IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.6698/Del/2016
Assessment Year : 2005-06

Jindal Steel & Power Ltd., Jindal Centre, 12, Bhikaji Cama Place, Delhi.	**Vs.**	DCIT, Circle- 1(1), Gurgaon.
PAN : AAACJ7097D		
(Appellant)		**(Respondent)**

Assessee by	:	Shri Ajay Vohra, Sr. Adv. Shri Rohit Jain, Adv. Shri Deepesh Jain, CA
Department by	:	Shri Vijay Verma, CIT-DR
Date of hearing	:	16-05-2018
Date of pronouncement	:	08-06-2018

O R D E R

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 01.12.2016 of the CIT(A)- 1, Gurgaon relating to assessment year 2005-06.

2. Facts of the case, in brief, are that the original return of income in this was filed by the assessee company on 31.10.2005 declaring total income of Rs.1,46,94,07,460/-. The assessee company is engaged in generation of power and manufacturing of sponge iron & other steel products etc. The said return was processed on 24.02.2006. Later a revised return was filed on 30.03.2007 reducing the income originally returned to Rs.92,06,88,890/-. The assessment

was completed u/s 143(3) on 31.12.2007 determining the total income of Rs.2,12,42,01,723/- making the various additions. Subsequently, the Assessing Officer reopened the assessment u/s 147 of the I.T. Act, 1961 by recording the following reasons :-

> *"Reasons U/s 147 of the Income Tax Act, 1961 :*
>
> *On completion of scrutiny assessment proceedings U/s 143(3) of the Act vide order dated 31.12.2007, returned income of Rs.1,46,94,07,460/- was enhanced by the AO to Rs.2,12,42,01,723/- making certain additions. Subsequently, it has been noticed that deduction under Section 80IB of the Act has been allowed in this case at Rs.41,20,57,046/-; being 100% of the income/profits of the Mini Blast Furnace Unit of the assessee. It has further transpired that accumulated losses upto the A/Y 2004-05 amounting to Rs.8,53,95,939/-, were required to be reduced for working-out allowable deduction U/s 80IB from the income of this Unit in view of the provisions of Section 80IB(13) read with Section 80IA(5) of the Act, but the same have not been reduced resulting into excess allowance of deduction U/s 80IB of the Act to this extent. Hence, the assessee has not disclosed fully & truly all material facts necessary for its assessment for the year under consideration.*
>
> *Therefore, I have reasons to believe that income chargeable to tax amounting to Rs.8,83,95,939/- has escaped assessment for the A/Y 2005-06."*

3. Before the ld. CIT(A), the assessee challenged the validity of the re-assessment proceedings as well as the various additions made by the Assessing Officer on merit. Ld. CIT(A) noted that the assessment order against which the appeal has been filed before him has already been set-aside by the then the ld. CIT, Hisar by his order dated 27.03.2015 passed u/s 263 of the I.T. Act and the Assessing Officer has been directed to pass a fresh order. He, therefore, confronted the assessee to explain as to why the appeal filed by the assessee should not be dismissed being infructuous. The assessee made elaborate

submissions regarding the maintainability of the appeal. The assessee also challenged the validity of the re-assessment proceedings.

3.1 However, ld. CIT(A) dismissed the appeal filed by the assessee by observing as under :-

> *"3.2 I have carefully considered the appellant's submissions. It is an undisputed fact on record that the order against which the present appeal has been filed has already been set aside by the CIT, Hisar u/s 263 of the I.T. Act. The only addition made in the order under appeal was addition u/s 80IB. This addition has been set aside by the CIT, Hisar and no addition survives in the original order. It is also a fact on record that the AO has already passed a fresh assessment order in accordance with the direction given by the CIT, Hisar vide order u/s 263 of the IT Act.*
> *3.3 In view of the aforesaid facts there is no addition or disallowance which can be considered for adjudication at this stage. As such, the appeal filed by the appellant has became in-fructuous and is accordingly dismissed. The appellant may take any ground of appeal for the appeal which he may file against the fresh assessment order passed by the AO in accordance with the direction given by CIT, Hisar u/s 263 of the IT Act.*
> *3.4 The appeal filed by the appellant is accordingly dismissed."*

4. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds :-

> *"1. That the Commissioner of Income Tax (Appeals) ['CIT(A)'] erred on facts and in law in dismissing the appeal filed by the appellant against order dated 04.03.2013 passed under section 143(3)/147 of the Income-tax Act, 1961 ('the Act'), holding the same to be infructuous.*
> *1.1 That the CIT(A) erred on facts and in law in dismissing the appeal as infructuous on the ground that the reassessment order dated 04.03.2013 passed under section 147 was subsequently set aside by the CIT under section 263 on the issue of computation of deduction under section 80IB of the Act.*
> *1.2 That the CIT(A) erred on facts and in law in dismissing the appeal as infructuous without adjudicating the grounds raised by the appellant challenging assumption of jurisdiction and validity of reassessment order dated 04.03.2013 passed under section 143/147 of the Act.*
> *1.3 That the CIT(A) failed to appreciate that validity of subsequent revisionary order under section 263 of the Act was dependent upon the validity of reassessment order challenged in appeal and consequently, the appeal filed was not rendered infructuous merely on account of passing of subsequent revisionary order.*

1.4 That the CIT(A) further failed to appreciate that the reassessment order had been set aside by the CIT under section 263 to the limited extent of examining issue relating to deduction under sections 80IA/80IB of the Act and not in toto and therefore, the appeal was not rendered infructuous.

2. That the CIT(A) erred on the facts and circumstances of the case and in law in not holding the reassessment order dated 04.03.2013, passed by the assessing officer under section 143(3)/147 of the Act to be beyond jurisdiction, barred by limitation, bad in law and void ab initio.

2.1 That the CIT(A) erred on facts and circumstances of the case and in law in not quashing reassessment order since the reassessment proceedings were completed without following the mandatory procedure laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. ITO: 259 ITR 19.

2.2 That the CIT(A) erred on facts and circumstances of the case and in law in not holding reassessment order to be illegal and bad in law, being based on mere change of opinion/reappraisal of existing material/information

2.3 That the CIT(A) erred on facts and circumstances of the case and in law in not holding that initiation of reassessment proceedings under section 147 of the Act was barred by limitation prescribed in first proviso to that section.

2.4 That the CIT(A) erred on facts and circumstances of the case and in law in not holding that reassessment order passed under section 147, in contravention of provisions of sections 149 to 151 of the Act, was invalid and bad in law.

3. That the CIT(A) erred on facts and circumstances of the case and in law in not holding that losses of Rs.8,83,95,939 pertaining to the unit eligible for deduction under section 80IB of the Act for earlier years, which already stood set off against profits for those years, were not required to be notionally brought forward and set off while computing eligible profits of the year under consideration.

4. That the CIT(A) er ed on facts and circumstances of the case and in law in not deleting interest charged under section 2340 of the Act.

5. That the CIT(A) erred on facts and circumstances of the case and in law in not reversing the action of the assessing officer in withdrawing interest under section 244A of the Act.

The appellant craves leave to add, alter, amend or vary the aforesaid grounds of appeal at or before the time of hearing."

5. In ground of appeal no.1 to 4, the assessee has challenged the order of ld. CIT(A) in treating the appeal filed by the assessee before him as infructuous, illegal and bad in law.

5.1 Ld. counsel for the assessee submitted that the original assessment was completed u/s 143(3) on 31.12.2007 determining the total income at

Rs.2,12,42,01,723/-. The notice u/s 148 was issued on 23.03.2012. The reasons recorded show that the issue on which re-assessment proceeding has been initiated is that loss of earlier assessment years of Mini Blast Furnace (MBF) unit, qua which deduction u/s 80IB was claimed, which were adjusted against taxable profits of earlier years, were required to be notionally carried forward and set off/adjusted against the current year profits of that unit while computing deduction u/s 80IB of the I.T. Act. He submitted that without disposing of the preliminary legal objections of the assessee, the Assessing Officer proceeded to pass the re-assessment order dated 04.03.2013 wherein he reduced eligible deduction of MBF unit from 41.20 crores to 32.36 crores, after adjusting notional loss of Rs.8.83 crores pertaining to earlier assessment years. He submitted that during the pendency of the aforesaid appeal before the ld. CIT(A), revisionary proceedings were initiated by the CIT vide show cause notice dated 22.10.2013, which culminated into order dated 27.03.2015 passed u/s 263 of the I.T. Act, whereby the CIT has set aside the reassessment order on the limited issues of examination of deduction u/s 80IA/80IB of the I.T. Act. The appeal against the said order passed u/s 263 is also pending before the Tribunal. In the aforesaid appeal before the ld. CIT(A) against the reassessment order dated 04.03.2013, the ld. CIT(A) vide impugned order dated 01.12.2013, dismissed the appeal filed by the assessee challenging (a) validity of

reassessment order dated 04.03.2016 on jurisdictional grounds; and (b) disallowance of deduction on merits on the ground that the said appeal had become infructuous as addition/disallowance made in the reassessment order dated 04.03.2016 was set aside by the ld. CIT u/s 263 of the I.T. Act.

6. Referring to the order passed u/s 263 for the impugned assessment year, ld. counsel for the assessee submitted that the reassessment order was set aside by the CIT exercising revisionary jurisdiction under section 263 to the limited extent of examining issues relating to deduction under sections 80lA/80IB of the Act. In other words, the reassessment order dated 04.03.2013 under section 147 of the Act was not set aside by CIT in toto. Referring to various decisions, he submitted that where the Commissioner in exercise of revisionary power under section 263 of the Act sets aside the assessment, the assessment is not completely effaced; only the issues set aside by the CIT in the order under section 263 of the Act are to be adjudicated afresh by the assessing officer. Therefore, the reassessment dated 04.03.2013 challenged in appeal before the CIT(A) was not set aside in toto but only to the extent of re-examining the claim of deduction under sections 80-IA / 80-1B as indicated in the order passed under section 263 of the Act. Therefore, the impugned assessment order is not completely effaced so as to result in the appeal being rendered infructuous, as held/claimed by the CIT(A). For the above proposition, he relied on the

decisions in the case of Express Newspaper (P.) Ltd. v. CIT reported in 255 ITR 137 (Mad.) and in the case of CIT v. HH Lekshmi Bai reported in 203 ITR 398 (Ker.).

7. The ld. counsel for the assessee submitted that while exercising jurisdiction under section 263 of the Act, the CIT assumed that the reassessment order dated 04.03.2013 was validly passed. In the appeal against the impugned reassessment order, the primary issue raised, as stated above, was challenge to the validity/ legality of proceedings under section 147 of the Act. In case the appellant is to succeed in demonstrating that jurisdiction under section 147 of the Act was not validly assumed, then, reassessment order would be quashed. Consequently, the order under section 263 of the Act seeking to revise the (non-existent) reassessment order would fail. Therefore, the validity of the order under section 263 of the Act is dependent on the fate of the reassessment order to be decided in appeal there against. To put it differently, the disposal of the appeal against the reassessment order by the CIT(A) on the grounds raised therein had material and significant bearing on the assumption of jurisdiction under section 263 of the Act, which is subject of challenge before the Tribunal (ITA No. 1462/Del/2016). In that view of the matter, the CIT(A) ought to have disposed off the appeal of the assessee on merits much less dismiss the same as infructuous.

8. He submitted that the validity of the reassessment proceedings was not the subject matter of consideration in the revisionary proceedings under section 263 of the Act, since the Commissioner proceeded on the premise that the reassessment order was valid in law. For that reason, the same could not and was not set aside by the CIT for fresh consideration. He submitted that the issue regarding quantum of deduction under section 80IB is secondary to the fundamental issue of legality/ validity of the impugned reassessment order. He reiterated that if the reassessment order is set aside as null and void being beyond jurisdiction, there would not be any scope of sustainability of subsequent revisionary order under section 263 of the Act. The first step, therefore, would be to examine the validity/ legality of the reassessment order passed by the assessing officer. It will, thus, be appreciated that the jurisdictional legal issue challenging the validity of reassessment proceedings arise out of the impugned reassessment order and could have and had to be examined by the CIT(A). Being so, it was of paramount importance to first examine the issue of legality of the reassessment order in the appeal by the CIT(A).

9. The ld. counsel for the assessee submitted that upholding the action of CIT(A) in dismissing the appeal as infructuous would render the appellant remediless insofar as the issue of validity of reassessment proceedings under

section 147 of the Act is concerned. In the appeal against order passed by CIT under section 263, the appellate authorities would not, it is submitted, consider the issue of jurisdiction of the assessing officer in passing the impugned reassessment order under section 147 of the Act. Therefore, the assessee would be rendered remediless qua the jurisdictional issue raised in the present appeal against the reassessment order, if the appeal is dismissed as infructuous.

10. Secondly, the legal issue regarding requirement of set off of losses on notional basis while computing deduction allowable under section 80IB in respect of MBF unit has neither been considered nor set aside by the CIT in revisionary proceedings under section 263 of the Act. Being so, the said issue also requires adjudication in the present appellate proceedings against the reassessment order dated 4.3.2013 and would neither arise in appeal filed against order under section 263 (before ITAT) nor in appeal against consequential order under section 143(3)/263 of the Act. He submitted that any cause of action is rendered infructuous if the very cause, leading to the grievance, against which legal remedy is pursued, itself ceases to operate/ exist. The legal remedy (appeal) cannot be regarded as infructuous when the cause and the fundamental grievance of the assessee/ petitioner/ litigant continues to survive. Referring to various decisions he submitted that it is quite fundamental that no one can be rendered remediless. The fundamental of law is captured in

the maxim' Ubi Jus Ibi Remedium' which means for every wrong, law provides a remedy. Referring to the decision of the Hon'ble Supreme Court in the case of Canon Steels (P) Limited V. Commissioner of Customs: (2007) 14 SCC 464, he submitted that the Apex Court in the context of territorial jurisdiction of Court, observed, "But no person should be left without remedy ..... ".

11. He submitted that the statutory provision of appeal under section 246A of the Act is for the benefit of the assessee. So long as the grievance of the appellant continues to subsist, the appeal cannot be regarded and, or dismissed as infructuous, so as to render the appellant remediless. Referring to the following decisions, he submitted that in the context of section 246/246A/249 of the Act, it has been consistently held by the Courts that the right to appeal is a valuable substantive right and unless expressly taken away or abandoned, it cannot be held that the assessee has abandoned or lost such right by any implication(s) :-

(i) Indian Aluminuin Co. Ltd. v. CIT: 162 ITR 788 (Cal.);

(ii) CIT v. Bengal Card Board Industries & Printers (P.) Ltd.: 176 ITR 196.

(iii) Nagpur Zilla Krushi Audyogik Sahakari Sangh Ltd. v. ITO: 207 ITR 213 (Bom.).

(iv) Janardhan Reddy v. The State: AIR 1951 SC 124.

12. He accordingly submitted that the right to appeal being a valuable right cannot be taken away/dismissed because of any subsequent act (order under section 263 in the present case). Right to appeal was vested in the appellant when proceedings under section 147/148 of the Act were initiated. The appeal was validly filed by the appellant under section 246A of the Act. Being so, the same could not have been dismissed as infructuous. He submitted that the two fundamental grievances of the appellant, viz. validity of the reassessment and legal issue of notional set off of loss, continues to survive and the said issues do not arise out of/form part of the revisionary proceedings. The appeal filed by the appellant could not, therefore, have been regarded as infructuous.

13. In grounds of appeal no.2 to 2.4, the assessee has challenged the validity of the re-assessment proceedings. Referring to the following decisions, ld. counsel for the assessee submitted that if the reasons recorded do not specify any allegation of failure on the part of the assessee to disclose the material facts necessary for completion of the assessment, entire re-assessment would be invalid :-

(a) CIT v. ITW India Ltd.: 377 ITR 195 (P&H).
(b) Dulichand Singhania v. ACIT: 269 ITR 182 (P&H).
(c) Mahavir Spinning Mills Ltd. Vs. CIT: 270 ITR 290 (P&H).
(d) State Bank of Patiala v. CIT: 375 ITR 109 (P&H).
(e) Oriental Carpet Mfrs. (India) Ltd. v. ITO: (1987) 168 ITR 296 (P&H).
(f) In Winsome Textiles Industries Vs. UOI: 278 ITR 470 (P&H).
(g) Avtec v. DCIT: 395 ITR 434 (Del.).

(h) Kaira District Cooperative Milk Producers Union Ltd. v. ACIT: 216 ITR 371 (Guj.)
(i) Fenner India Ltd. v. DCIT: 241 ITR 672 (Mad.).
(j) Hindustan Lever Ltd. : 268 ITR 332 (Bom.).
(k) Babu Lal Jug Raj & Co. vs. ITO: 289 ITR 115 (Raj.).
(l) Haryana Acrylic Manufacturing Company v. CIT: 308 ITR 38 (Del.).
(m) CIT v. Indian Farmers Fertilizer Cooperative Ltd.: 171 Taxman 379 (Del.).
(n) Wel Intertrade (P) Ltd. v. ITO: 308 ITR 22 (Del.).
(o) Atma Ram Properties (P) Ltd. : 343 ITR 141 (Del.).
(p) Unitech Ltd. v. DCIT : WP(C) 12324/2015 (Del) dated 24.7.2017.

14. Referring to the following decisions, he submitted that the assessee is only required to state the primary facts. Legal inferences, if any, has to be drawn by the Assessing Officer. If true and full disclosure of facts made, reassessment is held to be invalid :-

(a) Calcutta Discount Co. Ltd. v. ITO: 41 ITR 191 (SC).
(b) Atma Ram Properties (P) Ltd. : 343 ITR 141 (Del.).
(c) Haryana Acrylic Manufacturing Company v. CIT: 308 ITR 38 (Del.).
(d) CIT v. Shri Tirath Ram Ahuja (HUF): 306 ITR 173 (Del.).
(e) CIT v. Motor & General Finance Ltd.: 184 Taxman 465 (Del.).
(f) CIT v. ITW India Ltd.: 377 ITR 195 (P&H).
(g) Oriental Carpet Mfrs. (India) Ltd. v. ITO: (1987) 168 ITR 296 (P&H).
(h) State Bank of Patiala v. CIT: 375 ITR 109 (P&H).
(i) Winsome Textiles Industries Vs. UOI: 278 ITR 470 (P&H).
(j) Fenner India Ltd. v. DCIT: 241 ITR 672 (Mad.).
(k) EL Forge Ltd. vs. DCIT: 224 Taxman 222 (Mad.).
(l) Doshi Housing Ltd. v. ACIT: 211 Taxman 46 (Mad.).
(m) RPG Transmissions Ltd. v. CIT: 359 ITR 673 (Mad.).
(n) CIT v. A.R. Enterprises: 255 ITR 121 (Raj.).

(o) Babu Lal Jug Raj & Co. vs. ITO: 289 ITR 115 (Raj.).

(p) German Remedies Ltd. v. DCIT : 287 ITR 494 (Bom.).

(q) Austin Engineering Co. Ltd. v. JCIT: 312 ITR 70 (Guj.).

15. He submitted that in the instant case the reassessment has been made on the basis of change of opinion. Referring to para 2.7 to 2.8 of the original assessment order, he submitted that there was categorical expression of opinion by the Assessing Officer in the original assessment that notional losses are not required to be set off for the purpose of computing deduction u/s 80IB of the I.T. Act. Therefore, the present re-assessment proceedings are clearly initiated on mere change of opinion and, theref re, patently without jurisdiction, illegal and bad in law. Relying on various decisions, he submitted that the reassessment proceedings on the basis of change of opinion are not permissible. Third proviso to section 47 restrict assessing officer to reassess issues which have already been subject matter of appeal, reference or revision before higher authority. He submitted that in present case, third proviso is squarely applicable in respect of deduction under section 801A/80M since

(a) Claim of deduction under section 80IA and consequential computation under section 801B was extensively examined/ considered and varied in original assessment order;

(b) Appeal against aforesaid assessment order was disposed by CIT(A) vide order dated 11.11.2008.

(c) Department's appeal on issue of deduction under section 80lA/80M was disposed off by the Tribunal vide order dated 6.3.2014.

16. He submitted that as per section 149, notice under section 148 can be issued upto 6 years from end of relevant assessment year 2005-06, which expired on 31.03.2012. Though notice in present case was issued on 24.03.2012, but reasons and sanction accorded under section 151 were not provided and accordingly, notice was not complete/ valid He submitted that the reasons were admittedly communicated to the appellant much after the completion of reassessment proceedings. Sanction has in fact not been provided till date. He accordingly submitted that under the aforementioned facts, it cannot be held that notice was issued within period of 6 years, since notice was not complete and was not accompanied by reasons and the satisfaction note and consequently, impugned reopening is barred by limitation of 6 year prescribed in section 149. For the above proposition, he relied on the following decisions :-

(i) Haryana Acrylic Manufacturing Company v. CIT: 308 ITR 38 (Del.),

(ii) Balwant Rai Wadhwa vs. ITO: ITA No.4806/D/2010 (Del Trib.).

17. Referring to the law and procedure laid down in the case of GKN Driveshafts (India) Ltd. v. ITO: 259 ITR 19 (SC), the ld. counsel for the

assessee submitted that the same is sacrosanct and binding on the assessee and the Revenue. He submitted that as per the said decision (a) Pursuant to notice under section 148 of the Act, assessee is bound to file return in response thereto, (b) Assessee may seek copy of reasons recorded by the assessing officer for reopening the completed assessment, (c) Assessing officer is bound to provide reasons recorded for reopening, (d) The assessee pursuant to the receipt of reasons is entitled to file legal objections challenging the validity of reopening, (e) On receipt of legal objections, the assessing officer is bound to pass a separate speaking order disposing the legal objections, after hearing the assessee thereon, (f) If the legal objections are rejected, the order disposing the legal objections must be passed and served on the assessee reasonably in advance of the reassessment order. He submitted that violation of aforesaid procedure/ legal position would render reassessment order illegal and bad in law.

18. He submitted that the reasons for reopening in the instant case was not provided or communicated for which it constituted a jurisdictional error and, therefore, the impugned proceedings should be rendered as null and void. It was incumbent upon the Assessing Officer to provide reasons for reopening of the assessment. For the above proposition, he relied on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Trend Electronics reported in 379 ITR 456. Referring to the decision of the Hon'ble Delhi High Court in

the case of PCIT vs. Jagat Talkies Distributors reported in 398 ITR 13, he submitted that the Hon'ble High Court in the said decision has held that where the assessee was not given copy of reasons for issuing notice u/s 148 by the Assessing Officer, whole assessment proceedings and resultant order of assessment passed u/s 143(3) r.w.s. 148 of the I.T. Act was to be quashed.

19. Ld. counsel for the assessee submitted that the preliminary legal objection filed by the assessee was not disposed of by passing a separate speaking order and, therefore, the reassessment order is illegal and bad in law. Referring to page 226 of the Paper Book, he submitted that the Assessing Officer in the remand report dated 19.07.2016 had admitted that no separate order, much less speaking, dealing with preliminary objections to initiation of impugned reassessment proceedings raised by the assessee was passed by the then Assessing Officer. Referring to the decision of the Hon'ble Supreme Court in the case of GKN Draveshaft (supra) and various other decisions, he submitted that the action of the Assessing Officer in not disposing of objection raised by the assessee by way of separate speaking order makes the reassessment proceedings illegal, bad in law and is liable to be quashed.

20. So far as ground no.3 is concerned, ld. counsel for the assessee submitted that MBF Unit was set up as a separate and independent industrial undertaking /unit and is engaged in manufacture of liquid/pig iron. The said unit commenced

production on 12th April, 2002 falling in the previous year relevant to the assessment year 2003-04.

21. In the assessment years 2003-04 and 2004-05, despite the fact that the MBF Unit was eligible for deduction under section 80IB(5)(ii) of the Act since the said unit suffered losses. no deduction was claimed in the return of income. The said losses were completely set off by appellant with the taxable income for the respective assessment years and accordingly, no loss was left to be carried forward to future assessment years, including the relevant assessment year. The quantum of losses for the said assessment years were as under:

Assessment Year	Amount (Rs.)
2003-04	(-) 6,71,95,099
2004-05	(-) 2,12,00,840
Total	(-) 8,83,95,939/-

22. He submitted that in the impugned assessment order, the assessing officer, without appreciating the facts of the case and correct position in law, held that the aforesaid losses pertaining to assessment years 2003-04 and 2004-05 were required to be set off with profits of relevant assessment year in respect of MBF Unit and accordingly, reduced the amount of deduction claimed by appellant under section 80lB of the Act in respect of said unit by the aggregate amount of losses of such preceding assessment years. He submitted that the

aforesaid action of the assessing officer in reducing the amount of deduction claimed by appellant under section 801B of the Act in respect of MBF Unit by the aggregate amount of losses of such unit for assessment years 2003-04 and 2004-05, in view of the facts of the case and correct position in law, is incorrect, illegal and unsustainable.

23. Ld. counsel for the assessee referring to provisions of section 80IA(5) submitted that the said sub-section provides that the eligible unit claiming deduction under section 80-lA of the Act would be treated as a separate source of income and deduction has to be allowed only vis-a-vis profits derived from the eligible unit unaffected by the profits/losses of other units owned by the assessee. The assessing officer, in the present case has grossly misconstrued the application of the aforesaid provisions of sub-section (5) of section 80lA of the Act. The aforesaid provisions do not provide that the losses/ depreciation of the eligible unit relating to any earlier assessment year(s) which are already absorbed against profits of other units/ other incomes in the respective year(s) should once again be notionally brought forward and adjusted against the profits of the current assessment year for computing deduction allowable under section 80-IA/18 of the Act. He submitted that the effect of the deeming fiction enabled in the provisions of section 80lA(5) of the Act are that it seeks to set at rest long standing controversy, i.e., whether for computing deduction/losses incurred in

one eligible unit is required to be set-off against the profits of the other eligible undertaking or not.

24. Referring to the decision of the Madras High Court in the case of Carborundum Universal Limited vs. JCIT reported in 371 ITR 275, he submitted that the Hon'ble High Court has dealt with one of the question of law as under:

> *"1. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the losses incurred by the industrial undertaking claiming deduction under Section 801, which has been already set off against the profits of the other industrial undertaking should be notionally carried forward and set off against profit generated by the industrial undertaking during the relevant assessment year for determining the deduction under Section 80I?"*

25. The Hon'ble High Court in context of section 801(6) which is, in substance, similar to provisions of section 80IA(5) as is applicable to section 80IB of the Act, held tha losses for past assessment years which were fully set off against the total income of those assessment years could not be notionally carried forward and set off against income of the current year.

26. So far as ground no.4 and 5 are concerned, he submitted that the Assessing Officer, in the impugned assessment, has given no direction to levy any interest under the Act. However, in the computation of income, annexed with the assessment order, the interest had been charged under section 234D and also interest under section 244A of the Act has been withdrawn, which is untenable in law. Without prejudice to the aforesaid, he submitted imposition

of interest under section 234B of the Act is erroneous since the said section is not applicable to reassessment, as elaborated hereunder :-

> *"The provisions of the section 234B, it is submitted, applies to "regular assessment" and the only case in which interest on excess refund may be charged pursuant to order under Section 147 is where such "assessment is framed for the first time".*

27. In the present case, assessment has not been framed for the first time. Accordingly, for that reason, too. no interest was leviable under Section 234B of the Act.

28. Referring to the decision of Hon'ble Madras High Court in the case of CIT v. Rameo Industries Ltd. in Tax Appeal No. 1343 of 2009, wherein, on similar fact, the High Court held that interest under section 234B of the Act can be levied only when the assessee is granted refund under section 143(I) of the Act and the same is payable back to the Revenue on completion of assessment under section 143(3) of the Act. The said section 234D was held not applicable where reassessment is completed under section 147 of the Act. He also relied on the following decisions :-

(i) ACIT v. Oracle India (P) Ltd.: I.T.A. No. 4639 and 4640/Del/2007 (Del Trib.).
(ii) MMTC Limited vs. DCIT: ITA No.4321/Del/2009 (Del.).
(iii) ACIT v. Bank of Rajasthan Ltd. in ITA No.2246/Mum/2009 (Mum).
(iv) Dredging Corporation of India Ltd. vs ACIT: 142 TTJ 252 (Vishakapatnarn).
(v) K. Anji Reddy vs. DCIT: 59 SOT 92 (Hyderabad)

29. He accordingly submitted that the assessing officer erred in charging interest under section 234B of the Act and withdrawal of interest under section

244A in the demand notice and, therefore, interest so levied deserves to be deleted.

30. Ld. DR on the other hand strongly supported the order of the ld. CIT(A). He submitted that against the issue of notice u/s 148 only writ lies before the Hon'ble High Court/Hon'ble Supreme Court. Appeals before CIT(A) lie only against the orders mentioned in section 246(1) i.e. orders passed u/s 143(3) r.w.s. 147 of the I.T. Act. But that order is not the order dated 04.03.2018 as that order does not exist and shall not exit till the order u/s 263 is quashed. Therefore, the appealable order is that u/s 143(3) r.w.s. 147 r.w.s. 263 and the original order u/s 143(3) r.w.s. 147 does not exist as on date. He submitted that after order u/s 263 only notice u/s 148 survived and not the order. Therefore, deciding this appeal amounts to reviewing the order of Hon'ble High Court in writ jurisdiction dated 24.02.2016 in CWP 10702 of 2015 dismissing the writ of assessee against the order u/s 263. If the order u/s 263 is upheld by the Tribunal in ITA No.1462/Del/2016 then validity of notice u/s 148 can be examined in appeal against the order u/s 143(3) r.w.s. 147 r.w.s. 263 of the I.T. Act. He submitted that if the Tribunal quashes the order u/s 263 in ITA No.1462/Del/2016 then this appeal may go back to the file of the ld. CIT(A) as he has not decided the issue on merits. He submitted that vide order dated 30.03.2016 in SA No.198/Del/2016, para 8.8 of the Assessing Officer was

allowed to pass assessment order u/s 143(3) r.w.s. 263 of the I.T. Act. He accordingly submitted that ITA No.1462/Del/2016 filed by the assessee against the order passed u/s 263 may be decided first and appeal No.6698/Del/2016 would not survive unless ITA No.1462/Del/2016 is decided against the Revenue. So far as the arguments on merit of the other grounds are concerned, he heavily relied on the orders of the Assessing Officer/CIT(A).

31. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the ld. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case filed the original return of income on 31.10.2005 declaring total income of Rs.146,94,07,460/- which was revised on 31.03.2007 declaring income of Rs.92,06,88,890/-. In the said return of income, the assessee had claimed deduction of Rs.254.83 crores in respect of the following items :-

a) Deduction u/s 80IA in respect of the various captive power plants.

b) Deduction u/s 80IB in respect of Mini Blast Furnace (MBF) unit.

c) Deduction u/s 80IB in respect of others independent/ separate eligible units/ undertakings.

32. We find the Assessing Officer completed the assessment u/s 143(3) on 31.12.2007 determining the total income at Rs.212,42,01,723/-. We find the Assessing Officer reopened the assessment by issuing notice u/s 147/148 of the I.T. Act on 23.03.2012 and, thereafter, passed the order u/s 143(3)/147 on 04.03.2013 determining the total income at Rs.156,02,61,476/-. We find the assessee filed an appeal before the ld. CIT(A) and during the pendency of such appeal before the ld. CIT(A) revisionary proceedings u/s 263 were initiated by the ld. CIT by issuance of show-cause notice dated 21 10.2013. We find the ld. CIT vide order dated 27.03.2015 passed u/s 263 of the I.T. Act had set-aside the reassessment order on the limited issue of examination of deduction u/s 80IA/80IB of the I.T. Act. We find the assessee before the ld. CIT(A) had challenged the validity of reassessment order dated 04.03.2016 on jurisdictional ground and disallowance of deduction on merits. However, we find ld. CIT(A) dismissed the appeal filed by the assessee stating that the appeal filed by the assessee becomes infructuous as addition/disallowance made in the reassessment order dated 04.03.2016 was set-aside by the ld. CIT u/s 263 of the I.T. Act.

33. It is the submission of the ld. counsel for the assessee that the reassessment order dated 04.03.2013 passed u/s 143(3)/147 was not set-aside by the ld. CIT in toto. Therefore, when the ld. CIT in exercising of revisionary

power u/s 263 sets aside the assessment, the assessment is not completely effaced and only the issue set-aside by the ld. CIT in the order passed u/s 263 are to be adjudicated by the Assessing Officer. It is also his submission that the ld. CIT while exercising the jurisdiction u/s 263 assumed the reassessment order dated 04.03.2013 was validly passed. Therefore, when the issue of validity or legality of proceedings u/s 147 of the I.T. Act was challenged before the ld. CIT(A) and if the assessee succeeds in demonstrating that the jurisdiction u/s 147 was not validly assumed, then the reassessment order would have to be quashed and consequently, the order u/s 263 seeking to revise the reassessment order would fail.

33.1 We find merit in the above arguments of the ld. counsel for the assessee. A perusal of the order of ld. CIT passed u/s 263 shows that the ld. CIT by invoking powers conferred on him u/s 263 has set-aside the reassessment order on the limited issue of examination of deduction u/s 80IA/80IB. In other words, the entire order has not been set-aside and there is no specific comment by the ld. CIT in his order regarding the validity of the reassessment proceedings initiated by the Assessing Officer u/s 147/148 of the I.T. Act. Therefore, ld. CIT(A), in our opinion, should not have dismissed the appeal holding the same to be infructuous. He was duty bound and obliged to decide the issue of validity of the reassessment proceedings initiated by the Assessing Officer which was

challenged before him. If the assessee succeeds on this legal ground before the ld. CIT(A) then the 263 order passed by the ld. CIT would fail. Under these factual circumstances, the arguments by ld. DR, in our opinion, are without any merit and has to be rejected. Since the ld. CIT(A) in the instant case has not decided the validity of the reassessment proceedings challenged before him and had dismissed the appeal as infructuous because of the revisionary powers exercised by the ld. CIT u/s 263, therefore, we deem it proper to restore the issue to the file of the ld. CIT(A) with a direction to decide the legal ground raised before him challenging the validity of the reassessment proceedings. We again reiterate that since ld. CIT in the order passed u/s 263 had not set-aside the reassessment proceedings and had set-aside the order for limited purpose of examining the deduction u/s 80IA/80IB of the I.T. Act, therefore, ld. CIT(A) was duty bound to decide the validity of the legal ground raised before him.

34. We, therefore, restore the issue to the file of the ld. CIT(A) with a direction to adjudicate the legal ground raised before him challenging the validity of the reassessment proceedings. Since we are restoring the issue to the file of the ld. CIT(A) for adjudication of the legal ground, therefore, we are not deciding the other grounds raised before us by ld. counsel for the assessee. The submission of the ld. counsel for the assessee that all the grounds should be decided here and need not be restored to the file of the ld. CIT(A) to reduce the

multiplicity of the proceedings is not accepted because ld. CIT(A) had not at all discussed the validity of assumption of jurisdiction u/s 147/148 of the I.T. Act by the Assessing Officer and has simply dismissed the appeal filed by the assessee as infructuous. In the light of our above discussion, the matter is restored to the file of the ld. CIT(A) with a direction to adjudicate the validity of reassessment proceedings. Needless to say, he shall give due opportunity of being heard to the assessee and decide the issue as per law We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

35. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on this 08th June, 2018.

Sd/-	**Sd/-**
(BEENA A. PILLAI)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 08-06-2018.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi