

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.1601/Mum/2020

(निर्धारण वर्ष / Assessment Year: 2016-17)

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| Bharat Petroleum Corporation Ltd. Taxation Section, 4 th Floor, Bharat Bhavan 1, 4 & 6 Currimbhoy Road, Ballard Estate, Mumbai- 400001. | बनाम / Vs. | PCIT, Circle-2 Room No.344, Aayakar Bhavan, M. K. Road, Mumbai-400020. |
| स्थायी लेखा सं. /जीआइआर सं. /PAN/GIR No. : AAACB2902M | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

| | |
|--------------|-------------------------|
| Assessee by: | Shri Jehangir D. Mistry |
| Revenue by: | Dr. Mahesh Akhade (DR) |

सुनवाई की तारीख / Date of Hearing: 28/06/2022

घोषणा की तारीख /Date of Pronouncement: 05/09/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This appeal has been preferred by the assessee against the order of the Ld. Principal Commissioner of Income Tax-02 [hereinafter referred to as the “PCIT”], Mumbai dated 21.02.2020 for assessment year [hereinafter referred to as “AY”] 2016-17 passed under Section 263 of the Income Tax Act, 1961 [hereinafter referred to as “the Act”].

2. The assessee has challenged the revisionary jurisdiction exercised by the Ld. PCIT u/s 263 of the Act for interdicting the assessment framed by the AO u/s 143(3) of the Act on 20.12.2018. For the relevant AY 2016-17, the assessee had originally declared total income of Rs.7493,30,93,850/- which was later on revised to Rs.7406,50,30,030/- vide return of income dated 13.03.2018. The case of the assessee was selected for regular scrutiny and the assessment u/s



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143(3) of the Act was completed vide order dated 20.12.2018 assessing total income at Rs.7720,75,93,630/-. This assessment order of AO has been interfered by the Ld. PCIT by exercising his revisional jurisdiction u/s 263 of the Act. The Ld. PCIT in the show cause dated 04.02.2020 had put the assessee on notice that the assessment order was erroneous as well as prejudicial to the revenue on three (3) counts viz., (i) Investment allowance claimed u/s 32AC, (ii) Excess claim of deduction u/s 32AC & (iii) Exemption claimed u/s 10(34) on dividend income of Rs.259.71 crores received from KRL Trust. Pursuant to the show-cause notice, the assessee filed its reply. However, the Ld. PCIT was not convinced with the explanation dated 11.02.2020 rendered by the assessee and therefore he was pleased to hold that the assessment order passed by the AO u/s 143(3) of the Act dated 20.12.2018 was erroneous and prejudicial to the revenue in terms of Section 263 of the Act read with Explanation-2. Accordingly, the Ld. PCIT set aside the assessment order dated 20.12.2018 with a direction to pass fresh assessment order, after making due inquiries and verification on the issues, as discussed in his impugned order. Aggrieved by the aforesaid impugned action of the Ld. PCIT, the assessee is before us challenging the invocation of the revisional jurisdiction u/s 263 of the Act.

3. Assailing the action of the Ld. PCIT, the Ld. Sr. Counsel for the assessee Shri Jehangir D. Mistry submitted that the assessee is a Public Sector Undertaking, inter-alia engaged in refining/exploration of crude



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oil and marketing of petroleum/petrochemical products/lubricants, petroleum product and production and bottling of LPG for domestic and commercial use. According to him, the issues pointed out by the Ld PCIT to find fault with the assessment order cannot be said to be erroneous, because AO has enquired about them and took a plausible view. So, according to him, the Ld PCIT ought not to have invoked his revisional jurisdiction. According to him, the deduction claimed u/s 32AC of the Act was examined by the AO in the course of scrutiny assessment proceedings and after being satisfied with the claim of assessee allowed the same vide assessment order dated 20.12.2018. Therefore, according to the Ld. Sr. Counsel, the action of the Ld. PCIT to hold that the AO did not verify the claim of the assessee u/s 32AC of the Act is perverse. In order to buttress the fact that there was inquiry conducted by the AO on this issue, he drew our attention to the page no. 48 of the P.B wherein the notice issued by AO dated 09.10.2018 u/s 142(1) of the Act was placed; and he drew our attention to the page no. 49 of the P.B, more particularly to Question no. 5 wherein the AO had asked the assessee specific question regarding deduction claimed by assessee u/s 32AC of the Act as well as directed it to provide calculation in respect of claim made u/s 32AC of the Act along with a note on the same. The Ld. Sr. Counsel pointed out that, the assessee had replied to AO by letter dated 03.12.2018, which is found placed at page no. 51 of the P.B and drew our attention particularly to page no. 53 of the P.B wherein the assessee had specifically answered the query No. 5 raised by the AO. For the sake



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of convenience, the question put up by the AO and the reply furnished by the assessee, is verbatim reproduced below:

Question No. 5 of Notice issued u/s 142(1) of the Act

“please provide calculation of u/s 32AC of the Act deduction with note on taxability”

Reply given by the assessee in his letter dated 03.12.2018

“investment allowance has been claimed on assets acquired and installed during FY. 2015-16 relevant to AY. 2016-17. The total value of eligible assets is Rs.6477 crores on which investment allowance @ of 15% is claimed of Rs.972 crores. The details of assets acquired and installed is enclosed as annexure-4 (page no. 24 to 60)”

4. Thereafter, the Ld. Sr. Counsel drew our attention to the Annexure no-4 of the above reply, which is found placed in the P.B at pages 57 to 93, and he submitted that the assessee had filed complete break-up of the assets which were acquired and installed during the year, whose value was more than Rs. 10 Lakhs; and it was brought to the notice of AO that, the total value of the assets acquired and installed during the year was Rs.6477,33,64,907/- [Page no. 93 of the P.B]. Thus, according to the Sr. Counsel, it was apparent from the assessment records that the AO had made enquiries into the deduction claimed by assessee u/s 32AC of the Act which was duly answered by the assessee. Merely because the AO did not separately record the



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details of this enquiry in his assessment order could not have been viewed adversely by the PCIT to infer that the AO had not made any enquiry on this issue. According to the Ld. Sr. Counsel, once the AO had made enquiries on the issue regarding deduction claimed u/s 32AC of the Act in the course of assessment and had taken a plausible view, the Ld. PCIT could not have exercised jurisdiction u/s 263 of the Act. For this, he relied on the decision of the Hon'ble Supreme Court in case of CIT Vs. Reliance Communication Ltd. (244 Taxman 55) (SC) and also decision of the Hon'ble jurisdictional High Court in case of CIT Vs. Reliance Communication Ltd (396 ITR 217) (Bom) and CIT Vs. Gabriel India Ltd. (203 ITR 108) (Bom).

5. Per contra, the Ld. CIT-DR opposed the submission of the Ld. Sr. Counsel and has submitted that, the AO has merely called for the calculation in respect of deduction claimed u/s 32AC and that he did not examine in the first place, as to whether the assessee is eligible for deduction or not. He pointed out that, pursuant to the query from AO, the assessee has merely given the calculation regarding deduction of Rs.972 crores claimed u/s 32AC of the Act and further according to him, merely furnishing the list of assets was not sufficient to conclude that the AO has verified the claim of deduction u/s 32AC of the Act. In this regard, the Ld. CIT-DR laid stress on the observations made by the Ld. PCIT at page no. 6 of the impugned order, wherein Ld. PCIT had observed that, *“on careful perusal of the assessment record, it is seen that though the AO called for this information and placed it on*



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record, it is clear that the no further inquiry of this information was done by the AO nor was it examined to verify the claim of deduction u/s 32AC of the Act by the assessee. Since, the matter was not examined or inquired into by the AO, the main facts of placing the information on record does not result in an inference that the AO has formed an opinion regarding the matter, particularly when no finding regarding the claim of the assessee has been recorded". The Ld. CIT-DR further pointed out that, the assessee also did not furnish the reconciliation of the excess claim made u/s 32AC of the Act in the revised return of income, particularly when the figures of additions to fixed assets reflected in the financial statements did not reconcile with the additions reported in the return of income. Therefore, the Ld. CIT-DR contended that the Ld. PCIT has rightly held that the AO did not make any enquiry into the claim of deduction made by the assessee u/s 32AC of the Act and therefore the assessment order on the first two issues was erroneous as well as prejudicial to the revenue.

6. We have heard both the parties and perused the records. The first contention raised by the assessee is that, the Ld. PCIT could not have validly exercised revisionary jurisdiction in relation to the two (2) issues concerning the deduction claimed u/s 32AC of the Act, since these issues had already been examined and enquired into by the AO and therefore the assessment order cannot be held to be erroneous and prejudicial to interests of Revenue on the ground of inadequate enquiry. Having perused the order impugned before us, it is noted that



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the Ld. PCIT has observed that the AO had failed to properly enquire into the claim of deduction u/s 32AC of the Act during assessment proceedings in as much as merely calling for information and placing it on record will not suffice. So first let us examine, whether the AO has conducted any enquiry into the issues regarding the deduction u/s 32AC of the Act raised by the Ld. PCIT in the impugned order. As noted above, the AO in his notice u/s 142(1) of the Act had only asked the assessee to provide calculation of deduction in claimed u/s 32AC of the Act and taxability thereof. Pursuant thereto, the assessee in its reply, which is found placed at page no. 153 of the P.B, brought to the notice of the AO that investment-linked deduction u/s 32AC of the Act has been claimed in respect of the assets acquired and installed during AY. 2016-17 and that the total value of eligible assets was to the tune of Rs.6477 crores on which investment allowance u/s 32AC of the Act @ of 15% has been claimed to the tune of Rs.972 crores. Along with it, the assessee enclosed the details of the assets, which according to them, were acquired and installed during the year, details of which is found placed at page no 24 & 60 of the P.B marked as Annexure no 4.

7. According to the Ld. Sr. Counsel, the above question asked by AO and the answer given thereto by the assessee satisfies the requirement that the AO during the assessment proceedings had inquired into the issue relating to claim of deduction u/s 32AC of the Act. In order to examine the aforesaid contention of assessee, first of all we should bear in mind that investment allowance u/s 32AC of the



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Act is allowable only on fulfilment of conditions stipulated therein the said section, viz that (i) the assessee is a company (ii) it is engaged in the business of manufacturing or production and (iii) acquires and installed new assets. So, we have to examine whether from the question asked by AO on this issue and the reply given by the assessee (supra), it can be reasonably inferred that AO has examined/enquired into the aforesaid issue. When we undertake such an exercise, we note that there cannot be any dispute that the assessee satisfies the first condition being a company. Now the next question is whether from the enquiries made, it can be inferred that the assessee had satisfied the AO that, it met the other two conditions set out in Section 32AC of the Act. From a perusal of the answer given by the assessee to the query of AO, it is noted that, the assessee had stated that, it had acquired and installed assets worth Rs.6477 crores on which it has claimed the investment allowance to the tune of Rs.972 crores; and annexed the details of such assets whose individual value exceeded Rs.10 lacs. Having perused the list of the assets, it is revealed that there are several varieties of assets listed other than the LPG Cylinders and regulators, which has been found by the Ld. PCIT to be not eligible 'assets' for the purposes of computing deduction u/s Section 32AC of the Act. Having gone through these details, we concur with the Ld. PCIT that AO has not enquired into the eligibility of the assets enlisted in the reply as to whether they were eligible for investment-linked deduction u/s 32AC of the Act. Further, as pointed out by the Ld. PCIT, the list of assets only contained the details of assets to the tune



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of Rs.5969 crores and the balance assets of Rs.508 crores (whose individual value was less than Rs.10 lacs) was neither furnished by the assessee nor enquired into by the AO before allowing the deduction of Rs.972 crores on the entire sum of Rs.6477 crores. It is further noted by us that, the additions made to the block of assets 'Plant & Machinery' for the purposes of computing depreciation u/s 32 of the Act was Rs.4577.07 crores whereas the investment-linked deduction of Rs.972 crores was claimed with reference to additions of Rs.6477 crores. This apparent discrepancy is noted to have been overlooked by the AO. When enquired by the PCIT, the assessee has explained that the difference to the extent of Rs.1580.87 crores [$6477 \text{ crs} - 4577.07 \text{ crs} + 319.05 \text{ crs}$ (foreign exchange loss relating to fixed assets)] represents value of additions to Capital WIP, which according to the assessee, is eligible for deduction u/s 32AC of the Act. This averment of the assessee is noted to be in direct contradiction to their submission dated 03.12.2018 made before the AO, wherein it was claimed that the additions of Rs.6477 crores on which deduction was claimed u/s 32AC of the Act represented assets 'acquired and installed' during the year. There was no mention of the fact that the additions of Rs.6477 crores included Capital WIP i.e. assets which were yet to be completed. We thus find merit in the order of the Ld. PCIT that the AO had failed in his duty as an investigator to enquire into the deduction claimed u/s 32AC of the Act in as much as the eligibility of the assets on which such deduction was computed. We thus uphold the validity of the exercise of revisionary jurisdiction by the Ld. PCIT u/s 263 of the Act



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as the lack of enquiry by the AO rendered the assessment order erroneous and prejudicial to the revenue. So the condition precedent to invoke revisional jurisdiction is satisfied and therefore the assessee's challenge against the exercise of jurisdiction by the Ld. PCIT fails.

8. Coming to the merits of the first (i) issue, the Ld. Sr. counsel assailed the findings of the Ld PCIT that LPG Cylinders and regulators are not eligible assets to claim deduction u/s 32AC of the Act. He pointed out that this issue is no longer res-integra, since similar issue on similar line of reasoning was raised by the Ld. PCIT in assessee's own case for assessment year i.e AY 2015-16 and subsequent year 2017-18, which was adjudicated by this Tribunal vide order dated 23.02.2022 in ITA No 1602/Mum/2020 (AY 2015-16) and ITA No 1600/Mum/2020 (AY 2017-18) wherein this Tribunal while adjudicating the merits of similar finding/observation of Ld. PCIT while invoking revisional jurisdiction u/s 263 of the Act has found that the Ld. PCIT erred making such an observation and held as follows:-

“9. The assessee in ground No.3 and 4 of appeal has assailed additions on merits. A perusal of the impugned order reveals that the PCIT while denying the benefit of section 32AC of the Act has observed that the condition set out in section 32AC of the Act are not satisfied viz:

- (i) The eligible asset “installed” for the purpose of claiming deduction u/s. 32AC is not contributing to manufacturing process; and
- (ii) The LPG cylinders and regulators do not fall within the meaning of plant and machinery.

10. Before proceedings further, it would be imperative to refer to the relevant provisions of section 32AC of the Act:

Section 32AC:



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“(1) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset after the 31st day of March, 2013 but before the 1st day of April, 2015 and the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees, then, there shall be allowed a deduction,—

- (a)
 (b)”

A bare perusal of sub-section (1) to section 32AC would show that the assessee would be eligible for claiming investment allowance subject to conditions that the assessee:

- (i) is a company;
 (ii) engaged in business of manufacture or production; and
 (iii) acquires and installs new asset.

The first condition that assessee is a company is not in dispute. Now we will examine whether the LPG cylinders and regulators fall within the meaning of ‘new asset’ in the context of section 32AC. The ‘new asset’ has been defined in sub-section (4) to section 32AC. The definition of ‘new asset’ is reproduced herein below:

“(4) For the purposes of this section, “new asset” means any new plant or machinery (other than ship or aircraft) but does not include—

- (i) *any plant or machinery which before its installation by the assessee was used either within or outside India by any other person;*
- (ii) *any plant or machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house;*
- (iii) *any office appliances including computers or computer software;*
- (iv) *any vehicle; or*
- (v) *any plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head “Profits and gains of business or profession” of any previous year.”*

As per the definition, new asset means any new plant or machinery. Thereafter, there are certain exclusions in the definition. The new asset which is subject matter of dispute before us is LPG cylinders and regulators. The aforesaid asset certainly does not fall in the exclusions mentioned in the definition of new asset. Now, the question is whether the LPG cylinders and regulators can be construed as plant or machinery? The Id. Counsel for the assessee has drawn our attention to the New Appendix No. I



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of the Income Tax Rules, 1962. Appendix -I is a Table of rates at which depreciation is admissible. Part -A of the aforesaid table gives the list of tangible assets. Machinery and Plant is listed as Category -III of Tangible Assets. Gas cylinders including valves and regulators are listed in Clause 8(x) in Category-III i.e. Machinery and Plant. As per said table gas cylinders including valves and regulators are admissible for depreciation @40%. The inclusion of cylinders and regulators in the list of tangible assets eligible for depreciation in Appendix I shows beyond doubt that the Revenue for all intents and purposes consider cylinders and regulators as Machinery and Plant. Thus, Revenue cannot take a stand contrary to the provisions of Income Tax Rules. In the table cylinders and regulators are not specified and the expression has been used in generic sense. Therefore, cylinders and regulators as listed in the table would also include LPG Cylinders and regulators. Therefore, it can be safely construed that LPG Cylinders fall within the ambit of Machinery and Plant. The logical corollary would be, the LPG Cylinders and regulators acquired by assessee during the period relevant to the Assessment Year under appeal are 'new asset'.

11. The PCIT in the impugned order has also raised objection that one of the pre requisite of section 32AC of the Act is that the new asset is installed for the purpose of production and manufacture. The said pre-condition is not fulfilled. We do not concur with this objection of the PCIT. The expression 'install' or 'installed' is not defined in the section or the Act. The Oxford Dictionary meaning of the word 'install' is place or fix equipment in position, ready to use. The Tribunal in the case of Tejbali Singh Transport Co. vs. ITO, 27 TTJ (Jab) 405 explained the expression installed with reference to section 32(1)(iia) of the Act. While adjudicating on the issue of assessee's claim of additional depreciation on Pay loader u/s. 32(1)(iia) of the Act wherein similar expression 'acquired and installed' is used in the section, the Tribunal rejected the stand of Revenue that expression 'installed' means permanently fixed and held, "Installation" simply means making a machine ready for use and nothing more. The Tribunal allowed assessee's claim holding that the pay loader machine fell under clause III (D)(8) of Appendix - I of the Income-tax Rules, 1962, and was, therefore, entitled to depreciation at the rate of 30 per cent. The view of the Tribunal was upheld by the Hon'ble High Court of Madhya Pradesh reported as 220 ITR 408.

11.1 In the case of CIT vs. Saraspur Mills Ltd., 36 ITR 580 (Bom), the Hon'ble Jurisdictional High Court explained the meaning of word "installed" as occurring in section 10(2)(vib) of 1922 Act. The Hon'ble Court held:



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“The expression ‘installed’ is also used in the sense of ‘inducted or introduced’ and if that be the sense in which that expression is used, there is nothing inconsistent in the context in which that word is used which will justify us in holding that the word ‘plant’ in section 10, sub-section(2) clause(vib) of the Income Tax Act was not intended to include vehicle”

Thus, the Hon'ble High Court rejected the argument of the Revenue that the expression 'plant' used in Section 10(2)(vib) of 1922 Act postulates fixed in a position and does not include vehicles.

11.2 Thus, from above decisions and dictionary meaning of the word 'install', it can be safely construed that the expression install/installed is not limited to fixing permanently for the purpose of manufacture or production, the expression means and includes ready to use and moveable assets. In the present context the LPG Cylinders and regulators are installed when they are used for refilling. We are of considered view that the PCIT has erred in interpreting the meaning of word 'install/installed' in a narrow/limited context.

12. The next pre-condition that is required to be fulfilled for the purpose of section 32AC of the Act is, the process of 'manufacture or production'. The ld. Counsel for the assessee referred to the judgment of Hon'ble Supreme Court of India rendered in the case of CIT vs. Hindustan Petroleum Corporation Ltd. (supra). In the aforesaid case the assessee had claimed deduction u/s. 80I, 80IA and 80HH of the Act. The assessee therein was engaged in the process of bottling LPG cylinders meant for domestic use. The Assessing Officer disallowed the claim of assessee holding that the assessee is not engaged in the process of production or manufacturing activity. According to the Assessing Officer LPG is produced and manufactured in Refinery and thereafter there is no change in the chemical composition or other properties of the gas in the activity of filling the cylinder. In first appeal, the CIT(A) affirmed the findings of Assessing Officer. On further appeal by the assessee, the Tribunal held that bottling of LPG cylinders is a complex activity which involve multiple process viz. LPG suction, vapor distribution, compression of LPG vapor, external and internal cleaning, hydro pressure testing, refilling, quality control, etc. The Tribunal held that the activity of bottling LPG cylinder would amount to manufacturing activity, hence, the assessee is eligible for deduction u/s. 80 HH, 80I and 80 IA of the Act. The Revenue carried the issue before the Hon'ble High Court but remained unsuccessful. Thereafter, the Revenue filed appeal before the Hon'ble Supreme Court of India. The Hon'ble Apex Court after considering the submissions of rival sides and provisions of the section under which deduction was claimed, affirmed the



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view of Tribunal and the High Court. The relevant extract of the aforesaid judgment is reproduced herein below:

“15) At the outset, it needs to be emphasised that the aforesaid provisions of the Act use both the expressions, namely, ‘manufacture’ as well as ‘production’. It also becomes clear after reading these provisions that an assessee whose process amounts to either ‘manufacture’ or ‘production’ (i.e. one of these two and not both) would become entitled to the benefits enshrined therein. It is held by this Court in Arihant Tiles and Marbles P. Ltd. case that the word ‘production’ is wider than the word ‘manufacture’. The two expressions, thus, have different connotation. Significantly, Arihant Tiles judgment decides that cutting of marble blocks into marble slabs does not amount to manufacture. At the same time, it clarifies that it would be relevant for the purpose of the Central Excise Act. When it comes to interpreting Section 80-IA of the Act (which was involved in the said case), the Court was categorical in pointing out that the aforesaid interpretation of ‘manufacture’ in the context of Central Excise Act would not apply while interpreting Section 80-IA of the Act as this provision not only covers those assesseees which are involved in the process of manufacture but also those who are undertaking ‘production’ of the goods. Taking note of the judgment in Commissioner of Income Tax, Goa v. Sesa Goa Ltd. (2004) 271 ITR 331 (SC) which was rendered in the context of Section 32A of the Act and which provision also applies in respect of ‘production’, the Court reiterated the ratio in Sesa Goa Ltd. to hold that the word ‘production’ was wider than the word ‘manufacture’. On that basis, finding arrived at by the Court was that though cutting of marble blocks into marble slabs did not amount to ‘manufacture’, if there are various stages through which marble blocks are subjected to before they become polished slabs and tiles, such activity would certainly be treated as ‘production’ for the purpose of Section 80-IA of the Act. In this context, relevant discussion contained in Arihant Tiles case needs to be reproduced, which is as under:

“16. In the present case, we have extracted in detail the process undertaken by each of the respondents before us. In the present case, we are not concerned only with cutting of marble blocks into slabs. In the present case we are also concerned with the activity of polishing and ultimate conversion of blocks into polished slabs and tiles. What we find from the process indicated hereinabove is that there are various stages through which the blocks have to go through before they become polished slabs and tiles. In the circumstances, we are of the view that on the facts of the cases in hand, there is certainly an activity which will come in the category of “manufacture” or “production” under Section 80-IA of the Income Tax Act.

17. As stated hereinabove, the judgment of this Court in Aman Marble Industries (P) Ltd. [(2005) 1 SCC 279 : (2003) 157 ELT 393] was not required to construe the word “production” in addition to the word “manufacture”. One has to examine the scheme of the Act also while deciding the question as to whether the activity constitutes manufacture or production. Therefore, looking to the nature of the activity stepwise, we are of the view that the subject activity certainly constitutes “manufacture or production” in terms of Section 80-IA.

18. In this connection, our view is also fortified by the following judgments of this Court which have been fairly pointed out to us by learned counsel appearing for the Department.

19. In CIT v. Sesa Goa Ltd. [(2004) 13 SCC 548 : (2004) 271 ITR 331], the meaning of the word “production” came up for consideration. The question which came before this Court was whether ITAT was justified in holding that the assessee was entitled to deduction under Section 32-A of the Income Tax Act, 1961, in respect of machinery used in mining activity ignoring the fact that the assessee was engaged in



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extraction and processing of iron ore, not amounting to manufacture or production of any article or thing.

20. The High Court in Sesa Goa case [(2004) 13 SCC 548 : (2004) 271 ITR 331], while dismissing the appeal preferred by the Revenue, held that extraction and processing of iron ore did not amount to “manufacture”. However, it came to the conclusion that extraction of iron ore and the various processes would involve “production” within the meaning of Section 32-A(2)(b)(iii) of the Income Tax Act, 1961 and consequently, the assessee was entitled to the benefit of investment allowance under Section 32-A of the Income Tax Act. In that matter, it was argued on behalf of the Revenue that extraction and processing of iron ore did not produce any new product whereas it was argued on behalf of the assessee that it did produce a distinct new product.

21. The view expressed by the High Court that the activity in question constituted “production” has been affirmed by this Court in Sesa Goa case [(2004) 13 SCC 548 : (2004) 271 ITR 331] saying that the High Courts opinion was unimpeachable. It was held by this Court that the word “production” is wider in ambit and it has a wider connotation than the word “manufacture”. It was held that while every manufacture can constitute production, every production did not amount to manufacture.

22. In our view, applying the tests laid down by this Court in Sesa Goa case [(2004) 13 SCC 548 : (2004) 271 ITR 331] and applying it to the activities undertaken by the respondents herein, reproduced hereinabove, it is clear that the said activities would come within the meaning of the word “production”.

16) Keeping the aforesaid distinction in mind, let us take note of the process of LPG bottling that is undertaken by the assessee herein and about which there is no dispute. It has come on record that specific activities at assessee’s plant include receiving bulk LPG vapour from the oil refinery, unloading the LPG vapour, compression of the LPG vapour, loading of the LPG in liquefied form into bullets, followed by cylinder filling operations. The stages of these activities are as under:

- (a) Bulk LPG is received in the bottling plant through road tankers/rail wagons;*
- (b) The LPG is unloaded into spheres/bullets through LPG compressors which use variable levels of pressure for suction, unloading and vapour recovery;*
- (c) Refilling/bottling of LPG in cylinders by compressing the same into liquid form; and*
- (d) Capping, fixing of seals and safety valves prior to storage and loading of filled cylinders.*

17) Thus, after the bottling activities at the assessee’s plants, LPG is stored in cylinders in liquefied form under pressure. When the cylinder valve is opened and the gas is withdrawn from the cylinder, the pressure falls and the liquid boils to return to gaseous state. This is how LPG is made suitable for domestic use by customers who will not be able to use LPG in its vapour form as produced in the oil refinery. It, therefore, becomes apparent that the LPG obtained from the refinery undergoes a complex technical process in the assessee’s plants and is clearly distinguishable from the LPG bottled in cylinders and cleared from these plants for domestic use by customers. It may be relevant to point out that keeping in view the aforesaid process, the ITAT arrived at the specific findings in support of its decision, which are as under:

- (a) There is no dispute that the LPG produced in the refinery cannot be directly supplied to the consumer for domestic use because of various reasons of handling, storage and safety.*
- (b) LPG bottling is a highly technical and complex activity which requires precise functions of machines operated by technically expert personnel.*



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(c) Bottling of LPG is an essential process for rendering the product marketable and usable for the end customer.

(d) The word 'production' has a wider connotation in comparison to 'manufacture', and any activity which brings a commercially new product into existence constitutes production. The process of bottling of LPG renders it capable of being marketed as a domestic kitchen fuel and, thereby, makes it a viable commercial product.

18) In the considered opinion of this Court, the aforesaid activity would definitely fall within the expression 'production'. We agree with the submission of the learned counsels for the assesseees that the definition of 'manufacture of gas' in Rule 2 (xxxii) of the Gas Cylinders Rules, 2004 also supports the case of the assesseees inasmuch as gas distribution and bottling is treated as manufacturing or producing gas. We are also inclined to accept the submission of the learned counsel for the assesseees that various High Courts have, from time to time, decided that bottling of gas into cylinder amounts to production and, therefore, claim of deduction under Sections 80HH, 80-I and 80-IA would be admissible. Another important aspect which was highlighted by learned counsels for the assesseees was that identical issue whether bottling of gas into cylinder amounts to production for claim of deduction under the Act has been considered by various High Courts and decided in the affirmative but those decisions were not challenged by the Department. The cases specifically referred were *M/s. Puttur Petro Products Pvt. Ltd. v. The Assistant Commissioner of Income Tax, Mangalore (2014) 361 ITR 290* and *Central U.P. Gas Ltd. v. Deputy Commissioner of Income Tax, Kanpur (Income Tax Appeal No. 224 of 2014 decided by High Court of Allahabad.*

19) From the submissions made by learned counsel for the Revenue, who banked on the reasoning given by the AO, it can be gathered that the entire thrust of the AO was that the process involved in filling up the gas into cylinders does not amount to 'manufacture' inasmuch as the said process does not bring into existence a new identifiable and distinctive goods. In the first instance, no distinction was drawn between manufacture and production and the matter was not looked into from the angle as to whether the aforesaid process would amount to production or not. Other reason which prevailed with the AO and which was also the argument of the learned counsel for the Revenue was that, on identical facts, the Gujarat High Court had held that refilling the LPG after purchasing from M/s. HPCL into small cylinders would not amount to manufacture. That was a case which was decided in the context of the Gujarat Sales Tax Act, 1969. The Court held that transfer of LPG from bulk containers into cylinders did not amount to process of manufacture. It is pertinent to point out that Section 2(16) of the Gujarat Sales Tax Act, 1969 defines 'manufacture' and, therefore, the entire case was examined keeping in view the said definition of 'manufacture' and the issue was as to whether the process amounted to manufacture or not. As pointed out above, the question as to whether it amounts to 'production' as well did not arise for consideration. The AO committed manifest error in relying upon the said decision inasmuch as the provisions with which we are concerned in the instant case use the words 'manufacture or production' and are not limited to 'manufacture' alone."

The Hon'ble Apex Court in a lucid manner has explained the complex process of bottling LPG in cylinders. Thus, the Hon'ble Court after methodically examining the intricate procedures involved in bottling LPG cylinders came to the conclusion that process amounts to 'manufacturing or production'.

13. In the light of aforesaid decision it is unambiguously clear that bottling of LPG in cylinders amounts to 'manufacturing or production'. The provisions of section 32AC



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of the Act requires that the assessee company is engaged in the business of manufacture or production. The three mandatory conditions set out in section 32AC of the Act to be eligible to claim deduction are satisfied in the instant case. Thus, the objections raised by the PCIT for disallowing assessee's claim of deduction are set aside and the assessee is held to be eligible for the benefit of deduction u/s. 32AC of the Act. The ground No.3 & 4 of appeal are allowed, accordingly.

9. Having regard to the findings given by this Tribunal in assessee's own case (supra), we are in agreement with the assessee that, the observation/findings made by the Ld. PCIT in the impugned order that LPG Cylinders does not qualify for deduction u/s 32AC of the Act, is erroneous. This particular finding recorded at para no. 13 (supra) of the Tribunal in assessee's own case could not be controverted by the Ld. CIT-DR as well. In the light of the Tribunal decision (supra), we do not countenance the finding of the Ld. PCIT that the LPG Cylinders are not eligible assets for claiming deduction u/s 32AC of the Act and instead hold it to be eligible for deduction u/s 32AC of the Act. Having held so, as noted earlier, the list of assets provided by the assessee included items other than LPG cylinders as well. Whether such other items of additions are eligible for deduction u/s 32AC of the Act has not been looked into either by the Ld. PCIT or the AO. Hence, the limited issue regarding quantification and verification of the eligible assets [as defined in sub-section (4) to Section 32AC of the Act (infra)] is left open, which shall be looked into by the AO de novo uninfluenced by the findings of the Ld. PCIT.



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10. The second (ii) issue raised by the Ld. PCIT in the impugned order is connected and inter-linked with the first (i) issue, as discussed above. To examine the merits of the issue, it would be relevant to first extract the findings recorded by Ld. PCIT in this regard:

“PCIT Observations

4 The second issue pertains to excess claim of deduction u/s 32AC of the Act.

4.1 The assessee made the following submission before me regarding the matter:

At para 3.2 of the subject notice, it is stated that it is gathered from the addition to total assets as per the original revised returns tax audit report and Balance-Sheet as follows:

| Details | Plant and Machinery | Other assets | Total additions |
|------------------|---------------------|--------------|-----------------|
| Original return | 3931.56 | 645.51 | 4577.07 |
| Revised return | 4225.88 | 670.25 | 4896.13 |
| Tax Audit Report | 3931.56 | 645.51 | 4577.07 |
| Balance sheet | 4059.78 | 995.01 | 5054.79 |

That in the revised return assessee made addition of Re 319.05 crores to assets towards foreign exchange transactions losses and claimed depreciation of Rs 86 78 crores. This was disallowed. That considering the addition to Plant and machinery as per original return of Rs 3931.56 crores, the eligible deduction under Section 32AC of the Act works out to Rs 598.73 crores, however, A.O allowed deduction of Rs 971.60 crores being excess deduction of Rs 372.87 crores. That on the basis of the foregoing the assessment is erroneous insofar as it is



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prejudicial to the interest of the revenue within the meaning of Section 263 of the Act.

3.2) Assessee submits that the figure of total additions to Plant and Machinery and Other Plant or machinery considered for claim made assets cannot be co-related to the under Section 32AC of the Act. This is because what enters the computation of the figure of additions are those assets that have been put to use. This figure in the original return was Rs 4577.07 crores. With the additional claim of Rs 319.05 crores being loss on account of currency fluctuation being added to the value of assets in the revised return was reflected at Rs 4896.13 crores (4577.07 +319.05). However, the claim of deduction under section 32AC of the Act are available on installed assets as well that have not been put to use and remain in capital work in progress. It is submitted that the claim under 32AC of the Act as per the original return and as per the revised return always remained at Rs 971.60 crores, being 15% of Rs 6477 crores. Further, this amount of Rs 971.60 crores finds a place in the Tax Audit Report certified by the Tax Auditors in clause 19 and also in the Income tax return at Sr No. 28 of Schedule BP and as observed in the subject notice full details of the assets and the claim were provide in the submission dated 03. 12.2018."

4.2 I have carefully perused the submissions of the assessee and the facts of the case and do not agree with the submissions of the assessee on the following grounds:

(i) The main contention of the assessee that the claim of deduction u/s 32AC of the Act is available on installed assets as well as that remain capital work-in-progress is not acceptable at all in view of the clarificatory proviso to 32AC(1A) wherein it has specifically been



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mentioned that deduction will be “allowed in the year in which the new assets are installed” and not in the year of acquisition.

(ii) Given this clarificatory proviso there arises no scope of any interpretation regarding claiming of deduction on eligible assets in any year other than the year of installation. It cannot be claimed on work-in-progress but must be claimed in the year when the asset is actually and completely installed.

(iii) Therefore the claim of the assessee u/s 32AC on work-in-progress cannot be allowed.” (emphasis supplied)

11. It is noted that the assessee had reported total additions of Rs.4059.78 lacs under the head ‘Plant & Machinery’ (‘P&M’) and Rs.995.01 lacs under the head ‘Other Assets’ in the books of accounts. The tax auditor, on the other hand, had reported additions to P&M at Rs.3931.56 lacs and Other Assets at Rs.645.51 lacs, which according to the assessee, represented value of assets which were put to use during the year. In the original return of income, the assessee had accordingly reported these additions aggregating to Rs.4577.07 lacs under the respective Block of Assets. Subsequently, the assessee had revised the return of income wherein it had increased the figure of addition to the Block of Assets to Rs.4896.13 lacs. According to assessee, the differential sum of Rs.319.05 lacs (4896.13 – 4577.07) represented the foreign exchange fluctuation loss actually paid during the year in relation to these assets and accordingly it had been capitalized to the block of assets. Having regard to these figures, the Ld. PCIT noted that the corresponding eligible deduction on the newly installed assets would work out to Rs.598.73 lacs u/s 32AC of the Act



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but the assessee had claimed deduction of Rs.971.60 lacs resulting in excess claim of Rs.372.87 crores. When enquired on this aspect, the assessee explained that, the deduction so computed not only included the assets installed and put to use but also capital work in progress which was yet to be put to use, which according to the assessee was in accordance with law.

12. In order to examine the above contention of the assessee, it is necessary to reproduce the relevant provisions of Section 32AC of the Act, which reads as under:

1) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset after the 31st day of March, 2013 but before the 1st day of April, 2015 and the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees, then, there shall be allowed a deduction,—

(a) for the assessment year commencing on the 1st day of April, 2014, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April, 2014, if the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees; and

(b) for the assessment year commencing on the 1st day of April, 2015, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of



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April, 2015, as reduced by the amount of deduction allowed, if any, under clause (a).

(1A) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new assets and the amount of actual cost of such new assets acquired during any previous year exceeds twenty-five crore rupees and such assets are installed on or before the 31st day of March, 2017, then, there shall be allowed a deduction of a sum equal to fifteen per cent of the actual cost of such new assets for the assessment year relevant to that previous year:

Provided that where the **installation of the new assets are in a year other than the year of acquisition**, the deduction under this sub-section **shall be allowed in the year in which the new assets are installed**:

Provided further that no deduction under this sub-section shall be allowed for the assessment year commencing on the 1st day of April, 2015 to the assessee, which is eligible to claim deduction under sub-section (1) for the said assessment year.

(1B) No deduction under sub-section (1A) shall be allowed for any assessment year commencing on or after the 1st day of April, 2018.

(2) If any new asset acquired and installed by the assessee is sold or otherwise transferred, except in connection with the amalgamation or demerger, within a period of five years from the date of its installation, the amount of deduction allowed under sub-section (1) or sub-section (1A) in respect of such new asset shall be deemed to be the income of the assessee chargeable under the head "Profits and gains of business or



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profession" of the previous year in which such new asset is sold or otherwise transferred, in addition to taxability of gains, arising on account of transfer of such new asset.

(3) Where the new asset is sold or otherwise transferred in connection with the amalgamation or demerger within a period of five years from the date of its installation, the provisions of sub-section (2) shall apply to the amalgamated company or the resulting company, as the case may be, as they would have applied to the amalgamating company or the demerged company.

(4) For the purposes of this section, "new asset" means any new plant or machinery (other than ship or aircraft) but does not include—

- (i) any plant or machinery which before its installation by the assessee was used either within or outside India by any other person;
- (ii) any plant or machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house;
- (iii) any office appliances including computers or computer software;
- (iv) any vehicle; or
- (v) any plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year. (emphasis supplied by us)

13. Sub-Section (1A) of Section 32AC, which is applicable to the relevant AY 2016-17 in question, provides that only those new assets which are acquired and installed on or before the 31st day of March,



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2017, shall be eligible for deduction computed at the rate of fifteen percent of the cost of new assets. The proviso to Section 32AC(1A) which was inserted by Finance Act, 2016, further clarifies that where the installation of the new assets are in a year other than the year of acquisition, the deduction under this sub-section shall be allowed in the year in which the new assets are **installed**.

14. Sub-section (4) of Section 32AC defines the term "new asset" to mean any new plant or machinery (other than ship or aircraft) except the five exceptions set out therein. The term 'plant & machinery' is nowhere defined in the Income-tax Act, 1961. The Appendix 1 to the Income-tax Rules, 1962 also lays down the items of assets, which are in the nature of 'Machinery & Plant'.

15. Having perused the above Appendix, we per-se do not find that capital work-in-progress qualifies as Plant & Machinery, which have been acquired and installed in the relevant assessment year and therefore we countenance the action of Ld PCIT in holding that the deduction allowed u/s 32AC of the Act in relation to the Capital WIP was erroneous and prejudicial to the Revenue. Moreover, it is noted that the assessee never brought to the notice of the AO that the additions of Rs.6477 crores on which deduction @15% was claimed u/s 32AC of the Act, included Capital WIP of Rs.1580.87 crores, which represented assets yet to be completed and/or come into existence. Instead, the list of assets which purportedly contains the



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details of assets 'acquired & installed' during the year totals to Rs.6477 crores and there is no mention of Capital WIP therein. According to us therefore, the submissions furnished by the assessee on 03-12-2018 regarding this issue was ambiguous, vague and sketchy. Merely because the tax auditor had reported eligible deduction u/s 32AC of the Act at Rs.971.60 lacs, it could not have been accepted at its face value. Even the Ld. PCIT did not himself examine this discrepancy in the details of the assets stated to have been acquired and installed for the purposes of claiming deduction u/s 32AC of the Act vis-a-vis Capital WIP as reflected in the books of accounts. Resultantly therefore, and in addition to our directions given in Para 9 earlier, the AO is directed to de novo examine the details of the Capital WIP of Rs.1580.87 crores on which deduction u/s 32AC of the Act has been claimed by the assessee and enquire as to whether although the Capital WIP was acquired during the year but whether it was also installed during the year, as claimed by the assessee. If not, then the deduction u/s 32AC of the Act in relation thereto cannot be allowed in the relevant year, in terms of the proviso to Section 32AC(1A) of the Act, which is applicable to the relevant year in question. Needless to say, the AO shall afford sufficient opportunity to the assessee to explain its case, and shall decide the issue in accordance with law.

16. The third (iii) issue which has been found fault with by the Ld. PCIT is with regard to the dividend received by the assessee from BPCL Trust to the tune of Rs.259.71 crores, which the assessee



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claimed as exempt u/s 10(34) of the Act. The Ld. PCIT however held that such dividend income received from the Trust is not eligible for exemption u/s 10(34) of the Act. This finding of the Ld. PCIT has been assailed by assessee. According to the Ld. Sr. Counsel, this issue is no longer res-integra because identical issue came up before the Tribunal in assessee's own case cited (supra) which has been decided in favour of the assessee, wherein at para no. 14 the Tribunal held as under:

“14. The next issue in the appeal is with respect to dividend income received from BPCL Trust claimed as exempt u/s. 10(34) of the Act. The contention of the assessee is that the Trust is only a pass through entity. The dividend received by the Trust from the assessee has been passed on to the assessee. When the dividend was declared by the assessee the same was subject to tax u/s. 115O of the Act. The income retains the same character whether the income is assessed directly on the beneficiary or on the Trustee on behalf of the beneficiary. The Department has accepted the stand of assessee since Assessment Year 2007-08 and there is no change in the facts since then. We find that it is the dividend declared by the assessee which has travelled back to the assessee through the Trust. The dividend distributed by the assessee was already subject to tax under the provisions of section 115O of the Act, hence, same amount cannot be taxed twice merely for the reason that it has travelled through a Trust of which the assessee is a beneficiary.

In the preceding Assessment Years starting from A.Y. 2007-08, the Revenue has accepted the transaction and made no addition. The principle of consistency demands where there has been no change in the facts & law, no addition should be made on the settled and accepted transaction. Thus, in view of the accepted position, we find merit in ground No.5 raised by the assessee.”

17. Following the above reasoning (supra), we hold that Ld PCIT erred in observing that the dividend received from BPCL Trust is not exempt income u/s 10(34) of the Act. The assessee therefore succeeds on this issue.



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18. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 05/09/2022.

Sd/-

(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 05/09/2022.
Vijay Pal Singh, (Sr. PS)

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

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2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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