आयकर अपीलीय अधिकरण, मुंबई "सी " खंडपीठ

Income-tax Appellate Tribunal "C"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./I.T.A./6467/Mum/2013, निर्धारण वर्ष /Assessment Year:2009-10

Prestress Wire Industries 303, Elphinstone House, 17 Murzban Road Mumbai-400 001. **PAN:AAAFP 5807 C**	Vs.	ACIT- 12(1) Aayakar bhavan Mumbai-400 020.

(अपीलार्थी /Appellant) **(प्रत्यर्थी / Respondent)**

आयकर अपील सं./ITA/6569/Mum/2013,निर्धारण वर्ष /Assessment Year: 2009-10

ACIT-12(1) Mumbai-400 020.	Vs.	Prestress Wire Industries Mumbai-400 001.

(अपीलार्थी /Appellant) **(प्रत्यर्थी / Respondent)**

C.O./01/Mum/2015,निर्धारण वर्ष /Assessment Year: 2009-10

Arising out of आयकर अपील सं./ITA/84/Mum/2015,निर्धारण वर्ष /Assessment Year: 2009-10

Prestress Wire Industries Mumbai-400 001.	Vs.	ACIT-12(1) Mumbai-400 020.

(प्रत्याक्षेपक/Cross Objector) **(प्रत्यर्थी /Respondent)**

Revenue by: Ms. Radha Katyal Narang-DR

Assessee by: S/Shri Nitesh Joshi, D.S. Kabra-AR

सुनवाई की तारीख **/ Date of Hearing: 29.06.2016**

घोषणा की तारीख **/ Date of Pronouncement: 20.07.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 23/08/2013 of the CIT (A)-23,Mumbai, the Assessing Officer (AO) and the assessee have filed cross appeals for the year under consideration.The assessee has also filed Cross Objection (CO).Assessee-firm, engaged in business of manufacturing and trading of stressed-wires, standard-wires etc.,filed its return of income on 26/09/209, declaring total income of Rs.10.32 crores.The AO completed the assessment, under section 143 (3) of the Act,on 29/12/2011, determining the income of the assessee at Rs. 17.30 crores.

ITA/6467/Mum/2013 (Assessee's Appeal) :

2.Effective ground of appeal is about not adjudicating the additional ground raised by the assessee with regard to Central Sales Tax,amounting to Rs. 2.75 crores, embedded in the interstate sales made by the assessee.

2.1. During the appellate proceedings,the assessee submitted before the First Appellate Authority (FAA) that from the facts of the case and the scheme framed by the Government of Maharashtra the subsidy in the form of sale tax incentive was not given to the assessee for

assisting it in carrying out the business operations, that the object of the subsidy was to encourage the setting up of industries in the backward area, the subsidy was capital receipt, that the claim about the subsidy was not raised before the AO, that it was a pure legally claim, that same should be admitted based on certain Supreme Court decisions and adjudicated by following the decision of the special bench in the case of Reliance Industries (88 ITD273).The FAA held that the claim that the Central sales tax embedded in the sales is a capital receipt and therefore was to be excluded from the gross total income was not made by the assessee either in the return of income filed by it or before the AO in the course of assessment proceedings, that the receipt on account of Central sales tax was disclosed by the assessee in the return of income on its own, that the AO had not made any changes to the said receipts in the assessment order, that the assessee could have no grievance against the order of the AO, that the assessee had, by its own admission, reflected the central sales tax receipt as revenue receipt which had not been commented adversely upon by the AO, that the stand of the Department was that the sales tax receipt was a revenue receipt, the assessee should have filed a revised return for claiming the relief in view of the decision of the honorable Supreme Court delivered in the case of Goetze India Ltd. The FAA further observed that the assessee had claimed that submission made by it was based on certain Supreme Court decisions, that it had not made any reference to any of such decisions, that whether the particular receipt within a subsidy scheme was revenue capital was to be decided on the purpose for which same had been granted, that the question as to whether a particular receipt was a winner capital was a question of fact that could be found out only after analysing and examining the scheme and the facts, that the claim made by the assessee for the first time could not be admitted and adjudicated upon the appellate stage before the FAA, that it had not been explained by the assessee as to why the ground could not have been raised earlier. Finally, he dismissed the ground raised by the assessee.

2.2. During the course of hearing before us, Authorised Representative (AR) contended that ground raised by the assessee was purely legal in nature and should have been adjudicated by the FAA. He referred to the case of Prithvi share brokers (349 ITR 336). The Departmental Representative (DR) left the issue to the discretion of the bench.

2.3. We have heard the rival submissions and perused the material before us. We find that the issue of admitted fresh ground that the level of FAA has been conclusively decided by the

honorable jurisdictional High Court in the case of Prithvi brokers (supra).we would like to reproduce the relevant portion of the judgment and same reads as under:

> "*An assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion to permit such additional claims to be raised. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words "could not have been raised" must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts……"*

Respectfully following the above judgment, we direct FAA to adjudicate the issue after affording a reasonable of opportunity of hearing to the assessee.Effective ground of appeal raised by the assessee is decided in its favour, in part.

ITA/6569/Mum/2013 (Revenue's Appeal) :

3.First ground of appeal is about deduction claimed u/s.80IB of the Act.During the course of hearing before us,the AR stated that the issue was deliberated upon by the Tribunal (ITA No.8418/M/2010).We find that Revenue had raised the following grounds before the Tribunal:

> *"1. On the facts and circumstances of the case and in law, the Ld CIT (A) erred in directing the AO to allow deduction u/s 80IB of Rs. 8,50,23,349/- in respect of profits and gains of business of three new industrial undertaking i.e., Unit II, Unit III and Falaudi Unit without appreciating the fact that as the activities of these units do not constitute manufacture or production of any articles or things as specified in section 80-IB of the Act.*
>
> *2. The appellant prays that the order of the CIT (A) on the above ground/s be set aside and that of the AO be restored."*

The Tribunal dealt the issue as under:

> *3. At the outset, Ld Counsel for the assessee brought our attention to the above ground no.1 raised by the Revenue and mentioned that an identical issue has been raised by the Revenue before the Tribunal in assessee"s own case vide ITA No.4451 and 4452/M/2008 for the AY 2004-2005 and 2005-06, dated 20.11.2009. In this regard, Ld Counsel read out the relevant para 4 to 9 of the said order of the Tribunal (supra), wherein the Tribunal had decided the issue in favour of the assessee by holding that the activity of the assessee is a manufacturing activity and consequently eligible for deduction u/s 80IA of the Act. He further mentioned that, for the AYs 1995-96 to 1998-99, the Revenue was aggrieved with the similar decision of the Tribunal and filed an appeal before the Hon"ble High Court of Bombay, wherein the High Court dismissed the appeal vide Income Tax Appeal No. 4728 and 4729 of 2010, dated 14th September, 2011. He also mentioned that the Tribunal has consistently been allowing the assessee"s claim of deduction u/s 80IA of the Act.*
>
> *4. On the other hand, Ld DR relied on the orders of the Revenue Authorities.*
>
> *5. We have heard both the parties and perused the orders of the revenue authorities as well as the orders of the Tribunal filed before us. On perusal of the said order of the Tribunal dated 20.11.2009 (supra), we find para 9 is relevant in this regard and the same is reproduced here under:*
>
> *"9. We have considered the rival submissions made by both the sides, perused the orders of the AO and the CIT (A) and paper book filed on behalf of the assessee. We have also*

considered the various decisions cited before us. The only dispute in the instant case is as to whether the activity of the assessee company amounts to manufacture or production of an article or thing so as to enable the assessee the benefit of deduction u/s 80IB of the Act. We find the ITAT vide consolidated order dated 29.12.2006 for the AYs 1995-1996 to 1998-1999 has held that the activity of the assessee is a manufacturing activity and consequently eligible for deduction u/s 80IA of the Act. Accordingly, the appeal filed by the Revenue has been dismissed. Similarly, we find the ITAT in the cross appeals vide ITA Nos.4737/Mum/2006 ad 5260/Mum/2006 order dated 29.10.2008 for the AY 2003-2004, where one of us (AM) is party, has held that the activity of the assessee is that of manufacturing and the assessee is entitled to deduction u/s 80IB of the Act. We find the decision of the Hon"ble Apex Court in the case of Techno Weld Industries (supra) and the decisions in the grounds of appeal are distinguishable and not applicable to the facts of the present case. We further find merit in the submission of the learned counsel for the assesse that when the ITAT granted relief in the initial year and subsequent years and since there is no compelling circumstances, to take a different view than the view taken by the ITAT consistently, therefore, the relief cannot be withdrawn and the proper forum for the Revenue is to approach the Hon"ble High Court for this year also since they have approached the High Court for the earlier years. Since, the CIT (A) has followed the orders of the ITAT for the earlier years. Therefore, respectfully following the orders of the ITAT for the earlier years, we uphold the order of the CIT (A) and the grounds raised by the Revenue are dismissed."

6. From the above, the ITAT has been consistently granting relief to the assessee by holding that the activity of the assessee is a manufacturing activity and therefore, it is eligible for deduction u/s 80IA of the Act. As well, no contrary material has been brought to our notice by the Revenue to take a different view than that of the earlier views taken by the ITAT. Therefore, in these circumstances, following the principle of consistency, we are of the considered opinion that the assessee should get relief and accordingly the grounds raised by the Revenue are dismissed.

7. In the result, appeal of the Revenue is dismissed."

Following the above order of the Tribunal,we decide the first ground of appeal against the AO.

4.Second ground of appeal is about deleting the addition,amounting to Rs.97.16 lakhs, made u/s.2(22)(e) of the Act. During the assessment proceedings, the AO found that the assessee had shown and amount of Rs.6.15 crores in its balance-sheet as unsecured loan from Oxford Securities Private Ltd.(OSPL),that one of the partners of the assessee firm was holding 10% of the shares in the company,that she was also enjoying 20% of the share of profit of the firm as a partner,that OSPL was having accumulated profits of Rs. 97.16 lakhs as on 31/03/ 2009.He directed the assessee to explain as to why an amount of Rs.97,16,822/-should not be treated as deemed dividend in the hands of the firm as one of the partner was a substantial shareholder in the company and the firm.After considering the submission of the assessee , the AO referred to the provisions of section 2(22)(e)of the Act and held that the assessee had received a loan of Rs.1.18 crores from OSPL during the year under appeal,that all the

conditions specified in the section 2(22)(e) of the Act were satisfied.Finally ,he treated the amount of Rs. 97.16 lakhs as deemed dividend in the hands of the assessee.

4.1. During the appellate proceedings before the FAA,the assessee filed details of share holders of OSPL and sated that it was not a share holder of the said company,that no dividend could be assesseed in the hands of the assessee, the provisions of section 2(22)(e)were not applicable.After considering the submission of the assessee and the assessment order the FAA held that it was not the case of the AO that the assessee was a share holder of Oxford. He referred to the case of Bhaumik Colour P.Ltd.(313ITR(AT)146), National Travel Services(347ITR305) and granted relief to the assessee.

4.2 Before us, the DR supported the order of AO. The DR stated that the assessee was not a share holder of OSPL.In our opinion,the AO was not justified in invoking the provisions of section 2(22)(e) of the Act without establishing the basic fact as to whether the assessee was a share holder of OSPL or not.We find that in the case of Universal Medicare (324ITR263),the Hon'ble Bombay High Court has held as under :-

> "*In order that the first part of clause (e) of section 2(22) of the Income-tax Act, 1961,is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent. of the voting power or to any concern in which such a shareholder is a member or a partner and in which he has a substantial interest. Section 2(22)(e) defines the ambit of the expression "dividend". All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. Consequently, the effect of clause (e) of section 2(22) is to broaden the ambit of the expression "dividend" by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder."*

Respectfully following the above judgment and considering the fact that the assessee was not a share holder we decide the second ground against the AO.

5.Last Ground of appeal is about deleting the addition of Rs.2.81 crores under the head unaccounted profits on sale.During the course of assessment proceedings,the AO directed the assessee to submit month-wise power consumption of all the units. On the basis of power consumption unit figure of production in metric ton of power consumption was worked out for all the four units.The AO found that while the production for unit figure was largely stable or was not having much variation in case of Unit-I ,Unit -II and Falandi Unit, that

production figure were erratic for Unit-III, that the unit of power consumed per metric ton varied from 90.22 to 186.33 for Unit-III during the different month for the year under appeal. He was of opinion that such variation indicated that a detailed analysis was required into the case to understand the issue of power consumption vis-a-vis the production. After considering the submission of the assessee,the AO held that Unit-III was carrying out the activities of stress relieving etc., that the percentage of the total production distributed over the three activities remained almost similar for AY.s.2008-09 and 2009-10,that the total production in these two years was also very much similar, that same varied abnormally in the AY.2010-11.He further observed that during the FY. 2007-08 the assessee had consumed 96.12 units of power for production of one MT,that in the FY 08-09 it consumed 123.66 units on an average for 1 MT of production, that there was a huge difference in power consump - tion,that in the months of June and Oct. 2008, and Feb.2009 the power consumption per unit production was close to 96.12 units,that for the remaining months the consumption figures were erratic. Considering these facts the AO found that there was certain amount of production that was not disclosed by the assessee in its return of income.

5.1. He concluded that unit-III had carried out unaccounted production of steel wires to the tune of 6979.736 metric tons.He worked out total saleable production of it is goods resulting out of the unaccounted production at 5310.486 metric tons. Applying the selling price of finished goods at Rs. 54511.26 per metric ton and GP rate of 9.73%, the AO worked out the unaccounted gross profit of Rs. 2.81 corrodes. Finally, he added and amount of Rs.2.81 corrodes under the head unaccounted profit on the sale of out of books production.

5.2. Before the FAA,during the appellate proceedings, the assessee argued that the addition were made by the AO by notionally computing alleged unreported production by considering only the average units of power consumed per month for production of goods per MT, that there was no production and/or sale which was not recorded in the books of accounts, that the assessee was governed by excise law,VAT and other regulatory laws, that the figures reported for excise and VAT were the same as reported for the income tax, that the excise authorities had accepted the figures of production and/or sales as reported by the assessee, that during the period of August and September, 2008 the electricity meter was not working, that production in the earlier three months was much higher than the production during the months of August and September, 2008, that the bills for those months were raised on the assumed basis, that unit wise sub-meters were installed in the factory only during the

financial year 2008-09, that prior to that the total power consumed based on the common meter reading was allocated to various units based on the power rating of installed machines, that power consumption per MT for the financial year 2007-08 could not be compared with the power consumed for financial year 2008-09 which was on actual basis, that the power consumption per MT depended upon the product mix as well as on the numbers of files to be standard together, that each unit had got specific connected load based on the machine installed in those units,that the exercise taken by the AO without considering the due weightage of power consumption for different functions could not be taken as bench mark for deriving correct conclusions for unit consumed per MT of production, that from the consumption of raw material and consumables and the related input/output ratio there was no room for suspecting that goods were sold outside the books of accounts, that the AO had not brought any positive material on record to prove that assessee had indulged in selling the goods and not recording the same in the regular books.

5.3. Before us,the DR supported the order of the AO.The AR contended that there was no evidence with the AO to prove that the assessee had sold goods outside the books of accounts,that it had reasonable explanation with regard to discrepancy in the power consumption, that AO had not made any enquiry with the electricity board authorities, that books of account were not rejected by AO.

6.We have heard the rival submissions and perused the material before us. We find that the AO had made the additions,as he was of the opinion that there was some discrepancy in consumption of electricity in one of the units.In our,opinion it was a good starting point to make further investigation,but it in itself is not the clinching evidence for making addition. Any abnormality found in the return has to investigated to arrive at the correct taxability,but there is marked difference between a lead and an evidence.It is duty of the AO to call for explanation of the assessee about discrepancies noted by him before fastening tax liability to it.There can be several reasons for abnormal results and they could be perfectly valid. So, without considering the same no decision should be taken. Business world does not run as per the arithmetic rules it has many a nuances and each factor play role on taxable income of an assessee.It is not appropriate to apply mathematical formulas and determine tax liability.In the case before us,the assessee had filed a letter addressed to the State Electricity authorities informing them of malfunctioning of meter for two-three months. It is quite common feature that electricity meters in some cases do not function properly and electricity boards takes

time to rectify the defects.Thus, a plausible and reasonable explanation was filed by the assessee about the discrepancy in electricity bill.But,the AO without making any inquiry in that regard,jumped on a final conclusion.Besides even if there was no malfunctioning of the meters,there can be many a reasons for mismatch in consumption of electricity and production of goods.The assessee is not manufacturing only one type of wires or not using one kind of raw material.The variation in the final product and the raw material will affect the consumption of electricity.Other factors mentioned by the assessee for variation in power consumption before the FAA,were also not considered by the AO.It is pertinent to note that the AO has not commented upon the documents maintained by the assessee for the purposes of excise duty or sales tax department.No evidence has been brought on record about unrecorded purchases of raw material.It is not understood as how without purchases goods were manufactured and sold as alleged by the AO.We are of the opinion that the FAA has rightly held that the addition made by the AO was based on surmises and conjectures and on any reliable evidence.So,confirming his order,we decide the last ground against the AO.

C.O./01/Mum/2015 :

6.1. The only ground raised in the C.O. is about taxing the interest income of Rs.7.35 lakhs from fix deposits under the head income from other sources as against income from business and profession claimed by the assessee.

6.2. During the course of hearing before us representatives of both the sides conceded that the issue had been sent back to the file of AO by the Tribunal while deciding the C.O. 138/Mum/2012 (A.Y. 2007-08, dt.31.01.14). We find that the facts for consideration are similar to the earlier year we would like to reproduce paragraphs 14-17 of the impugned order of the Tribunal,relied upon by the AR and same reads as under :-

> *"14. Regarding the issue of interest received from fixed deposits kept as margin money for bank guarantees, Ld Counsel for the assessee mentioned that the temporary deployment of funds should be assessed as „business income" and not as „income from other sources" as treated by the Assessing Officer. In this regard, Ld Counsel relied on the following decisions.*
> *i) CIT vs. Vidyut Steel Ltd. 219 ITR 30 (AP)*
> *ii) CIT vs. Koshika Telecom Ltd 287 ITR 479 (Del)*
> *iii) CIT vs. Karnal Cooperative Sugar Mills Ltd 243 ITR 2 (SC)*
> *iv) CIT vs. Indo Swiss Jewells Ltd 284 ITR 389 (Bom)*
> *15. On the other hand, Ld DR dutifully relied on the order of the AO.*
> *16. We have heard both the parties and perused the orders of the Revenue Authorities as well as citations quoted by the Ld Counsel along with the relevant material placed before us. On perusal of the cited judgments of the higher judiciary, we find that they are relevant for the proposition that the there is no question of isolating the interest received on margin money paid for obtaining bank guarantee and assessing it as separate income under section 56. Therefore, agree with the view of the Tribunal that the income derived on the margin money for obtaining*

bank guarantee cannot be separately assessed under section 56. Considering the binding judgments given by the Hon"ble High Courts as well as the Hon"ble Supreme Court, we are of the opinion that the interest derived on margin money for the purpose of obtaining bank guarantee should be assessed as „business income" instead of 'income from other sources'. Accordingly, we decide this part of the ground in favour of the assessee.

17. Regarding the issue raised in ground no.3 with regard to benefit of netting off of interest income against the expenditure and the same was raised without prejudice. In this regard, it was argued by the Ld Counsel that whether the impugned interest is assessed under the head „business income" or „income from other sources", if it is held that the said receipts do not qualify for deduction u/s 80IB of the Act, then the exclusion for the purposes of ascertaining the income qualifying for deduction has to be the „net interest income and not the „gross interest receipt". In support of his contention, Ld Counsel relied on the judgment of the Hon"ble Supreme Court in the case of ACG Associated Capsules P. Ltd vs. CIT (343 ITR 89). In this connection, both the parties stated that the said claim of the assessee needs to be considered in favour of the assessee in view of the binding judgment of the Hon"ble Apex Court in the case of ACG Associated Capsules P. Ltd vs. CIT (supra). Accordingly, we direct the AO to apply the said judgment on considering the facts of the present case after reasonable opportunity of being heard to the assessee as per the principles of the natural justice. In substance, ground no.3 is treated as allowed in favour of the assessee.

Respectfully following the above , sole ground of appeal raised by the assessee in its C.O., is restored back to file of A.O. for fresh adjudication. He is directed to afford a reasonable opportunity of hearing to the assessee. C.O. filed by A.O. is decided in part.

As a result,appeal and the C.O. filed by the assessee stand partly allowed and appeal of the A.O. is dismissed.

फलतः निर्धारिती द्वारा दाखिल की गईं अपील एवं प्रत्याक्षेप अंशतःमंजूर किए जाते हैं और निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 20th July, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 20 जुलाई , 2016 को की गई।

Sd/-	**Sd/-**
(पवन सिंह /Pawan Singh)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 20.07.2016.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR " C" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**