आयकर अपीलीय अधिकरण, कोलकाता न्यायपीठ 'ए', कोलकाता।

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

BEFORE SHRI WASEEM AHMED, AM & SHRI S.S.VISWANETHRA RAVI, JM

आयकर अपील सं./**ITA No.2760/Kol/2013**

(**निर्धारण वर्ष** / Assessment Year: 2009-10)

ITO, Ward-4(2), P-7, Chowringhee Square, Aayakar Bhavan, 8th Floor, Kolkata-700001	Vs.	M/s Hanuman Texnit Industries Ltd., Nicco House, 2, Hare Street, Kolkata-1
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACH 6426 J**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri A. Sallong Yaden, Adl.CIT

निर्धारिती **की ओर से** /Assessee by : Shri S.K.Dangi, FCA

सुनवाई की तारीख / **Date of Hearing : 19/12/2016**

घोषणा की तारीख/**Date of Pronouncement 13/01/2017**

आदेश / O R D E R

***Per Shri Waseem Ahmed, AM*:**

This appeal by the Revenue is directed against the order dated 23.08.2013, passed by the ld. Commissioner of Income Tax (Appeals)-IV, Kolkata in Appeal No.231/CIT(A)-IV/1112, pertaining to assessment year 2009-10. The assessment was framed by JCIT (OSD), Circle-4, Kolkata u/s.143(3) of the Income Tax Act, 1961(hereinafter referred to as 'the Act'.

Shri A. Sallong Yaden, Ld. Departmental Representative appeared on behalf of Revenue and Shri S.K. Dangi, Ld. Authorized Representative appeared on behalf of assessee.

2. The revenue has raised the following grounds of appeal :-

> 1. *That on facts and circumstances of the case, the CIT(A) erred in law as well as on facts in deleting the disallowance of Rs.30,53,7 45/- as deduction claimed by the assessee u/s.80IE, ignoring the fact that the assessee failed to fulfill pre-condition of filing audit report in 10CCB form along with the original return u/s.139(1) read with section 80IE(6) to become eligible for deduction U/s.80IE.*

> 2. *That on facts and circumstances of the case, the CIT(A) erred in law as well as on facts in holding that cess on green leaf of Rs.17,14,746/- is an allowable expenditure ignoring the fact that it is directly attributable to core agriculture activities of the appellant taxable under state agriculture income tax, beyond the purview of Central Income Tax and on the same issue SLP is pending in the case of AFT Industries.*

3. The first issue raised by Revenue in this appeal is that ld. CIT(A) erred in deleting the disallowance made by AO for Rs. 30,53,745/- for deduction u/s 80IE of the Act on account of non-filing of audit report in Form No.10CCB along with the return of income u/s.139(1) of the Act.

4. Briefly stated facts are that the assessee in the present case is a limited company and engaged in the manufacturing business of Tea. The assessee filed its original return of income dated 22-9-2009 without claiming deduction u/s.80IE of the Act. The assessee claimed the deduction u/s.80IE of the Act subsequently by filing the revised return of income on 7th November, 2009. Accordingly, the AO observed that the audit report in Form No.10CCB was not filed along with the original return of income filed u/s.139(1) of the Act, and, therefore, there is a violation of provisions of Section 80IA(7) r.w.s. 80IE(6) of the Act. As per the provisions, it is mandatory for claiming the deduction u/s.80IE of the Act to file the audit report in Form No.10CCB within the due date as referred u/s.139(1) of the Act. Accordingly, the AO disallowed the claim of the assessee and added to the total income.

5. Aggrieved, the assessee preferred appeal before ld. CIT(A) whereas assessee submitted that the deduction u/s 80IE of the Act was not claimed in the original return of income due to mistake but the same

was claimed in the revised return which was filed within the due dates as specified u/s.139(5) of the Act. The assessee further submitted that as per CBDT Notification SO No.866(E), dated 27th March, 2009, there was no need to file any attachment with the return of income. Therefore, the audit report in Form 10CCB was not filed by the assessee along with return of income filed u/s 139(5) of the Act. However, the report in Form No.10CCB was duly submitted at the time of assessment. As such, there was no provision under the Income Tax Act to file the report in Form No.10CCB separately in physical form. Ld. CIT(A) after considering the submission of the assessee has deleted the disallowance made by the AO by observing as under :-

> *5.2 I have perused the assessment order as well as submission made by the A.R. of the appellant. It seems that the only reason that deduction u/s.80IE(5) was not allowed by the A.O. was because in the original return such a deduction was not claimed and no audit report enclosing Form 10CCS was filed along with the original return. The deduction u/s.80IE(5) was claimed only at the time of filing of the revised return on 7.11.2009. The validity of the revised return itself has not been challenged by the A.O. On this issue I am fully in agreement with the A.R. of the appellant that Circular No.3/2009 dt.21.05.2009 of CBDT, at Para-6 clearly stipulates that the return require to be furnished by taxpayer [except in ITR-7] shall not be accompanied by any attachments/annexure but these documents will have to be produced before the A.O. on demand by him. In the appellant's case, it is amply clear that both the audit report as well as the claim of deduction u/s. 80IE(5) in Form No.10CCB was filed during the assessment proceedings when required by the A.O. I am of the view that there is no technical or procedural violation committed by the appellant which could consequent the denial to it of the benefit of deduction u/s. 80IE(5). Disallowance of the claim of the appellant u/s.80IE(5) for Rs.30,53,745/- is not justified and the A.O. is directed to allow the claim of deduction.*

Aggrieved by this, the revenue has come up in appeal before us.

7. Before us Ld. DR vehemently supported the order of AO.

On the other hand, ld. AR before us filed the paper book which is running from pages 1 to 26 and reiterated the submissions made before the ld. CIT(A) and he relied on the order of Ld. CIT(A).

9. We have considered rival contentions of both the parties and perused the material available on record. The issue in this case relates to disallowance of deduction claimed by the assessee u/s.80IB of the Act. The disallowance was made on account of two reasons by the AO. Firstly, the deduction u/s.80IE of the Act was claimed in the revised return of income. As per the provisions of Section 80IE, Form No.10CCB was to be filed along with original return of income within the due date as specified u/s.139(1). Therefore, it was inferred by the AO that Form No.10CCB was not available with the assessee at the time of original return filed. Secondly, the audit report in Form No.10CCB was not attached in the original return filed by the assessee u/s 139(1) of the Act. Now, the issue before us arises for adjudication so as to whether the disallowance made by the AO is valid in the aforesaid facts and circumstances. Admittedly, it is first year of the assessee when deduction was claimed u/s.80IE of the Act. As per the provisions of section 80IE of the Act, the assessee was under the obligation to file Form No.10CCB report along with the return of income, however, we find that the CBDT vide Circular No.3/2009, issued on 21st May, 2009, relaxed the provisions by directing that, "no attachment will be filed along with the return of income". As there was no mechanism to file the audit report in Form 10CCB, either in electronic form or physical form, we find no fault of assessee in this regard. Therefore, on this ground

the disallowance made by the AO cannot be sustained and we uphold the order of Ld. CIT(A). This ground of Revenue is dismissed.

10. Now, coming to the other issue raised by the revenue that the claim was made in the revised return of income. On perusal of facts, we find that revised return of income was filed within the time as prescribed u/s.139(5) of the Act. Indeed, it is a technical fault on the part of the assessee not to claim deduction u/s.80IE of the Act in the original return of income but original return of income was filed within the time. As such there was no delay in filing the original return of income on the part of the assessee. Due to oversight, the assessee failed to claim deduction u/s.80IE of the Act but the same, in our considered view, cannot be the basis for denying the deduction claimed by the assessee u/s.80IE of the Act as it was a procedural requirement. We also find that the AO has not brought any defect in the audit report filed by the assessee in Form No.10CCB of the Act. In this connection, we also rely upon the decision of Hyderabad Bench of the Tribunal in the case of Sri S.Venkataiah, ITA No.984/Hyd/2011, 104 CTR 216 (93 ITR 548). The relevant extract of the order is reproduced below :

> ***"13.*** *We have heard both the parties and perused the material on record. In this case admittedly, the assessee filed the return of income on 23.12.2008. The due date for filing the return of income u/s. 139(1) of the Act for the assessment year under consideration in the case of the assessee is 31.10.2008. As such the return filed by the assessee is belated. In this the assessee claimed deduction u/s. 80IC of the Act which was disallowed by the Assessing Officer as the return of the assessee was not filed within the time as prescribed u/s. 139(1) of the Act. The assessee has given reasons for delay in filing the return of income that the assessee was preparing its accounts through computer and the computer got corrupted due to viruses and in spite of continuous efforts by the computer technical personnel to retrieve the data in time for filing the return of income, problem persisted in the system. By trying to retrieve the data for 4 days the required data could not be retrieved and the backed*

up data were available only up to 31st January, 2008 in the CD and the entire data for the two months period, February and March, 2008, had to be re-entered into the computer system again. On preparation of the final accounts and finalising of statutory audit it took a little extra time that resulted in belated filing of return of income. Thus there was a delay of 74 days in filing the return of income which is beyond the control of assessee. This was also confirmed by the statutory auditor vide his letter dated 20.3.2011. Being so, in our opinion there is a reasonable cause for filing the return of income belatedly and this is beyond the control of the assessee. When the substantial question of justice involved technicalities should be ignored. Further, we are supported by the order of the Tribunal in [IT Appeal Nos. 1231 & 1199/Hyd/2010 in the case of Dy. CIT v. Vega Conveyors & Automation Ltd. order dated 31st December, 2010] wherein in para 5 of the order the Tribunal held as follows:

> "5. We have considered the rival submissions and perused the orders of the lower authorities, and other material available on record, including the case-law relied upon by the parties. It is an undisputed fact that the assessee in the present case has filed the audit report in Form 10CCB during the course of reassessment proceedings. The issue that arises for consideration is whether the Assessing Officer was justified in disallowing the assessee's claim for deduction under S. 80IB on the ground that the audit report in Form 10CCB was not filed along with the return of income; or whether the CIT(A) was correct in proceeding on the basis of Form10CCB filed during the course of re-assessment proceedings and directing the Assessing Officer to allow the claim of the assessee for deduction under S. 80IB of the Act. It is settled position of law, as consistently held by various Benches of this Tribunal and as held in various decisions referred to by the CIT(A) in the impugned order, that though filing of audit report in Form10CCB is mandatory and prerequisite for deduction under S. 80IB, non-filing of the same along with the return of income is only a curable defect, and assessee's claim for deduction has to be considered on its merits as and when the defect is cured by filing Form 10CCB. We are fortified in this behalf by the decision of the jurisdictional High Court in the case of Hemsons Industries (Supra), relied upon by the learned counsel for the assessee. It is contended by the Learned Departmental Representative that the assessee's claim for deduction under S. 80IB can be entertained and examined on merits, when the audit report is filed before the completion of assessment, which has not been done in the present case, since the audit report was filed only during the course of reassessment proceedings initiated by the Assessing Officer, which cannot end up giving additional deductions/benefits to the assessee. We do not find merit even in this contention of the learned Departmental Representative. In the case of Hemsons Industries (Supra), before the jurisdictional High Court, for one of the years under appeal before Hon'ble High Court, viz., assessment year 1979-80, audit report was filed during the course of re-assessment proceedings and in response to the show-cause notice under s. 148 issued by the Assessing Officer. In this view of the matter, respectfully following the decision of the jurisdictional High Court cited above, among others, we find no justification to interfere with the order of the CIT(A). We accordingly uphold the same and reject the grounds of the Revenue in this appeal."

14. *In our opinion, in view of the above discussion, the claim of the assessee cannot be denied on technicalities when the assessee is legally otherwise entitled for deduction. As such we are inclined to dismiss the appeal filed by the Revenue as devoid of merit."*

Respectfully following the aforesaid decision of the Tribunal, we find no merits in this ground of appeal raised by the revenue. Hence, we dismiss the appeal of the revenue on this ground.

11. Second issue raised by the revenue in this appeal is that ld. CIT(A) erred in deleting the addition made by the AO for Rs.17,14,746/- on account of cess expenditure claimed by the assessee.

12. The assessee during the year has claimed cess expenses on the production of green leaf made in the gardens as per the provision of Assam Government. The assessee claimed deduction of such cess before apportioning the composite income as per rule 8 of Income Tax Rules. The assessee also relied on the judgment of Hon'ble jurisdictional High Court in the case of *Commissioner of Income Tax vs. A.F.T Industries Ltd.* (2004) , 270 ITR 167 (Cal). However, the AO disallowed the claim of the assessee by observing that against the order of Hon'ble jurisdictional High Court in the case of *A.F.T Industries Ltd.* (supra), the Revenue has filed an SLP before the Hon'ble Supreme Court which has been admitted. Since the matter is pending before the Hon'ble Supreme Court, therefore, the AO treated the cess as non-deductible expenditure from the composite income of the assessee and disallowed the same and added to the total income.

13. Aggrieved, assessee preferred an appeal before ld. CIT(A), who has deleted the addition made by the AO by observing as under :-

> *"6.2 I am in agreement with the submission of the A.R. of the appellant. The fact that the Departmental SLP is pending before the Hon'ble Supreme Court against the decision of the Hon'ble Kolkata*

> *High Court in respect of AFT Industries Ltd Vs. CIT 270 ITR 167 will not have any effect since the Hon'ble apex Court has neither set aside the orders of the Kolkata High Court nor granted any stay. Addition made on this account for rs.17,14,746/- is deleted."*

Aggrieved by this, Revenue has come up in appeal before us.

15. Ld. DR vehemently supported the order of AO whereas Ld. AR relied on the order of ld. CIT(A).

16. We have considered rival contentions of both the parties. The issue in the instant case relates to disallowance of cess expenditure claimed by the assessee. The Hon'ble High Court of Calcutta has decided the issue in favour of the assessee but against the same order the Revenue has filed SLP in the Hon'ble Apex Court which has been admitted for final adjudication. In view of this, the AO has disallowed the expenditure claimed by the assessee in the name of cess. However, on perusal of record, we find that in identical facts and circumstances, Hon'ble Supreme Court in the case of *Commissioner of Income Tax Vs. M/s Apeejay Tea & Co. Ltd.* **Civil Appeal No.1105 of 2006**, order dated 6th August, 2015 has decided the issue in favour of the assessee. The relevant extract of the order is reproduced below :-

O R D E R

> *The respondent-assessee had paid cess on green leaf to the Government of Assam which was levied under Assam Taxation (On Specified Land) Act, 1990. In its income tax return, it had claimed the same as deduction which has been allowed by the High court. The relevant discussion in this behalf is as under: -*
>
> > *"However, the learned Tribunal had held that the deduction is eligible after computing the income under Rule 8 and the apportionment is to be made only after the income is so computed. Such apportionment cannot be made be fare the deduction. Rule 8 of the Income Tax Rules, 1962 requires that the computation is to be made as if by fiction the entire income out of the tea grown and*

> *manufactured as income assessable under the Income Tax Act, 1961. In view of Rule 8 the income so. computed is to be apportioned 60:40 of which 40 is assessable to tax under the Act. It does not provide that after apportionment of the 60% of the income so computed shall again be required to be computed under the Agricultural Income Tax Act. On the other hand, this 60% is exposed and becomes eligible to tax under the Agricultural Income Tax Act. without being required to be assessed under the said Act by reason of the fiction so created. Therefore, the cess paid has rightly been excluded while computing the income under Rule 8 of the tea grown and manufactured.*

In arriving of the aforesaid conclusion the High Court has referred to the various judgments of this Court.

We are of the opinion that the High Court has rightly interpreted the scope of Rule 8 of the Income Tax Rules 1962. We, thus, find no merit in this appeal which is, accordingly, dismissed."

Respectfully following the above decision of Hon'ble Supreme Court, we do not find any merit in this ground of appeal raised by the revenue, hence, we dismiss the same.

15. In the result, appeal of revenue stands dismissed.

Order pronounced in the open court on this 13/01/2017.

Sd/-	**Sd/-**
(S.S.VISWANETHRA RAVI)	**(WASEEM AHMED)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / MEMBER ACCOUNTANT**

कोलकाता /Kolkata; दिनांक Dated 13/01/2017

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

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

1. अपीलार्थी / The Appellant-ITO Ward-4(2), Kolkata
2. प्रत्यर्थी / The Respondent-M/s Hanuman Texnit Industries Ltd.
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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