

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ “बी” चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH ‘B’, CHANDIGARH

BEFORE: SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND SHRI R.L. NEGI, JUDICIAL MEMBER

आयकर अपील सं./ ITA No.206/Chd/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Sh.R.P. Kapoor, Prop. M/s Mandav Air Industries, Plot No.12, Phase-I, Industrial Area Sauli Khad, Mandi (H.P.) स्थायी लेखा सं./PAN NO: AKZPK1895L	बनाम	The Pr.C.I.T. , Shimla (H.P.)
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri Parikshit Aggarwal, CA
राजस्व की ओर से/ Revenue by : Shri Sandeep Dahiya, CIT DR

सुनवाई की तारीख/Date of Hearing : 21.06.2021
उद्घोषणा की तारीख/Date of Pronouncement: 30 .06.2021

(Hearing through webex)

आदेश/Order

Per Annapurna Gupta, Accountant Member:

The above appeal has been preferred by the assessee against the order of the Learned Principal Commissioner of Income Tax, Shimla [in short the ‘Ld. Pr.CIT] dated 04.12.2017 relating to assessment years 2014-15, passed in exercise of

revisionary jurisdiction, u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as 'Act')

Earlier the appeal of the assessee was dismissed by the Tribunal vide order dated 30.05.2019 noting that the assessee had arguable points vis a vis one of the issues raised by the Ld.Pr.CIT, but had made no arguments relating to the other issues raised and that even in set aside proceedings was unable to convince the AO on those issues. Thereafter the assessee sought to recall the order vide a miscellaneous application filed in MA. No.101/Chd/2019, pointing out that the ITAT ought have given a finding on the issue found arguable and that on the other issues also the fact of the assessee unable to convince the AO in set aside proceedings had been incorrectly recorded. Convinced with the mistake pointed out by the assessee, the ITAT recalled the entire order, vide order dated 27.05.2020. Hence, this appeal before us.

2. The facts relating to the case are that for the impugned assessment year the income of the assessee had been assessed u/s 143(3) of the Act at Rs.72,89,920/-. Subsequently, on perusal of assessment record, the Ld. Pr.CIT noted that the assessment had been completed without proper enquiry and application of mind and the issues had not been properly

thrashed before concluding the assessment. Accordingly, he issued a show cause notice dated 08.11.2017, exercising his revisionary jurisdiction as per provisions of section 263 of the Act, on the assessment order so passed, outlining therein the various issues on which he found the order passed by the AO to be erroneous. In response, the assessee filed written submissions, after considering which, he dismissed all the contentions of the assessee and held that the order passed by the AO was erroneous since necessary enquiries on the issues outlined had not been made before completing the assessment. He cancelled the assessment order so passed and directed the AO to reframe fresh assessment for the impugned year in accordance with law.

3. Aggrieved by the same, the assessee has come up in appeal before us.

4. The Ld.Counsel for the assessee began by drawing our attention to the show cause notice issued by the Ld.Pr.CIT u/s 263 of the Act, reproduced at para 3 of his order, to point out the various issues on which revisionary jurisdiction had been exercised ,as under:

- a. *"Deduction u/s 801C of the Income Tax Act, 1961 was allowed to you in respect of Unit -II where Dissolved Acetylene Gas was being produced which falls under the negative List of Schedule XIII of the Income tax Act, 1961.*

The assessment order was passed on 28.12.2016. However, the information related to the production of Dissolved Acetylene Gas (that falls under the list) was available with the A.O- from the letters issued by Directorate of Industries, H.P. and Department of Industrial Policy and Promotion, Govt. of India vide letter dated 03.06.2016 and 11.03.2016 respectively despite thereof the deduction u/s 80IC is allowed by the A.O.

- b. In profit & Loss account Unit I (IU-II) you have shown income on account of rent at Rs. 60,000/- and net income was shown at Rs. 45,97,055/-. Said income was not derived from manufacturing activities and also had no direct nexus between the profits and gains from industrial undertaking. Hence you are not eligible for deduction u/s 80IC of the Income Tax Act, 1961. However, the A.O. has not verified the same and had wrongly allowed deduction u/s 80IC on this income.*
- c. On perusal of Note 7, short term loans and advances, it is noticed that you had deposited securities with sales tax department amounting to Rs. 5,000/- and Rs. 4,58,000/- with HPSEB. On verification of form No. 26AS, it is also noticed that you had received interest income of Rs. 35,179/- from HPSEB on which IDS of Rs.3624/- was also deducted. The interest earned on these deposits is not eligible for claiming deduction u/s 80IC. However, it appears that interest income was not disclosed by you.*
- d. On perusal of the Profit & Loss account in respect of Unit- I (IU-II), you had shown net profit of Rs. 45,97,055/- on which deduction @ 25% was claimed at Rs.11,49,264/-. Nevertheless, the said claim was rejected by the A.O., by holding that it is splitting up/reconstruction of existing business i.e. Unit -I(IU-I) instead of new industrial undertaking but still deduction was allowed to you; whereas, the department is already in appeal in ITAT against allowance of the same by CIT(A) for A.Y. 2012-13.*
- e. On perusal of profit & Loss account in respect of Unit I(IU-II) in which you had claimed deduction @ 25% u/s 80IC, expenses on account of electricity and Water has been claimed at Rs. 82,70,484/-, whereas only Rs. 1,66,020/- (there is no schedule or details of these expenses also) has been claimed for Unit -II as electricity and Water expenses, in which 100% deduction under section 80IC was claimed. It is also noticed that there is no electricity security deposited with the HPSEB for installation of electric connection in*

respect of this unit. Thus there appears to be no electric connection for unit -II and therefore, whole electricity/water expenses have been claimed in Unit-1 only. In the absence of any details, the expenses should have been apportioned amongst the Units in same proportionate as per the sales/turnover and accordingly, deduction u/s 80IC has been excessively allowed. Similarly, it is noticed that expenses on account of employees benefits have been claimed in respect of Unit I at Rs. 29.87 Lac and for Unit II only Rs. 10.49 Lac, whereas turnover of Unit II is more than 45% of Unit I at Rs. 3.05 crore and Rs. 2.10 crore respectively. Thus, it appears that you have diverted the expenses to claim higher deduction u/s 80IC.

3. In the light of above facts and failure on the part of the A.O. to verify and examine the above shows negligence on the part of the A.O. and, thus, constitutes an error within the meaning of Section 263 of the I.T.Act,1961. The assessment, thus, framed by the A.O. for the A.Y. 2014-15 vide order passed u/s 143(3)/147 of the I.T. Act, 1961 on 28.12.2016 is erroneous, in so far as it is prejudicial to the interest of revenue.”

5. Referring to the same, Ld.Counsel for the assessee contended that out of the above, the major issue related to the assessee's claim of 100% exemption of profits u/s 80IC of the Act, in respect of its Unit-II as mentioned at para (a) above. He therefore took up this issue first for making his arguments.

6. Briefly explaining the facts of the case, the Ld.Counsel for the assessee stated that the assessee was operating three units in the State of Himachal Pradesh, Unit -I (i.e. IU-I), Unit-I (i.e. IU-II) and Unit-II. That the first two units, i.e. Unit-I (i.e. IU-I), Unit-I (i.e. IU-II) were established in the same premises and manufacturing the same product, i.e. medicinal

and industrial oxygen and nitrogen, IU-I being set up in 2000-01, while IU-II being set up in 2007-08. Vis-à-vis the third unit, i.e. Unit-II, Ld.Counsel for the assessee pointed out that the assessee was manufacturing Dissolved Acetylene Gas and had commenced manufacturing the same in the year ended 2010. He drew our attention to para 3 of the assessment order wherein the aforesaid facts find mention.

7. Ld.Counsel for the assessee contended that the issue raised in point (a) of the show cause notice related to Unit II of the assessee. He further stated that the profits of the said unit were being claimed as exempt u/s 80IC of the Act since commencement of business and had been allowed by the Revenue after scrutiny assessment in assessment year (A.Y) 2013-14. Our attention was drawn to the copy of assessment order for the said year placed before us at P.B 68-79. The Ld.Counsel for the assessee contended that for the impugned year also it had been allowed 100% deduction of profits earned in the impugned unit, in the order passed by the AO u/s 143(3) of the Act, but the Ld. Pr.CIT found that the AO had information in his possession that the product being manufactured by the assessee did not qualify for exemption as it fell in the negative list specified by the government, by way of letter issued to this effect by the Directorate of Industries,

Himachal Pradesh and the Department of Industrial Policy & Promotion, Government of India dated 03-06-2016 and 11-03-2016. And that despite possessing this information the AO had allowed deduction u/s 80IC of the Act to the assessee, which made his order erroneous on this count.

8. The Ld.Counsel for the assessee, thereafter proceeded to make detailed arguments before us in support of his contention that there was no error at all in the order of the AO allowing assessee's claim of deduction u/s 80IC of the Act in Unit II. Briefly summarized, his arguments were to the effect that:

a) the issue of the items being manufactured by the assessee, whether it fell in the negative list or not, had been thoroughly examined during the assessment proceedings and after due application of mind the AO had taken a possible view in favour of the assessee.

In this regard, he drew our attention to the assessment order for the impugned year pointing out therefrom the submissions made by the assessee to the AO, when asked to demonstrate its eligibility for claim of deduction u/s 80IC of the Act at para 6 of the assessment order as under:

“6. In respect of industrial undertaking i.e. Third Unit (Unit-II) situated at Vill. Mathyani, P.O. Nasloh, Distt. Mandi, H.P. assessee has submitted that:-

the product dissolved acetylene NIC classification 24119 is nowhere mentioned in NIC classification given in schedule 13 and hence eligible for deduction under 80IC.

All the other conditions stipulated under the Act for claiming deduction under section 80IC are inter alia are being adhered to as per explanation given below:

-undertaking should be new undertaking or should have undergone substantial expansion.

-undertaking should be formed or undergone substantial expansion between 01-01-2003 to 01-04-2012.

-there should be no reconstruction, re-establishment or revival of old business. And no old plant and machinery should be used.

As regards, the product of Dissolved acetylene produced in Unit II it is to submit that the product mentioned in negative list is:

- 1. An Organic Chemical*
- 2. Items should be classifiable under chapter 29*
- 3. Item should be classifiable under sub class 24117 of the NIC classification 1998.*

All the aforesaid three conditions should be cumulatively satisfied/ fulfilled, to qualify to fall under S.No. 5 of Negative Lists of notifications and to become ineligible to the benefit of exemption notifications. If any of the above condition is not satisfied, the product cannot be treated covered by the negative list and benefit of exemption cannot be denied. Basic Organic Chemical (N.E.C.) are covered under sub class 24119 of NIC Classification and not under 24117, which find mention against S. No.5 of the negative list of notifications. Entry against sub class 24119 is also reproduced below:

24119- Manufacture of basis organic chemicals NIC.

The Dissolved Acetylene manufactured by assessee is also known as 'Industrial Gas' in trade parlance and fall under sub class No. 24111 of NIC Classification, 1998, which reads as under:-

24111- Manufacture of industrial gases (includes manufacture of elemental gases, liquid or compressed air, acetylene refrigerant gases and mixed industrial gases etc.

Industries engaged in the manufacture of items classifiable under sub class is No, 24111 and 24119 of the NIC Classification, 1998, do not find mention under any of the entries contained in Negative Lists. One cardinal rule of interpretation while interpreting the entries in taxation statutes/notifications is that the words used in the entries must be construed strictly and there is no scope of intendment. Therefore, it cannot be a case of Revenue to cover the Dissolved Acetylene against entries in Negative Lists and also to deny the benefit of exemption as it does not satisfy all the conditions mentioned therein. It may appreciate that it is a settled principle of law that to avail benefit of exemption notification all the conditions must be fulfilled. On the same footing, it is also imperative that to cover an item under negative list, all the conditions of the negative list must be satisfied".

He pointed out therefrom that it had been explained to the AO that the item being manufactured by the assessee was Dissolved Acetylene Gas which had been allotted the NIC Code 24119. That to qualify in the negative list of Schedule-XIII ,the item manufactured by it had to be an organic chemical, classifiable under Chapter-29 of the Excise Classification and having NIC Code 24117. The Ld.Counsel for the assessee pointed out that it had been explained to the AO that all the aforesaid three conditions needed to be fulfilled to qualify as item falling in the negative list of Schedule-XIII, but in the

case of the assessee since NIC Code was not that as mentioned in Schedule-XIII, the item manufactured by the assessee did not fall in the negative list. The Ld.Counsel for the assessee contended that being convinced with this explanation of the assessee the AO had allowed the claim of the assessee stating as under:

“6.1 During proceedings, the submissions of the assessee have been considered w.r.t. the assessment record and details and evidences furnished in this regard. After due verification it has been noticed that the contention of the assessee is acceptable. Also the products i.e. oxygen and nitrogen (24111) and dissolve acetylene (24119) are found to be outside the NIC Classification given under schedule 13 of the IT Act. Accordingly assessee is found eligible for claiming deduction u/s 80IC of the IT Act. After discussion and due perusal of books of accounts and reply filed by the assessee, it is found that this unit fulfills the conditions for allowability of deduction u/s 80IC of the IT Act and accordingly deduction so claimed is allowed.”

b) The next contention of the Ld.Counsel for the assessee was that this explanation had been given to the Ld. Pr.CIT also and without pointing out any fault in this explanation, had proceeded to hold the order of the AO as erroneous. He drew our attention to the findings of the Ld.Pr.CIT in this regard at para 6-6.3 of his order as under:

“6. There is no dispute regarding the fact that the assessee had claimed deduction u/s 80IC of the Income Tax Act, 1961, which was allowed to the assessee in respect of Unit-II where Dissolved Acetylene Gas was being produced, which falls under the negative List of Schedule XIII of the Income tax Act, 1961. However, the

information related to the production of Dissolved Acetylene Gas (that it falls under the said list) was available with the A.O. from the letters issued by Directorate of Industries, H.P. and Department of Industrial Policy and Promotion, Govt. of India vide letter dated 20.05.2016 and 11.03.2016 respectively, despite thereof, the deduction u/s 801C has been allowed by the A.O. to the assessee. For the sake of convenience, the basic clarifications given vide these letters is as under.-

- a) *As per the clarification given by the GO1, Ministry of Commerce & Industry, Deptt. of Industrial Policy and Promotion, New Delhi's letter No. 8(4)/2016-SPS dated 11th March, 2016, the "Dissolved Acetylene Gas" is covered under S.No. 5 of the Negative List at Annexure -III of OM NO. 1(1)/2001-NER dated 7th January, 2003. (copy of letter and Annexure -111 enclosed - as P/1-1 to P/1-6).*
- b) *As per the letter No. Ind. Dev. CClS/Enquiry/ 2015-16 of the Director of Industries, Govt. of HP, Directorate of Industries, dated 24.06.2016, the State Govt. vide letter No. Ind. A(B)-11-3/2016 dated 20.05.2016, after conducting preliminary inquiries has found that the incentives have been wrongly allowed to the assessee and thus, directed that the wrong claim on various accounts such as capital subsidy, income tax on incentive availed/being availed by the Unit, Central Excise incentives or State taxes availed wrongly be recovered from the assessee. (Copy of letter enclosed - as P/2-1 to P/2-4).*
- c) *Further in the "List **of** Articles or things" pertaining to negative list, mentioned in PART-B at S.No. 5 - Organic chemicals excluding Provitamins/vitamins, Hormones (2936), Glycosides (29.39), sugars (29.40) - in Chapter 29 of Excise classification - "Thirteenth Schedule" of the schedules to Income Tax Act, 1961 (Copy enclosed as P/3-1) which is also identical to the manufacturing process being carried out by the assessee.*

6.1 However, it is found that the AO had failed to verify the articles being manufactured by the assessee. And also whether these are covered in the negative list, inspite of the specific clarification of the Govt. Of India and Director of Industries, Govt. of H.P. reported above.

6.2.As regards to be submissions of the assessee that the Dissolved Acetylene Gas being produced in their industrial undertaking Unit-11 having NIC Code 24119 and not 24117

as mentioned in the above notification as such this Gas does not fall in the negative list, the submissions are not acceptable for the reasons that the assessee has failed to produce any documentary evidence to substantiate his claim that the unit of the assessee is registered with industry department for manufacturing of Dissolved Acetylene Gas under the Code, which is not falling in negative list. Whereas, the department is in possession of the information from the Industry Department of Himachal Pradesh, which clarifies that the unit of the assessee falls in negative list.

6.3 In view of the above facts, it is clearly established that Assessing Officer, has remained passive on the information available with him on records, which required proper inquiry and verification. As such, the order passed by the A.O. i.e. DCIT, Circle, Mandi for A.Y. 2014-15, on this issue is held to be erroneous as well as prejudicial to the interest of revenue within the meaning of section 263 of Income Tax Act 1961.”

The Ld.Counsel for the assessee contended that when the Ld. Pr.CIT himself could not point out any infirmity in this explanation of the assessee how could he have held the view taken by the AO as being erroneous.

- c) The Ld.Counsel for the assessee contended that the letters of the Department of Industrial Policy & Promotion, Government of India mentioned the item manufactured by the assessee falling at Sl.No5 of the negative list, but the explanation of the assessee to the AO sufficiently demonstrated that it could not be categorically so said by any chance. Explaining the same, he pointed out that there was an anomaly in S.No.5 of Schedule-XIII of the Income Tax Act,

which lists the items manufactured in Himachal Pradesh not eligible for exemption u/s 80IC of the Act, in short the negative list. He pointed out that while it mentions organic chemicals included in Chapter-29 of the Excise Classification, which also deals with organic chemicals, it goes on further to mention the NIC Code 24117, which relates to inorganic chemicals. In this regard he drew our attention to Schedule XIII of the Income Tax Act placed at paper book page no 74 , Chapter-29 of the Excise Classification placed before us at Paper Book page No 77 and the description of items included NIC Code 24117 placed before us at Paper Book page No.79 .

Ld.Counsel for the assessee stated that clearly there was an anomaly in serial No.5 of the negative list which mentioned organic chemicals but referred to the NIC Code of inorganic chemicals. He contended, therefore, that in such circumstances when there was no clarity about the item being dealt with in serial No.5 of the negative list, it could not be outrightly stated that the item manufactured by the assessee fell in S.No.5 of the negative list. He further contended that considering the anomaly as above, the view taken by the AO,

that since NIC Code of the assessee was not that mentioned in negative list, the item manufactured by him did not fall in the negative list, could not be said to be totally false or incorrect. The Ld.Counsel for the assessee, therefore, contended that there was no error in the order of the AO at all, nor was any error being pointed out by the Ld. Pr.CIT in his order.

9. The Ld. DR on the contrary contended that when the Directorate of Industries, Himachal Pradesh and the Department of Industrial Policy & Promotion, Government of India had clarified that the item Dissolved Acetylene Gas fell in the negative list of Schedule-XIII, this being a technical matter, the AO had grossly erred in taking a view to the contrary solely on the basis of some explanation preferred by the assessee who was not technically competent to rebut/controvert the technical report of the government department. He argued that the AO therefore having not considered the aforesaid reports which were available with him, while considering the claim of exemption u/s 80IC of the Act to the impugned unit-II, his order was clearly erroneous.

10. We have heard both the parties and we have also carefully gone through all the documents referred to before us.

11. The finding of error by the Ld.Pr.CIT in the order of the AO allowing the assesses claim of exemption u/s 80IC vis-a-vis unit II of the assessee, rests entirely on the letters available with the AO, of the Directorate of Industries, Himachal Pradesh and the Department of Industrial Policy & Promotion, Government of India dated 03-06-2016 and 11-03-2016, stating that the product manufactured by the assessee in the said unit fell in the negative list and despite which he allowed the assesses claim.

To adjudicate the issue it is relevant to bring out clearly all the necessary facts.

12. The contents of the aforestated letters placed before us in the paper book at page 94-96 are as under:

Letter of the Directorate of Industries, Himachal Pradesh

*"No.Ind.Dev.CCIS/Enquiry/2015-16
Government of Himachal Pradesh
Directorate of Industries*

Dated : Shimla, The
From *Director of industries
Himachal Pradesh.*

To

- 1. The Income Tax Officer,
Income Tax Office, Mandi
Distt. Mandi (HP).*

2. *Deputy Excise & Taxation Commissioner
Mandi Distt. Mandi (HP).*
3. *The Assistant Commissioner,
Central Excise & Service Tax Division
Loha Bazar Mandi Distt. Mandi (HP)*
4. *The General Manager
Distt. Industries Centred
Mandi Distt. Mandi (HP).*

Subject:- Fraud and illegal claim & payment of Central Capital Investment Subsidy, Central Transport Subsidy, interest Subsidy, Electricity duty and illegal exemption on account of GST/GST, Income Tax and Central Excise Duly and VAT deferment-conducting of enquiry thereof.

On the subject cited above, it is informed that this office had earlier received a complaint from Sh. Harsh Kumar, Village & Post Office Gutkar, Tehsil Sadar, District Mandi dated 07/09/2015 (copy enclosed) regarding "Fraud & Illegal claim & payment of Central' Capital Subsidy, exemption on account of Income Tax CCIS, CTS, GST/CST and interest Subsidy "fraudulently claimed by M/s Mandav Air Industries Unit-II, Village Mathyari, PO Nasloh, Tehsil Sadar, Distt. Mandi.

In this regard, this office had conducted preliminary inquiry against the M/s Mandav Air Industries Unit-II, Village Mathyari, PO Nalsloh, Tehsil Sadar, Distt. Mandi and found that item manufactured by the unit falls in the negative list of Industries under the Special Package of Incentive to the State of Himachal Pradesh & Uttrakhand-2003, thereafter matter was referred to the State Government for further directions/orders. The State Government has directed to recover the all incentives/benefits from the unit.

You are, therefore, requested to recover the Central/State incentive availed/being availed by the unit from your respective Departments as directed by the Govt.

Yours faithfully,

Encls: As above

*Sd/-
Director of Industries
Himachal Pradesh*

Endst.. No. As above

Copy for information and taking necessary action is forwarded to:-

1. *The Tehsildar Recovery, Directorate of Industries Shimla-171001.*
2. *The General Manager, District Industries Centre Mandi is directed to initiate process of recovery of Central Capital Investment Subsidy from the unit and send the recovery certificate under the Public Money (Recovery of Dues)Act,2000 to this office immediately please*

*Sd/-
Director of Industries
Himachal Pradesh*

Letter of the Department of Industrial Policy & Promotion,
Government of India

*“No.8(4)/2016 SPS
Government of India
Department of Industrial Policy and Promotion*

*Udyog Bhawan, New Delhi
Dated 11th March, 2016*

*The Additional Controller of Stores,
Directorate of Industries,
Government of Himachal Pradesh,
Udyog Bhawan,
Bemloe,
Shimla – 171 001 (Himachal Pradesh).*

*Subject:- New Industrial Policy and other concessions for the
State of Uttaranchal and the State of Himachal Pradesh
– Chandigarh.*

Sir,

*I am directed to refer to your letter No.Ind.Dev.(CC
Subsidy)161/2010 dated 24/02/2016 on the subject cited
above.*

*The matter has been examined in consultation with the
Technical Wing DIPP and it is informed that “Dissolved
Acetylene Gas is covered under Sl.No.5 of the Negative List at
Annexure-III of O.M. No.1(10)/2001-NER dated 7th January
2003.*

Yours faithfully,

*Sd/-
(Ms ARUNIMA K SINHA)
Under Secretary to the Government of India*

*MANAGER
Directorate of Industries
H.P.*

A perusal of the above reveals that it mentions the item manufactured by the assessee, Dissolved Acetylene Gas, as falling in S.no.5 of the negative list.

This S.No.5 of the negative list, which it was stated is listed as Schedule XIII of the Income Tax Act, is as under (P.B 74-76)

*“THE THIRTEENTH SCHEDULE
(See Section 80-IC(2))
LIST OF ARTICLES OR THINGS*

.....
.....
.....

**FOR THE STATE OF HIMACHAL PRADESH AND
THE STATE OF UTTARANCHAL**

<i>S.No.</i>	<i>Activity or article or thing</i>	<i>Excise Classification</i>	<i>Sub-class under National Industrial Classification (NIC), 1998</i>
1.		
2.		
3.		
4.		
5.	<i>Organic chemicals excluding</i>	<i>Chapter 29</i>	<i>24117</i>

*Provitamins/Vitamins,
Hormones (29.36) Glycosides
(29.39), sugar* (29.40)*

As is evident from the above it describes the item covered therein giving a brief description thereof, mentions the excise classification in which they fall , being chapter 29, and also their NIC CODE, being 24117.

Chapter 29 of the Excise classification, relevant portion, reads as under(P.B 77)

“1. Except where the context otherwise requires, the headings of this Chapter apply only to :

- (a) separate chemically defined organic compounds, whether or not containing impurities:*
- (b) mixtures of two or more isomers of the same organic compound (whether or not containing impurities), except mixtures of acyclic hydrocarbon isomers (other than stereoisomers), whether or not saturated (Chapter 27);*
- c) the products of headings 2936 to 2939 or the sugar ethers, sugar acetals and sugar esters, and their salts, of heading 2940, or the products of heading 2941. whether or not chemically defined;*
- d) the products mentioned in (a) or (b) or (c) above dissolved in water;”*

NIC CODE 24117 describes item covered as under (P.B 79)

“24117 Manufacture of basic inorganic chemicals n.e.c.”

13. The NIC Code allotted to the assessee is 24119, copy EM-II issued to the assessee by District Industries Centre,

Himachal Pradesh, allotting the said NIC code was placed before us in paper book filed on 22-10-18 and the Ld.Counsel for the assessee has stated at bar that the said code has remained unchanged even as of now.

From the above facts, two very vital aspects/facts relating to the issue before us emerge:

1. That the NIC CODE of the item manufactured by the assessee, i.e. 24119, is not that mentioned in S. NO.5 of the negative list, i.e. 24117.
2. That the first two descriptions of serial No.5 of the negative list relate to organic chemicals, while the NIC Code 24117 mentioned therein on the contrary refers to inorganic chemicals.

14. Putting together all the facts brought out above, the letter of the GOI to the DIC, Himachal, which as per the Ld.Pr.CIT the AO failed to consider, stated the item manufactured by the assessee as covered under serial no.5 of the negative list, but the item manufactured by the assessee does not have the NIC CODE mentioned against the said serial NO. of the negative list and also that the description of items in the said serial no. is ambiguous mentioning organic chemicals under some descriptions and inorganic chemicals

against other description. There is no dispute vis a vis the aforestated facts.

15. Perusing the manner of description of items falling in the negative list, i.e. Schedule XIII of the Income tax, there is no doubt that to qualify as an item covered therein, all the manners of describing the items has to be satisfied. It has to fit into the description, belong to the specified chapter of Excise classification and also qualify as item of the specified NIC CODE. In the present case the uncontroverted fact is that the NIC CODE of the item manufactured by the assessee is not that mentioned in S.No.5 of Schedule XIII, though it may meet the other descriptions. It cannot therefore be categorically said that the item manufactured by the assessee qualified in S.No.5 of the negative list. Moreover on account of the clear cut ambiguity in the item mentioned/described against S.No.5, relating both to organic and inorganic chemicals, the assessee is entitled to the benefit of doubt regarding the items sought to be covered under it.

16. In view of the above, we do not find any error in the view taken by the AO, in the light of the above facts which were before him also, that the item manufactured by the assessee does not qualify in S.No.5 of the negative list and the assessee therefore is entitled to claim exemption u/s 80IC of the Act,.

17. The letters of the Directorate of Industries, Himachal Pradesh and the Department of Industrial Policy & Promotion, Government of India, which the Ld.Pr.CIT has stated the AO failed to consider, we find give no new/additional information to alter this position since they only state that the item manufactured falls in S.No.5 of the negative list, which position stood rightly examined by the AO, as held by us above. The argument of the Ld.DR that the statement of the Department of Industrial Policy & Promotion is a technically backed one, we find is very impressive and pertinent and there may be no doubt about it also, but all the same it only mentions the item as falling in S.No.5, which at the cost of repetition, we state, has been clearly demonstrated as being unclear of the items sought to be covered and the assessee not qualifying therein on account of its NIC CODE being not covered in it.

18. We therefore hold that there was no error in the order of the AO, taking the view that the item manufactured by the assessee did not meet the description of S.No.5 of the negative list and accordingly allow assessee's claim of exemption u/s 80IC of the Act. The findings of the Ld. Pr.CIT therefore to the effect that the AO's order was erroneous on account of

inadequate enquiry having been conducted on the issue of grant of exemption u/s 80IC of the Act to unit-II of the assessee are accordingly set aside.

19. The remaining issues raised by the Ld. Pr.CIT, it was pointed out, related to the issue of claim of deduction u/s 80IC of the Act on rental income in Unit-I(IU-II) at Rs.60,000/- and on interest on securities deposited with Sales Tax Department and H.P.S.E.B. amounting to Rs. 5,000/- and Rs.4,58,000/- respectively.

20. With respect to the above, the contention of the Ld.Counsel for the assessee was that the AO had rejected assessee's claim of deduction/exemption u/s 80IC of the Act with respect to the profits earned in the said unit i.e. Unit-I(IU-II) and, therefore, there was no question of any exemption/deduction having been allowed to the assessee on account of the aforesaid two incomes of rent and interest on securities earned in the said unit. He contended, therefore, that the finding of error by the Ld. Pr.CIT on these two counts was not based on the facts on record and, therefore, needed to be dismissed. He drew our attention to para 5.3 of the assessment order pointing therefrom the findings of the AO rejecting the claim of deduction u/s 80IC of the Act with respect to the profits of Unit-I(IU-II) as under:

“5.3 From the above facts it is established that assessee's business i.e. of Unit-I (IU-II) is not a new business. The assessee added Plant & Machinery in the existing business costing meager amount. Existing employees transferred to new unit i.e. Unit-I (IU-II). C.S.T. and G.S.T. Number are of existing unit i.e. Unit-I(IU-I). By no consideration Unit-I (IU-II) can be held as a new industrial undertaking. It is a clear cut case of splitting up/ reconstruction of the existing business..Hence, not eligible for allowing of deduction u/s SOIC. Accordingly, deduction claimed u/s 80IC at Rs. 11,49,264/- is disallowed and added in the taxable income of the assessee. (Reliance is placed in the case of Chenab Information Technologies (P) Ltd. Vs ITO (ITAT, Mum) 25 SOT 432; 24 DTR 595). Penalty proceedings u/s 271(1)(c) of the IT Act, 1961 are being initiated separately for the default of the assessee in furnishing inaccurate particulars of Income and also for concealment of income.”

21. The Ld. DR was unable to controvert the above contention of the Ld.Counsel for the assessee.

22. In view of the above since it is a fact on record that the AO had not allowed the assessee's claim on deduction of profits earned in Unit-I(IU-II) as per the provisions of section 80IC of the Act, it is but obvious that the entire income earned therein had been subjected to tax and, therefore, the findings of the Ld.Pr.CIT that the assessee had been wrongly allowed deduction u/s 80IC of the Act on rental income and interest on securities earned in the said unit by the AO is incorrect .There is clearly no error in the order of the AO since both the rental income and interest on securities has been subjected to tax and the findings of the Ld.Pr.CIT in this regard are therefore set aside.

23. The last issue, it was pointed out by the Ld.Counsel for the assessee, related to bifurcation of expenses between Unit-I(IU-II) and Unit-II of the assessee. The expenses being on account of electricity, water and employees benefit, it was pointed out that the Ld. Pr.CIT was of the view that the said expenses ought to have been apportioned in proportion of the turnover of the said two units, while the assessee had claimed a greater portion of these expenses in Unit-I(IU-II) where it was eligible for lesser deduction u/s 80IC of the Act @ 25% and had claimed a small portion of these expenses in Unit-II thus inflating its profit in the said unit and claiming deduction of the entire profits u/s 80IC of the Act.

24. In this regard, the contention of the Ld.Counsel for the assessee was that it had been explained to the Ld. Pr.CIT that this issue has been examined during assessment proceedings also and it had also been pointed out to him that two units were different units manufacturing different products, with Unit-I(IU-II) manufacturing oxygen and nitrogen gas and Unit-II manufacturing Dissolved Acetylene and the process involved, therefore, were totally different and no occasion, therefore, arose for bifurcating the expenses between the two units or even for that matter on the basis or in proportion to

their turnover. The Ld.Counsel for the assessee contended that it was explained to the Ld. Pr.CIT that both the units were independent units with their own facility, infrastructure and staff and there was no inter-dependence between the two units. He drew our attention to the reply filed to the Ld. Pr.CIT in this regard, placed before us at Paper Book page 8 as under:

e) In Unit-II the assessee has installed the transformer as well as electric meter himself as per practice of HPSEB as such no security was paid to the HPSEB. More over the bills raised by HPSEB does not show any meter charges. It is not correct that no electric connection was installed in this unit. The electric charges claimed are as per actual bills raised by the HPSEB and paid. Copies of the Bills raised and copy of ledger pertaining to electric charges of Unit-IS are enclosed. It is also to submit that the electric charges claimed in respect of Mandav Air Industries (IU-I and IU-II) are actual expenses for the energy consumed by the assessee.

Similarly expanses on account of employees as salary and other benefits are actual expenses pertaining to Unit-II copy of ledger account showing salary and other benefits and also salary paid to employee's for the month of March,2014 are enclosed. No part of salary pertaining to staff deployed in Unit-II has been claimed in Mandav Air Industries (Unit-IU-I and IU-II).

25. The Ld.Counsel for the assessee contended that the Ld. Pr.CIT had, without dealing the aforesaid contention of the assessee, proceeded to hold the order of the AO erroneous for not having apportioned the expenses between the two units.

26. The Ld. DR, on the other hand, relied upon the order of the Ld. Pr.CIT at para 10.1 of his order as under:

“10.1. The above explanations given by the assessee has been considered and found not tenable. The assessee has not been able to justify as to how the electric charges of Unit in which deduction u/s 80IC is being claimed is more than 3 times, even if the submissions that no meter charges are included in the bills, the same will not make any difference as the meter charges may not be more than Rs. 1,000/- per month. Likewise, the assessee has not furnished any document from which it could not gathered that the salaries/ other benefits for the employees have been incurred and claimed in the proportionate turnover/sales or there is separate management/roll of employees for both the units.”

27. We have heard both the parties. With respect to the apportionment of expenses relating to the electricity charges and salary to employees between Unit-I(IU-II) and Unit-II, we find that the assessee had explained that the two units were separate manufacturing different items, having their own infrastructure for electricity and had different employees on their rolls and expenses had accordingly been accounted for in the said two units. The Ld. Pr.CIT while finding error in the order of the AO has not dealt with this contention of the assessee. The Ld. Pr.CIT could have found an error in the order of the AO only after pointing out any infirmity in the reply filed by the assessee, which he has failed to do so. Therefore, on this issue also we set aside the order of the Ld. Pr.CIT.

In effect, the entire order of the Ld. Pr.CIT passed u/s 263 of the Act is set aside.

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

Order pronounced on 30th June, 2021.

Sd/-
(R.L. NEGI)

न्यायकि सदस्य/Judicial Member

Dated: 30th June, 2021

रती

Sd/-
(ANNAPURNA GUPTA)

लेखा सदस्य/Accountant Member

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar

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Draft placed before author	06.2021	Sr.PS
Approved Draft comes to the Sr.PS/PS	.2021	Sr.PS
Order signed and pronounced on		
File sent to the Bench Clerk		Sr.PS
Date on which file goes to the AR		
Date on which file goes to the Head Clerk.		
Date of dispatch of Order.		