RESERVED.

INCOME TAX APPEAL NO. 30 OF 2001
The Commissioner of Income Tax, Meerut & another v. M/s. Modi Xerox Ltd., New Delhi.

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Hon'ble Rajes Kumar, J.
Hon'ble Pankaj Mithal, J.

(Delivered by Hon'ble Rajes Kumar, J.)

This is an appeal under section 260-A of the Income Tax Act filed by the Commissioner of Income Tax, Meerut, against the order of the Tribunal dated 4.9.2000 for the assessment year 1991-92, raising the following questions :

"(1) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in deleting the addition of Rs. 8,63,240/- on account of rent paid by the assessee for hiring certain premises for its training centre which was in the natuare of guest house in contravention of provisions of section 37(4) read with section 37(5) of the I.T. Act?

(2) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in deleting the addition of Rs. 23,86,696/- u/s 40-A(2)(b) of the I.T. Act out of payment made to Modi Rubber Ltd. whereas the assessee failed to prove that the claimed amount of expenditure was made for the purpose of business and was commercially expedient?

(3) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in holding that the environmental expenses for development of new product was not covered under the provisions of section 43-B ignoring the fact that the amount of addition represented custom duty?

(4) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in confirming the order of Ld. CIT (A) deleting the disallowance of Rs. 3,05,961/- on account of expenses on printing of balance sheet and Rs. 1,80,000/- on account of printing and dispatch of dividend warrants which was incurred for benefit of shareholders and not for the business ` purpose?

(5) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in deleting the addition of Rs. 76,929/- on account of club membership subscription even though there is no material on record to substantiate that the expenditure is commercially expedient for the purpose of business of the assessee as required by the provisions of section 37(1) of I.T.Act?

(6) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in confirming the order of CIT (A) allowing assessee's claim of lease charges of Rs. 1,81,44,400/- even though the Xerox machine and equipments had not passed on the lessors being purchaser of the same goods from the assessee company for certain period and the lease charges were not directly connected with the user of the goods?

(7) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in confirming the order of the CIT (A) deleting the addition of Rs. 19,64,279/- on account of bad debts in absence of any effort for the realisation of the amount in the light of provisions contained in section 36(2) read with sec. 36(1)(vii) of the I.T. Act without contemplation of subsequent realisation?

(8) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in confirming the order of the CIT(A) directing the AO to allow the amount of Rs. 74,05,160/- in respect of custom duty u/s 43-B without appreciating the material available on record?

(9) Whether on the facts and in the circumstances of the case, the Ld. ITAT was legally justified in confirming the CIT(A)'s order allowing the claim of the company that it could claim deduction u/s 80-HH and 80-I on two profit making units M/s. Xerographic undertaking and M/s Toner, Developer, and Photo Receptor Unit, ignoring third unit M/s Service Trading & other which though had suffered losses yet constituted a unit for the business of the assessee as a whole, in totality and without appreciating the provisions of Sec. 80-AB and 80-B(5) of the I.T.Act?”

Heard Sri R.K. Upadhyay, learned Standing Counsel, and Sri Rupesh Jain, Advocate, along with Sri R.R. Agrawal, Advocate, appearing on behalf of the respondent-assessee.

The respondent is a company engaged in the business of manufacture and sales of photo-copier machines, toners, etc.

Learned counsel for both the sides fairly admitted that questions no. (1), (5) and (6) are covered by the decision of this Court in the case of the assessee itself in I.T. Appeal No. 225 of 1999 (Commissioner of Income Tax, Meerut v. M/s. Modi Xerox Ltd.) decided on 14.5.2009.

So far as question no. (1) is concerned, this Court held that the Tribunal was not justified in allowing the claim of deduction on account of the rent paid by the assessee to the M/s. Modipur Hotels (P) Ltd. and transit house as it contravened the provisions of Section 37(4) read with Section 37(5) of the Act.

Respectfully, following the aforesaid decision of this Court, question no. (1) is answered in favour of the Revenue and against the assessee. The order of the Tribunal is, accordingly, set aside to this extent.

So far as question no. (5) is concerned, this Court held as follows:-

> “Coming to the question as to whether the payment made by the assessee towards the membership of the clob is an allowable deduction, we find that the expenditure was incurred in order to procure business. Whether the assessee was successful in getting any business or not is not the question. The intention has to be seen as the amount was spent towards advancement of business. It is a business expenditure and, therefore, has rightly been allowed as it is not specifically covered by any statutory provision wherein it has to be disallowed.”

Respectfully, following the view taken by this Court, as stated above, the question is answered in favour of the assessee and against the Revenue. The order of the Tribunal is accordingly upheld in this regard.

So far as question no. (6) is concerned, this Court has held as follows:-

> “We are of the considered opinion that the Tribunal was justified in allowing the assessee's claim partly towards the finance charges and partly as lease charges. We may mention here that there is no dispute that the

> money had not passed from the lessor/purchaser to the assessee company and that the assessee company had utilised the same in its business."

Following the aforesaid decision, question no. 6 is answered in favour of the assessee and against the Revenue. The order of the Tribunal is affirmed accordingly.

So far as question no. (7) is concerned, learned counsel for both the parties agree that it is covered by the decision of this Court in I.T. Appeal No. 256 of 2000 (Commissioner of Income tax, Meerut v. M/s. Modi Xerox Ltd.), decided on 25.2.2010, wherein this Court, following the decision of the apex Court in Civil Appeal No. 5293 of 2003 (TRF Ltd. v. Commissioner of Income Tax, Ranchi), decided on 9.2.2010, held as follows:-

> "The Apex Court in **Civil Appeal No. 5293 of 2003 TRF Limited vs. Commissioner of Income Tax, Ranchi, decided on 9.2.2010, reported in 2010-TIOL-15-SC-II** has considered the question of deduction for bad debts with reference to Section 36(1)(vii) of the Act. The Apex Court held that after 1st April, 1989, the position has been altered by deleting the word established which existed earlier in Section 36(1)(vii) of the ACt and after 1st April, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. In the present case, the Tribunal has recorded a categorical finding that the assessee has complied with both the requirements, namely, that the amount has been considered for computation of income in the earlier years and the debt has been written off in the books of accounts. The finding of the Tribunal is finding of fact.
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> We do not see any error in the view taken by the Tribunal which is inconformity with the law laid-down by the Apex Court, referred hereinabove."

So far as question no. (8) is concerned, both the counsels agree that the issue involved is squarely covered by the decision of the apex Court in the case of ***Berger Paints India Ltd. v. Commissioner of Income Tax*** reported in *266 ITR 99 (SC)* wherein the apex Court has held that the entire amount of excise duty/custom duty paid by the assessee in a particular accounting year is allowable under Section 43-B of the Income Tax Act, 1961, as a deduction in respect of that year, irrespective of the amount of excise duty/custom duty included in the valuation of the assessee's closing stock at the end of the accounting

year as relating thereto.

In view of the law laid down above, we do not find any error in the order of the Tribunal. The question is accordingly answered in favour of the assessee. The order of the Tribunal is upheld in this regard.

So far as question no. (2) is concerned, the brief facts of the case are that during the relevant accounting period, the assessee paid the amount of Rs. 33,38,696/- to M/s. Modi Rubber Ltd. details of which are as under :

1)	Rent		Rs. 22,10,869/-
2)	AGM Expenses		Rs. 64,894/-
3)	Telephone & Telex		Rs. 4,96,211/-
4)	Electricity & Water		Rs. 3,33,585/-
5)	Misc. expenses		Rs. 2,33,136/-
		Total =	Rs. 33,38,696/-

The Assessing Officer on ad hoc basis, disallowed deduction of Rs. 9,52,000/- (though mentioned as Rs. 10 lacs in the astt. order). Out of this expenditure disallowed sum of Rs. 23,86,696/- u/s 40A(2)(b) of the Act alleging that the same should not have been incurred for the business purposes and that the same is excessive and unreasonable. On appeal, the CIT(A) confirmed the aforesaid disallowances.

M/s. Modi Rubber Ltd. is a proprietor of M/s. MRL and allowed the assessee to use the flats taken by it on lease in Hemkunt Tower, Nehru Place, New Delhi, for the purpose of its business against reimbursement of rent paid by M/s. MRL to the landlord. The assessee has been using identifiable flats taken on lease by M/s. MRL against the reimbursement of rent paid by M/s. MRL to the landlord. There is no element of profit in the transaction. For the premises in the occupation of the assessee-company, the assessee reimbursed to M/s. MRL electricity, water, telephone charges etc. relating to the user of such flats. The revenue, by invoking the provisions of Section 40-A(2) of the Act, disallowed the reimbursement of expenses on the ground

that the reimbursement to M/s. MRL was excessive having regard to legitimate needs of the business of the assessee-company. Before the Tribunal the assessee contended that while making disallowance both the assessing officer and the Commissioner of Income Tax (Appeal) have alleged that the appellant did not specify the area occupied by the assessee in respect of payment made to M/s. MRL without appreciating the fact that during the course of the assessment as well as appellate proceeding the assessee furnished the rent paid to M/s. MRL and these details accompanied by copies of lease deeds of the flats taken on lease by M/s. MRL clearly specify the area of each flat. It was also submitted that in the subsequent years the assessing officer deputed an Inspector to conduct on the spot enquiry to ascertain the actual user of the flat. Based on the Inspector's report, the Commissioner of Income Tax (Appeal), in the year 1994-95, deleted the disallowance of rent holding that the assessing officer has not brought on record any evidence to show that the assessee's claim of rent was false. It was further submitted that reimbursement of electricity, water and other expenses was based on actual amount spent by M/s. MRL and was evidenced by debit-note raised by M/s. MRL which also provided the details of such expenses. The same had been audited by both the statutory and tax auditors and have found to be in order. It was further submitted that the assessee and M/s. MRL were large quoted Public Limited Company and was assessed at the same rate of tax. The reimbursement made by the assessee to M/s. MRL had been accounted for and offered for tax by the receiving company. It was submitted that Section 40-A(2) of the Act has been introduced to check evasion of income as explained by C.B.D.T. in circular dated 6.7.1968. The reimbursement by the assessee to M/s. MRL is on cost basis and did not contain any element of profit. Therefore, the provision of Section 40-A(2) of the Act have no application in the facts of this case. The Tribunal has recorded the

following finding :-

> "3. We have heard the rival parties and have perused the material placed on record and are of the opinion that what the assessee has actually paid as the amount of actual expenditure incurred by M/s MRL. The rent paid is as per lease deed payable by M/s. MRL besides the expenditure on account of AGM expenses, telephone/telex, electricity, water expenses are as actually incurred by M/s. MRL. The Assessing Officer has failed to prove that by any comparable case or comparison by market rate as to how the amount paid by the assessee is excessive or unreasonable. It is not clear as to how has he allowed the deduction of the expenditure of Rs. 9,52,000/- though mentioned at Rs. 10 lacs in the asstt. year. Even in the subsequent year, CIT (A) has deleted the addition of the rent paid by the assessee to M/s. MRL. We, therefore, feel that keeping in view the totality of the facts and circumstances of the case, disallowance by A.O. and upheld by CIT (A) are unreasonable and unjustified. These additions are, therefore, deleted in toto.

Section 40-A(2)(a) of the Income Tax Act reads as follows :

> "(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made in any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

A perusal of Section 40-A(2)(a) of the Act reveals that any expenditure incurred shall be disallowed in case if the payment is made to the persons referred in clause (b) of Section 40-A(2) of the Act and the assessing officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate need of the business or profession of the assessee shall be disallowed.

In the present case, having regard to the facts and circumstances referred herein above, the Tribunal has arrived to a conclusion that the assessing officer has failed to prove by any comparable case or comparison by market rate that the amount paid by the assessee was excessive or unreasonable. The finding of the Tribunal is finding of

fact. On the enquiry the Inspector found that the premise was in occupation and use of the assessee and the claim of the rent was not false. The Tribunal found that the assessee has paid the actual rent and reimbursed the actual expenditure incurred by M/s. MRL. We are of the view that the finding of the Tribunal is finding of fact, based on material on record and cannot be said to be perverse. The order of the Tribunal, in this regard, is liable to be upheld.

The brief facts giving rise to question no. 3 are that the assessee has imported certain new model of Xerographic machines manufactured by the collaborator, M/s. Rank Xerox Ltd., for test marketing in India on payment of customs duty with an undertaking that the assessee would re-export the goods after two years. The customs duty was admittedly paid in the earlier year and not in the year under consideration. In the year when the customs duty was paid the same was not debited to the profit & loss account but were shown under the head “Advances Recoverable” in the balance-sheet since the assessee was eligible for duty draw back on re-export of goods. In the year under consideration the assessee has re-exported the goods. Thus the amount of customs duty ultimately borne by the assessee after reducing duty draw back availed was debited to the profit & loss account in the year under consideration under the head 'environmental test expenses'. The assessing authority has disallowed the claim of deduction under the provision of Section 43-B of the Act on the ground that the customs duty was neither payable in the year under consideration nor it has been actually paid.

Being aggrieved by the order of the assessing authority, the assessee filed appeal before the CIT (Appeals). The CIT (Appeals) held that the deduction claimed by the assessee which represents customs duty paid was admissible only in the year under payment as per Section 43-B of the Act irrespective of the method of accounting. It has been observed that it is not clear as to actually when the customs

duty was paid. He, however, issued a direction to the assessing authority to allow the claim to the extent it represents the balance of customs duty paid during the year under consideration.

Being aggrieved by the order of the CIT (Appeals), the assessee filed appeal before the Tribunal. The Tribunal, in a very cryptic manner, allowed the claim of deduction and observed that "we are of the opinion that the expenditure has rightly been held as revenue in the nature by CIT (A). We also feel that the provisions of Sec. 43-B are not attracted to the facts of this ground of appeal. We accordingly delete the addition."

Sri R.K. Upadhyay, learned Standing Counsel, submitted that admittedly the customs duty was neither payable nor paid during the year under consideration and, therefore, any amount deducted towards customs duty in the books of account cannot be allowed as a deduction in the year under consideration. In the year under consideration only that much amount of customs duty can be allowed as a deduction which has been actually paid in view of the provisions of Section 43-B of the Act. He further submitted that the Tribunal has erred in holding that the provision of Section 43-B of the Act is not attracted. Learned counsel for the assessee supported the order of the Tribunal.

Section 43-B of the Income Tax Act reads as follows :-

> "43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -
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> (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or
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> (b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or
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> (c) any sum referred to in clause (ii) of sub-section (1) of section 36, or
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> (d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement

governing such loan or borrowing, or

(e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

Provided that nothing contained i n this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

Explanation 1. - For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2. - For the purposes of clause (a), as in force at all material times, “any sum payable” means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

Explanation 3. - For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3A. - For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (e) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1996, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid

by him.

Explanation 3B. - For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (f) of this section is allowed in computing the income, referred to in section 28, of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 2001, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3C. - For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid.

Explanation 4. - For the purposes of this section, -

(a) "public financial institutions" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956);

(aa) "scheduled bank" shall have the meaning assigned to it in the Explanation to clause (iii) of sub-section (5) of section 11;

(b) "State financial corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) "State industrial investment corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and eligible for deduction under clause (viii) of sub-section (1) of section 36."

The above provision provides that a deduction otherwise allowable under this Act in respect of any sum payable by the assessee by way of duty shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28-A of that previous year in which such sum is actually paid by him (emphasis provided). It appears that in the present case the goods were imported in the earlier years, and when the goods were imported the duty was payable and the customs duty was actually paid in the said year. No

customs duty has been paid in the year under consideration in respect of such transaction and, therefore, in view of Section 43-B of the Act the customs duty, which was not paid during the year under consideration, cannot be allowed as a deduction. Therefore, the Tribunal has erred in its view that the provision of Section 43-B of the Act is not attracted on the facts and circumstances of the present case is erroneous. We, accordingly, restore the direction given by the CIT (Appeals) to the assessing officer to allow only those customs duty which has been actually paid in the year under consideration. The order of the Tribunal, in this regard, is set aside.

So far as question no. 4 is concerned, the Tribunal recorded the following finding :-

> "5. The first ground of appeal taken by the revenue is the deletion of addition made by A.O. amounting to Rs. 3,05,961/- on the printing of balance sheet and an amount of Rs. 1,80,000/- incurred on printing and despatch of dividend warrants. The A.O. disallowed the expenses being incurred exclusively for the benefit of share holders and not for the business purposes. We are of the opinion that these expenses were incurred by the assessee for compliance of statutory requirements as prescribed under the Company's Act. These are clearly revenue in nature and we hold that the CIT (A) while deleting this addition was reasonable and justified. We decline to interfere on this account."

We do not find any error in the order of the Tribunal in coming to the conclusion that the expenses incurred on printing of balance-sheet and on printing and despatch of dividend warrant were incurred by the assessee for the compliance of statutory requirement as prescribed under the Companies Act and are revenue in nature. The order of the Tribunal is, accordingly, upheld.

The brief facts giving rise to question no. 9 are that the assessee is a multi-unit company carrying on the following activities :

(i) Manufacture of xerographic equipment.
(ii) Manufacture of toner, developer &photoreceptors.
(iii) Servicing and trading activities.

There were three separate units for the aforesaid activities. It appears

that the two units, viz. unit manufacturing xerographic equipment and unit manufacturing toner, developer & photoreceptors, were profit making units and the third unit, viz. servicing and trading activities, has suffered loss. The assessee claimed deduction under section 80-HH at Rs. 7,18,75,912/- and deduction under Section 80-I at Rs. 8,92,44,892/- against which the assessing authority has allowed deduction under Section 80-HH at Rs. 2,04,93,837/- and deduction under Section 80-I at Rs. 2,56,17,297/-. The dispute between the assessee and the assessing officer appears to be with regard to the working of the deduction under section 80-HH and 80-I were on account of (a) the assessing officer allowed deduction under the aforesaid sections on the aggregate profits of the assessee-company without seeking to separately determine the profits derived from the two eligible industrial undertakings, viz. (i) Xerographic Equipment Unit & (ii) toner, developer & photoreceptors unit, and (b) the assessing officer allowed the deduction under Sections 80-HH and 80-I on the profits of the assessee-company after reducing brought forward losses and allowances. The Commissioner of Income Tax (Appeals) directed the assessing officer to allow deduction under Sections 80-HH and 80-I of the Act on unitwise profits treating the Xerographic Equipment Unit and Toner, Developer & Photoreceptor Unit as separate industrial undertakings. However, he confirmed the action of the assessing officer in allowing deduction under the aforesaid sections after reducing brought forward losses and allowances. The Tribunal has accepted the plea of the assessee and upheld the order of the CIT (Appeals) and has held that the manufacturing units and services unit were independent to each other and the deductions under Section 80-HH and 80-I of the Act are allowable only in the case of manufacturing unit and not service units. The Tribunal, while coming to the aforesaid conclusion, has made the following observations :

> "It is also brought on record by ld. A.R. that CIT (A) ignoring the

provisions of sec. 263 of the Act directed the A.O. to withdraw deductions allowed u/s 80-I of the act for asstt. year 1991-92 and 1992-93, stand cancelled by Tribunal vide its order dated 29.4.1998 reported at 67 ITD 252. It was further submitted that the Tribunal originally held that the xerographic equipment manufactured by the appellant is "office machine falling within the ken of item 22 of Schedule XI to the Act." stands recalled by the order dated 25.1.99 in M.A. No. 119/Del./98 which was finally settled in favour of the assessee vide order of the Tribunal dated 6.7.2000 in I.T.A. No. 3034/Del./96 and 3290/Del./97 wherein the benefits u/s 80-I was allowed to the appellant. It was further submitted that the tribunal has recognised the facts that the unit manufacturing xerographic machines and unit manufacturing toner, developer and photoreceptor are two distinct units. Apart from these two distinct independent industrial undertakings, carrying on manufacture of Xerographic equipments and toner, developer and photoreceptor at Rampur, the appellant carried on the business of servicing the various xerographic equipments installed all over the country as also trading in paper, fax, laser printer, etc., through its branches all over India and corporate office located at New Delhi. It was, therefore, submitted that the deductions u/s 80HH and 80-I is to be determined with reference to the profits derived from eligible industrial undertakings and not with reference to the aggregate profits of the appellant. As has been held by Karnataka High Court in the case of CIT V. Siddaganga Oil Extraction Pvt. Ltd. 201 ITR 968. It was further submitted that the hon'ble Apex Court in the case of CIT Vs. Canara Workshops P. Ltd. 161 ITR 320 held that in the application of sec. 80E of the Income-tax Act the profits and gains earned by one priority industry cannot be reduced by the loss suffered by any other industry or industries owned by the assessee. Each industry must be considered on its own working only. It was further submitted that the Delhi Bench Tribunal in the case of Rajasthan Petro Synthetics Ltd. v. DCIT : 60 ITD 682 held that deduction u/s 80HH/80-I was admissible to the assessee in respect of the profits of the first unit without reducing therefrom the losses incurred in the second unit. The ld. A.R. further submitted that the A.O. has alleged that in the present case that service was inextricably linked to the appellant's business and taking away after the after-sale service would result in reducing the appellant's productivity. On that reasoning the assessing officer has concluded that the appellant constituted one exclusive industry having three units. In this connection, it is argued that sale services is provided under a separate contract entered into by customers at his option. It is not compulsory for the customer to opt for the after-sales service contract which would go to show that the income from sale of photocopying machine is de hors the rendering of after sale service and that the two activities are independent of each other. Whereas the manufacturing activities of the industrial undertakings are carried on at Rampur, UP, the services and t rading activities are carried out by the corporate office at Delhi and various branches located all over the country. The fact that services and trading activities are carried out from locations other than Rampur (where the industrial undertakings are located) would also go to show that the income derived from the industrial undertakings. The ld. A.R. therefore, strongly supported the order passed by CIT (A).

4. We have heard the rival parties and perused the material available on record and are of the opinion that manufacturing units and services unit are independent to each other. Deductions u/s 80HH/80-I are allowable only in the case of manufacturing unit and not service units. We, therefore, feel that the ratio of the decision relied upon by ld. A.R., are fully applicable to

> the facts of these cases and the CIT(A) was reasonable and justified in allowing this claim. This ground of appeal taken by revenue, therefore, fails."

Sri R.K. Upadhyay, learned Standing Counsel, submitted that the deduction under Sections 80-HH and 80-I is admissible on the gross profit of the assessee company which is to be computed on the consideration of profits of the two companies and the loss of the third unit. In support of the contention he relied upon the decision of the apex Court in the case of ***Synco Industries Ltd. v. Assessing Officer (Income-tax) and another reported in (2008) 299 ITR 444 (SC)*** and the decision of the apex Court in the case of ***Liberty India v. Commissioner of Income-Tax, reported in (2009) 317 ITR 218 (SC)***.

In the case of ***Synco Industries Ltd. v. Assessing Officer (Income-tax) and another*** (Supra), the Apex Court while dealing with the deductions under Chapter VI-A of the Income Tax Act which provides deductions under Sections 80A, 80AB, 80B(5), 80HH, 80-I, contemplates special deductions to the new industrial units from the gross total income. The fact of that case was that the assessee was engaged in the business of oil and chemical. It had a unit for oil division in Sirohi and a unit for chemical division in Jodhpur. For the assessment years 1990-91 and 1991-92 it had earned profits in both the units. But in the earlier years the assessee had suffered losses in the oil division. In relation to the deductions under Sections 80HH and 80-I of the Income Tax Act, 196, it claimed that each unit should be treated separately and the losses suffered in the earlier years by the oil division were not adjustable against the profits of the chemical division. Since the gross total income after the adjustment of the losses was nil the Assessing Officer held that the assessee was not entitled to the benefit of deductions under Chapter VI-A of the Act. The Appellate Tribunal and High Court have confirmed the view of the Assessing Authority. The Apex Court held as follows:

"The above discussion makes it very evident that predominant majority of the High Courts have taken the view that while working out the gross total income of the assessee the losses suffered have to be adjusted and if the gross total income of the assessee is "nil" the assessee will not be entitled to deduction under Chapter VI-A of the Act. It is well-settled that where the predominant majority of the High Courts have taken a certain view on the interpretation of certain provisions, the Supreme Court would lean in favour of the predominant view. Therefore, this Court is of the opinion that the High Court was justified in holding that the gross total income must be determined, by setting off against the income, the business losses of earlier years, before allowing deduction under Chapter VI-A and if the resultant income is "nil", then the assessee cannot claim deduction under Chapter VI-A.

The contention that under section 80-I (6) the profits derived from one industrial undertaking cannot be set off against loss suffered from another and the profit is required to be computed as if profit making industrial undertaking was the only source of income, has no merit. Section 80-I(1)lays down that where the gross total income of the assessee includes any profits derived from the priority undertaking/unit/division, then in computing the total income of the assessee, a deduction from such profits of an amount equal 20 per cent. has to be made. Section 80-I (1) lays down the broad parameters indicating circumstances under which an assessee would be entitled to claim deduction. On the other hand, section 80-I (6) deals with determination of the quantum of deduction. Section 80-I (6) lays down the manner in which the quantum of deduction has to be worked out. After such computation of the quantum of deduction, one has to go back to section 80-I (1) which categorically states that where the gross total income includes any profits and gain derived from an industrial undertaking to which section 80-I applies then there shall be a deduction from such profits and gains of an amount equal to 20 per cent. The words "includes any profits" used by the Legislature in section 80-I (1) are very important which indicate that the gross total income of an assessee shall include profits from a priority undertaking. While computing the quantum of deduction under section 80-I (6), the Assessing Officer, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income in order to arrive at the deductions under Chapter VI-A. However, this Court finds that non obstante clause appearing in section 80-I (6) of the Act, is applicable only to the quantum of deduction, whereas, the gross total income under section 80B (5) which is also referred to in section 80-I (1) is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking. If the interpretation as suggested by the appellant is accepted it would almost render the provisions of section 80A (2) of the Act nugatory and, therefore, the interpretation canvassed on behalf of the appellant cannot be accepted. It is true that under section 80-I (6) for the purposes of calculating the deduction, the loss sustained in one of the units, cannot be taken into account because sub-section (6) contemplates that only the profits shall be taken into account as if it was the only

> **source of income. However, section 80A (2) and section 80B (5) are declaratory in nature. They apply to all sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and, therefore, the non obstante clause in section 80-I (6) cannot restrict the operation of sections 80A (2) and 80B (5) which operate in different spheres. As observed earlie, section 80-I(6) deals with actual computation of whereas section 80-I (1) deals with the treatment to be given to such deductions in order to arrive at the total income of the assessee and, therefore, while interpreting section 80-I (1), which also refers to gross total income one has to read the expression "gross total income" as defined in section 80B (5). Therefore, this court is of the opinion that the High Court was justified in holding that the loss from the oil division was required to be adjusted before determining the gross total income and as the gross total income was "nil" the assessee was not entitled to claim deduction under Chapter VI-A which includes section 80-I also.**
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> **The proposition of law, emerging from the above discussion is that the gross total income of the assessee has first got to be determined after adjusting losses, etc., and if the gross total income of the assessee is "nil" the assessee would not be entitled to deductions under Chapter VI-A of the Act."**

In the case of ***Liberty India v. Commissioner of Income-Tax*** (Supra), the Apex Court held that Chapter VI-A of the Act provides for incentives in the form of deductions essentially belongs to the category of "profit-linked incentives". Therefore, when section 80-IA/80-IB refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives; what attracts the incentives under section 80-IA/80-IB is the generation of profits (operational profits). It is for this reason that Parliament has confined deduction of profits derived from eligible business mentioned in sub-sections (3) to (11A). Sections 80-IB and 80-IA are a code by themselves as they contain both substantive as well as procedural provisions. Section 80-IB provides for the allowing of deduction in respect of profits and gains derived from the eligible business. The connotation of the words "derived from" is narrower as compared to that of the words "attributable to". By using the expression "derived from" Parliament intended to cover sources not beyond the first degree. In this view of the matter, the duty drawback received and DEPB benefits have been held not form part of the net profits of eligible industrial undertaking for

the purposes of the deduction under sections 80AB, 80-I, 80-IA (1), 80-IB.

Learned counsel for the assessee submitted that the decision of the apex Court in the case of ***Synco Industries Ltd.*** *(supra)* has been considered by the Division Bench of the Delhi High Court in a recent decision in ITA No. 1279 of 2008 (Commissioner of Income Tax v. Sona Koyo Seering Systems Ltd.) decided on 10.2.2010 wherein it has been held that the Supreme Court did not at all hold that while computing the deduction under Section 80-IA of the Act the loss of one eligible industrial undertaking is to be set off against the profit of another eligible industrial undertaking. All that the Supreme Court said was that in computing the gross total income of the assessee, the same has to be determined after adjusting the losses and that, if the gross total income of the assessee so determined turns out to be 'Nil', then the assessee would not be entitled to deduction under Chapter VI-A of the said Act.

The Division Bench of the Delhi High Court has followed its earlier decision in the case of ***Commissioner of Income-tax v. Dewan Kraft Systems P. Ltd.*** reported in *297 ITR 305 (Delhi)* wherein it has been held that while computing deduction under Section 80-IA of the said Act the profits and gains of the Kalamb Unit for the purposes of determining the quantum of deduction under Section 80-IA(5) was to be computed as if such eligible business of the said unit was the only source of income of the assessee. The Delhi High Court further observed that the Assessing Officer had erroneously mixed the profits of the Delhi and Noida units and had thereby restricted the deduction to the extent of business income and that such an exercise was in total disregard of the provisions of sub-section (7) of Section 80-IA of the said Act. It was held that the Kalamb unit, being the only unit of the assessee eligible for deduction under Section 80-IA of the said act, was to be treated as an independent unit and the same was to be

treated as the only source of income of the assessee for the purposes of computing deduction under section 80-IA of the Act.

The assessee had three units, two manufacturing units and one service unit. The assessee had worked out the profit and loss as under:

(I) Xerographic undertaking-income 2,99,64,490

(II) Toner, Developer, Photoreceptor Undertaking-income 32,94,16,078

(III) Service Unit loss 25,00,06,600

The assessee, however, disclosed nil net income after the adjustment of the unabsorbed business loss, investment allowances, depreciation, etc. The deduction under Sections 80HH and 80-I have been claimed before adjusting the unabsorbed business loss, depreciation and investment allowance of the earlier years amounting to Rs.10,93,172/- on the basis of the profits of the two undertakings. The assessing authority proposed to adjust unabsorbed/brought-forward losses and allowances of all the three units. In appeal, the Commissioner of Income Tax (Appeal) has held that the deduction to the undertakings are to be allowed on the profits and gains derived from each industrial undertaking but the income of the industrial undertaking eligible for deduction means income determined after adjusting unabsorbed business loss, investment allowances and depreciation. The claim of the assessee for deduction without adjustment of unabsorbed business loss, depreciation and investment allowances has not been accepted. The Commissioner of Income Tax (Appeal) held that Sections 80-HH and 80-I only refer the income derived from industrial undertaking, thus the income derived by the two manufacturing units are only to be considered for the purposes of the deduction. However, for the computation of the income derived by the industrial undertaking, the matter has been remanded back to the Assessing Officer. The Tribunal by the impugned order has upheld the

view of the Commissioner of Income Tax (Appeal).

We have considered the facts and circumstances of the present case and the law laid down by the Apex Court and the decision of the Delhi High Court referred herein above. It is not the case of the assessing authority that the gross income of the Company was nil. From perusal of the income disclosed to all the three units it appears that the gross income was not nil and, therefore, the assessee was eligible to claim the deduction under Sections 80-HH and 80-I of the Act. After becoming eligible to claim the deduction, the question for consideration is that whether deduction is eligible to the income derived to each industrial undertaking independently or on a consideration of the losses suffered by the service unit. Sections 80-HH and 80-I of the Act contemplate the deduction from the income derived by the undertaking. The CIT (Appeal) has rightly held that income of the undertaking shall be calculated on a consideration of an absorbed business losses, etc. in respect of each individual unit and thereafter on the profit derived by the unit the deduction is to be allowed. This view of the CIT (Appeal) confirmed by the Tribunal is in accordance to provisions of the Act as well as inconsonance with the law laid down by the Apex Court and Delhi High Court. The Apex Court in the case of ***Synco Industries Ltd. v. Assessing Officer (Income-tax) and another*** (Supra) has held that non obstante clause appearing in Section 80-I (6) of the Act is applicable only to the quantum of deduction, whereas, the gross total income under Section 80B (5) which is also referred to in section 80-I (1) of the Act is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking. The Apex Court further held that under Section 80-I (6) of the Act for the purposes of calculating the deduction, the loss sustained in one of the units, cannot be taken into account

because sub-section (6) of the Act contemplates that only the profits shall be taken into account as if it was the only source of income. Therefore from the decision of the Apex Court, two principle of laws emerges- one for the purposes of computation of gross total income the losses of other units are to be taken into account but for the purposes of calculating the deduction of industrial undertaking, the loss sustained in another unit cannot be taken into account and only the profit shall be taken into account as if it was the only source of income of that unit. In this view of the matter, we are of the view that there is no error in the order of the Tribunal.

In the result, the appeal is allowed in part, as stated above.

Dated : 15.4.2010.
PG.