-2003 to 31st March, 2012. The assessee has complied with twofold condition of section 80IC(2)(a)ii).

5. The reply of assessee was not accepted by Ld.CIT(LTU) holding that initial assessment year as defined in clause (v) of sub section (8) of section 80-IC used the expression "or" which has been used in respect of new unit by stating "begins to manufacture or produce article or things or commenced operation" or "complete substantial expansion". The assessee, in column No.25(1)(c) of its audit report, clearly stated for deduction u/s 80IC as new business and in column 25(1)(d)(i) stated as substantial expansion of the same unit. The assessee was availing deduction u/s 80IC on new plant. Therefore, the substantial expansion of the same unit cannot be considered for the period of deduction u/s 80IC at 100%. Hence, the assessee wrongly claimed deduction u/s 80IC at 100% of eligible unit in respect of consumer division in the sixth

year of operation in violation of the provisions of section 80IC. Therefore, the Ld.CIT(LTU) directed the AO to give effect of her order. Aggrieved by the order of Ld.CIT(LTU), the assessee has filed present appeal before us by raising the grounds of appeal, which we have quoted above.

6. We have heard the submission of Ld.AR for the assessee and Ld. DR for the revenue and perused the material available on record with the assistance of Id. representatives of the parties. Grounds 1 to 4 relates to validity of proceedings u/s 263 of the Act. The Ld.AR for the assessee submits that provisions of section 263 can be invoked only in case where twin conditions, i.e. order being erroneous and prejudicial to the interest of revenue are cumulatively satisfied. In support of his submission, the Ld.AR relied upon the decision of Malabar Industrial Co. Ltd vs CIT 243 ITR 83 (SC) and Bombay High Court in CIT vs Gabriel India Ltd 203 ITR 108 (Bom). The Ld.AR further submitted that revisionary proceedings are not valid where the AO has fully examined all the records at the time of passing of assessment order and passed the assessment order, after due application of mind. It was submitted that the AO was aware of the fact that Assessee Company has been claiming deduction u/s 80IC since assessment year 2008-09 at 100% and further, the fact that substantial expansion was carried out by the assessee during AY 2010-11 to which 100% deduction has been claimed in AY 2013-14. This fact of substantial

expansion was mentioned in form 10CCB (+) audit report for AY 2013-14 as well. The assessee filed tax audit report and Form No. 10CCB certifying the deduction to be claimed u/s 80IC during the course of assessment proceedings. The AO, after due verification of form 10CCB, called for further report and details including expansion about substantial expansion. The assessee, vide its reply dated 26-12-2016, during the assessment proceedings furnished complete details. The AO, after considering the reply of assessee, allocated other common expenses to head office including research and development expenditure of assessee company while computing amount of deduction u/s 80IC for Baddy unit and partly disallowed the claim of deduction to the extent of Rs.12,10,58,904/-. The Ld.AR further submitted that the AO was satisfied about the admissibility of the claim based on the details submitted. Therefore, provisions of section 263 cannot be invoked. In support of his submission, Ld.AR for the assessee relied upon the decision of Hon'ble Bombay High Court in MOIL Ltd vs CIT 396 ITR 244(Bom).

7. In other alternative submission, the Ld.AR submits that where two views are possible and the AO has adopted one of the two views, then assessment order cannot be said to be erroneous or prejudicial to the interest of revenue and thereby proceedings u/s 263 cannot be sustained. For the issue in dispute, it was the controversy that where assessee is eligible to get fresh period for

claiming 100% deduction in respect of substantially expanded unit. The Ld.AR submits that the Delhi Tribunal in Tirupati LPG Industries vs CIT in ITA No.991/Del/2013 dated 29-01-2014 held that where there is nothing to suggest in the section that there could be second initial year if substantial expansion is completed even to existing unit which claiming deduction u/s 80IC undertook substantial expansion, then year of completion of substantial expansion cannot be (initial year). The Ld.AR for the assessee fairly submitted that Hon'ble Supreme Court in Classic Binding Industries 407 ITR 429 (SC) held that there cannot be multiple assessment years for claiming deduction u/s 80IC. Once the taxpayer has started claiming deduction u/s 80IC and initial assessment year has commenced, there cannot be another initial assessment year thereby allowing 100% deduction for next five year. However, the Hon'ble Supreme Court in the Full Bench decision in PCIT Vs Arham Softronics (102 Taxmann.com 343) dated 20-02-2009, after considering the decision of Classic Binding Industries (supra) held that there can be multiple initial assessment year for claiming deduction u/s 80IC and hence, where a unit claiming deduction u/s 80IC undertakes substantial expansion, the initial assessment year will commence again from the year in which it undertakes substantial expansion and assessee shall be eligible for 100% deduction. The Id. AR for the assessee would submit that in view of the decision of larger bench of Hon'ble Apex Court

in PCIT Vs Arham Softronics (supra) the grounds of appeal raised on merits are covered in favour of the assessee. Therefore, the order passed by Id CIT(LTU) is not sustainable on legal as well as on merit.

8. On the other hand, the Ld.CIT -DR, after going through the year of decision of Full Bench of Hon'ble Supreme Court in PCIT Vs Arham Softronics (supra) submits that he strongly relies upon the order of Id. CIT(LTU).

9. We have considered the submissions of both the parties and have gone through the assessment order passed on 16-02-2017 and the order passed by Ld. CIT(LTU) u/s 263 dated 25-06-2018. We have also deliberated on various decisions cited by Ld.AR for the assessee and relied upon by CIT(LTU) in the impugned order. Perusal of assessment order reveals that during the assessment, the AO examined the issue of deduction u/s 80IC. The AO, examined the deduction related to consumer division, hospital product and ethicon sutures. The AO, after elaborate discussion has recorded at para 8.1 to 8.16, partly disallowed certain expenses related to head office, common expenses and shared expenses of Rs.12,10,58,904. However, the Ld.CIT(LTU) treated the assessment order qua deduction u/s 80IC by taking view that substantial expansion of consumer unit cannot be considered for further period of deduction u/s 80IC @100%. We have noted that in the impugned order, the Ld.CIT(LTU) has not given a finding that the assessment order passed by AO is

erroneous insofar as it is prejudicial to the interest of revenue. The Hon'ble Supreme Court in Malabar Industrial Co. Ltd (supra) held that the twin conditions, i.e. order is erroneous and prejudicial to the interest of revenue must cumulatively satisfied. The Hon'ble jurisdictional High Court in CIT vs Gabriel India Ltd (supra) held that

“The power of suo moto revision under subsection (1) of section 263 of the Act is in the nature of supervisory direction and can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the CIT to exercise the power of revision under this sub section viz (1) the order should be erroneous and (2) by virtue of the order being erroneous prejudice must have been caused to the interest of the revenue. And order cannot be termed as erroneous unless it is not in accordance with law. If ITO. Act in accordance with law. Make certain assessment; the same cannot be branded as erroneous by the CIT simply because according to him, the order should have been written more celebratory. This section does not visualise a case of substitution of the judgement of the CIT for that of the ITO, who passed the order, unless the decision is held to be erroneous. This is may be visualised where the ITO while making the assessment examines the accounts, makes enquiries, applied his mind to the facts and circumstances of the case and determine the income either by accepting the accounts for by making some estimate himself. The CIT on perusal of records, may be of opinion that the estimate made by the officer concerned was on the lower side and left to the CIT, he would have estimated the income at a higher figure than one determine by the ITO. That would not vest the CIT with power to re-examine the accounts and determine the income himself at the higher figure. This is because ITO has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous, simply because the CIT does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the CIT the order in question is prejudicial to the interest of revenue. But that by itself would not be enough to vest the CIT with the power to suo moto revision because the 1st requirement, namely that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interest of the revenue, then the power of suo moto revision cannot be exercised. And every erroneous order cannot be subject matter of revision because the 2nd requirement must be fulfilled. There must be some prima facie material on

record to show that tax which was lawfully eligible has not been imposed or that by the application of the relevant statute, on an incorrect or incomplete interpretation, a lesser tax than what was just has been imposed. When exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have material on record to satisfy in that regard. If the action of the authorities challenged before the court, it would be open to the courts to examine whether relevant objective factors were label from the records called for and examined by such authority”.

10. The coordinate bench of ITAT, Mumbai in ITA No. 3299 & 3200/M/2005 in case titled as M/s Khatiza S. Oomerbhoy Vs ITO dated 27th of the 2006, held as under:

“if the AO has raised quarries and the assessee has filed written submissions/explanation, merely because there is no elaborate discussions in the AO’s order, it cannot be said that such order became erroneous. No new material came to the notice of CIT and he made certain addition without any basis or material. The power vested in CIT under section 263 are extraordinary power and completed assessment proceeding cannot be reopened unless there is some cogent material to show that there is a total non-application of mind on the part of AO or that AO has committed any glaring mistake of fact or law.”

11. We have noted that the assessing officer has examined the issue of deduction under section 80IC and passed assessment order. The Id CIT(LTU) has not specified as to how the order passed by assessing officer fall with the twin condition as provided under section 263 of the ACT. Thus, in our view the order passed by Id CIT(LTU) is not sustainable under the law.

12. We have further seen that the Hon’ble Apex Court in PCIT vs Arham Softronics Ltd (supra) held that an assessee who sets up new industry of a kind

mentioned in sub-section (2) of section 80-IC and starts^ availing exemption of 100 per cent tax under sub-section (3) of section 80-IC (which is admissible for five years) can start claiming exemption at same rate of 100 per cent beyond period of five years on ground that assessee has now carried out substantial expansion in terms of clause (ix) of sub-section (8) of section 80-IC within aforesaid period of ten years in its manufacturing unit. The said previous year in which substantial expansion is undertaken would become 'initial assessment year', and from that assessment year, assessee shall be entitled to 100 per cent deductions of profits and gains, (d) Such deduction, however, would be for a total period of 10 years, as provided in sub-section (6).

10. We have noted that the Ld.CIT(A) has not disputed the substantial expansion undertaken by assessee during AY 2010-11. Therefore, in view of the above discussion, we are of the view that the grounds of appeal raised by the assessee are squarely covered by the recent decision of Full Bench of Hon'ble Apex Court in the case of PCIT vs Arham Softronics Ltd (supra). Therefore, the revision order passed by the Ld.CIT(LTU) quashed /set aside.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 17 -07-2019.

Sd/-

sd/-

(G. Manjunatha)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 17th July, 2019

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai