

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.346/PUN/2017

निर्धारण वर्ष / Assessment Year : 2011-12

DCIT, Circle-9,
Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Kala Genset Pvt. Ltd.,
392/1, Vill- Mahalunge,
Tal. Khed, Pune-410501.

PAN : AAACK6784C

.....प्रत्यर्थी / Respondent

Revenue by : Shri N. Ashok Babu
Assessee by : Shri Nikhil Pathak

सुनवाई की तारीख / Date of Hearing : 17.07.2019

घोषणा की तारीख / Date of Pronouncement : 26.08.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal is filed by the Revenue against the order of CIT(A)-6,
Pune dated 31.10.2016 for the Assessment Year 2011-12.

2. The grounds raised by the Revenue are as under :-

“1. “Whether on the facts and circumstances of the case, the CIT(A) was justified in **deleting the excess remuneration** paid to the Directors of the company?”

2. “whether on the facts and circumstances of the case, the Hon'ble CIT(A) was justified in allowing the assessee's claim of Rs. 55,20,630/- claimed as **deduction u/s 80IB(5)(i)** of the I.T. Act, 1961, when the assessee is not involved in manufacturing or producing activity but is only carrying out the activity of assembling at its silassa unit?”

3. “whether on the facts and circumstances of the case, the Hon'ble CIT(A) was justified in allowing **deduction u/s 80IB(5)(i)** of the I.T. Act, by holding that assembling of various components amounts to manufacture; without appreciating that no manufacturing activity is possible without sophisticated machinery or skilled manpower?”

4. “whether on the facts and circumstances of the case, the Hon'ble CIT(A) was justified in ignoring the **significance of amendment of Sec. 10A and 10B by the Finance Act, 2000** whereby definition of manufacturing, which included any process or ASSEMBLING, has been elected w.e.f. 01/04/2001 thereby meaning that those involved in assembling and processing would not be entitled to benefits intended for manufacturing concerns?”

5. “whether on the facts and circumstances of the case, the Hon'ble CIT(A) has erred in not applying the ratio of Hon'ble Calcutta High Court in the case of CIT vs Babcock & Wilcox of India Ltd reported in 241 ITR 583 wherein it has been held that the activity of erecting of boiler at site by assembling of parts cannot be equated with manufacture of an article or thing?”

6. “whether on the facts and circumstances of the case, the Hon'ble CIT(A) has erred in not applying the ratio of Hon'ble Supreme Court in the case of CIT vs N.C. Budhiraja & Co. reported in 204 ITR 412, wherein the meaning of manufacture has been analyzed in detail?”

7. “Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in **deleting disallowance of depreciation of Rs. 13,76,694/-** on unexplained investment in WIP of Rs. 1,37,66,943/- when the Ld.CIT(A) vide his order for A.Y. 2010-11 accepted that the material has been purchased locally in cash & only for the purpose of availing any vat credit he may have sought these bills from the hawala operators?”

8. “Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in **deleting the Disallowance of Interest** of Rs. 16,52,033/- made at 12% of purchases of Rs.1,37,66,973/- from bogus suppliers treated as advance made to unknown debtors not for business purpose?”

3. The ground-wise adjudication is given in the following paragraphs of the order.

4. Referring to **ground no.1** i.e. excess remuneration paid to the Directors of the company, ld. Counsel for the assessee submitted that the order of the CIT(A) on this issue is reasoned one. The CIT(A), as per

discussion given in para 4.1.3 of his order, rightly deleted the addition as made by the Assessing Officer u/s 40A(2)(b) of the Act.

5. On the other hand, ld. DR for the Revenue heavily relied on the order of the Assessing Officer.

6. On hearing both the sides and perusing the order of the CIT(A) on the issue raised in ground no.1 relates to the applicability of the provisions of section 40A(2)(b) of the Act in respect of remuneration paid to the Directors of the assessee company, we find the contents of para 4.1.3 of the order of the CIT(A) being operational para are relevant. The same are extracted hereunder :-

“4.1.3 The submissions have been considered. The AO's observation that the qualifications of the directors are to be in tune with the functions undertaken by them cannot be a guideline to decide the remuneration without understanding the specific role played by them in the company in its growth. The working directors need managerial skills to get the functions carried out by the subordinates working under them. It is commonly observed in the listed companies and other promoter companies, the directors are persons with a vision and strategic thinking and they steer company's towards growth and profits. They are not always highly qualified and their qualifications are always not in tune with the functions overseen by them. Therefore, the qualification per se cannot be the deciding factor in fixing the remuneration. The other observation of the AO is that the appellant had failed to establish that the remuneration is reasonable. In my considered opinion, the appellant had actually established the personal risks taken by the directors by undertaking personal guarantees and also the fact that the companies turnover had actually increased and the company was in a position to establish units at multi locations. These clearly prove that the remuneration paid is reasonable.

The third observation of the AO is that the tax has to be paid by the concerned person irrespective of the fact that there is no revenue loss, if paid by the other person. The intention behind the insertion of sec 40A(2) is to plug the tax evasion as explained by the CBDT circular in this regard. It is for this reason that the payments made to the specified persons are only covered in this provision. The tax avoidance is possible in respect of the persons closely associated with the concerns by suitably altering the payments structure. It is for this reason, the payments made to the specified persons should be in relation to the market value of the services rendered by them. It is already held that the payment is not unreasonable

considering the services rendered and risk undertaken by them. Further, in the present case, as all the directors are in the highest tax bracket and have paid taxes on the remuneration received by them, there is no tax avoidance or loss of revenue. Considering all these factors the addition made by the AO is deleted.”

7. It is a settled legal proposition in law *qua* the provisions of section 40A(2) of the Act that, with furnishing of preliminary facts relevant to the issues, the onus shifts to the Revenue. From the above, it is evident that the Assessing Officer failed to bring any evidence on record to demonstrate that the payments made were excessive or unreasonable. The CIT(A) rightly considered all the issues and decided to grant relief to the assessee. Considering the same, we are of the opinion, the order of the CIT(A) is fair and reasonable on this issue and it does not call for any interference. Thus, the **ground no.1** raised by the Revenue is dismissed.

8. Referring to **grounds no.2 to 6** i.e. validity of claim of deduction u/s 80IB(5)(i) of the Act, ld. Counsel for the assessee submitted that the issue raised in grounds no.2 to 6 is a **covered issue** and the same is now stands decided in favour of the assessee by the Co-ordinate Bench of the Tribunal in **assessee's own** case vide ITA Nos.2653 & 2654/PUN/2016 for the assessment years 2010-11 & 2006-07 dated 31.12.2018. Referring to the said decision of the Tribunal (*supra*), ld. Counsel for the assessee brought our attention to para 2 to 6 and submitted that the issue relates to the applicability of the provisions of section 80IB(5)(i) of the Act was decided in favour of the assessee.

9. On the other hand, ld. DR for the Revenue heavily relied on the order of the Assessing Officer.

10. On hearing both the sides, we find it relevant to extract the contents of para 2 to 6 of the order of the Tribunal (supra) and the same are extracted hereunder :-

"2. The brief facts of the case as emanating from the records are; the assessee is engaged in the business of manufacture and assembling of Generator sets. The assessee filed its return of income for the impugned assessment year on 22-11-2006 declaring total income of Rs.1,71,42,956/-. The assessee claimed deduction u/s.80IB(5) in respect of manufacturing unit located at Silvassa. In scrutiny assessment proceedings, the assessee's claim of deduction u/s.80IB(5) was allowed vide order dated 04-11-2008. Subsequently, the Assessing Officer (in short 'AO') reopened the assessment to reject assessee's claim of deduction amounting to Rs.1,63,06,945/- u/s.80IB(5) of the Act. The AO vide order dated 08-03-2013 passed u/s.143(3) read with section 147 disallowed the assessee's claim of deduction u/s.80IB(5) of the Act.

3. Aggrieved by reopening of assessment and disallowance of claim of deduction u/s.80IB(5), the assessee filed appeal before the CIT(A). The First Appellate Authority vide impugned order held that the assessee is eligible for claiming the deduction u/s.80IB(5) and reversed the findings of AO. Against the order of CIT(A), the Revenue is in appeal before the Tribunal.

4. Shri Yogesh Kamat representing the Department submitted that the CIT(A) has erred in coming to the conclusion that 'assembling' amounts to 'manufacturing'. The CIT(A) while allowing the appeal of assessee has placed reliance on the decision of Pune Bench of the Tribunal in assessee's own case for the assessment years 2007-08 and 2008-09 in ITA Nos. 2056 & 2057/PUN/2012 decided on 28-02-2014. The Department is in appeal before the Hon'ble High Court against the said order of Tribunal. The ld. DR fairly conceded that the appeal of the Revenue may not be accepted by the Hon'ble High Court as the tax effect in the appeal is below the monetary limit as has been recently notified by the CBDT vide Circular No.21/2015. The ld. DR placed reliance on the decision of Hon'ble Calcutta High Court in the case of CIT Vs. Babcock & Wilcox of India Ltd. reported as 241 ITR 583 to contend that assembling of parts cannot be equated with 'manufacture of an article or a thing'. The ld. DR contended that the provisions of section 10A and 10B have been amended by the Finance Act, 2000 whereby definition of 'manufacturing', which included any process or assembling has been deleted w.e.f. 01-04-2001.

5. On the other hand, Shri Nikhil Patkalk appearing on behalf of the assessee submitted that the assessee claimed deduction u/s.80IB(5) for the first time in the assessment year 2005-06. The Revenue initially allowed the assessee's claim of deduction. Thereafter, the assessment was reopened and the assessee's claim of deduction u/s.80IB(5) was

denied. The assessee carried the matter in appeal before the First Appellate Authority. The CIT(A) deleted the addition. Thereafter, the Department did not agitate the issue in appeal before the Tribunal on account of low tax effect. In assessment years 2007-08 and 2008-09, the assessee's claim of deduction was again disallowed. In the first appeal before the CIT(A), the assessee's claim of deduction u/s.80IB(5) in respect of Silvassa unit was allowed. The Department carried the issue in appeal before the Tribunal in ITA Nos. 2056 & 2057/PUN/2012 (supra). The Tribunal upheld the order of CIT(A) in holding assessee eligible for claiming deduction. The ld. AR referred to the above order of Tribunal placed at pages 21 to 37 of the paper book. The ld. AR submitted that the Tribunal has held that 'manufacturing' includes assembly of parts. The ld. AR further pointed that the Tribunal while allowing assessee's claim has considered the decision rendered in the case of CIT Vs. Babcock & Wilcox of India Ltd. (supra).

6. We have heard the rival submissions and have perused the orders of the authorities below. The solitary issue in the appeal by Revenue is against allowing assessee's claim of deduction of Rs.1,63,06,945/- u/s.80IB(5). The assessee is engaged in the business of assembling and manufacture of Diesel Generator Sets for industrial and commercial applications. As per the contentions of the Revenue, **assembling of various components does not amount to 'manufacture'**. We find that, for similar reasons, the assessee's claim of deduction u/s.80IB(5) was denied by the Department in assessment years 2007-08 and 2008-09. The issue travelled to the Tribunal. The Tribunal after placing reliance on the decisions rendered in the case of Chiranjeevi Wind Energy Ltd. reported as 2011-TIOL-91-HC-MAD-IT, Tata Locomotive & Engineering Ltd. reported as 68 ITR 325 (Bom.), CIT Vs. Jackson Engineers Ltd. reported as 341 ITR 518 (Delhi) upheld the order of CIT(A) in allowing assessee's claim of deduction u/s.80IB(5). We further find that the Coordinate Bench of the Tribunal while deciding the issue in favour of the assessee has also considered the decision rendered in the case of CIT Vs. Babcock & Wilcox of India Ltd. (supra). Since this issue has already been considered and decided in favour of the assessee by the Tribunal, we find no reason to take a contrary view, especially when the facts are identical. Accordingly, the impugned order is upheld and the appeal of the Revenue is dismissed."

11. The activity of assemblage of various components/items into a product, constitutes 'manufacturing' functions. Accordingly, the benefit of the deduction of section 80IB(5) of the Act are available to the assessee. Considering the above, we find the order of the CIT(A) is fair and reasonable on this issue and it does not call for any interference. Thus, the **grounds no.2 to 6** raised by the Revenue are dismissed.

12. Referring to **ground no.7** i.e. disallowance of depreciation, ld. Counsel for the assessee submitted that the order of the CIT(A) on this issue is reasoned one. The CIT(A), as per discussion given in para 4.3.3 of his order, rightly deleted the addition made by the Assessing Officer.

13. On the other hand, ld. DR for the Revenue heavily relied on the order of the Assessing Officer.

14. On hearing both the sides and perusing the order of the CIT(A) on the issue, we find the contents of para 4.3.3 of the order of the CIT(A) are relevant and the same are extracted hereunder :-

*“4.3.3 The CIT(A) order has been perused and the CIT(A) has held that the WIP to be genuine based on the certification done by the architects. The CIT(A) has detailed the reasons as to why the **WIP cannot be held to be bogus**. In view of such findings, the depreciation on capitalized WIP has to be allowed. Therefore, the addition made on this ground is deleted. Similarly, the CIT(A) order clearly specifies that the funds withdrawn would have only gone to increase the Work In Progress irrespective of the fact that the bills produced from the alleged suppliers may not have been found to be correct. In view of this finding the interest disallowance holding that the funds have been diverted does not have any merit. Therefore, the interest disallowance is also deleted. In effect the ground No.12 is allowed.”*

15. Considering the above, we are of the opinion, the order of the CIT(A) is fair and reasonable on this issue and it does not call for any interference. Thus, the **ground no.7** raised by the Revenue is dismissed.

16. **Ground no.8** relates to the disallowance of interest. The said ground is not pressed before the CIT(A) and the same was dismissed as not pressed.

17. Before us, ld. Counsel for the assessee fairly submitted that no special argument put forward before us on this issue. Therefore, without going into the merits of the issue, we find the order of the CIT(A) is fair and reasonable and it does not call for any interference. Accordingly, the **ground no.8** raised by the Revenue is dismissed.

18. In the result, the appeal of the Revenue is dismissed.

Order pronounced on 26th day of August, 2019.

Sd/-	Sd/-
(विकास अवस्थी / VIKAS AWASTHY)	(डी. करुणाकरा राव/ D. KARUNAKARA RAO)
न्यायिक सदस्य/ JUDICIAL MEMBER	लेखा सदस्य/ ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 26th August, 2019.
Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-6, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.