IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

I.T.A. Nos. 2029, 2030 & 2031 /Mds/2002
(Assessment Years : 1992-93, 1993-94 & 1994-95)

The Deputy Commissioner of Income Tax, Company Circle I(1), Chennai - 600 034 .	v.	M/s Arkema Peroxides India Pvt. Ltd., 1st floor, Balmer Lawrie House, 628, Anna Salai, Teynampet, Chennai - 600 018. PAN : AAACE1713F
(Appellant)		(Respondent)

I.T.A. Nos. 1427, 1428 & 1429/Mds/2011
(Assessment Years : 1992-93, 1993-94 & 1994-95)

M/s Arkema Peroxides India Pvt. Ltd., 1st floor, Balmer Lawrie House, 628, Anna Salai, Teynampet, Chennai - 600 018.	v.	The Commissioner of Income Tax (Appeals)-III, Chennai - 600 034 .
(Appellant)		(Respondent)

Revenue by : Shri K.E.B. Rengarajan, Junior Standing Counsel

Assessee by : Shri Saroj Kumar Parida, Advocate

Date of Hearing : 21.06.2012
Date of Pronouncement : 19.07.2012

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

These are appeals of the Revenue and assessee respectively for the impugned assessment year. While appeals of the Revenue are

directed against orders dated 17.9.2002 of Commissioner of Income Tax (Appeals)-III, Chennai, for the impugned assessment year, appeals of the assessee are directed against a revisionary order dated 20.12.2002 for assessment year 1992-93 and similar orders dated 23.12.2002 for assessment years 1993-94 and 1994-95 of Commissioner of Income Tax (Appeals)-III, Chennai.

2. Main issue arising in these appeals is regarding a claim of deduction under Section 80HH of Income-tax Act, 1961 (in short 'the Act') made by the assessee for the impugned assessment years.

3. Facts apropos are that assessee engaged in manufacture of polimerisation initiators, had acquired a large extent of land in Semmanikuppam Village in Cuddalore, South Arcot District, for setting up an undertaking for manufacturing these products. The said Cuddalore was declared as backward area in 1984. For the purpose of starting an industry, assessee received a letter of Indent on 12.11.1984. Assessee had entered into a collaboration agreement which was approved by Government of India on 9.11.1984. The Certificate of Incorporation of assessee was dated 14.3.1985 and it obtained its Certificate of Commencement of Business from Registrar of Companies on 2.4.1985. Assessee obtained Reserve Bank of India’s approval for collaboration agreement on 4.2.1986. It had received approval of

Department of Chemicals and Petrochemicals, Government of India on 8.1.1986. Application for Environment Clearance was put up by the assessee on 25.3.1986 and subsequently in December, 1986, assessee started production. Assessee filed its return for assessment year 1992-93 on 30.12.92, which was subsequently revised on 30.3.1994. Along with such revised return, assessee filed a note staking its claim for deduction under Section 80HH of the Act for ₹ 20,82,634/-. However, the Assessing Officer did not take the revised return into consideration, but proceeded to complete the assessment on the basis original return and claim made under Section 80HH was disallowed.

4. For assessment year 1993-94, return was filed on 30.12.93. The return was initially processed under Section 143(1)(a) of the Act, but later subjected to scrutiny proceedings. Along with the return, assessee it seems had given a detailed note staking its claim for deduction under Section 80HH of the Act. Nevertheless, Assessing Officer did not consider such claim made through note and completed the assessment without giving such deduction.

5. For assessment year 1994-95, assessee filed a return on 30th November, 1994. This was also subjected to scrutiny proceeding. Along with this return also, assessee filed a note staking claim for

deduction under Section 80HH of the Act. However, A.O., while completing the assessment, did not accept the claim of the assessee.

6. Assessee moved in appeal before CIT(Appeals) against refusal of A.O. to consider its claim under Section 80HH of the Act. Argument of the assessee was that it had taken irrevocable steps for locating an industrial undertaking in Cuddalore, which was a backward area as per Industrial policy. As per the assessee, the amendment introduced by Taxation Laws (Amendment) Act, 1986 retrospectively from first April, 1984, by which the Eighth Schedule to the Act which listed out backward districts was deleted, did not affect its claim since it had already taken steps for establishing the industrial undertaking. As per the assessee, though the Board by a notification No.165 dated 19.12.1986 had listed out the backward areas to which Section 80HH applied and though such list did not exclude South Arcot District in which Cuddalore fell, it would not be concerned or affected by such notification since its intention was to take advantage of the deduction available under Section 80HH and it had made substantial investment towards this end already. As per the assessee, the object of Section 80HH was to attract industrial investments in backward areas. Upto 9.9.1986, the backward areas were mentioned in Eighth Schedule to the Act, whereas, after that date, pursuant to amendment, only those areas covered in a notification

issued by Central Government and sub-section (11) of Section 80HH of the Act could be considered backward.

7. CIT(Appeals) called for a remand report from the A.O. The A.O., though he accepted in the remand report that the assessee had started all preparations to establish a unit in Cuddalore, which was a backward area as per Eighth Schedule as it stood, was of the opinion that when it started production in December, 1988, it was no more a backward area. CIT(Appeals), after going through the submissions of the assessee and remand report of the A.O., was of the opinion that in view of the decision of Hon'ble Apex Court in the case of Bajaj Tempo Limited v. CIT (196 ITR 188), Section 80HH had to be liberally interpreted. According to CIT(Appeals), if the subsequent notification by the Government was so interpreted to exclude certain areas, which otherwise could be considered backward by virtue of Eighth Schedule to the Act, then it would result in uncertainty and the investment made by the assessee would go in vain. CIT(Appeals) held that assessee was entitled to claim of deduction under Section 80HH since it had started all preparations to establish an industrial unit in Cuddalore, which was a backward area at the time when assessee had initiated steps to make investments for that purpose. He, therefore, directed the A.O. to allow the claim of the assessee for assessment year 1992-93.

8. For assessment year 1993-94, the CIT(Appeals) followed his order for assessment year 1992-93, though in such later years there were no revised returns filed by the assessee, but only claims made through notes attached to the returns of income.

9. Thereafter, on 20.12.2002, the CIT(Appeals) issued a revision to the appellate order for assessment year 1992-93 whereby he modified his order and denied the deduction under Section 80HH allowed by him earlier. According to him, there was a mistake in his earlier order since such order was passed ignoring Circular No.484 of CBDT dated 15.5.1997. As per the CIT(Appeals), the said circular clearly stated that benefit of Section 80HH already granted could not be withdrawn just because some of the areas specified in Eighth Schedule were not appearing in the subsequent notification, provided manufacture or production was started by the concerned industrial undertaking before 10.9.1986. The President of India had given his assent to the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 on 10.9.1986 and hence this date became relevant. As per the CIT(Appeals), assessee having started its manufacture only in December, 1986, it could not be given benefit of Section 80HH of the Act. For subsequent assessment years 1993-94 and 1994-95 also, CIT(Appeals) passed revisionary orders on 23.12.2002 denying

assessee's claim under Section 80HH and thus modifying his appellate orders for respective years.

10. Revenue has now moved in appeals against original orders of the CIT(Appeals) allowing the claim of deduction under Section 80HH before this Tribunal, whereas, assessee has moved in appeals against the revision orders of the CIT(Appeals) denying the claim for respective years, earlier allowed by him.

11. When the matter came up before us, learned A.R. submitted that assessee had moved writ petitions before Hon'ble jurisdictional High Court against the revision orders of the CIT(Appeals) for the respective assessment years and there was a grant of stay by the Hon'ble jurisdictional High Court on such revisionary orders. Nevertheless, learned A.R. also brought to the notice of the Bench that the said writ petitions were disposed of by their Lordship by giving direction to CIT(Appeals) to consider the issues dealt with in the revisionary orders afresh.

12. Learned D.R. in support of the appeals filed by the Revenue, submitted that assessee had not started manufacture prior to 10th September, 1986 and this position remained undisputed. The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 which added sub-section 11 to Section 80HH came into effect on 10.09.1986.

Therefore, as per learned D.R., assessee could not say that even when production was started after that date, benefit of Section 80HH should be given to it. As per learned D.R., even if plea of the assessee that the retrospective amendment would not affect its vested rights, was accepted, it could still be not given benefit of Section 80HH. For, according to him, assessee had not started manufacture or production even when the amendment became a part of the statute on receiving President's assent. According to learned D.R., there was no estoppel against the Parliament and Parliament was well within its power to add sub-section (11) to Section 80HH, whereby some of the areas which fell under Eighth Schedule, no more became eligible for claim of deduction under Section 80HH of the Act. Reliance was placed on the decisions of Hon'ble jurisdictional High Court in the case of CIT v. Electro Alloy Special Steel Castings P. Ltd. (264 ITR 97) and Mettur Chemical And Industrial Corporation Ltd. v. CIT (107 ITR 352). Learned D.R. also supported the orders of CIT(Appeals) revising his earlier orders for, according to him, such orders were necessary since the earlier orders were passed ignoring a relevant circular of the CBDT and this was an error apparent on record.

13. Per contra, learned A.R. submitted that in the first place, the CIT(Appeals) had correctly considered in his original orders the real purpose behind Section 80HH of the Act and construed it to include an

industrial undertaking which had made investment in a backward area falling in earlier Eighth Schedule to the Act. According to him, just because manufacture was started on a later date, assessee, which had all through made investments in a backward area with the intention of having the advantages available to it on starting an industrial undertaking in a backward area, could not be denied the benefits, simply based on a subsequent amendment to the Act. If such a position was allowed, then the State would be going back on its commitment already given and assessee, an industrial undertaking, who relied on the commitment given by the State, would be put in great peril. The principle of estoppel applied to the State also. Reliance was placed on the decision of Hon'ble Apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. Sate of U.P. (118 ITR 326). For his claim that liberal interpretation had to be given to beneficial provisions, reliance was once again placed on the decision of Hon'ble Apex Court in the case of Bajaj Tempo Limited (supra). Further, as per learned A.R., though CIT(Appeals) had taken correct view of the matter, later on he had resorted to an unjustified rectification. Nevertheless, such a rectification order was no more there, according to him, since the matter stood remitted back to the CIT(Appeals) by the jurisdictional High Court.

14. We have perused the orders and heard the rival submissions. Facts undisputed are that assessee, though it was granted a letter of

Indent by Government on 12.11.1984 and though it had obtained Certificate of Commencement of Business from Registrar of Companies on 2.4.1985, had admittedly, started manufacture only in December, 1986. No doubt, it is not at all disputed that assessee had taken all efforts for establishing an industry in Cuddalore block, which was then an industrially backward area falling in Schedule Eight of the Act. Assessee had made massive investment, made application to the various loans, obtained approval for collaboration agreements and moved for environment clearance. In fact, Assessing Officer in his remand report has accepted this position. But, nevertheless, it remains a fact that assessee started its production only in December, 1986 only. At this juncture, it is necessary to have a look at Section 80HH of the Act as it stood before and after its amendment by Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. Prior to the amendment, it stood as under:-

> 80HH. **Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.** – (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent, thereof.
>
> (2) This section applies to any industrial undertaking which fulfills all the following conditions, namely:-

(i) it has begun or begins to manufacture or produce articles after the 31st day of December, 1970, in any backward area;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence in any backward area:

Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose in any backward area;

(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

Explanation - Where any machinery or plant or any part thereof previously used for any purpose in any backward area is transferred to a new business in that area or in any other backward area and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then for the purposes of clause (iii) of this sub-section, the condition specified therein shall be deemed to have been fulfilled.

(3) ... ...
(4) ... ...
(5) ... ...
(6) ... ...
(7) ... ...
(8) ... ...
(9) ... ...
(10) ... ...

Explanation - In this section, "backward area" means an area specified in the list in the Eighth Schedule.

The amendment made through Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 did not make any change in the Section as contained in sub-section (1) to (10) mentioned above, but, replaced the Explanation thereunder, with sub-section (11), which reads as under:-

> (11) For the purposes of this section, "backward area" means such area as the Central Government may, having regard to the stage of development of that area, by notification in the Official Gazette, specify in this behalf;
>
> Provided that any notification under this sub-section may be issued so as to have retrospective effect to a date not earlier than the 1st day of April, 1983.

15. The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 came into effect on 10.9.1986, when President gave assent. Eighth Schedule which defined 'backward area' included Cuddalore block where assessee was establishing its industry. After the above amendment, on 19.12.1986, Government issued notification S.O. 165 wherein a list of 'backward areas' was specified and such list was given effect from 1.4.1983. In such list, Cuddalore block was not there. By virtue of notification, Cuddalore District which was a part of backward area, as defined earlier under Eighth Schedule to the Act, was no more a backward area. Can we say the rule of estoppel stops the Government from withdrawing from the list of backward areas, a

particular place which was already covered under an earlier provision. Of course, even the Government cannot easily go back on commitment already made, as held by Hon'ble Apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. (supra), though it was held that doctrine of estoppel did not apply where Government could show that public interest required it to renege from its earlier commitment. Assessee's contention might have been true and could have been accepted if it had started manufacturing atleast before 10.9.1986 when Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 became an Act. This is because proviso to sub-section (11) of Section 80HH introduced by such amending Act, clearly gives a power to make a retrospective notification subject to a condition that such retrospectivity did not date prior to 1st April, 1983. The Notification No.165 dated 19.12.1986 was to have effect from 1.4.1983 and thus was well within the power of the Government to issue such a notification vide proviso to sub-section (11). Therefore, we cannot say that rule of estoppel had any application here since assessee by its own admission, started production or manufacture only in December, 1986. No doubt, the notification was dated 19.12.1986 and assessee could have had a bonafide belief that it would be in a backward area till such date. But, nevertheless, when a specific power has been given by the Act for making a retrospective notification specifying backward areas, unless and until assessee questions the

validity of the proviso to sub-section (11) which gave such a retrospective power, before the appropriate judicial forums, for arbitrariness and gets a ruling in its favour, it will have to be given effect to. As long as the said Section appears in the Act, it will apply on all four squares to the assessee. This Tribunal, being a creature of a statute, has no powers to go into validity of a statutory provision. Nothing has been brought on record by the learned A.R. to show that proviso to sub-section (11) of Section 80HH was held invalid by any competent court of law. Unless and until it is so done, we have to go by the proviso giving a power to Government to issue retrospective notification. By virtue of retrospective notification, Cuddalore was placed out of backward area. No doubt, assessee might have had every intention to take advantage of Section 80HH of the Act by locating its industry in Cuddalore. But, nevertheless, in our opinion, this will not pre-empt the Government from issuing a notification which, it was empowered to do under proviso to sub-section (11) of Section 80HH of the Act.

16. The question of giving a liberal interpretation, as argued by learned A.R., can be acceded to only when the wordings give some leeway for such interpretation. Here, Section 80HH states that an industrial undertaking has to begin manufacture or production in a backward area. Mere intention to begin manufacture or production and making investment would not suffice for that purpose. There has to be actual

manufacture or production. Hon'ble Apex Court in the case of Commissioner of Central Excise v. Harichand Shri Gopal (2011) 1 SCC 236 unequivocally held that provision providing exemption, concession or exceptions in a fiscal statute has to be interpreted strictly. A person who claims exemption or concession, is required to establish clearly that he is covered by provision concerned and as per this decision of the constitutional Bench, in the case of any ambiguity, benefit will give go to the State. We are, therefore, of the opinion that learned CIT(Appeals) fell in error in giving very liberal interpretation to Section 80HH and holding that assessee's intention and investment to start an industry would suffice and actual manufacture or production could have been started even after the location went out of backward areas. We, therefore, set aside the orders of CIT(Appeals) for all the years and hold that assessee was not eligible to claim deduction under Section 80HH of the Act.

17. Appeals of the Revenue are allowed.

18. Coming to the appeals of the assessee, as already stated by learned A.R., Hon'ble jurisdictional High Court had set aside the orders of the CIT(Appeals) revising his earlier orders. As per the learned A.R., subsequent to directions of Hon'ble jurisdictional High Court, revised

orders on revision have been passed by the CIT(Appeals). Therefore, the appeals of the assessee have become infructuous.

19. To summarise the result, appeals of the Revenue are allowed, whereas, those of the assessee stand dismissed.

The order was pronounced in the Court on Thursday, the 19th of July, 2012, at Chennai.

sd/-	sd/-
(Vikas Awasthy)	(Abraham P. George)
Judicial Member	Accountant Member

Chennai,
Dated the 19th July, 2012.

Kri.

Copy to:
(1) Assessee
(2) Assessing Officer
(3) CIT(A)-III, Chennai-34
(4) CIT, Chennai-I, Chennai
(5) D.R.
(6) Guard file