IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' NEW DELHI)

BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

I.T.A. No.253/Del/2009
Assessment year : 2005-06

DCIT, Haldwani.	V.	M/s Raj Laxmi Stone Crusher Pvt. Ltd., Nainital Road, Haldwani.

AND

I.T.A. No.349/Del/2009
Assessment year: 2005-06

M/s Raj Laxmi Stone Crusher Pvt. Ltd., Nanital Road, Halswani.	V.	DCIT, Haldwani.
(Appellant)		(Respondent)

PAN /GIR/No.AABCR-0021-Q

Appellant by : Shri KK Mishra, Sr. DR.
Respondent by : Shri Ashwani Taneja, Advocate
Shri Somil Aggarwal, C.A.

ORDER

PER TS KAPOOR, AM:

These are two appeals, one by the assessee and one by the Revenue. These appeals were heard together and for the sake of convenience are being disposed off by this common order. The grounds raised by the revenue are as under:-

1. The Ld CIT(A) has erred in law and on facts of the case in deleting the addition of ₹.16,33,645/- on account of disallowance u/s 40A(2)(b) of the Income Tax Act, 1961 ignoring the facts brought on record by the Assessing Officer that both average manufactured cost and selling rate is less than the purchase rate of the assessee. Moreover, Ld CIT(A) has accepted the arguments of the assessee not supported by any evidence.

2. The Ld CIT(A) has erred in law and on facts of the case in deleting the addition of ₹.53,000/- on account of legal fee of being capital nature ignoring the fact that the amount has been spent for increasing the authorized capital of company which is a one time expenditure and not a recurring expenditure, secondly the nature of expenditure has nothing to do with commencement of the business.

2. The grounds raised by the assessee are as under:-

1. That having regard to the facts and circumstances of the case, Ld CIT(A) –II, Dehradun has erred in law and on facts in confirming the action of the ld Assessing Officer in making addition of ₹.49,00,462/- on account of illegal transportation on the basis of surmises and assumptions without placing any corroborating material and by recording incorrect facts and observations purely on the basis of third party reports the findings which were also stayed by the higher authorities.
2. That having regard to the facts and circumstances of the case, the Ld CIT(A) –II, Dehradun has also erred in law and on facts in confirming the action of the Ld Assessing Officer in making addition of ₹.45,89,133/- on account of illegal stock on the basis

of surmises and assumptions without considering the relevant material and by recording incorrect facts and observations purely on the basis of third party reports, the findings of which were also stayed by the higher authorities who also regularized the same on 28.3.2008 considering the same has having mined from the pit and collecting the royalty accordingly. The said income has been brought to accounts in the financial year 2007-08 resulting in double taxation of the same income once in assessment year 2005-06 and second in assessment year 2008-09.

3. That having regard to the facts and circumstances of the case, the Ld CIT(A) –II, Dehradun has further erred in law and on facts in confirming the action of the Assessing Officer in disallowing a sum of ₹.62 lakhs as having covered under the provisions of section 40a(ia) in complete disregard to the departmental circulars and the terms of the agreement on record failing to appreciate that the TDS provisions for hiring of machine and equipments were introduced by the IT Amendment Act, 2006 and the same could not have been made applicable retrospectively from assessment year 2005-06.
4. The Ld CIT(A) has also erred in law and on the facts of the case in not giving benefit of provisions of section 80-IB of the IT Act which are applicable to the unit and the same was not claimed in the original return as the company had nil profit due to brought forward losses. The said rejection of claim is against the spirit of the Board Circular No.14(XL-35) dated 11th April, 1955.
5. That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.

3. The brief facts of the case are that the assessee company is engaged in running of stone crusher and manufacturing of stone grits and stone dust which are extracted from Gola river, Haldwani (acquiring rights from Forest Department of Uttranchal Pradesh). The return declaring net income of nil was filed on 31.10.2005 which was processed u/s 143(1) on 5.5.2006. Later on notice u/s 143(2) was issued. The assessment proceedings were concluded and the following additions were made:-

i) Disallowance u/s 40A(2)(b) in respect of alleged purchase of finished goods at comparatively high price ₹.16,33,645/-.
ii) Plant & Machinery by treating heavy bill for a component used for replacement as capital expenditure ₹.5,20,000/-.
iii) Petty un-verifiable expenses ₹.1.50,000/-
iv) Legal fee for increasing capital of the company ₹.53,000/-.
v) Out of running and hired vehicles ₹.1,00,000/-.
vi) Penalty on account of illegal mining ₹.75,000/-.
vii) Illegal transportation (Un-disclosed sales) ₹.49,00,452/-.
viii) Illegal stock of ₹.45,89,133/-.
ix) Disallowance u/s 40a(ia) in respect of non deduction of TDS on fixed monthly hire charges of transportation ₹.62 lakhs.

4. Aggrieved by the above, the assessee company filed an appeal before Ld CIT(A). The Ld CIT(A) vide his order dated 8.1.2008 deleted the addition at (i) to (iii) above. Aggrieved, by the CIT(A)'s order both the Department and the assessee has filed separate appeals. The

Department has filed appeal against deletion of addition made u/s 40A(2)(b) amounting to ₹..16,33,645/- and ₹.53,000/- being legal fee being capital in nature. Whereas the assessee has filed appeal against confirmation of addition of ₹.49,00,452/- on account of illegal transportation and ₹.45,89,133/- being illegal stock. The appeal of the assessee also include confirmation of disallowance u/s 40a(ia) in respect of hiring of machines and equipments on the ground that TDS was not deducted. We will first take up the appeal filed by the Department.

5. Ground No.1 relates to addition of ₹.16,33,645/- on account of disallowance u/s 40A(2)(b) of the Act. During the assessment year, the assessee has purchased finished goods weighing 326729 qtls from its sister concern @ ₹.18.50 per qtl. The Assessing Officer observed that the cost of manufactured goods came to ₹.11.87 per qtl. And in view of difference between the cost of manufactured goods and cost of purchase from sister concern covered u/s 40A(2)(b) of the Act, the Assessing Officer made addition of ₹.16,33,645/- @ ₹.5/- per qtl. on total purchases of 326729 qtl. The contention of the assessee that the purchases were made on FOR basis and the purchases were made at prevalent market price during the month of March did not find favour with the assessee. The assessee during pleadings before Ld CIT(A) submitted the following arguments in support of its defence that payments against purchases made from sister concern were not excessive.

1. That the appellant company has made the above purchases to tied over the crisis in the subsequent month of May, June and July when the raw material availability becomes very poor and mining activity is closed.

2. The material was sold @ ₹.20/- per qtl. in the subsequent month thereby earning profit of ₹.1.5/- per qtl.
3. The goods were purchased on credit and thereby the appellant saved on account of interest on such payments.
4. The material was purchased on FOR basis and freight was borne by the supplier.

6. The Ld CIT(A) after hearing the submissions of the assessee agreed with the contentions made by the assessee and deleted the addition of ₹.16,33,645/-. While deleting the addition, the Ld CIT(A) had made the following observations:-

1. That the negotiated price of ₹.18.50 contains consideration of making delayed payments to the seller and therefore ultimately the company has made surplus on such sales.
2. That though the material was lifted from December, 2004 to March, 2005 the rates were finalized only in the month of March, 2005 when the selling rate of material was ₹.20/- per qtl. Therefore, the purchase rate of ₹.18.50/- per qtl. was not excessive specifically keeping in view the fact that the materials were supplied on FOR and the appellant had saved notional interest on working capital for a period of about 8 months. The operative part of Ld CIT(A)'s order in this regard is reproduced below:-

"I am in agreement with the contention of the counsel of the appellant that under business exigencies of the situation, the appellant had to resort to purchase at the prevailing market price when the purchase negotiation actually got settled during March, 2005 and therefore the rejection of such purchase rate is

not tenable and therefore I am not in a position to sustain the addition made by the Assessing Officer u/s 40A(2)(b) of the IT Act by adopting an estimated rate of such purchase at ₹.13.50 per qtl. as against the actual rate of purchase at ₹.18.50/- per qtl. and accordingly the Assessing Officer is hereby directed to delete such addition of ₹.16,33,645/-."

7. Aggrieved the Department is in appeal.

8. The Ld DR argued that whatever stock was purchased in the month of March, was lying as stock in trade in the month of March and therefore there was no business exigencies and therefore he pleaded that there is contradiction in the order of Ld CIT(A) wherein the Ld CIT(A) had stated that during business exigencies the assessee could have to purchase at a litter higher price. Therefore, he argued that the orders of Ld CIT(A) be reversed and the order of Assessing Officer be restored.

9. The Ld AR argued that purchases were compulsory as its p[rice varies from time to time. The moment supply decreased the price tend to increase. He further argued that past average cannot be taken for determining the present market price. The Assessing Officer had taken the average of past price and had compared it with the purchase price paid by the assessee whereas it should have been compared with the present market price which was ₹.20/- per qtl. He further argued that since the stock was lying as on 31st March, and was valued as its purchase price, there is no impact on profit/loss of the year.

10. We have heard the rival submissions of both the parties and have gone through the material available on record. We have observed

that Ld CIT(A) had rightly deleted the addition by comparing the purchase p[rice paid by the assessee with the market price prevalent at the time of purchase i.e. in the month of March. Moreover CIT(A) has rightly observed that goods were purchased on FOR basis as there was no freight debited in the books of assessee which the Assessing Officer could have easily checked from the books of accounts. Similarly his observation regarding consideration of element of interest in the price is also correct as the assessee benefited from the saving in notional interest. Therefore, keeping in view all these elements like consideration of market price in March, 2005, element of interest and saving of freight, the Ld CIT(A) has rightly reversed the order of Assessing Officer on this ground. Therefore, we do not see any reason to interfere in the order of Ld CIT(A). This ground of the revenue is dismissed.

11. The next ground relates to addition of ₹.53,000/- on account of legal fees. The assessee had incurred an amount of ₹.66,500/- under the head legal expenditure. The amount included ₹.53,000/- for increase in the authorized share capital of the company. The Assessing Officer rejected this amount of ₹.53,000/- as being of revenue nature and thereby added back the amount of ₹.53,000/- considering it expenditure of capital nature.

12. Before Ld CIT(A), the Ld AR submitted that ₹.53,000/- was paid to Registrar of Companies for increase in the authorized share capital; of the company and the expenditure was incurred after the commencement of business and therefore is a regular revenue expenditure and should be allowed as normal business expense. The Ld CIT(A) after considering the submissions of the assessee agreed

with the contentions deleted the addition of ₹.53,000/-. The relevant portion of Ld CIT(A)'s order is reproduced below:-

> "I find enough force in the contention of the counsel of the appellant and since the expenses have been laid out after the commencement of operation, the same should constitute revenue expenses and accordingly the same should be allowed in the assessment. In view of these facts, the Assessing Officer is hereby directed to delete the addition of ₹.53,000/- under the head legal expenses."

13. Aggrieved, the revenue is in appeal before us.

14. The Ld DR argued that ₹.53,000/- is a capital expenditure being incurred for increase in share capital of the company and therefore should not be allowed as revenue expenditure.

15. On the other hand, Ld AR submitted that the amount is a regular business expenditure and was incurred after commencement of business and therefore it is a revenue expenditure to be allowed against the profits of the company.

16. We have heard the rival submissions of both the parties and have gone through the material available on record. We are of the considered opinion that the expenditure incurred for increase in the share capital of the company after commencement of business is not a capital expenditure but a regular business expenditure of revenue nature. Therefore, we do not see any reason to interfere in the order of Ld CIT(A). Hence, the second ground raised by the revenue in this appeal is dismissed.

Assessee's appeal:

17. The first & second ground in the assessee's appeal relates to disallowance of addition of ₹.49,00,462/0 on account of illegal transportation + ₹.4589133/- on account of illegal stock. During the year under consideration, a survey was conducted at the premises of the appellant by the Forest Department of Uttrakhand. On the basis of material found during the course of survey, the DM Nainital passed order on 19.3.2005 holding that during the year under consideration, the appellant has done illegal transportation of 6551029 cubic meters of stone grits. It was held by the DM, Nainital that during the year, the appellant has done illegal mining of 77885.57 cubic meters of stone. Further it was alleged that the appellant is found to be in possession of illegal stock of 52567.43 cubic meters of stone boulders. The DM, Nainital passed order on dated 19.3.2005 wherein it was held as under:-

1. That the appellant has done illegal mining of 77885.57 cubic meters for which compounding fees of ₹.21,17,793/- was imposed.
2. The appellant was having illegal stock of 52567.43 cubic meters of stone for which compounding fees of ₹.50,18,906/- imposed.
3. That the appellant has done illegal transportation for 65510.29 cubic meters of stone grits for which compounding fees of ₹.1,71,23,186/- was imposed.

18. The Assessing Officer on the basis of these orders calculated the undisclosed sales of ₹.1,60,01,540/.- and after applying 30% profit on turnover arrived at a figure of ₹.48,00,452/- as being profits earned by

the assessee out of books of account. A sum of ₹.one lakh was also added to this figure being capital employed for running such business outside the books, thus, making total addition of ₹.49,00,462/-. The Assessing Officer further alleged that the assessee must have incurred expenses on account of labour and transport charges outside the books of accounts. He took ₹.4.85 per qtl. as average transportation and labour charges and therefore calculated an amount of ₹.45,89,133/- being payments made for labour and transportation outside the books of account and added the same to the total income of the assessee. Aggrieved, the assessee filed appeal before Ld CIT(A).

19. The Ld AR submitted the following submissions before Ld CIT(A):-

1) That the Assessing Officer has wrongly made the addition on account of illegal mining/illegal transportation on the basis of report of DM, Nainital which had already been stayed by Commissioner due to inheritance weakness in the findings of investigating agencies.
2) That the ld Assessing Officer proceeded to make superfluous addition on the basis of further assumption on the basis of said report of DM, Nainital without placing any material on record and without finding any defect in the accounts.
3) The Assessing Officer failed to take note of the fact that Ld DM, Nainital had initially allowed the appellant the right to transport and use the material by him from his own site by depositing the royalty and compounding fees and later on cancelled his own order arbitrarily without assigning any reason.

20. The Ld CIT(A) after going through the submissions filed by Ld AR did not accept the contentions made by Ld AR and confirmed both the additions. The operative part of the Ld CIT(A)'s order is reproduced below:-

> "Since the Mining Officer and the Joint enquiry Committee consisting of officials of Forest Department, PWD and revenue Department were the experts who has determined the quantum of illegal mining and illegal transportation and illegal possession of stock, the report of such authorities cannot be brushed aside. Further, DM, Nainital being competent authority to evaluate such reports, I have no other fresh materials to differ from the findings of such authorities and accordingly the addition made by the Assessing Officer towards the undisclosed sales to the tune of ₹.49,00,462/- is hereby upheld. Similarly, the Assessing Officer has made an addition of ₹.45,89,133/- on account of undisclosed investment towards the payments of labour and transportation charges outside the books of accounts which is also found to be in order and no interference is called for."

21. Aggrieved, the assessee filed appeal before this Tribunal.

22. The Ld AR submitted that under similar circumstances and in the same State of Uutranchal similar additions were made and the Hon'ble ITAT has set aside the files to the respective Assessing Officers. in this respect and he took us to page 5 to 78 of paper book wherein copies of judgments in the following cases as decided by ITAT were placed.

1. M/s Uttrakhand Stone Products v. DCIT in I.T.A. No. 347/Del/2007 dated 26.4.2010.

2. M/s Jai Shree Ram Stone Crusherrs (P) Ltd.v. DCIT in I.T.A. No. 348/Del/2009 dated 26.9.2011.
3. M/s JP Stone Crushers (P) Ltd. v. DCIT in I.T.A. No. 350/Del/2009 dated 25.10.2011.

He further requested that since the facts of present case are similar to the facts in the cases listed above therefore the case of the assessee on these points be also remitted back to the file of the Assessing Officer.

23. The Ld DR did not raise any objection.

24. We have heard the rival submissions of both the parties and have gone through the material available on record. We have also gone through the said ITAT orders in the case of above three assesses and have found that the facts of the present case are similar to the facts of above three cases relied upon by the Ld AR. The operative part of the Tribunal order in the case of M/s Jai Shree Stone Crushers (P) Ltd. is reproduced below:-

> "5. We have duly considered the rival contentions and gone through the records carefully. No doubt there was survey by the Forest Department, Revenue Department and PWD of the State of Uttarakhand. But the proceedings arising from such survey for the purpose of determining the violation of the terms of lease agreement etc. have not attained finality. The penalty imposed by the Ld. District Magistrate, Nainital for such violation is under challenge before the Divisional Commissioner, Nainital. Thus, the information in the shape of any corroborative evidence considered by the A.O. for charging the assessee with having

excess stock is premature information. Considering this aspect, we set aside this issue to the file of the A.O. for re-adjudication. He shall take into consideration the outcome of survey carried out by the authorities of the State Government as corroborative piece of evidence and then determine the issue whether the assessee has excess tock or not at the end of the accounting year. This information received from the state Government would be the information, which comes out after the determination of issue in pursuance of the order of Divisional Commissioner, Nainital. Needless to say that observation made by us will not impair or injure the case of the A.O. or would cause any prejudice to the defense/ explanation of the assessee in the fresh proceedings. The A.O. shall afford due opportunity of hearing to the assessee."

25. Respectfully following the Hon'ble Tribunal order in the cases based upon identical facts, we are incline to restore the issues involved on these points in this appeal back to the file of the Assessing Officer for fresh adjudication after taking into account the final outcome of survey and after providing reasonable opportunity of being heard to the assessee. Needless to say that observations made by us will not impair or injur the case of the Assessing Officer as would not cause any prejudice to the defence explanation of the assessee in the fresh proceedings.

26. The third ground of appeal is regarding disallowance u/s 40a(ia) of the Act for non deduction of tax. During the year, the assessee company has paid lease rent amounting to ₹.62 lakhs to M/s Radha Transport Agency and M/s Parveen Stone Crusher amounting to ₹.50 lakhs and ₹.12 lakhs respectively for using JCV/dumper. The Assessing Officer noted during assessment proceedings that tax was not

deducted on payments made for use of these trucks/dumpers. The assessee was required to explain as to why these payments should not be disallowed u/s 40a(ia). The assessee replied that no tax was required to be deducted as the transaction was not covered by the provisions of section 194C and 194-I of the Act and he further pleaded that this type of transaction has been covered by Taxation Laws Amendment Act, 2006 w.e.f. 13.7.2006. However, the Assessing Officer did not accept the contention and disallowed the sum of ₹.62 lakhs considering this as contractual payment in performance of works contract. The operative part of the Assessing Officer's order is reproduced below:-

> "From the copy of agreement filed, it is clear that the assessee has entered into a contract with lesser to use his dumpers/JCV loaders at a fixed price per month for transporting goods. The contracts are terminable at a notice of two months. Thus, it is clear that it is a case of transporting goods contract where expenses are to be borne by the assessee but the dumpers/JCV was to be provided by M/d Radha Transport Agency and M/s Parveen Stone Crushers."

27. Aggrieved, the assessee filed appeal before Ld CIT(A) and submitted as under:-

> 1) That Assessing Officer had made the addition illegally and against the provisions of law in complete disregard to departmental circulars and terms of agreement on record.

2. That TDS provision for hiring of machines/equipments were introduced by the Income Tax Amendment Act, 2006 and the same could not have been made applicable retrospectively.

3. The Assessing Officer contradicted his findings made in para 8 of the order considering the transaction as running and maintenance of hired vehicle for the purpose of making disallowance of ₹.1 lac.

4) The Assessing Officer had deliberately failed to distinguish between hiring of machines and transportation contract.

28. The CIT(A) did not agree with the contentions of Ld AR and upheld the addition made by the Assessing Officer. The operative part of Ld CIT(A)'s order is reproduced below:-

"I am not agreeable to such contention used by the counsel of the appellant because the transaction of taking dumpers/JCB loaders at a fixed price per month as per contract entered into by the appellant with the lessor constitutes a works contract and therefore the provision of section 194C are clearly applicable."

29. Aggrieved the assessee filed appeal before the Tribunal.

30. We have heard the rival parties and have gone through the material placed on record. Before us the Ld AR argued that the said agreement for supply of dumper was not a works contract and it was only for supply for dumpers which is nothing but equipments. Reliance was placed on the following judgments:-

1. Mithari Transport Corporation v. ACIT Viashakapatnam Bench reported in 124 IITD 40.
2. DCIT v. Satish Aggarwal & Co. (Asr Bench) 124 TTJ 542.
3. Datta Digamber Sahkari Sansthan v. ACIT ITAT Pune Bench 83 ITD 148.

31. The Ld AR brought before our notice that all these cases were cases decided by different Benches of the Tribunal. It was held in all cases that where the vehicles are simply placed at the disposal of the assessee without involving themselves carrying out any part of work, it cannot be said that the payments made for hiring of vehicles fell in the category of payments towards contract and therefore the assessee was not liable to deduct tax at source.

32. The Ld DR relied upon the orders of the Assessing Officer and the Ld CIT(A) and argued that the payments made by the assessee squarely fit in the provisions of section 194C of the Act as is clear from the terms and conditions of lease agreement of dumpers.

33. We have considered the orders of the Assessing Officer and those of Ld CIT(A). From the plain reading of relevant portion of Assessing Officer's order, it is observed that Assessing Officer had relied on the terms and conditions of lease agreement wherein dumpers were leased to the lessee at a fixed price for transport of goods and moving and shifting of material. The Assessing Officer further observed that lease rent paid are nothing but transport contract or works contract, therefore, in his opinion, the provisions of section 194C of the Act were clearly applicable. The Ld CIT(A) also took the view that contract entered into by the appellant with the lesser

constitutes service contract and therefore the provisions of section 194C are clearly applicable.

34. The Assessing Officer in his order at para 12 of page 08 has clearly mentioned that it is a transporting contract where expenses are to be borne by the assessee but the dumpers/JCB was to be provided by M/s Radha Transport Agency and M/s Pasrvin Stone. In fact the Assessing Officer himself has admitted in his order that dumpers/JCB were hired and all expenses were borne by the assessee. This establishes the fact that agreement was for lease of dumpers/JCB only and there was no agreement for executing any work or contract and hence cannot be classified as works contract or a service contract. To arrive at the correct conclusion in the present case we have to compare the facts of the present case with the facts of cases relied upon by the Ld AR which are as under:-

1. Mithari Transport Corporation v. ACIT Vishakhapatnam Bench reported in 124 ITD 40.

The assessee a transport contractor hired lorries from other persons to transport bitumen to various points as per directions of the owners of goods. The assessee himself executed the contract of transportation of Bitumen. The lorry owners had simply placed the vehicles at the disposal of the assessee without involving themselves in carrying out any part of the work undertaken by the assessee. It was held that payments to lorry owners cannot be categorized as payments towards sub contracts and therefore assessee was not liable to deduct tax at source as per the provisions of section 194C and consequently the provisions of section 40(a)(i) were not applicable such payments.

DCIT v. Satish Aggarwal & Co. 124 TTJ 542 (Amritsar):

The assessee hired trucks for a fixed period on payment of hire charges. There was no agreement for carrying out any work or to transport any goods as or passengers from one place to another. It was held that hiring of trucks for the purpose of using them in assessee's business did not amount to contract for carrying out any work as contemplated in section 194C. For carrying out any work manpower is the sine qua non. Mere providing of the trucks without any manpower can not be termed as carrying out any work by the truck owners. Once the contract was not for carrying out any work, the provisions of section 194C were not attracted.

Datta Digamber Sahakari Kamgar Sansthan Ltd. v. ACIT 83 ITD 148 (Pune).

Assessee a Cooperative Society engaged in executing contract for transportation of milk of the Govt. Milk Schemes by using tankers belonging to its members on payment of transport charges. Transport work undertaken by the assessee society was so complex that no individual tanker owner could be said to be carrying out any part thereof. Tanker owners had merely entrusted these tankers to the assessee society. Therefore, it could not be said that the assessee society had given further sub contract to it's own members. Therefore, provisions of section 194C were not applicable.

35. The facts of the cases relied upon by Ld AR are similar to the facts of present case and hence the ratio laid down in those cases is applied to the present case and is concluded that in the present case

assessee was not required to deduct tax on payments made for lease of dumpers. In view of the above, the appeal of the assessee is allowed.

36. The fourth and last ground of assessee's appeal is regarding non allowing of deduction u/s 80IB on the ground that it was not claimed in the original return of income. The Ld CIT(A) rejected this ground of appeal because of the fact that no claim was made in the return of income and no claim was made before Assessing Officer during assessment proceedings.

37. Before us Ld AR argued that even no claim was made in the return of income then also the assessee is eligible to get the benefit of deduction u/s 80IB of the Act. He pleaded that the objective of the Income tax proceedings is to assess fair amount of income and tax payable as per law. If any claim is allowable to the assessee and the assessee omits to make claim in the return, it was the duty of the Assessing Officer to inform the assessee about such omission and give him opportunity to make the claim as per law. He placed reliance in the decision of Delhi Bench of the Tribunal in the case of M/s JP Stone Crusher Pvt. Ltd. in I.T.A. No.3872/Del/2009, assessment year 2006-07 and in I.T.A. No. 350/Del/2009 for assessment year 2005-06 and in the case of Malika Arjun JEO Resources Associates in I.T.A. No.,5000/Del/2004 for assessment year 2002-03. Reliance was also placed on the decision of Hon'ble Tribunal in assessee's own case for assessment year 2006-07 in I.T.A. No.3874/Del/2009.

38. The Ld DR relied upon the order of Ld CIT(A) in this regard and argued that in the absence of any specific claim made by the assessee before Assessing Officer. The Ld CIT(A) was correct in dismissing this ground of appeal.

39. We have heard the rival parties and has gone through the material placed on record. We have also gone through the judgment of Hon'ble Tribunal in all cases relied upon by the Ld AR and has found the facts of the present case are similar only in the case in I.T.A. No.350/Del/.2009 wherein the Hon'ble Delhi Bench 'D' has dealt with the similar issue which was at ground No.3 of the appeal. The Tribunal has held in favour of the assessee and had remitted back file to the office of Assessing Officer for consideration of claim of assessee u/s 80IB. While deciding the matter, the Hon'ble Tribunal had considered various judicial pronouncements in which it was held that the authorities under the Act are under an obligation to act in accordance with law. If an assessee under a mistake, misconception or not being properly instructed is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes are collected.

40. Respectfully following the various judicial pronouncements, we are of the considered opinion that this issue also requires to be considered at the level of Assessing Officer. Therefore, we restore the same to the file of the Assessing Officer to be decided as per law. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

41. In the result, the appeal filed by the revenue is dismissed and he appeal filed by the assessee is allowed.

42. Order pronounced in the open court on the 25th day of May, 2012.

Sd/-	Sd/-
(A.D. JAIN) JUDICIAL MEMBER	(T.S. KAPOOR) ACCOUNTANT MEMBER

Dt. 25.5.2012.
HMS

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi).

Date of hearing	10.4.2012
Date of Dictation	16.5.2012
Date of Typing	18.5.2012
Date of order signed by both the Members & pronouncement.	25.5.2012
Date of order uploaded on net & sent to the Bench concerned.	