आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ **'B'** अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD
(Conducted through Virtual Court)

BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA No.278/Ahd/2020
Asstt.Year 2015-16

Rasna Pvt. Ltd. Atlanta Tower Opp: Sears Tower Panchvati, Gulbhai Tekra Ahmedabad 38001. PAN : AAACW 4408 M	Vs.	Pr.CIT-3 Ahmedabad.

(Applicant)		(Responent)

Assessee by :	Shri P.F. Jain, AR
Revenue by :	Shri Sanjeev Jain, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 23/03/2021**
घोषणा की तारीख /**Date of Pronouncement: 09/04/2021**

आदेश/**O R D E R**

PER RAJPAL YADAV, VICE-PRESIDENT:

Present appeal is directed at the instance of the assessee against order of ld.Pr.Commissioner-3, Ahmedabad dated 16.3.2020 passed under section 263 of the Income Tax Act, 1961 for the Asstt.Year 2015-16.

2. Though the assessee has taken ten grounds of appeal, but its solitary grievance is that the ld.CIT has erred in taking cognizance under section 263 of the Act and thereby setting aside the assessment order for passing a fresh assessment order.

3. Registry has pointed out that the appeal filed by the assessee is time barred by six days. The ld.counsel for the assessee brought to our notice that impugned order was passed on 16.3.2020. Immediately thereafter lockdown was imposed throughout Country on account of COVID-19 pandemic and due to this logistic problem, appeal could not be filed in time. Considering the brief delay of six days, and explanation of the assessee, we condone the delay and proceed to decide the appeal of the assessee on merit.

4. Brief facts of the case are that the assessee-company has filed its return of income on 28.11.2015 declaring total income at Rs.9,08,58,880/-. The assessee-company at the relevant time was engaged in manufacturing and trading of soft drink concentrate/mixes and bakery items under the brand name "Rasna". The assessee-company was entitled to claim deduction under section 80IC of the Act. It has claimed exemption of Rs.11,02,39,702/- being 100% profit earned from industrial undertaking located at Uttaranchal. The AO has passed an assessment order under section 143(3) and allowed deduction. The ld.Commissioner pursued the record and observed that exemption under section 80IC is admissible at the rate of 100% for initial five years i.e. from the year in which the assessee had commenced commercial production from the unit and claimed deduction. The ld.CIT further observed that the assessee had claimed exemption for the first time in the Asstt.Year 2010-11. Therefore, this exemption was admissible upto the Asstt.Year 2014-15. The present assessment year is Asstt.Year 2015-16, and according to the ld.Commisssioner, exemption at the rate of 100% is not available to

the assessee in this year. The ld.Commissioner further observed that exemption at the rate of 100% was claimed at Rs.11,02,39,702/-. However, being sixth year, it was eligible for exemption of Rs.3,30,71,911/- at the rate of 30%. Thus, according to him, excess exemption was allowed to the assessee under section 80IC by the AO for the Asstt.Year 2015-16. He issued show cause notice under section 263 inviting explanation of the assessee as to why the impugned order of the AO be not set aside on this ground. Copy of this notice has been placed on page no.1 & 2 of the paper book. We have gone through this notice. In response to the show cause, the assessee has filed reply and relevant part of the reply has been reproduced by the ld.Commissioner in the impugned order, which reads as under:

> *" With regard to the show-cause notice for alleged claim u/s.80IC at the rate of 100% in the sixth year i.e. in the A.Y.2015-16, it is respectfully submitted that there is no error factual or legal committed by the A.O. while granting deduction at the rate of 100% in A.Y.2015-16. During course of assessment proceedings, this aspect was specifically verified. The A.O has issued questionnaire dated 02/01/2017 along with notice u/s. 142(1) seeking details on as many as 54 points and at the point at Sr. No.48, it was specifically asked regarding deduction under chapter VI-A of the Act which was to be given in the prescribed format with amount of deduction, section and justification for thee claim and al the required aspects of claim were duly verified by the A.O. alongwith Audit Report in Form No.lOCCB and detailed chart furnished and explaining the computation of claim alonqwith the allocation of expenses and further the audited account for the Dehradun unit has also been furnished.*
>
> *The controversy is regarding claim of 100% deduction in A.Y.2015-16 as reported by the Auditor at Sr.No.29 and 30 of the 10CCB Report at Rs.11,02,39,702/-. In point No. 25 of the report, against 25(ii)9d) there is details of substantial expansion during F.Y.2010-11 relevant to A.Y.2011-12, and as per 25(ii)(dO(ii) the value of Plant & machinery mentioned is Rs.1,68,14,946/- and value of increase in the Plant & Machinery in the year of substantial expansion is of Rs.1,70,80,638/- which have been duly verified in A.Y.2011-12 which has also been passed after scrutiny.*

Now the controversy of claiming 100% deduction on account of substantial expansion stand concluded by the decision of Hon'ble Supreme Court in the case of Pr.CIT Vs. Aarham Softronics reported in (2019)412 ITR 623. In this decision, the decision in Classic Binding Industries has been held to be not laying down correct law. The head-notes of this decision are reproduced below:

> *"INDUSTRIAL UNDERTAKING IN SPECIAL CATEGORY STATES-SPECIAL DEDUCTION-INITIAL. ASSESSMENT YEAR-DWEFINITION-UNIT-AVAILING AT 25 PER CENT. FOR NEXT FIVE YEARS- CARRYING OUT SUBSTANTIAL EXPANSION WITHUIN TEBN YEARS PERIOD-YEAR OF SUBSTANTIAL EXPANSION WOULD BE INITIA EAR FOR START OF 100 PER CENT- DEDUCTION-BUT TOTAL PERIOD OF DEDUCTION NOT TO EXCEED TEN YEARS-INCOME TAX ACT, 1961 S.80IC"*
>
> *PRECEDENT-SUPREME COURT-DECISION IN CLASSIC BINDING INDUSTRIES' CASE DOES NOT LAW DOW CORRECT LAW. INTERPRETATION OF TAXING STATUTES-INTENTION OF LEGISLATURE TO BE SEEN"*

Therefore the controversy o claiming 100% deduction u/s.80IC in the year of substantial expansion also stand concluded by the decision of Hon'ble Apex Court as quoted above. The question before the Hon'ble Court was as under:

> *" Whether on assessee who set up of a new industry of a kind mentioned in sub-section (2) of section 80IC of the Act and starts availing exemption of 100 percent tax under sub-section(3) of Section 80IC (which is admissible for five years) can start claiming the exemption at the same rate of 100% beyond the period of five years on the ground that the assessee has now carried on t substantial expansion in its manufacturing unit.?"*

According to this decision when substantial expansion is carried out then that will also be initial year and assessee will be entitled to claim exemption at the rate of 100% again. Therefore, the issue stands concluded in favour of assessee by supreme Court in the above case (being Civil Application No. 1784 of 2019 arising out ofSLP (C) No. 23172 of 2018).

Therefore, it is respectfully submitted that the order passed by the A.O. granting 100% exemption in A. Y.2015-16 u/s.80IC is correct and is not irregular and therefor, there is no excess allowance of deduction of Rs.7,71,67,791/- as mentioned in the show cause notice. Consequently, it will be appreciated that the order is not erroneous an is not prejudicial to the interest of revenue."

5. The ld.Commissioner was not satisfied with the explanation of the assessee, and set aside the assessment for passing *de novo* assessment order. The conclusions in the last two paragraphs made by the ld.Commissioner read asunder:

> *"16. this is a case where assessment has been made without making proper verification of the claim of substantial expansion and eligibility of assessee for deduction @100% u/s.80IC of the Act. Reliance is also placed on the decision of Hon'ble Supreme Court in the case of Rajmandir Estate Ltd Vs. Commissioner of Income tax Kolkata-lll, reported in 245 taxman 127(SC) (2017): In this case Hon'ble Apex Court has dismissed the Special Leave Petition filed by assessee upholding the order passed by the commissioner passed order u/s 263 and held that on facts this could be a case of money laundering which went undetected due to lack of requisite inquiry into increase of share capital and non application of mind by the AO.*
>
> *17. In view of the above, I am of the view that the assessment order passed by the A.O. u/s. 143(3) of the Act on 09/11/2017 is erroneous in so far as it is prejudicial to the interest of the revenue and is squarely covered under the Explanation 2(a) & 2(b) of Section 263(1) of the Act as already discussed. Accordingly, by virtue of the powers vested in me u/s. 263 of the Income Tax-Act, I hereby set-aside the order u/s. 143(3) of the Act and direct the Assessing Officer to pass a, fresh assessment order after properly ascertaining the genuineness of claims keeping in view the discussions above and also after gathering and examining other suitable evidence / making field enquiries and verification as necessary on facts of the case and make the assessment denovo.*

6. The ld.counsel for the assessee at the outset submitted that the issue in dispute is squarely covered by the latest decision of Hon'ble Supreme Court rendered in the case of Aarham Softronics, (2012) 102 taxmann.com 343 (SC). He contended that in this decision, Hon'ble Supreme Court has propounded that expression "initial year" provided in section 80IC is to be read in such a manner that on substantial expansion, the assessee can claim second initial assessment year. In

other words, section 80IC can be availed by a eligible unit at the rate of 100% for the five years from the initial year it was claimed, but if an assessee made substantial expansion during the period of those five years, then it can select the second initial year and subsequently thereafter it can claim exemption at the rate of 100% for the next five years. He placed on record copy of this decision. The ld.counsel for the assessee thereafter took us through the ledger and pointed out that in the F.Y.2010-11, the assessee has made a substantial expansion. It has added Rs.1.70 crores to the existing block of assets of Rs.1.68 crore. For buttressing this contention, he drew our attention towards page no.68 of the paper book, where break of these plant & machinery amounting to Rs.1,70,80,638/- has been given. The ld.counsel for the assessee took us through reports submitted in form no.10CCB appended at serial no.25(d). The relevant part of the report given by the CA is available at page no.33 of the paper book, which reads as under:

c)	*If the eligible business is new, please give the date of commencement of production or manufacture of article or thing*	*18/02/2010*
d)	*If the existing business has undertaken substantial expansion Please specify*	
	i) The date of substantial expansion	*Various dates during F.Y.2010-11*
	ii) The total book value of plant and machinery(before taking depreciation in any year) as on first day of the previous year in which substantial expansion took place.	*Rs.1,68,14,946/- (Gross Block)*

	iii) Value of increase in the plant and machinery in the year of substantial expansion.	*Rs.1,70,80,638/-*

7. He pointed out that in the accounting period relevant to the Asstt.Yeare 2011-12, the assessee has made major addition i.e. more than the existing plant & machinery. Thus, it amounts to substantial addition, and from the Asstt.Year 2011-12, it is entitled for exemption at the rate of 100% in the next five years. If that be taken into consideration, then Asstt.Year 2015-16 is not the sixth year, rather it falls within five years from the Asstt.Year 2011-12.

8. On the other hand, the ld.CIT-DR supported order of the ld.Commissioner. He submitted that the grievance of the ld.Commissioner was that the AO did not verify this aspect, and he simply accepted the computation made by the assessee, therefore, there is nothing wrong in the order of the ld.CIT for directing fresh inquiry.

9. We have considered rival submissions and gone through the record carefully. We find that Section 263 has a direct bearing on the controversy therefore, it is pertinent to take note of this section. It reads as under:-

> "263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an

> opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

10. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101

TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. If cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in his and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not fee stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

11. Before adverting to the facts of the present case, we would like to deliberate upon the position of law with regard to admissibility of deduction under section 80IC as expounded by the Hon'ble Supreme Court in the judgment rendered in the case of Aarham Softronics (supra). The question of law formulated by the Hon'ble Supreme Court reads as under:

> *"Whether an assessee who sets up a new industry of a kind mentioned in sub-section (2) of Section 80-IC of the Act and starts availing exemption of 100 per cent tax under sub-section (3) of Section 80-IC (which is admissible for five years) can start claiming the exemption at the same rate of 100% beyond the period of five years on the ground that the assessee has now carried out substantial expansion in its manufacturing unit?"*

12. After detailed discussion, the Hon'ble Court has laid down the following ratios:

> *24. The aforesaid discussion leads us to the following conclusions:*
>
> *(a) Judgment dated 20th August, 2018 in Classic Binding Industries case omitted to take note of the definition 'initial assessment year' contained in Section 80-IC itself and instead based its conclusion on the definition contained in Section 80-IB, which does not apply in these cases. The definitions of 'initial assessment year' in the two sections, viz. Sections 80-IB and 80-IC are materially different. The definition of 'initial assessment year' under Section 80-IC has made all the difference. Therefore, we are of the opinion that the aforesaid judgment does not lay down the correct law.*

(b) An undertaking or an enterprise which had set up a new unit between 7th January, 2003 and 1st April, 2012 in State of Himachal Pradesh of the nature mentioned in clause (ii) of sub-section (2) of Section 80-IC, would be entitled to deduction at the rate of 100% of the profits and gains for five assessment years commencing with the 'initial assessment year'. For the next five years, the admissible deduction would be 25% (or 30% where the assessee is a company) of the profits and gains.

(c) However, in case substantial expansion is carried out as defined in clause (ix) of sub-section (8) of Section 80-IC by such an undertaking or enterprise, within the aforesaid period of 10 years, the said previous year in which the substantial expansion is undertaken would become 'initial assessment year', and from that assessment year the assessee shall been entitled to 100% deductions of the profits and gains.

(d) Such deduction, however, would be for a total period of 10 years, as provided in sub-section (6). For example, if the expansion is carried out immediately, on the completion of first five years, the assessee would be entitled to 100% deduction again for the next five years. On the other hand, if substantial expansion is undertaken, say, in 8th year by an assessee such an assessee would be entitled to 100% deduction for the first five years, deduction @ 25% of the profits and gains for the next two years and @ 100% again from 8th year as this year becomes 'initial assessment year' once again. However, this 100% deduction would be for remaining three years, i.e., 8th, 9th and 10th assessment years.

13. In the light of the above, let us examine the facts of the present case. The stand of the ld.CIT is that the Asstt.Year 2015-16 is the sixth year, whereas according to the assessee, the company has made substantial expansion in the Asstt.Year 2011-12 and is eligible for the exemption under section 80IC of the Act at the rate of 100% for five years for the Asstt.year 2011-12. The Asstt.Year 2015-16 fall in those five years. The next grievance of the ld.Commission is that the AO has not carried out the investigation or verification about the claim of substantial expansion. The ld.CIT failed to take note of the facts that in the Asstt.Year 2011-12, the assessee has made substantial expansion. The assessment order in this assessment year was passed under a scrutiny assessment and the copy of this assessment order has

also been placed on record by the assessee at page no.70 of the paper book. The ld.AO has passed an assessment order on 12.3.2014 under section 143(3). The detailed explanations were available in the income-tax record, because the addition of Rs.1.70 crores in the plant & machinery would increase WDV of the assets, and accordingly, depreciation would have also been accounted for. Earlier value of the assets was reported by the assessee at Rs.1.68 crores. It has made further addition of Rs.1.70 crores in the gross block of assets. Hon'ble Delhi High Court in the case of DG Housing Projects Ltd. [2012] 343 ITR 329 (Delhi) has held that the ld.Commissioner should have not relegated to the point that assessment order is erroneous to the AO himself. The ld.Commissioner, after analyzing the record, ought to have recorded a categorical finding as to how the assessment order is erroneous. In the present case also, when the assessee took a specific plea in its reply that it has made substantial expansion in the Asstt.Year 2011-12, and it has produced those details, then the ld.Commisisoner ought to have considered the same, and should have recorded a categorical finding. Had that been done, then it would have avoided the second round of litigation at the level of the AO. The relevant part of the discussion made by the Hon'ble Delhi High Court on this aspect is worth to note, and it reads as under:

> *"17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or*

may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing & Products Camphor Works [1998] 231 ITR 53/98 Taxman 1 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous."

14. Factum of expansion was reported by the assessee in the Asstt.Year 2011-12 itself. The assessment order was passed under section 143(3) in the Asstt.Year 2011-12. Its claim of depreciation on enhanced value of the asset was not disturbed and therefore it is to be construed that these substantial expansion was in the knowledge of the Department right from the year the expansion was made and when the assessee has claimed the deduction under section 80IC from that year. The assessment year 2011-12 is to be construed as the fresh initial year, in view of the latest decision of the Hon'ble Supreme Court cited (supra). Therefore, the assessee has rightly claimed exemption under section 80IC and the AO has rightly granted. The ld.Commissioner failed to point out any error for establishing that the assessment order is erroneous, and that the order of the AO cannot be sustained. We

quash the impugned order of the ld.CIT under section 263 of the Act and allow the appeal of the assessee.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 9th April, 2021 at Ahmedabad.

Sd/-	**Sd/-**
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**