Judgment reserved on 18.7.2012
Judgment delivered on 06.8.2012

INCOME TAX APPEAL NO. 42 OF 2002

Commissioner of Income Tax & another

vs.

M/s Modi Zerox Ltd

Hon'ble Sunil Ambwani, J.
Hon'ble Aditya Nath Mittal, J.

1. This appeal relates to income-tax assessment of M/s Modi Zerox Ltd-a company incorporated under the Companies Act, 1956 for the assessment year 1996-97. The appeal was admitted on 25.7.2007, on the questions of law as follows:-

> "1. Whether on the facts and in the circumstances of the case, ld. ITAT is legally justified in deleting the disallowance U/s 40A (2) (b) of IT Act amounting to Rs. 25, 00, 000/- out of payment made to M/s Modi Rubber Ltd. whereas the assessee failed to prove that the claim amount of expenditure was made for the purpose of business and was commercially expedient?
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> 2. Whether on the facts and in the circumstances of the case, ld. ITAT was legally justified in deleting the addition of Rs. 12, 00, 000/- being rent paid to M/s Silver Tone India Ltd. for hiring certain premises; ignoring that premises was being used as a guest house in contravention of provision of Section 37 (4) read with Section 37 (5) of IT Act?
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> 3. Whether on the facts and in the circumstances of the case, ld. ITAT is legally justified in confirming the order of CIT (A) allowing assessee's claim of lease rentals/charges of Rs. 3, 30, 68, 110/- even though the zerox machine and equipment had not passed on to 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?
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> 4. Whether on the facts and in the circumstances of the case, ld. ITAT is legally justified in deleting the disallowance on account of claim for discount amounting to Rs. 63, 59, 106/- inspite of the fact that assessee did not furnish the postal addresses of the purchasers

> so as to enable the AO to conduct inquiries?
>
> 5. Whether on the facts and in the circumstances of the case, ld. ITAT is legally justified in holding that the claim of deduction U/s 80HH is allowable with respect to the profit of two profit making industrial units only and holding that loss of third unit is to be ignored?"

2. Shri R.K. Upadhyay, learned counsel appearing for the revenue and Shri R.R. Agarwal, learned counsel appearing for the respondent-assessee, agree that question nos. 1, 2, 3 and 5 are covered by the decision of this Court between the same parties in **CIT & another vs. Modi Xerox Ltd (ITA No. 30 of 2001)** decided on 15.4.2010.

3. In the assessment year in question the assessee had debited a sum of Rs. 9, 09, 92, 266/- as against Rs. 4, 76, 68, 948/- under the head discounts. It was asked to explain by notice dated 3.12.98 as to why disallowance in the earlier years may not be made for the assessment year. The assessee replied that model-wise discounts were given during the year and submitted that these are actual business discounts and are thus fully allowable. The AO found that in the assessment year 1993-94 and 1994-95 the discount to the extent of 2% of the sale was for business purposes and the balance was gratuitous in nature. The CIT (A) had restored the file to AO. In the fresh assessment the AO again held that the discount to the extent of 2% was for business purpose and the balance was for the non-business purposes.

4. The AO found that the details of the discount allowed by 13 regions of the company were given in the reply dated 9.2.99, giving the details of the customers, dates, C/N supp. bill no. and amount. The postal address of the customers was not furnished so as to make independent enquiries. In the earlier years the assessee used to allow discount to the customers, who purchased at least five machines of

any particular model. Following the past history the discount @ 2% of the sale was made admissible for deductions and the balance was added to the income being gratuitous in nature.

5. The CIT (A) found that the appellant had claimed discounts at 2.81% of the total sales. Relying upon the past history the AO had allowed discounts only upto 2% and the balance was disallowed. This issue was found to be covered in the order of CIT (A) dated 21.5.1997 for assessment year 1994-95 by which the AO was directed to make further verification of the facts and to examine the claim on actual basis. For the relevant year also the CIT (A) restored the issue to the file of AO.

6. The ITAT, dealing with the point and issue, held in paragraph-14 of its order, as follows:-

> "14. We have heard the rival parties and are of the opinion that the discount claimed is as per vouchers and books of account which are duly audited by the competent auditors. We, therefore, feel that no rough and short method of estimate can be applied to these facts. The AO/CIT(A) has not found fault on actual allowance of discount. We, therefore, direct that in the absence of any defect in the actual amount claimed and the defect found in the invoices on the basis of which discount claimed by the appellant, the total claim should be allowed. We order accordingly."

7. Shri R.K. Upadhyay, appearing for the revenue submits that the CIT (A) had restored the matter to the file of AO for verification of the facts and examining the claim of discount on actual basis. The ITAT erred in law in interfering with the remand order on the issue on the ground that no rough and short method of estimate should be applied to these facts. The Tribunal, however, misread the findings of AO/CIT (A) in finding that they have not found any fault on actual allowance of discount and in the absence of any defect in the actual amount claimed and the defect found in the invoices, the total amount should be allowed.

8. We find substance in the contention of Shri R.K. Upadhyay appearing for the revenue, that the Tribunal did not go through the findings of AO/CIT (A), by which the AO had disallowed the discount over and above 2% of the sale on the ground of lack of the addresses of the customers as well as the basis on which such discount was allowed. The AO also observed, that in the earlier years the discount used to be offered on the purchase of at least five machines of any particular model. The CIT (A) did not examine the facts or had gone into the question and had restored this issue to the file of AO. There was as such no findings as incorrectly observed by the Tribunal on the basis of the discount as well as the defect in the actual amount, or in the invoices.

9. We also find substance in the argument of Shri R.K. Upadhyay, that as in the previous years the burden was on the assessee to satisfy the AO, by placing before him the scheme of the company for offering discounts, and to give the details of addresses of the purchasers, who were offered discount to make an enquiry. The scheme of discounts, or the policy of the company was not produced. The argument was only based on the percentage of discounts and the small increased in fraction to be considered on approximate basis.

10. It was not denied that the discounts were offered as in previous years in accordance with the scheme based on the policy of the assessee-company. The company was required to produce the scheme as well as the addresses of the purchasers to make an enquiry and to verify the claim of discount over and above 2% allowed in the assessment of previous years. The assessee company had claimed substantial increase in the disallowance namely of Rs. 63, 59, 106/-, corresponding to 0.8% which was required to be verified.

11. Shri R.R. Agarwal, learned counsel appearing for the

respondent-assessee submits that since the increase was only in fraction of 0.8% as compared to the previous years, the satisfaction of the Tribunal should not be doubted and that small claims of such nature should be treated to be findings of fact, which do not require interference of the High Court.

12. We are of the opinion that in order to claim discounts, which had increased for assessment year in question from 2% to 2.8% and which turned down to Rs. 63, 59, 106/-, the insistence of the AO to verify such discounts by making an independent enquiry was justified. The discounts are offered after the scheme is prepared in accordance with the policy of the company, which may vary from year-to-year and may also depend upon the business strategy adopted to meet the market conditions. The companies do not offer discounts on adhoc basis.

13. The submission of learned counsel for respondent-assessee, that since in the previous years the discounts were offered at 2% of the gross sales, the marginal increase of 0.8% should not have been disallowed, is difficult to accept. The discounts at 0.8% worked out at Rs. 63,59,106/-. The amount was substantial and could not be given on adhoc treatment at the time of assessment.

14. The question no. 4 framed by this Court is decided in favour of revenue and against the assessee.

15. The appeal is **allowed.** The issue will be restored to the file of AO to conduct enquiry and to record findings after giving notice to the assessee-company in accordance with law.

Dt.06.8.2012

RKP/