IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'SMC', LUCKNOW

BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.76 & 77/Lkw/2021
Assessment year:2017-18 & 18-19

M/s Satish Cold Storage, 250-A, Vikas Nagar, Kanpur. PAN:ABLFS5524P	Vs.	Dy. C.I.T., Circle-1(1)(1), Kanpur.
(Appellant)		(Respondent)

Appellant by	Shri Swaran Singh, C.A.
Respondent by	Shri Harish Gidwani, D. R.
Date of hearing	19/05/2022
Date of pronouncement	25/05/2022

O R D E R

These appeals have been filed by the assessee against the separate orders of learned CIT(A), both dated 31/03/2021. In these appeals, a common issue regarding disallowance of deduction u/s 80IB is involved and therefore, these appeals were heard together and for the sake of completeness, the grounds of appeal in I.T.A. No.76 are reproduced below:

1. *That the Ld. C.I.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the alleged disallowance arbitrarily made by the Ld. A.O., CPC Bangalore, amounting to Rs.6,48,423/- claimed by the appellant under section 80IB vide Intimation under section 143(1)of the income Tax Act, 1961, and the Ld. A.O. CPC,*

Bangalore has also erred in law and on facts in rejecting the Rectification Application dated 15.02.2020 filed under section 154 of the Income Tax Act 1961 vide Impugned Order dated 19.02.2020.

2. *That the Ld. C.I.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the Order passed by the Ld. A.O. CPC Bangalore for rejecting the request for rectification under section 154 of the Income Tax Act, 1961 of the appellant, without giving any valid reasons for rejection, therefore the impugned order is invalid and liable to be quashed and application under section 154 of the Income Tax Act, 1961 is liable to be allowed.*

3. *That the Ld. C.I.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the Order passed by the Ld. A.O. CPC Bangalore for rejecting the request for rectification under section 154 of the Income Tax Act, 1961 of the appellant vide Order dated 19.02.2020 in respect of claim of deduction under section 50IB of the Income Tax Act, 1961 amounting to Rs.6,48,423/ under chapter VI-A, therefore, without giving any valid reasons for rejection, therefore the impugned order is invalid and liable to be quashed and application under section 154 of the income Tax Act, 1961 is liable to be allowed.*

4. *That the Ld C.I.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in arbitrarily dismissing die appeal of the appellant without giving reasonable opportunity of being heard to the appellant.*

5. *That the Ld. C.I.T.(A). National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the alleged Addition/disallowances arbitrarily made by the Ld. A.O. is without proper basis and unjustified and deserves to be deleted.*

6. That the Ld. C.I.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the alleged Addition/disallowances arbitrarily made by the Ld. AO is much too high and excessive and deserves to be deleted.

7. That the Ld. CJ.T.(A), National Faceless Appeal Centre Delhi has erred in law and on facts in sustaining the alleged Addition/disallowances arbitrarily made by the Ld. A.O. is contrary to the Principles of natural justice and equity and deserves to be deleted.

8. That the impugned Assessment Order is without Jurisdiction and therefore is liable to be quashed."

2. The ld. AR Submitted that the only issue involved in these appeals is denial of exemption u/s.80IB of the Act for the reason that the audit report in Form-10CCB was not filed along with the return of income and was only filed after the intimation u/s. 143(1) was issued. The ld. AR submitted that auditor of the assessee who was also dealing with tax matters omitted to upload the audit report in Form-10CCB and therefore, the CPC rejected the claim of the assessee u/s. 80IB of the Act and the assessee, on receipt of intimation u/s. 143(1), filed application u/s. 154 of the Act after uploading the copy of audit report in Form-10CCB, which was rejected by CPC and therefore, appeal was filed before ld. CIT(A) against the order passed by the CPC u/s. 154 of the Act, which again was dismissed by ld. CIT(A) by holding that no mistake was apparent from the record. The ld. AR in this respect submitted that the CBDT vide Circular No. 689, dated 24.8.1994, had allowed rectification to be carried out u/s. 154 in case the evidence of the claim is filed subsequent to the date of furnishing of return of income for claim and in this respect read the contents of Circular No.689. The ld. AR

further submitted that relying on said circular, Hon'ble High Court of Karnataka in the case of ITO vs. Smt. Mandira D Vakharia decided similar issue in favour of assessee and copy of which was referred to be placed in P.B. pgs. 85 to 87. Therefore, in view of these facts and circumstances, it was submitted that the appeals filed by the assessee may be allowed.

3. The ld. DR, on the other hand supported the orders of authorities below and invited our attention to the findings of ld. CIT(A), wherein he has categorically held that since the copy of audit report was not available when the CPC passed order u/s. 143(1), therefore, it could not be said that there was a mistake apparent from record and hence, d. CIT(A) has rightly dismissed the appeals of the assessee.

4. I have heard the rival parties and have perused the material available on record. I find that it is undisputed fac that the claim of the assessee u/s. 80IB has not been allowed by the authorities below only because of the reason that the audit report in Form-10CCB was not filed along with return of income and was only filed after receipt of intimation u/s. 143(1) and therefore, the assessee filed rectification applications u/s. 154 of the Act after uploading Form-10CCB which was rejected by CPC. The ld. CIT(A) has rejected the appeals by holding that there was no mistake apparent from record. However, while holding so, he escaped the contents of Circular No.689 dated 24.8.1994 which clearly directs the Officers to allow rectification u/s. 154 for non filing of audit report or other evidence which could not be filed with the return of income. For the sake of completeness, the contents of Circular No.689 are reproduced below:

CIRCULAR NO. 689,

SCOPE OF PRIMA FACIE DISALLOWANCES UNDER SECTION 143(1)(A)

CIRCULAR NO. 689, DATED 24-8-1994

Section 143(1)(*a*) authorises, with effect from assessment year 1989-90, *inter alia*, disallowance of any loss carried forward, deduction, allowance or relief claimed which, on the basis of information available in the return or the accompanying accounts or documents, is *prima facie* inadmissible. The earlier instructions of the Board were to the effect that no disallowance should be made of items on which two opinions are possible. The matter has been further considered by the Board in the light of the recommendations of the Tax Reforms Committee headed by Prof. Raja J. Chelliah and it has been decided that *prima facie* disallowance shall be made only in respect of the following types of claims :

(*a*) an incorrect claim, if such incorrect claim is apparent from the existence of other information in the return or the accompanying accounts or documents.

EXAMPLEHENCE

If a deduction has been claimed under the head Capital Gains under section 54F, and if there is information in the return of income or the accompanying accounts or documents to show that the unutilised net consideration had not been deposited in an account specified in the notified scheme as stipulated under section 54F(4), the claim is incorrect and can be disallowed as a *prima facie* adjustment.

(*b*) any claim in respect of which there is an omission of information which is required, under the specific provisions of the Act or the Rules, to be furnished along with the return to substantiate such claim :

EXAMPLE

If the audit report specified under section 80HHC(4), which is required to be filed along with the return of income, is not so filed, the deduction claimed under that section can be disallowed as a *prima facie* adjustment. Some more examples in this regard are the non-filing of audit reports or other evidence along with the return of income as required under sections 12A(*b*), 33AB(2), 35E(6), 43B (first proviso), 54(2), 54B(2), 54D(2), 54F(4), 54G(2), 80HH(5), 80HHA(4), 80HHB(3), 80HHD(6), 80HHE(4), 80-I(7), 80-IA(8) and the like. But if evidence is subsequently furnished, rectification under section 154 should be carried out to the extent permitted by Board's Circular No. 669, dated 25-10-1993. No *prima facie* disallowance shall however be made if any evidence, required to be filed along with the return of income only in pursuance of the non-statutory guidance notes for filling in the return of income, is not so filed.

(*c*) A claim for deduction or rebate of any amount which exceeds statutory limit imposed, if such limit is expressed either as a specific mandatory amount or as a percentage, ratio or a fraction, and if the information relevant to application of the statutory limits appear in the return or the accompanying accounts or documents.

EXAMPLE

(*i*) If under section 24(1)(*i*) the deduction in respect of repairs and collection charges to claimed in excess of 1/5th of the annual value (applicable with effect from assessment year 1993-94), such excess can be disallowed as a*prima facie* adjustment.

(*ii*) If the rebate on contribution eligible under section 88 is claimed in excess of 20 per cent of

such contribution, the excess can be disallowed, provided there is indication of the total amount of such contribution in the return or the accompanying accounts or documents.

(*d*) Any claim which is patently inadmissible in law.

EXAMPLE

Deduction of items like income-tax, wealth-tax, personal expenses, depreciation claimed on conveyance under the head salary, depreciation claimed under the head house property and the like. The items of disallowance should be such that no two opinions are possible on their inadmissibility.

3. The Board desires that no other *prima facie* disallowance should be made except with the previous approval of the Commissioner of Income-tax who will, after according approval in suitable cases, bring the same to the notice of the Board.

4. The above procedure applies to all returns pending processing under section 143(1) on the date of issue of this Circular.

CLARIFICATION ONE

Section 143 relating to assessments has been substituted with effect from 1st April, 1989 by a new section by the Direct Tax Laws (Amendment) Act, 1987 (hereinafter referred to as the Amendment Act.)

2. Clause (*a*) of sub-section (1) of the substituted section provides that where a return has been made under section 142(1) of the Act, and any tax or interest is found due on the basis of the return, an "INTIMATION" shall be sent to the assessee specifying the sum so payable. Similarly if any refund is due on the basis of the return it shall be granted to the assessee.

3. For the purposes of computing the tax or interest payable by or refundable to the assessee the following adjustments are required to be made, under the proviso to sub-clause (*a*) of sub-section (1) of section 143 to the income or loss declared in the return :—

i. Any arithmetical error in the return, accounts or documents accompanying it shall be rectified.

ii. Any loss carried forward, deduction allowance or relief which on the basis of the information available in such return, accounts or documents is *prima facie* admissible but which is not claimed in the return, shall be allowed.

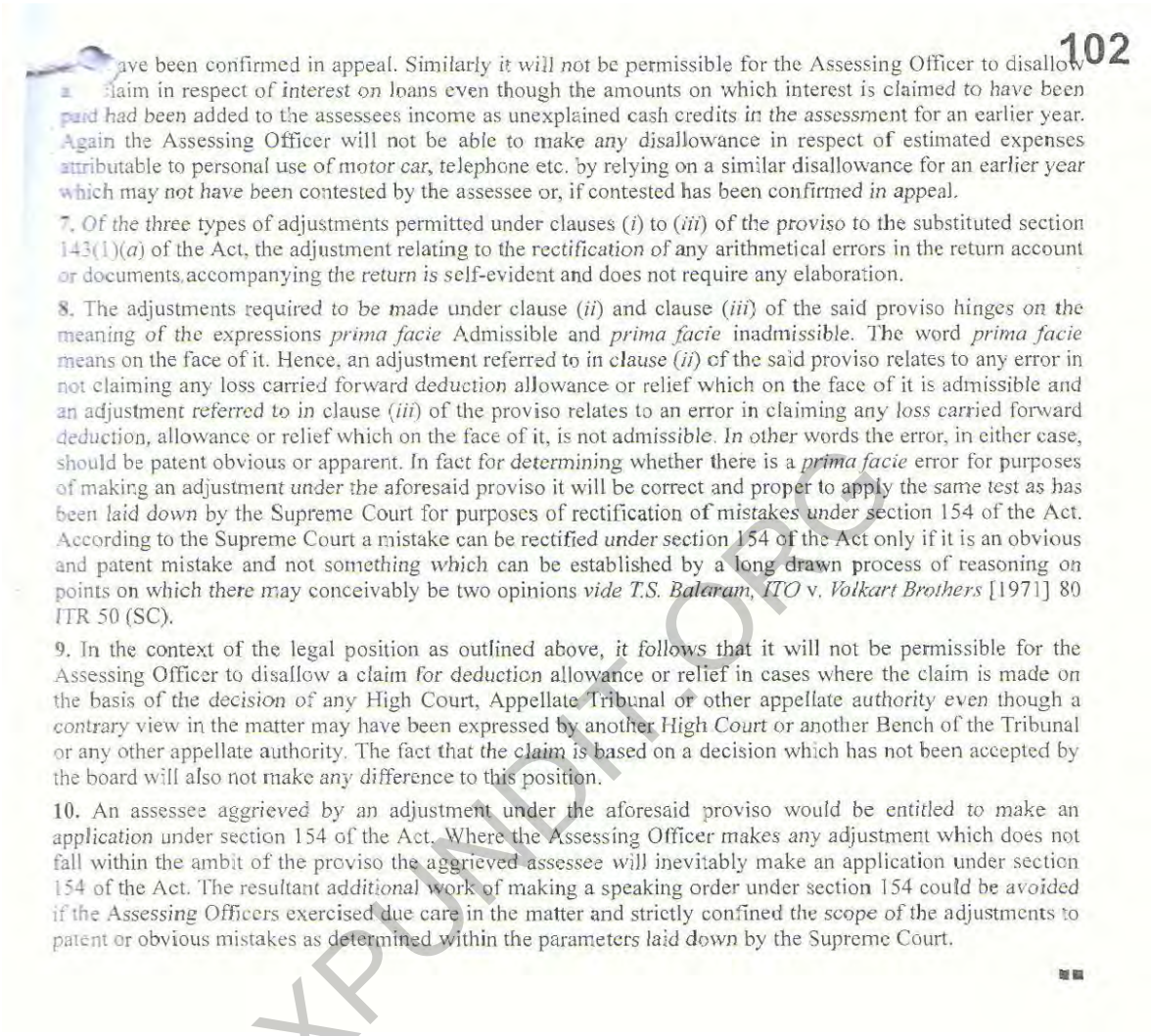
iii. Any loss carried forward deduction, allowance or relief claimed in the return, which on the basis of the information available in such return account or documents is *prima facie* inadmissible, shall be disallowed.

This circular seeks to explain the ambit and scope of adjustments required to be made under the aforesaid provision.

4. At the outset, it has to be noted that by virtue of para 2 of the Income-tax (Removal of Difficulties) Order, 1989 GSR 376(E), dated 23rd March, 1989 made by the Central Government the substituted section 143 shall apply only in relation to the assessment year 1989-90 and subsequent years. Hence, the adjustments which were not permissible under the section as it stood prior to its substituted section, cannot be made in the returns relating to the assessment year 1988-89 and earlier assessment years irrespective of whether such returns are filed before 1st April, 1989 or on or after the said date.

5. It is also to be noted that the procedure outlined in clause (*a*) of sub-section (1) of section 143 is applicable only in cases where any tax or interest or any refund is found due on the basis of the return after making the adjustments specified in the proviso to the aforesaid clause. Hence, in cases where no tax or interest or refund is found due on the basis of the loss declared in the return the case will fall outside the ambit of section 143(1)(*a*) and the Assessing Officer should issue a notice under section 143(2) for determination of the correct loss of the assessee under section 143(3) of the Act. In cases where action under section 143(2) of the Act is not taken within the time limit laid down on this behalf the Assessing Officer will have to take action under section 147 of the Act.

6. It has also to be noted that for purposes of making the adjustments under the aforesaid proviso, it will not be permissible to refer to the record of past assessments in the case of the assessee. For instance, it will not be permissible for the Assessing Officer to make an addition to the profits by applying a higher rate of gross profit than that shown in the books, even though in an assessment for an earlier year the profits so estimated



102

ave been confirmed in appeal. Similarly it will not be permissible for the Assessing Officer to disallow a laim in respect of interest on loans even though the amounts on which interest is claimed to have been paid had been added to the assessees income as unexplained cash credits in the assessment for an earlier year. Again the Assessing Officer will not be able to make any disallowance in respect of estimated expenses attributable to personal use of motor car, telephone etc. by relying on a similar disallowance for an earlier year which may not have been contested by the assessee or, if contested has been confirmed in appeal.

7. Of the three types of adjustments permitted under clauses (*i*) to (*iii*) of the proviso to the substituted section 143(1)(*a*) of the Act, the adjustment relating to the rectification of any arithmetical errors in the return account or documents accompanying the return is self-evident and does not require any elaboration.

8. The adjustments required to be made under clause (*ii*) and clause (*iii*) of the said proviso hinges on the meaning of the expressions *prima facie* Admissible and *prima facie* inadmissible. The word *prima facie* means on the face of it. Hence, an adjustment referred to in clause (*ii*) of the said proviso relates to any error in not claiming any loss carried forward deduction allowance or relief which on the face of it is admissible and an adjustment referred to in clause (*iii*) of the proviso relates to an error in claiming any loss carried forward deduction, allowance or relief which on the face of it, is not admissible. In other words the error, in either case, should be patent obvious or apparent. In fact for determining whether there is a *prima facie* error for purposes of making an adjustment under the aforesaid proviso it will be correct and proper to apply the same test as has been laid down by the Supreme Court for purposes of rectification of mistakes under section 154 of the Act. According to the Supreme Court a mistake can be rectified under section 154 of the Act only if it is an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions *vide T.S. Balaram, ITO* v. *Volkart Brothers* [1971] 80 ITR 50 (SC).

9. In the context of the legal position as outlined above, it follows that it will not be permissible for the Assessing Officer to disallow a claim for deduction allowance or relief in cases where the claim is made on the basis of the decision of any High Court, Appellate Tribunal or other appellate authority even though a contrary view in the matter may have been expressed by another High Court or another Bench of the Tribunal or any other appellate authority. The fact that the claim is based on a decision which has not been accepted by the board will also not make any difference to this position.

10. An assessee aggrieved by an adjustment under the aforesaid proviso would be entitled to make an application under section 154 of the Act. Where the Assessing Officer makes any adjustment which does not fall within the ambit of the proviso the aggrieved assessee will inevitably make an application under section 154 of the Act. The resultant additional work of making a speaking order under section 154 could be avoided if the Assessing Officers exercised due care in the matter and strictly confined the scope of the adjustments to patent or obvious mistakes as determined within the parameters laid down by the Supreme Court.

5. I further find that taking cognizance of this circular the Hon'ble High Court of Karnataka in the case of ITO vs. Smt. Mandira D Vakharia vide order dated 17.11.2000 has decided similar issue in favour of the assessee. The findings of Hon'ble Karnataka High Court are reproduced below:

> *"Aggrieved against the order passed by the Tribunal Bangalore in IT Appeal No.173(Bang.) of 1993 dated 23.9.1999, relating to the assessment year 1992-93, the revenue has come up in appeal under section 260A of the Income-tax Act, 1961 ('the Act'). According to the revenue, the following substantial questions of law arise from the order of the Tribunal:*

"1. Whether, on the facts and in the circumstances ol the case, the Tribunal was correct in holding that the disallowance made by the assessing authority in the assessee's case under section 143(l) of the Act was not proper?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding Ihat the assessing authority was required to rectify the mistake under section 154 of the Income-tax Act, 1961 ?"

2. Admit.

3. With the consent of the counsels for the parties, we proceed to answer the questions of law raised before us.

4. The respondent-assessee is a software consultant and is doing business of exporting the software out of India. The assessee filed her return for the assessment year 1992-93. Deduction under section 80HHE(4) and under section 8OGG of the Act was denied to the assessee on the ground that proof of certificate (report from the Chartered Accountant the prescribed form) had not been enclosed with the return of income. The assessee filed a rectification application under section 154 of the Act. With the rectification application, she attached the certificate in proof of the claim made by her under sections 80HHE and 8OGG. The assessing authority declined to rectify its earlier order on the ground that the assessee was required to file the proof or certificate in support of the deduction claimed under sections 80HHE and 80GG al the time of filing of the return and the proof or certificate filed by her with a rectification application could not be taken into consideration.

5. The assessee, being aggrieved by the order of the assessing authority, filed an appeal before the Commissioner (Appeals), which was accepted and held that non-filing of the proof of certificate from the chartered accountant with the original return was not fatal to the claim made by the assessee. That the proof could be furnished later on with the rectification application. The assessing authority should have taken into consideration the proof furnished by the assessee with the rectification application while considering the claim of the assessee for deduction under sections 80HHE, and 80GG of the Act. The Commissioner (Appeals) allowed the claim of the assessee in full.

6. Aggrieved by the order of the Commissioner (Appeals), the revenue filed further appeal before the Tribunal which has been dismissed by the impugned order. The Tribunal has dismissed the appeal relying upon a circular of the Board holding that disallowance made by the Assessing Officer for not furnishing the particular form along with the return was not in accordance with the Board's circular. That the assessing authority had erred in not rectifying the order under section 154 after the assessee furnished the requisite proof/certificate in support of the claim made by her under sections 80H1IE and 80GG.

7. Operative portion of the Board's Circular reads:

Scope of prima facie disallowance under section I43(1)(a) of the income-Tax Act, 1961 - Clarification regarding.

Section 143(1)(a) authorises, with effect from assessment year 1989-90, inter alia, disallowance of any loss carried forward, deduction, allowance or relief claimed which, on the basis of information available in the return or the accompanying accounts or documents is prima facie inadmissible. The earlier instructions of the Board were to the effect that no disallowance should be made on items on which two opinions are possible. The matter has been further considered by the Board in the light of the recommendations of the Tax Reforms Committee headed by Prof. Raja J. Chellaiah and it has been decided that prima facie disallowances shall be made only in respect of the following types of claims:

(a) Not relevant for the purpose of this appeal.

(b) Any claim in respect of which there is an omission of information which is required, under the specific provisions of the Act or (he Rules, to be furnished along with the return to substantiate such claim.

Example :

If the audit report specified under section 80HHC(4), which is required to be filed along with the return of income, is not so filed, the deduction claimed under that section can be disallowed as a prima facie adjustment. Some more examples in this regard are non-filing of audit reports or other evidence along with the return of income as required under sections 12A(ft), 33AB(2), 35E(6), 43B (first proviso), 80-1(7), 80-IA(8) and the like. But if

evidence is subsequently furnished, rectification under section 154 should be carried out to the extent permitted by Board's Circular No. 669. dated 25th October, 1993. No prima facie disallowance shall, however, be made if any evidence, required to be tiled along with the return of income only in pursuance of the non-statutory guidance notes for filing in the return of income, is not so filed." [Emphasis supplied]

8. By the Board's circular, it has been made clear that if audit report specified under section 80HHC(4) is not furnished with the return, then the deduction may be disallowed as a prima facie adjustment, But, if evidence is subsequently furnished, rectification under section 154 should be carried out to the extent permitted by ihe Board's Circular No. 669 dated 25-10-1993. The circular then proceeds to mention some other provisions in regard to the non-filing of the audit report or other evidence along with the return of income as required under various sections such as 12A(fc), 33AB(2), 35E(2), 35E(6), 43B (First proviso), 80-1(7), SO-IA(R) and the like. The case of the revenue is that since sections 80I1HF, and SOGG are not specifically mentioned in the Board's circular, the assessee would not be entitled to the benefit of deductions under sections ROI1HE and SOGG on the furnishing of the audit report proof with the rectification application.

9. Submission is without any substance. The intention of the Board is clear. The illustrations and instances referred to in the Board's circular are qualified by the words '. . . and the like'. The illustrations and instances given by the Board are not exhaustive The intention behind the Board's circular is that in case the audit report required to be filed was not furnished with the return of income, then the deduction claimed can be disallowed as a prima facie adjustment. But, if it is furnished subsequently, then rectification should be carried out to the extent permitted by the Board's Circular No. 669 dated 25-10-1993. The illustrations given in the Board's circular being not exhaustive, it would include the provisions like sections 80HHE and 80GG as well. The assessee has claimed the same relief as would have been admissible to an assessee who was claiming deduction under section 80HHC(4) and other sections mentioned in the Board's circular. The assessee claiming deduction under sections 80HHE and 80GG would be similarly situated as an assessee claiming deduction under section 80HHC(4) or other

provisions mentioned in the Board's circular. The use of the words '. . . and the like in the Board's circular would include the assessee who are claiming a similar relief although the provision of the Act is not specifically mentioned in the Board's circular.

10. The assessee would be entitled to the deductions in the rectification under section 154 to the extent permitted by the Board's Circular No. 669 dated 25-10-1993. The Assessing Officer was not right in law in disallowing the rectification application only on the ground that the assessee had failed to furnish the audit report along with the return of income.

11. The Tribunal was right in law in extending the benefit of Board's circular to the assessee's case as well. The Assessing Officer has rightly been directed to rectify his order and extend the benefit of deductions under sections 80HHE and 80GG to the assessee in terms of the Board's circular.

12. For the reasons stated above, the substantial questions of law on which the appeal is admitted are answered in the affirmative, i.e., in favour of the assessee and against the revenue.

6. In view of above facts and circumstances & judicial precedents, I find merit in the arguments of assessee and therefore, the appeals of the assessee are allowed.

7. In the result, both the appeals of the assessee are allowed.

(Order pronounced in the open court on 25/05/2022)

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:25/05/2022
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

Assistant Registrar