IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA

Before Shri P.M. Jagtap, Accountant Member and
Shri S.S. Vishwanethra Ravi, Judicial Member

I.T.A. No. 259 /KOL/ 2013
Assessment Year: 1997-1998

MSL Industries Limited,...Appellant
P-22, Swallow Lane,
Kolkata-700 001
[PAN: AACCM 0109 M]
-Vs.-
Assistant Commissioner of Income Tax,............................Respondent
Circle-3, Kolkata,
8/2, Dwarli House, Explanade East,
Kolkata-700 069

Appearances by:
Shri V.N. Dutta, Advocate, for the assessee
Shri Sallong Yaden, Addl. CIT, D.R., for the Department

Date of concluding the hearing : July 11, 2016
Date of pronouncing the order : September 7th, 2016

O R D E R

Per Shri P.M. Jagtap, A.M.:

This appeal filed by the assessee is directed against the order of ld. Commissioner of Income Tax (Appeals)-XX, Kolkata dated 10.12.2012 for the assessment year 1997-98, whereby he upheld the order passed by the Assessing Officer under section 143(3)/251/154 of the Act.

2. The assessee in the present case is a Company, which filed its return of income for the year under consideration on 08.05.1998 declaring total income of Rs.5,76,06,700/- after claiming deduction under section 80IA of the Act. In the said return, the deduction of Rs.3,50,10,212/- was also claimed by the assessee on account of interest capitalized. In the assessment completed under section 143(3) vide an order dated 15.03.2000, the claim of the assessee for the said deduction on account of interest capitalized was disallowed by the Assessing Officer

and after making certain other additions, the total income of the assessee was determined by the Assessing Officer at Rs.10,03,18,170/- after allowing deduction of Rs.1,15,46,638/- under section 80IA in respect of profit of the eligible Unit-II Steel Division. On appeal, the ld. CIT(Appeals) allowed the claim of the assessee on account of interest capitalized and after giving effect to the order of the ld. CIT(Appeals), the total income of the assessee was recomputed by the Assessing Officer at Rs.6,26,86,780/- vide an order passed under section 143(3)/251 of the Act on 17.01.2001. Thereafter it was noticed by the Assessing Officer that the profit of the units of the assessee eligible for deduction under section 80IA had reduced by Rs.3,50,10,212/- as a result of deduction allowed by the ld. CIT(Appeals) on account of interest capitalized and the assessee, therefore, was eligible for deduction under section 80IA at the rate of 30% on Rs.34,78,683/- (Rs.3,84,88,795/- minus Rs.3,50,10,212/-) and there was a mistake in allowing such claim at 30% of Rs.3,84,88,795/-. He, therefore, issued a notice under section 154 to rectify the said mistake and since there was no response on the part of the assessee to the said notice, he proceeded to pass an order under section 143(3)/251/154 reducing the deduction allowed to the assessee under section 80IA by Rs.1,05,03,063/-. On appeal, the ld. CIT(Appeals) upheld the order of the Assessing Officer passed under section 143(3)/251/154. Aggrieved by the order of the ld. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

3. We have heard the arguments of both the sides and also perused the relevant material available on record. The first contention raised by the ld. counsel for the assessee is that the mistake, if any, allowing the excess claim to the assessee under section 80IA was in the order of the Assessing Officer passed under section 143(3) on 15.03.2000 and, therefore, the rectification of the said mistake by the order passed by the Assessing Officer under section 143(3)/251/154 on 30.03.2005, i.e. after the expiry of four years from the end of the financial year, in which the orders said to be amended was passed, is clearly barred by limitation as

provided in sub-section (7) of section 154. We are unable to accept this contention of the ld. counsel for the assessee. It is observed that in the assessment completed under section 143(3) vide an order dated 15.03.2000, the claim of the assessee for deduction on account of interest capitalized amounting to Rs.3,50,10,212/- was disallowed by the Assessing Officer and accordingly a higher deduction under section 80IA on the eligible profit as increased by the said disallowance was correctly allowed by the Assessing Officer in the assessment order passed under section 143(3) dated 30.03.2005. On appeal, the claim of the assessee for deduction on account of interest capitalized was allowed by the ld. CIT(Appeals) and while allowing the claim of the assessee for deduction on account of interest capitalized as per the order of the ld. CIT(Appeals), the claim of the assessee for deduction under section 80IA as allowed in the original assessment passed under section 143(3) ought to have been restricted by the Assessing Officer as a necessary corollary while the order dated 17.01.2001 passed under section 143(3)/251 of the Act. The mistake in allowing higher claim to the assessee for deduction under section 80IA thus was in the order passed by the Assessing Officer under section 143(3)/251 of the Act on 17.01.2001 and since the same was rectified by him vide his order dated 30.03.2005 passed within the period of four years from the end of the financial year, in which the order under section 143(3)/251 was passed, we are of the view that the rectification order passed by the Assessing Officer under section 143(3)/251/154 cannot be held to be barred by limitation.

4. The second contention raised by the ld. counsel for the assessee in support of the assessee’s case is that notice under section 154 was never served upon by the assessee and in the absence of the same, the order passed by the Assessing Officer under section 143(3)/251/154 is bad in law. In this regard, he has invited our attention to the copy of notice purportedly issued by the Assessing Officer under section 154 placed at page no. 19 of the paper book and submitted that the same claimed to be served on the assessee on 23.03.2005 fixing the hearing on the same date,

i.e. 23.03.2005 was not received by the assessee or any of his representative or employee. As rightly submitted by the ld. counsel for the assessee, the statutory provision in this regard as contained in sub-section 3 of section 154 is very clear that an amendment, which has the effect of enhancing an assessment or reducing a refund otherwise increasing the liability of the assessee, shall not be made under section 154 unless the authority concern has given notice to the assessee of its intention so to do and has allowed the assessee a reasonable opportunity of being heard. Even the legal position in this regard as emanating from the various judicial pronouncements cited by the ld. counsel for the assessee is also clear that the provision contained in sub-section (3) of section 154 gives statutory shape to the principles of natural justice and any order of rectification, which has the effect enhancing the liability of the assessee, passed without complying with the said requirement is invalid in law. It is, however, observed that a detailed submission on this issue was made by the assessee before the ld. CIT(Appeals) by raising specific points and after extracting the same in paragraph no. 5.1, the ld. CIT(Appeals) decided the issue in paragraph no. 5.2 of his impugned order. The said paragraphs no. 5.1 & 5.2 being relevant in the context are reproduced below:-

> *"5.1. During the course of appellate proceedings, the A.R of the appellant submitted as under:*
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> > *"The next ground of appeal is in connection with and with regard to the service of the notice u/s 154 as wel. as the service of the order dtd 30.3.2005 u/s 143/251/154. Your appellant, contents that these notices and orders were not at all served on the appellant. Your kind attention is invited to the provisions of sec 282 of the I.T. Act, 1961, which requires that notice must be properly and legally served on the assessee Your kind attention is invited to the paper book in serial no. 8 & 9 on pages 19 to 23). Your honour will find that notice us/ 154 was alleged to have been served on 23.3.2005 and the hearing of the case was fixed for hearing on 23.3.2005 at 11.30 am. Upon whom this notice was served is not known to your appellant. The signature appearing on the said notice are illegible and not of anybody from the office of the appellant. The appellant claims that they have not received the said notice and therefore could not act on the said notice. Further, the signature does not bearing official rubber stamp of the appellant. If your honour will call for the record of the*

dept. and look to the records, your honour will find that invariably whenever the notice has been properly served on the appellant, the appellant has attended and receipt of notice does bear the official stamp of the appellant company on the tear off slips if these are served through process server.

33) Further, in so far as the service of the order dtd 30.3.2005, your honour will find that the tear off slip does bear the signature of any official of the appellant company and also does not bear the rubber stamp of the appellant company. It seems that the assessing officer has just fabricated all these documents in his own office and did not serve them at all on the appellant in accordance with the provisions of law and took the signature of somebody in his own office.

34) Further, you will find that the cause of action as mentioned on the notice u/s 154 was given as under: -
"Excess allowance of deduction u/s 80I by Rs.1,05,03,063/-" whereas the order has been passed for excess allowance of deduction us/ 80lA when the cause of action in the notice was for u/s 80I how can the AO pass any order u/s 80IA, without giving proper opportunity of being heard on the said section? As has already stated above, the AO has no authority of law and was in excess of his jurisdiction to issue such notice when the order was already got merged with the order of the CIT(A) and CIT, Kolkata-I.

35) Further, in order to exercise the powers u/s 154 the AO has to act judiciously or quasi-judiciously. He cannot act on direction of any higher or superior authority. If he acts on the direction of any higher or superior authority, it will be tantamount with the judicial or quasi judicial interference with the function of the Ld AO. Acting on the objection tantamount to judicial Interference with the power of the Ld AO.

36) Without prejudice to what has been stated above, assuming but not admitting, that the Ld AO has served the notice but before passing the order us/ 154 he should have checked the date on which the notice was issued, date fixed for hearing and date of service on the assessee. As per record of the Ld AO the notice was served on 23.3.2003 and the case was fixed for hearing on 23.3.2003 at 11.30 am. How it can be said that he has given reasonable opportunity of being heard to the appellant' No other notice or date of hearing was given by the Ld AO.

37) That the allegation of the appellant that the Ld. AO has concocted and/or fabricated all these documents in his office, your appellant has submitted to the Ld AO as under:
a) The appellant was aware of any such proceeding otherwise he would have filed the appeal much earlier, when a letter dt

14.7.2008 was received by the appellant, the appellant was shocked and surprised to go through the contents of the said letter. The appellant immediately paid a visit to the office of the Ld AO and enquired into the matter and requested him to make available certified true copies of all the documents. After getting the certified true copies of the papers filed this appeal before your honour.

b) That the appellant, after tiling the appeal before your honour, also filed a petition u/s 220(6) of the I.T. Act, 1961. The Ld AO dismissed the petition u/s 220(6) without giving any opportunity of being heard and without passing any speaking order. The appellant filed a revision petition u/s 264 of the I.T. Act, 1961 before the CIT, Kolkata-I. The Ld CIT, Kol-I after going through the contents of the petition u/s 264 and without hearing of the case, set aside the order of the Ld. A.O and directed him to provide reasonable opportunity of being heard to the assessee and then pass a speaking order vide his order dtd 10.12.2008. The Ld. AO there after fixed the case of hearing. When the case was attended before the Ld AO in connection with the said petition, various questions were raised before him and the Ld A.O. was called upon to answer these questions in his order u/s 220(6) of the I.T. Act, 1961. We give below the various questions raised before him: -

i) That upon whom the notice u/s 154 fixing the case for hearing on 23.3.2005 at 11.30 am was served. whether the service of the said notice is in strict and legal compliance and in accordance with the provisions of sec.282 01 the I.T. Act, 1961.

ii) That upon whom the order u/s 154 dtd 30.3.2005 and notice of demand dtd 30.3.2005 and challan raising demand on the assessee company of Rs.79,33,596/- was served. Whether the service of the said AO, DN and challan were in strict and legal compliance and in accordance with the provisions of sec. 282 of the I.T. Act, 1961?

iii) That the alleged notice u/s 154 a certified true copy of the said notice shows "excess allowance of deduction u/s 80I by Rs.1,05,03,063/-". When the cause of action in the notice u/s 154 was for excess allowance of deduction u/s 80I, then how can the order be passed for withdrawing & / or reducing the relief granted u/s 80IA?

iv) That the alleged order u/s 154 was passed on 3003.2005. Therefore, it must have been recorded ill the demand collection register-4 , in the FY 2004-05, Kindly show the demand collection register for the AY 2004-05, where the demand is entered, recorded and registered. Kindly also show the demand collection statistics submitted to the Higher Authorities including CBDT where this demand has been included. The Ld AO has no reply to the said question and he

has also not dealt with this question in his order u/s 220(6) of the I.T. Act, 1961. .

v) That when the demand was raised in the FY 2004-05, it must have been carried forward in the demand collection register for the FY 2005-06, 2006-07 & 2007-08. The demand must have been included in the summary and statistics submitted to Higher Authorities for the FY 2005-06, 2006-07 and 2007-08. Kindly show the said demand collection register where the demand has been carried forward and brought forward from the year after year and the statistics submitted for the FY ended 2006-07 and 2008 for demands raised and the amount collected and the reconciliation for the FY 2005-06, 2007-08 & 2007-08.

vi) That when the demand was outstanding since 30.03.2005, then why no notice u/s 221 has been issued to the assessee? What are the reasons for non-issue of the notice us! 221 of the I.T. Act, 1961.

vii) That when the demand was outstanding since 30.03.2005 when why the demand was not certificated to the Tax Recovery Officer?

38) That the Ld AO has no answer to all the questions. He has not been able to show any of the evidence as called for to show that action was genuinely taken in time. Such silence on the part of the AO leads to the inference being drawn that entire proceedings were fabricate in the office of the Ld AO without informing at all to the assessee.

39) That under the circumstances, action taken by Ld AO and the order passed by him are not legally passed and served in compliance with the provisions of sec. 282. At the same time the orders passed u/s 154 was legally bad and is liable to be quashed or otherwise proceedings annulled."

5.2. 1 have perused the assessment order and considered the submission of the appellant. I find that the notice was served on the appellant on which signature was also put by the person concerned who received the said notice. Order u/s.154 was also duly served upon the appellant, simply taking argument that the Tear off slip does not bear rubber stamp of the appellant company is not found to be acceptable when the notice as well as order was duly served upon the appellant".

5. A perusal of paragraph no. 5.1 of the impugned order of the ld. CIT(Appeals) extracting the detailed submissions of the assessee on the issue and paragraph no. 5.2 of the order of the ld. CIT(Appeals) giving his decision thereon clearly shows that the various factual aspects pointed

out by the assessee have not even been verified by the ld. CIT(Appeals) from the relevant record nor the same have been discussed and considered by him while passing a very cryptic order on this issue dismissing the case of the assessee without giving any cogent and convincing reason. We, therefore, consider it fair and proper and in the interest of justice to set aside the impugned order of the ld. CIT(Appeals) on this issue and remit the matter back to him for deciding the same afresh by passing a well reasoned and well discussed order after verifying all the factual aspects from the relevant record.

6. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open Court on September 7th, 2016.

Sd/-	**Sd/-**
(S.S. Vishwanethra Ravi)	**(P.M. Jagtap)**
Judicial Member	**Accountant Member**

Kolkata, the 7th day of September, 2016

Order Pronounced by

Sd/-	***Sd/-***
(J.M.)	***(A.M.)***
S.S.V.R.	***W.A.***

Copies to : (1) ***MSL Industries Limited,***
P-22, Swallow Lane,
Kolkata-700 001

(2) ***Assistant Commissioner of Income Tax,***
Circle-3, Kolkata,
8/2, Dwarli House, Explanade East,
Kolkata-700 069

(3) Commissioner of Income Tax (Appeals)-XX, Kolkata;
(4) Commissioner of Income Tax- ,
(5) The Departmental Representative
(6) Guard File

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.