

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH “SMC-2” BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No. 2690/DEL/2019**

**[Assessment Year: 2015-16**

Sanjeev Dhawan 10103/3, Pul Bangash, Azad Market, Delhi-110006 PAN- AAGPD4848M	<u>Vs</u>	Income-tax Officer, Ward 63(1), New Delhi.
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>		<b>Sh. Rajesh Gupta CA</b>
<b>Respondent by</b>		<b>Sh. Om Prakash, Sr. DR</b>
<b>Date of hearing</b>		<b>17.01.2022</b>
<b>Date of pronouncement</b>		<b>24.01.2022</b>

**ORDER**

**PER KUL BHARAT, JM:**

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), dated 24-01-2019, pertaining to the assessment year 2015-16. The assessee has raised following grounds of appeal:

*“1. On the facts and circumstances of the case and as per law, the learned CIT(A) were incorrect and not justified in disallowing the amount of deduction claimed u/s 80IC(2)(a) of the I.T.Act,1961.*

*As per law, the deduction u/s 80IC (2)(a) can be allowed if the following conditions will be satisfied:-*

*a) It is not formed by splitting up, or the reconstruction, of a business already in existence.*

- b) *It is not formed by the transfer to a new business of machinery or plant previously used for any purpose.*
- c) *Industrial Undertaking should be set up in certain special category of States.*
- d) *The Industrial Undertaking should manufacture / produce specified goods / articles.*
- e) *Manufacture or production should be started within a stipulated time limit.*
- f) *Return of Income should be submitted on or before due date of submission of return of income.*
- g) *The Books of Accounts of taxpayer should be audited and the Audit Report in Form No- 10CCB should be submitted along with the Return of Income.*

The learned CIT(A) has mentioned in the order that the conditions at point no. (b), (c) and (d) are not satisfactory.

2. *In view of above, it is respectfully submitted that with respect to point no. (b), the assessee had started his business in f/y 2010-11 only. It was not through the transfer from a business which was already running. The assessee was not given the sufficient time to procure the documents with respect to initial investments of plant & machinery. The assessee had made the initial investment of Rs.5, 34, 708/- on various dates after 28<sup>th</sup> March, 2010 i.e the date of start of undertaking. The copy of details of initial investments of plant & machinery along with the copies of invoices are being attached for your kind perusal.*

3. *With respect to point no.( c) ,the learned assessing officer has mentioned that the manufacturing activity was carried out in an area which is not notified by the CBDT. With respect to this point, it is submitted that the appellant carried on the manufacturing activity located at Khasra no3961. Opposite Birla power. Lai Tannar. Dehradun. Uttarakhand. As per Notification No. 177/2004 [ISO 7411 IF.No.142/47/2003-TPL]. dated 28.06.2004 of Sec 80-IC(2)(a) of I.T Act, 1961, (copy enclosed) which prescribes the various khasra nos. to be considered as industrial undertaking as per Section 80IC(2)(a) of the I.T.Act,1961 (copy attached).It is worthwhile to mention that the assessee is carrying on his manufacturing at Khasra No .3967 in the district of Dehradun which is covered in schedule (4) of the above said notification. While raising the demand, the learned assessing officer has passed the order on pre-conceived enotions without actually checking as to whether the address from where manufacturing*

activity was carried out is within the area covered by notification no. 177/2004[SO 741] [f. No. 142/47/2003-TPL], dated 28.06.2004 of Sec 80-IC (2)(a) of I.T. Act, 1961.

Your honour can also check the status of assessee's undertaking, which comes in the list of business undertakings under ease of doing business on the government website. Please find attached the details of undertakings which come under the list of Industries -Ease of doing business for your perusal which have taken from government's website.

4. With respect to point no. (d), the learned A.O has mentioned that the goods which are being manufactured by the assessee are not covered in any notification of Section 80IC(2)(a) of the I.T.Act,1961 or are not covered in the fourteenth schedule of Section 80IC(2)(a) of the Act. In respect of above, it is submitted that the goods which are manufactured by the assessee are covered in part -C of fourteenth schedule of Section 80IC(2) (**copy attached**). The goods manufactured by appellant are covered under S.No. 10 of Part - C for the state of Himachal Pradesh and the State of Uttaranchal as sports goods and articles and equipment for general physical exercise and equipment for adventure sports/activities, tourism. The assessee is manufacturing sports shoes and slippers which are covered in the above said category as the learned assessing officer herself mentioned in the order that the assessee is the manufacturer of shoes as per the design received from different customers like Bata, Adidas, Lakhani, Puma etc. and these companies are the major suppliers of sports shoes and articles etc. which have used for sports and tourism.

The assessee is dealing in the trading of sports shoes only. Your honor can verify the same with the copies of invoices of sales from various companies. **The copies of sales invoices are being enclosed.** The main vendors of the assessee are M/s Adidas India Marketing Pvt. Ltd., M/s Puma Sports India Pvt. Ltd. and M/s Reebok India Company. It is worthwhile to mention that these vendors are the main traders of sports shoes in India and provide the best quality of sports shoes in India. This clearly shows that the assessee is dealing in sports goods and articles and equipment for general physical exercise and equipment for adventure sports/activities, tourism which are covered under part C of fourteenth schedule of Section 80IC(2) of the I.T.Act,1961 for the state of Himachal Pradesh and the state of Uttaranchal.

The above grounds were not considered by the learned CIT(A)-XX, on the basis of remand report submitted by the concerned AO. In the remand report, AO was stressing on the fact that sufficient opportunities were given to assessee/representative of assessee and was not considering the fact or reason as why the assessee/representative of assessee were unable to submit the requisite details on time and whether the assessee was actually eligible for the deduction u/s 80IC(2) as per law, on the basis of the information submitted as per Rule 46A of the I.T.Act,1961.

5. As per the remand report, the respected ITO has stated that ample opportunities were given to assessee to furnish the required details/evidences. When the assessee did not file the required details, the AO had passed the order u/s 143(3) of the I.T. Act, 1961. In this respect, it is submitted that the authorized representative of the assessee during the assessment proceedings was Mr. P.K. Arya, Chartered Accountant, and he was not well at the time of assessment proceedings and could not attend the case or send any other person to represent at that time. The copies of medical certificates are attached hereby for the kind perusal of honourable court.

During assessment proceedings, the authorized representative of the assessee has submitted various documents/details which could be procured by the assessee in the given time. The last notice was served to the appellant on 08.12.2017 requiring the appellant to attend his office on or before 15.12.2017 and the order was passed by the learned officer on 19.12.2017 without giving the final opportunity of being heard to the assessee.

It is worthwhile to point out that the AO can't do injustice with the assessee just due to illness of the authorized representative or authorized representative could not attend.

As per the case law “ **ITAT Chandigarh, Income-tax Officer Vs Bhagwan Dass, Contractor** IT Appeal No. 383 (Chd.) of 2011”, the CIT(A) will confirm the admission of new evidences as the interest of the quasi-judicial proceedings is to render justice and not to deny justice by declining to new evidence.

Secondly, as per the case law,” **ITAT Delhi ONS Creations Private Limited Vs ITO** ITA No. 6250/Del/2013” it was held by ITAT Delhi that if additional evidence cannot be produced before AO for a reasonable cause by assessee, the CIT (A) must admit the additional evidences and assessee must be given an afresh opportunity of being heard.

In the case of “**Jute Corporation of India Ltd. v. CIT 1991 AIR 241, 1990 SCR Supl. (1) 340 the Hon'able Supreme Court**”, the Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

Also in the case of “**ITAT Mumbai Avan Gidwani Vs ACIT I.T.A..No. 5138/Mum/2015**, the principle “**Audi alteram partem**”, i.e. no man should

*be condemned unheard is the basic canon principles of natural justice and accordingly we find merit in the contentions of the assessee that Rule 46A of the Income Tax Rules cannot be override the principles of natural justice.*

*Therefore, from the above cited case laws, it is requested that the assessee should be given the opportunity of being heard in the light of natural justice. The copies of various case laws cited above are attached for your kind perusal.*

6. *The learned CIT(A) has mentioned in her order that the findings/proofs submitted by the assessee can be afterthought to claim deduction. In this respect, it is submitted that during appeal hearing, all the proofs which were submitted by AR are related to the location of the business and related to the goods manufactured by assessee were basically the notifications issued by the government and can't be changed or a afterthought according to assessee's benefit. The contention given by the Ld. CIT in his order is simply not maintainable and very filmsy.*

7. *As per Section 251 of the I.T. Act, 1961, the CIT(A) cannot refer back the case to AO for fresh assessment. With respect to additions made by AO, needs the Ld. AO to re assess the case and consider the additional evidences which were submitted by the representative of assessee as per Rule 46A because of the facts that assessee manufactures specified goods as per the submitted notification and manufactures at a place which is notified by the government, is not a afterthought and assessee should be allowed with the deduction's benefit.*

*The following case laws confirms that the CIT(A) does not have powers to refer back case to AO for fresh assessment. Therefore, it is requested your honor to refer back the case to AO for fresh assessment and consider the documents which will be submitted by the representative of the assessee.*

- A. *The Hon'ble High Court in case of ABCAUS 2104 (2017) (10) HC held that under the amended section 251 of the Act, the Appellate Commissioner may confirm, reduce, enhance, or annul the assessment. But he cannot refer the case back to the Assessing Officer for making a fresh assessment; nor can he direct the Officer to decide in accordance with his directions.*
- B. *Hon'ble Supreme Court in the case of ITO vs. Murlidhar Bhaghubabu reported in 52 ITR 335 (SC). The relevant extract of the judgment is reproduced below:-*

*“Section 33(4) of 1922 Act only refers to a finding or direction made by an appellate authority and does not itself confer any power on an appellate authority to make a finding or direction. Indeed, section 34 of 1922 Act deals with entirely a different aspect, that of empowering an ITO to bring to assessment escaped income, and has no concern with the powers of an appellate authority. The provision which deals with the powers of an appellate authority is section 31 of 1922 Act.”*

Respectfully following the judgment of Hon'ble Supreme Court in the case of Murlidhar Bhaghubabu (supra) we conclude that Ld. CIT(A) has no power under the provision of law for giving any direction to AO for reopening of assessment.

- C. In the case of INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A', KOLKATA, ITA No. 13^/Ko\2011 : Asstt. Year: 2009-2010, ITO (APPELLANT) vs. Satyapriya Joardar (RESPONDENT), Date of Order: 04-03- 2016

*Regarding the addition under undisclosed fixed deposits, the CIT(A) in the interest of natural justice remanded the matter to AO with a direction to verify the claim of the assessee relating to submission made by the assessee that the assessee could not explain the source of the said fixed deposits. Aggrieved by the said order, the Revenue is in appeal before this Tribunal questioning the action of the Id. CIT(A) in remanding the matter to the AO to verify documents which is beyond the scope of power available to him under section 251 of the Act.*

*Heard assessee's representative and perused the record. The main stand of the Revenue as taken in grounds of this appeal is that the Commissioner does not have the powers in remanding the matter to AO with a direction to verify the claim of the assessee under section 251 of the Act whereas it is observed from the provision of section 251 of the Act that the Commissioner is not having the power to send back the file to AO to verify the claim of the assessee. The only power available to him to exercise under section 251 of the Act is that he may confirm, reduce, enhance or annul the assessment, besides the other clauses contained therein. We, therefore, set aside the impugned order of the Id. CIT(A) on this issue and remit the matter back to him with a direction to decide the same on merit, after giving the assessee proper and sufficient opportunity of being heard.*

*In the result, the appeal filed by the Revenue is allowed for statistical purposes.*

*Therefore, it is requested your honor to refer back the case to Assessing officer for fresh assessment and direct AO to consider the notifications and various documents which is not a afterthought and provide the deduction u/s*

*80IC(2)(a) of the I.T.Act,1961.*

8. *The deduction claimed u/s 80IC(2)(a) of the I.T.Act,1961 in the income tax return is supported by the audit report u/s 10CCB of the I.T.Act,1961. It is worthwhile to mention that the onus to prove that the deduction is eligible or not is on the Chartered Accountant who is signing the audit report. The Chartered Accountant must had considered the requirements whether the assessee is eligible for deduction u/s 80IC(2)(a) as per the information and documents available at the time of signing of audit report.*

9. *The tax demand of Rs. 5,36,940/- created against the appellant is liable to be deleted as the order u/s 250(6) of Income tax Act, 1961 was passed under pre-conceived notions and without going through the correct legal provisions as applicable to this case.*

10. *The penalty proceedings have also been initiated u/s 271(1 )(b) and 271(1 )(c) of Income tax Act, 1961. Since, the assessment order passed in this case is itself illegal, null and void and liable to be set aside, the penalty proceedings are also liable to be vacated. The appellant reserves the right to add, amend or delete any or more Grounds of Appeal as deemed necessary for the purposes of this appeal.”*

2. At the outset the learned counsel for the assessee submitted that the authorities below have misdirected themselves and did not appreciate the facts in right perspective. He submitted that the matter may be remanded back to the Assessing Officer to verify the facts regarding availability of deduction to the assessee.

3. Learned Sr. DR submitted that he has no objection if the matter is restored to the file of Assessing Officer for verifying the claim of the assessee regarding deduction u/s 80IC (2)(a).

4. I have heard the rival submissions. It is the contention of the assessee that the facts as recorded by the authorities below need verification so as to bring the correct facts on record and the matter needs to be restored to the Assessing Officer for making assessment afresh. In view of the submissions made by the learned

counsel for the assessee I am of the view that the issue of deduction u/s 80IC needs verification at the end of the Assessing Officer. Accordingly, impugned order is set aside and the matter is restored to the Assessing Officer for decision afresh. Grounds raised in this appeal are allowed for statistical purposes.

5. In the result, appeal of the assessee is allowed for statistical purposes.

**(KUL BHARAT)**  
**JUDICIAL MEMBER**

\*Madan PalVerma\*

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI

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