

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA Nos.323 to 327/SRT/2018

AYs: (2005-06 to 2007-08, 2009-10 & 2011-12)

(Virtual Court Hearing)

N. Core Cables, Gala No.7, Plot No.10, Premier Industrial Area, Kachigam, Daman-396210, U.T of Daman & Diu.	Vs.	The ACIT, Vapi Circle, Vapi.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAEFN7954N		
(Appellant)		(Respondent)

आयकर अपील सं./ITA No.689/SRT/2018

Assessment Year: (2007-08)

(Virtual Court Hearing)

N. Core Cables, Gala No.7, Plot No.10, Premier Industrial Area, Kachigam, Daman-396210, U.T of Daman & Diu.	Vs.	The ACIT, Vapi Circle, Vapi.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAEFN7954N		
(Appellant)		(Respondent)

Assessee by	Shri A. Gopalkrishnan, CA
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	10/10/2022
Date of Pronouncement	19/12/2022

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

Captioned six appeals filed by the same assessee, pertaining to Assessment Years (AYs) 2005-06 to 2007-08, 2009-10 and 2011-12, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), Valsad [in short “the ld. CIT(A)”], which in turn arise out of separate assessment orders passed by the Assessing Officer under section 143(3)/271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. First, we shall adjudicate the following appeals of the assessee, wherein the common and identical issues are involved:

(i) ITA No. 323/SRT/2018 for AY.2005-06

(ii) ITA No.324/SRT/2018 for AY.2006-07

(iii) ITA No.325/SRT/2018 for AY.2007-08

(iv) ITA No.326/SRT/2018 for AY.2009-10

(v) ITA No.327/SRT/2018 for AY.2011-12

3. Since, the common and identical issues are involved therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. The facts as well as grounds of appeal raised by the assessee in ITA No. 323/SRT/2018 for AY.2005-06, have been taken into consideration for deciding these appeals *en masse*.

4. The grounds of appeal raised by the assessee as per lead case in ITA No. 323/SRT/2018 for AY.2005-06 are as follows:

*“01. The order of assessment is contrary to the facts and prejudicial to the appellant.*

*02. On appreciation of the facts and circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer of not granting deduction to the appellant U/s 80IB of the Income tax Act*

*03. On appreciation of the facts and circumstances of the case and interpretation of law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer in treating the income earned by the appellant as income not eligible for deduction U/s. 80IB. The action of the Learned Commissioner of Income Tax (Appeals) in concluding that the appellant has not carried out any manufacturing activity is contrary to the facts of the case on record and hence deserves to be deleted.*

*04. On appreciation of the facts and circumstances of the case the Learned Commissioner of Income Tax (Appeals) has erred in holding that the appellant firm has not carried out any manufacturing activity at its industrial undertaking at Daman on or before 31.03.2004.*

*05. The appellant craves leave to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.*

*06. The appellant humbly prays that the appeal be allowed in toto.”*

5. Brief facts *qua* the issue are that the assessee has claimed deduction of Rs.11,08,626/- under section 80IB of the Income Tax Act. During the course of assessment proceedings, vide letter dated 26.7.2007, the assessee was asked as under:

*“(i) You have claimed deduction of Rs.11,08,630/- under section 80IB of the I.T. Act. On going through the report of 10CCB, it is noted that you have not employed even a single worker in the process of job work. As per provision of section 80IB, there should be at least 10 or more workers employed for claiming deduction.*

*As you are not fulfilling one of the conditions enumerated in the section 80IB, therefore, you are show cause as to why you claim 80IB should not be disallowed?*

*(ii) It is noted from the record of AY.2004-05 that the Department has not considered your business activity as manufacturing and disallowed the claim of deduction u/s. 80IB of the Income Tax Act. Therefore, you are show cause as to why your claim for deduction under section 80IB should not be disallowed as you are not engaged in the manufacturing activity?*

*(iii) Further, it is also noted at Column No. 26(e) of Form No. 10CCB that you have not used machinery or plant for business manufactured goods.”*

6. However, the assessee did not make compliance of the above show cause notice, therefore Assessing Officer considering the material available on record, held that assessee is not engaged in the manufacturing process, not employed workers and not used machinery, therefore assessee's claim in respect of 80IB of the Income Tax Act was rejected.

7. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the action of Assessing Officer. The Ld. CIT(A) called remand report from Assessing Officer and after taking into consideration the assessee's submission, held that assessee is not carried out any manufacturing activity, therefore assessee's claim for deduction under section 80IB of the Act, was rejected.

8. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

9. The Learned Counsel for the assessee submitted that the issue under consideration is squarely covered by the judgment of Co-ordinate Bench of ITAT,

Surat in the assessee's own case in ITA No.322/SRT/2018 for AY.2004-05, order dated 04.08.2022, therefore assessee's claim for deduction under section 80IB may be allowed.

10. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

11. We find merit in the submission of Ld. Counsel for the assessee and noted that issue under consideration is squarely covered in favour of assessee in assessee's own case by the judgment of the Division Bench of ITAT, Surat in ITA No. 322/SRT/2018 for AY.2004-05, order dated 04.08.2022 wherein the Tribunal held as follows:

*"10. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Regarding power connection, ld Counsel submits that admin, of U. T. of Daman & Diu has sanctioned the power connection on 01.03.2004 subject to submission of occupancy certificate of the building. Thereafter the agreements were entered into with the Electricity Department on 23.03.2004 for the release of power connection and ultimately power was released on 30.03.2004. Thus, even if the assessee operates the machinery for one day on 31.03.2004 and manufactures items, it is eligible for deduction u/s 80IB of the Act. Therefore, as per ld Counsel, this critical evidence has been overlooked and ignored by the lower authorities while concluding that power has not been used for manufacturing. The Learned Counsel also pleaded that ld CIT(A) did not confine scope of adjudication up to the direction given by Hon`ble ITAT, which is against the principle of natural justice.*

*11. About plant and machinery, ld Counsel submits that entire machinery has been transported in a truck by the supplier and installation of commissioning of Plant and Machinery was done by the employees of the assessee within 5 to 10 days because of their past experience. The Purchases of raw materials has never been disputed by the AO either in the original assessment order or in the remand report. The assessee sufficiently substantiated the diesel purchase bills and the AO has not controverted the same except to point out some discrepancy in the invoice number, which is third-party evidence and not at all in the control of the assessee. The assessee has given exhaustive details of manufacturing process, number of working hours required to manufacture the items sold, copy of the audited balance sheet disclosing the purchases and sale and installation of plant and machinery before all the authorities and the same has not been found to be false at any stage. Further the books of accounts had been produced before the AO during the course of assessment proceedings and has been duly verified. The*

observations made by Id CIT(A) are general in nature. The assessee had submitted Permanent Certificate of Registration as an SSI unit obtained from DIG, Daman specifying the date of commencement of production as 02.03.2004, vide Paper Book Page 24 to 39. The Assessee's manufacturing activity consisted of (i) canvassing of orders, (ii) preparation of specifications of the material to be supplied to Formula Cables and electrical on the basis of orders, (iii) placing orders for the manufacture of rubber cables with Nangalwala chemicals Ind. (iv) to ensure that the manufacturing process is carried on by Nangalwala chemicals, under the direct supervision of the Partner Mr. Naresh Agarwal, the Partner and (v) to have a check over the quality control of Cables manufactured and assuring that the end products conform to specification as per customers order giving performance and guarantee to the customer. Further the Payment of cable making charges Rs. 46,518/- Paid to Nagalwal Chemical has been debited to Profit and Loss Account, vide Page 79 of the Paper Book. We note that decision of the Honorable Bombay high Court in the case of Penwalt India Ltd reported in [1991] 58 TAXMAN 133 (BOM) wherein on a similar situation the Hon'ble High Court has held that assessee in that case qualify for the relief u/s 80-I of the Act. In this regard it is submitted by Id Counsel that section 80-I is pari-materia to section 80-IB of the Act and therefore is squarely applicable to the facts of the case of the assessee as well. The findings of the Hon'ble Court is reproduced below:

*“6. It cannot perhaps be disputed on the basis of the decisions relied upon that the expression 'engaged in manufacture' indicates that the assessee should be directly involved in the manufacturing process and it will not include the cases where he gets the goods manufactured totally by an outside agency. Incidentally, the Madras High Court in its decision in Chillies Export House Ltd.'s case (supra) referred to the Allahabad High Court decision in the case of Bulbu Prasad Amarnath v. CST [1964] 15 STC 46 wherein it was held that it is not merely the person who manufactures but even the person who had the goods manufactured would be entitled to the benefit of the definition. In so doing the learned Judges referred to 33, Halsbury's Laws of England, Third Edn. 'Revenue', paragraph 407, wherein it was said that a person is deemed to make goods or to apply a process if the goods are made, or the process is applied, by another person to his order under any form of contract other than a purchase. Therefore, we have to proceed on the basis of the decisions cited that an assessee would be said to be engaged in manufacturing activity if he is doing a part of the manufacturing activity by himself and for the rest of it engages the services of somebody else on a contract other than a contract of purchase.*

*7. Coming to the facts of the instant case, we find from the facts found by the Tribunal that the assessee's manufacturing activity consisted of (i) canvassing of orders, (ii) preparing of designs and drawings on the basis of orders, (iii) placing orders for the manufacture of machinery with Turner Hoare, (iv) to see that the manufacturing process is carried on by Turner Hoare under the direct supervision of the assessee-company and (v) to have a check over the quality control and last but not the least to be responsible for the proper functioning of the machinery and guarantee*

*after sale service for a stipulated period. Out of so many activities, except for one activity, namely, getting the machinery manufactured through Turner Hoare, all other activities are admittedly undertaken by the assessee-company. In the circumstances, we find no difficulty in agreeing with the Tribunal that the assessee is engaged in the business of manufacture sugar and tea machinery and is accordingly qualified for relief under section 80-I. In the above view of the matter, we answer the 3rd and the 4th question is also in the affirmative and in favour of the assessee.*

*8. There would be no order as to costs.”*

*12. On the identical facts, our view is fortified by the judgment of the Hon'ble Bombay high Court in the case of Anglo French Drug Co. (Eastern) Ltd reported in [1991] 57 TAXMAN 008 (BOM) wherein pursuant to Circular No. 347 issued by CBDT the Hon'ble Bombay High Court has clearly held that manufacturing at third party premises using their machinery under the supervision and control of an assessee amounts to manufacturing by the industrial undertaking. While holding as such the honorable court followed its own decision in the case of CIT v. Neo Pharma (P.) Ltd. [1982] 137 ITR 879 and Calcutta High Court in the case of Addl. CIT v. A. Mukherjee & Co. (P.) Ltd. [1978] 113 ITR 718. The relevant findings of the Hon'ble Court is reproduced below:*

*“3. In our judgment, the answer to this question is squarely covered by the judgment of our High Court in the case of CIT v. Neo Pharma (P.) Ltd. [1982] 137 ITR 879. In this case, it was held that although the plant and machinery employed for the purpose of manufacture belonged to Pharmed and the services of certain employees were also utilised in that process, the manufacturing activity was really that of the assessee. It is not necessary that the manufacturing company must manufacture the goods by its own plant and machinery at its own factory. If in substance the manufacturing company has employed another company for getting the goods manufactured by it under its own supervision or control, the assessee can be considered as a company engaged in manufacture of goods and, thus, an industrial company. Mr. Dalvi has also invited our attention to the fact that in Neo Pharma (P.) Ltd.'s case (supra), the Division Bench of our Court had relied upon the judgment of the Calcutta High Court in the case of Addl. CIT v. A. Mukherjee & Co. (P.) Ltd. [1978] 113 ITR 718, and the Board has already accepted the correctness of the said judgment in A. Mukherjee & Co. (P.) Ltd.'s case (supra) in its Circular No. 347 dated 7-7-1982 (See Taxmann's direct Taxes Circulars, Vol. 1, 1985 edn., p. 1112), Mr. Dalvi is right in this submission.*

*4. Mr. Jetly, the learned counsel for the revenue, has submitted that the assessee cannot be considered as a manufacturing company as the assessee did not depute its own staff at the factory and did not exercise supervision over the manufacturing activity undertaken by Roche Products Ltd while manufacturing pharmaceutical goods for the assessee. It is not absolutely necessary that the assessee must depute the supervisory staff or exercise direct supervision over the manufacturing process of the kind suggested by the learned counsel. It is sufficient if on*

*an overall view of the matter it is found that it was the assessee-company was the real manufacturer and the assessee had merely employed the agency of some one else through whom the goods were caused to be manufactured. It is also not necessary that the assessee must pay the wages of the workers employed in the manufacturing process. We have considered the factual data in this case in the light of the judgment of our High Court in Neo Pharma (P.) Ltd.'s (supra) and we are of the view that the Tribunal was right in the view which it took. In the result, we answer both the questions in the affirmative and in favour of the assessee.”*

13. *From the above judgment of the Hon`ble Bombay High Court in the case of Anglo French Drug Co. (Eastern) Ltd(supra), it is abundantly clear that it is not necessary that the manufacturing company must manufacture the goods by its own plant and machinery at its own factory. If in substance the manufacturing company has employed another company for getting the goods manufactured by it under its own supervision or control, the assessee can be considered as a company engaged in manufacture of goods and, thus, an industrial company. Therefore, we note that in the assessee`s case under consideration, assessee received orders from customers to supply the goods to them and the assessee executed these orders by way of manufacturing done by M/s Nangalwala Chemical Industries of Alwar, under the direct supervision of one of the partners. The assessee applies own technology, standard process, own raw material, own quality control/check, and the goods are manufactured as per the specification given by customers. Based on these facts and circumstances, we note that assessee is entitled to get deduction under section 80-IB of the Act. Hence, we direct the assessing officer to allow deduction under section 80IB of the Act, to the tune of Rs.8,00,308/-*

14. *In the result, appeal filed by the assessee is allowed.”*

12. Since, the issue is squarely covered in favour of assessee by the decision of the Co-ordinate Bench in assessee`s own case (supra), therefore, respectfully following the binding precedent, we allow these appeals of the assessee.

13. In the result, appeals filed by assessees (in ITA Nos. 323 to 327/SRT/2018) are allowed.

14. Now, we shall take penalty appeal of assessee, in ITA No.689/SRT/2018 for AY.2007-08, wherein the grounds of appeal raised by the assessee are as follows:

*“01. The order imposing penalty U/s. 271(1)(c) of the Act is contrary to the facts of the case and prejudicial to the Law. The appellant has neither concealed its income nor submitted any inaccurate particulars of income and the action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts of the case and law and deserves to be deleted.*

02. On appreciation of the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer imposing penalty U/s. 271(l)(c) to the tune of Rs.21,19,870/-

03. On appreciation of the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Learned Assessing Officer in imposing penalty U/s. 271(1)(c) for both concealment as well as furnishing of inaccurate particulars of income. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts of the case and law and deserves to be deleted.

04. The appellant craves leave to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.

05. The appellant humbly prays that the appeal be allowed in toto.”

15. The assessee has also raised additional grounds of appeal wherein the assessee has challenged penalty proceeding under section 271(1)(c) of the Act, based on the defective notice of penalty. The additional grounds raised by the assessee in respect of penalty proceedings, is reproduced below:

*“1. On appreciation of the facts and circumstances of the case and law, the Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the learned assessing officer in initiating the penalty proceedings U/s. 271(1)(c) of the Act for furnishing inaccurate particulars/concealment of income without mentioning the specific limb for which penalty is proposed to be levied. By way of the above additional ground of appeal the appellant has raised purely a legal issue and facts are available on record. The same may kindly be adjudicated on merits in view of the discretion conferred on your Honours under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963.”*

16. We have heard both the parties and perused the material available on record. We note that since we have deleted the quantum addition made by the Assessing Officer for assessment year 2007-08, therefore penalty under section 271(1)(c) of the Act for AY.2007-08, does not survive. That is once the foundation fails, the super structure also fails. Legal maxim “*sublato fundamento cadit opus*”. Therefore, the penalty under section 271(1)(c) of the Act, in ITA No.689/SRT/2018 for AY.2007-08 is hereby deleted.

17. Since, we have deleted the penalty as the quantum addition was deleted by the Co-ordinate Bench of this Tribunal, therefore, additional ground raised by the assessee becomes infructuous and hence does not require adjudication.

18. In the result, appeal filed by the assessee (in ITA No.689/SRT/2018) is allowed.

19. We note that assessee has raised additional ground in ITA No. 323/SRT/2018 for AY.2005-06. The additional grounds raised by the assessee are as follows:

*“In regard to the captioned appeal proceedings before your honors, we would like to humbly request to permit us to raise the following additional grounds of appeal before your honor as under.*

*1. On appreciation of the facts and circumstances of the case, the Learned Commissioner of Income tax (Appeals) has erred in not adjudicating the grounds of appeal raised by the appellant as against the addition made by the Learned Assessing Officer to the tune of Rs.25,35,000/- out of unsecured loan taken from various parties, considered as unexplained cash credit U/s.68 of the Income Tax Act, 1961. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and circumstances of the case and deserves to be deleted.*

*2. On appreciation of the facts and circumstances of the case and interpretation of law, the Learned Commissioner of Income tax (Appeals) ought to have adjudicated the grounds of appeal regarding addition made out of unsecured loans to the tune of Rs.25,35,000/- which was set aside and restored back by the Honorable ITAT in ITA No. 1487/Ahd/2010 & ITA No. 1364/Ahd 2010 vide order dated 31.10.2013.*

*By way of the above additional ground of appeal the appellant has raised an issue which has already been raised before the lower authorities and facts are available on record. The same may kindly be adjudicated on merits in view of the discretion conferred on your Honors under Rule 11 of the Income-tax (Appellate Tribunal) Rules. 1963.”*

20. We have heard Learned Departmental Representative (Ld. DR) for the Revenue and perused the material available on record. We note that the Co-ordinate Bench of this Tribunal in ITA No.1487/AHD/2010 for AY.2005-06, order dated 31.10.2013 has directed the ld. CIT(A) to adjudicate the issue afresh. The direction given by the Tribunal is reproduced below:

*“6. Ground No.5 is against confirmation of addition made by the AO to the tune of Rs.14 lacs out of unsecured loan taken from M/s.National Minerals and M/s.Akshat Leasing & Hire Purchase Pvt.Ltd. Ld.counsel for the assessee submitted that the relevant details were submitted before the ld.CIT(A). He submitted that copies of confirmation of the concerned parties are enclosed with the paper-book at page Nos.164 to 166. On the contrary, ld.Sr.DR supported the orders of the authorities below on this issue.*

7. We have considered the rival submissions, perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) in his order has decided this issue vide paragraph Nos.7.2 & 7.3, the same are reproduced for the sake of clarity.

*“7.2. Findings: I have considered the submissions made by the appellant and have gone through the remand report of the AO. The appellant submitted before me that it's then A.R.has been hospitalized owing to a severe heart attack and he could not attend before the A.O. in response to several notices and show cause notices issued. I am incline to agree with the appellant that there are genuine causes which prevented it to comply with various notices/letters issued by the A.O. In view of natural justice I am considering and admitting the various evidences submitted by the appellant firm for the purpose of adjudicating this appeal. 7.3. The appellant has submitted before me the confirmation letters from whom the unsecured loans were taken along with their PAN and copy of Income tax return. Before me the ld.AR contended that unsecured loans from National Minerals, and Akshat Leasing and Hire Purchase Pvt.Ltd. were squared up during the year under consideration. The amount involved is Rs.14,00,000/- (6,00,000 + 8,00,000). I have considered the submission made by the ld.AR that the unsecured loan from the doctor Alka Gupta, Sunderlal Agarwal & Sons HUF and Suresh Agarwal & Sons HUF appeared to be genuine and therefore I direct the AO to delte from the addition made from the assessment order made. However with regard to the loan of Rs.14,00,000/- from National Minerals, and Akshat Leasing and Hire Purchase Pvt.Ltd., the loan is not genuine because of the fact that the appellant has himself said that the loan has been cleared during the year under consideration. The ld.AR also failed to put up details of confirmation and creditworthiness of these parties. In view of this the AO is directed to delete addition of Rs.11,35,000/-. Accordingly, this ground of appeal is allowed partly.”*

*7.1. We find that the ld.CIT(A) has given a finding that the ld.AR failed to put up the details of confirmation and creditworthiness of these parties, however, the contention of ld.counsel for the assessee is that all the confirmations were duly placed on record of the ld.CIT(A). He has drawn our attention towards page Nos.164 to 166 of the paper-book. After considering all aspects of the matter, we find that the order of the l;d.CIT(A) is cryptic and, therefore, in the interest of justice, this issue is restored back to the file of ld.CIT(A) to decide it afresh after verifying the details as submitted by the assessee. Needless to say that ld.CIT(A) will give reasonable opportunity of hearing to the assessee. Ground No.5 is allowed for statistical purposes.*

*8. The other grounds are general in nature which require no independent adjudication.*

*9. In the result, the appeal of the Assessee for AY 2005-06 is partly allowed for statistical purposes.”*

Since, Tribunal has directed the ld. CIT(A) to adjudicate the issue afresh, Ld Counsel submitted before us that ld. CIT(A) has not adjudicated this issue yet, therefore, we direct the ld. CIT(A) to adjudicate this issue as early as possible. Therefore, additional ground raised by the assessee is allowed for statistical purposes.

21. In the result, additional ground raised by the assessee in ITA No. 323/SRT/2018 for AY.2005-06, is allowed for statistical purposes.

22. In the combined result, appeals of the assessee are allowed to the extent indicated above.

Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order is pronounced on 19/12/2022 by placing the result on the Notice Board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

सूरत /Surat

दिनांक/ Date: 19/12/2022

*SAMANTA*

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat