

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" D " BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 884/AHD/2014
निर्धारण वर्ष/Asstt. Year: 2004-05
And

आयकर अपील सं./ITA No. 779/AHD/2015
निर्धारण वर्ष/Asstt. Year: 2011-12

M/s Khyati Chemicals Pvt. Ltd., A/7, 4 th Floor, Safai Profitire, Opp. Auda Garden, Prahladnagar, Corporate Road, Satellite, Ahmedabad-380015. PAN: AAACK6277E	Vs.	D.C.I.T(OSD), Circle-4, Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	None
Revenue by :	Shri Purushottam Kumar, Sr.D.R

सुनवाई की तारीख / **Date of Hearing** : **22/11/2021**
घोषणा की तारीख / **Date of Pronouncement**: **14/12/2021**

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Assessee against the separate orders of the Learned Commissioner of Income Tax (Appeals)-VIII, Ahmedabad, arising in the matter of assessment order passed under s. 154 & 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2004-05 & 2011-12 respectively.

2. When the matter was called for hearing it was noticed that there was none appeared on behalf of the assessee despite the fact that case has been listed for hearing on several occasions. On the previous occasions, the notices intimating the date of hearing were sent to the address of the assessee which were duly served. It is the trite law that assessee after filing the appeal should be vigilant enough to prosecute the same. But, we find that the assessee is not serious in pursuing the appeal filed by it. In the absence of any co-operation from the side of the assessee, we don't find any reason to keep the matter pending before us. Accordingly, we decide to proceed to adjudicate the appeal after hearing the learner DR appearing on behalf of the Revenue.

3. The assessee has raised the following grounds of appeal:

Your appellant being dissatisfied with the order passed by the Commissioner of Income tax (Appeals) presents this appeal against the same on the following amongst other grounds.

1.0 The order passed by the assessing officer is bad in law since it is contrary to the provisions of law and the facts of your appellant's case. It is submitted that it be so held now.

2.0 The CIT(A) erred in upholding disallowance of Rs. 23,18,866/- made by the AO by invoking provisions of proviso to section 36(1) (iii). The appellant submits the disallowance of Rs. 23,18,866/- is erroneous under the law and the facts. He appellant submits that disallowance of Rs. 23,18,866/- be quashed.

2.1 The appellant without prejudice to above submits disallowance of Rs. 23,18,866/- is excessive. The appellant submits that disallowance of Rs, 23,18,866/- be substantially reduced.

Your appellant prays for leave to add, alter, amend and/or withdraw all or any of the grounds of appeal before the final hearing of the appeal.

4. The interconnected issue raised by the assessee is that learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance of interest expenses under the provisions of section 36(1)(iii) of the Act.

5. The facts of the case in brief are that the assessee in the present case is a private limited company and engaged in the business of manufacturing of whitening agent. The assessee in the year under consideration has purchased a piece of land

from Gujarat Industrial Development Corporation for total cost of ₹ 1,73,25,000/- vide offer cum allotment letter dated 21st January 2011. The assessee was required to make the payment for the purchase of land in the following manner:

- i. Down payment of ₹ 51,97,500/-.
- ii. Balance payment of ₹ 1,21,27,500/- in 12 quarterly instalments along with interest at the rate of 12.5%.

5.1 The assessee has treated the amount of ₹ 1,21,27,500/- as loan in its books of accounts on which an interest of ₹ 22,54,696/- was incurred. As per the assessee such amount of interest expenses was deductible either under the provisions of section 28, or 36(1)(iii) or 37 of the Act.

5.2 However the AO was dissatisfied with the contention of the assessee on the reasoning that the assessee was to setup the manufacturing unit in the said plot of land and commence the commercial production within 3 years from the date of the allotment letter. Thus there remains no doubt that the land was not used for the purpose of the business in the year under consideration. Accordingly he was of the view that such interest expenses cannot be allowed as deduction under the provisions of section 36(1)(iii) of the Act. The AO accordingly worked out the amount of interest pertaining to such acquisition of land amounting to Rs. 23,18,866/- and added the same to the total income of the assessee. Aggrieved assessee preferred an appeal to the learned CIT (A).

5.3 The assessee before the learned CIT (A) submitted that it has not borrowed any money for the acquisition of the land from GIDC. The part payment for the land was required to be made in 12 quarterly instalments under the allotment letter. Thus interest has been paid on the outstanding purchase consideration and not on the amount borrowed for the acquisition of the land. There was no relationship between the assessee and the GIDC of borrower and lender.

5.4 The assessee without prejudice to the above also contended that there was no extension of the existing business as required under the provisions of section 36(1)(iii) of the Act. As per the assessee it was already engaged in the business activity of whitening agents at Ahmedabad. Accordingly the proviso to section 36(1)(iii) of the Act is not applicable.

5.5 The assessee further submitted that the expenditure in the form of interest was incurred by it in the ordinary course of business only and exclusively for the purpose of the business. Therefore the same should be treated as revenue in nature and the same should be allowed either under the provisions of section 28 or 37 of the Act.

5.6 However, the learned CIT (A) disregarded the contention of the assessee by observing that it is discernible from the allotment letter issued by GIDC that the land was acquired by the assessee for the purpose of extension of the existing business and therefore contention of the assessee that it is going to establish the manufacturing plant which is not the extension of the business, is contrary to the facts on record. It is also an admitted fact that there was no commercial operation carried out on the impugned land. Therefore, all the preoperative expenses before the commencement of the production should be capitalized. However, in either of the case, the deduction qua the interest is not available under the provisions of law.

5.7 Even, if the contention of the assessee that the land was acquired for the expansion of the business is assumed to be correct, then also the deduction is not available under the provisions of section 36(1)(iii) of the Act. It is for the reason that all the expenses incurred prior to the commercial production have to be capitalized.

5.8 Furthermore, if the land was acquired not to establish the new manufacturing facility, then the interest cannot be considered as for the purpose of business.

Likewise, the amount of interest directly relates to the capital assets being land and therefore the same has to be capitalized. In view of the above the learned CIT (A) upheld the order of the AO.

6. Being aggrieved by the order of learned CIT (A), the assessee is in appeal before us.

7. The learned DR before us vehemently supported the order of the authorities below.

8. We have heard the Id. DR and perused the materials available on record. The facts of the case have been elaborated in the preceding paragraph and there appears no dispute with respect to the same. Therefore, we are not inclined to repeat the same for the sake of brevity and convenience. The following issues arise for our consideration:

- i. Whether the land acquired by the assessee on deferred payment basis and interest paid on the outstanding amount of purchase consideration, does the outstanding amount represent the borrowed fund?
- ii. Whether the land acquired by the assessee represents the extension or expansion of the business and therefore interest cost incurred qua to such land is to be capitalized.

8.1 Admittedly, the interest cost was incurred by the assessee with respect to the capital asset being the land which was not put to use in the year under consideration. The explanation 8 of section 43(1) of the Act directly deals such situation which reads as under:

*In sections 28 to 41 and in this section, unless the context otherwise requires—
"actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority;*

Explanation 8.—For the removal of doubts, it is hereby declared that where any amount is paid or is payable as interest in connection with the acquisition of an asset, so much of such

amount as is relatable to any period after such asset is first put to use shall not be included, and shall be deemed never to have been included, in the actual cost of such asset.

8.2 A perusal of the above provisions reveals that the entire interest cost has to be capitalized if it was incurred in connection with the capital asset. Thus, without going into the provisions whether it relates to the expansion/extension of the business, interest cost cannot be allowed as revenue expenses in the given facts and circumstances. Accordingly, we do not find any infirmity in the order of the authorities below. Thus we uphold the same. Hence the ground of appeal of the assessee is dismissed.

8.3 In the result appeal of the assessee is dismissed

Coming to ITA No. 884/Ahd/2014 an appeal by the assessee corresponding to A.Y. 2004-05.

9. The assessee has raised the following grounds of appeal:

Your appellant being dissatisfied with the order passed by the Commissioner of Income tax (Appeals) presents this appeal against the same on the following amongst other grounds,

1.0 The CIT(A) erred in upholding order under section 154 framed by the AO where under he rejected application under section 154 made by the appellant. The appellant submits that the mistakes were apparent from the records and fell within purview of section 154.

2.0 The CIT(A) erred in holding the appeal preferred by the appellant was without : o any basis. The observations and the alleged facts stated by the CIT(A) on page No.10 of the order are contrary to the facts.

2.1 The appellant submits that it had pointed out the mistake apparent from the records and further the appellant had provide that unutilized modvat credit was considered in computation of the total income. j~

2.2 The appellant had not sought revision of the order as alleged by the Commissioner of Income tax (Appeals). The matter was neither considered nor decided in any proceedings by way of appeal. The matter had remained undecided by the Commissioner of Income tax (Appeals) and also by the Appellate Tribunal. The appellant submits that under the circumstances the CIT(A) erred in holding that the order cannot be revised under section 154. The mistake being apparent from the record ought to have been rectified.

3.0 The Commissioner of Income tax (Appeals) erred in not deleting the addition of Rs. 20,30,909/-. The appellant submits that addition of Rs. 20,30,909/- is an error apparent from the records and ought to have been deleted. The addition was erroneous as the

appellant had already included Rs. 20,30,909/- in computation of total income. Rs. 20,30,909/- has been taxed twice on account of erroneous addition of Rs. 20,30,909/- . The error is apparent from the records and the addition made by the AO be quashed.

3.1 The appellant without prejudice to ground No. 3 submits that the assessing officer ought to have reduce, income returned by your appellant by an amount of Rs. 20,30,909/- . Inclusion of Rs.20,30,909/- being unutilized modvat credit in computation of the total income was mistake apparent from records. Rs.20,30,909/- is not income in view of decision of the Hon'ble Supreme Court in the case of CIT vs. Indo Nippon Chemicals Co. Ltd. reported at 261 ITR 275 and also in view of decision of the Hon'ble Gujarat High Court in the case of Nirma Ind. Ltd. v/s Dy. CIT 283 ITR 429 and CIT vs Unique Industries reported at 307 ITR 350.

4. The appellant without prejudice to above further submits that addition of Rs.20,30,909/- in any event is excessive and the same is required to be substantially reduced. The AO ought to have increased deduction u/s.80HHC admissible to the appellant. The appellant submits that appropriate relief be allowed.

Your appellant prays for leave to add, alter, amend and/or withdraw all or any of the grounds of appeal before the final hearing of the appeal.

10. At the outset we note that there was a delay in filing the appeal by the assessee for 22 days only. Considering the length of delay, the Id. DR raised no objection if the delay is condoned. Hence, we condone the delay and proceed to adjudicate the issue raised by the assessee on merit.

11. The only issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by treating the unutilized MODVAT credit of Rs. 20,30,909/- as income of the assessee.

12. The facts in brief are that the assessee in its balance sheet as on 31st March 2004 has shown unutilized MODVAT credit amounting to Rs. 20,30,909/- which was added to the total income of the assessee by the AO in the assessment framed under section 143(3) of the Act vide order dated 28th December 2006 by treating the same as income of the assessee.

12.1 On appeal, the learned CIT (A) also confirmed the same vide order dated 8th October 2007. On further appeal, the ITAT also upheld the order of the authorities

below vide order dated 16th August 2010 in ITA No. 4375/Ahd/2008 by observing as under:

This appeal by the assessee is directed against the order of the learned CIT(A)-VIII, Ahmedabad dated 08-10-2007 for the above assessment year 2004-05.

None appeared on behalf of the assessee despite service of the notice through registered post. It appears that the assessee is no more interested in prosecuting the appeal. The assessee's appeal is liable to be dismissed un-admitted. We, therefore, relying upon the decision of ITAT Delhi Bench in the case of CIT Vs Multiplan India (Pvt) Ltd. 38ITD 320 (Del), dismiss the appeal of the assessee in limine.

12.2 The assessee subsequent to the order of the ITAT has moved an application under section 154 of the Act before the AO on the reasoning that there is a mistake apparent from record in the order of the AO which requires rectification. As per the assessee, the issue that unutilized MODVAT credit has been decided by the Hon'ble Gujarat High Court in the case of Nirma India Ltd vs. Dy. DCIT reported in 283 ITR 429 in favor of the assessee. Therefore the authorities below have erred in treating the unutilized MODVAT as income of the assessee as held by the Hon'ble Gujarat High Court in the case discussed above. The assessee also submitted that non-consideration of the judgment of jurisdictional High Court amounts a mistake apparent from record. Thus, the assessee before the AO prayed vide letter dated 4th July 2011 to rectify the mistake crept in his assessment order dated 28th December 2006.

12.3 However, the AO rejected the contention of the assessee by observing that the issue of MODVAT credit has been decided right up to the tribunal against the assessee and therefore there remains no mistake apparent from record.

12.4 The assessee against the order of the AO preferred an appeal before the learned CIT (A) who has also dismissed the appeal of the assessee by observing as under:

If is clear from the above sequence of events that the appeal is without any basis. The AO has rightly rejected the application under section 154 as there was no error which was apparent from records in his order. The additions which were made by the AO in the assessment order were duly reasoned out. The AO had given correct facts of the issue and thereafter the addition was made. The CIT(A) also discussed the issue in detail and

*confirmed the order. The appellant has not pointed out as to what was the mistake in the assessment order or in the order of CIT(A) which should be now connected. It has been pointed out by him ground No. 2.0 that the appellant had already included Rs. 2030909/- in the computation of total income and therefore, the addition has resulted in taxing twice the amount. However the claim of the appellant is without any factual basis. The appellant has not been able to prove that if has already added the unutilised MODVAT credit in the income statement. The appellant was specifically asked, during the course of appellate proceedings, to furnish the computation of income filed with the return filed under section 139(1) so that its claim can be examined. However, the appellant has not furnished any detail but in response to the query it is only furnished the copy of assessment order and the grounds of appeal against the order. The mistake is therefore, not apparent from records he appellant is seeking revision of an order which is settled in appeal by | misrepresenting the facts. It is a settled law that an order cannot be revised under section 154 if the mistake is not apparent from record. It is clear from these facts that there is no basis in the appeal of the appellant and therefore, the ground No.2.0 of appeal is **dismissed**.*

13. Being aggrieved by the order of learned CIT (A) the assessee is in appeal before us.

14. The learned DR before us vehemently supported the order of the authorities below.

15. We have heard the contentions of the learned DR and perused the materials available on record. Admittedly, non-consideration of the judgment of the jurisdictional High Court amounts to a mistake apparent from record as held by Hon'ble Supreme Court in the case of ACIT vs. Saurashtra Kutch Stock Exchange Ltd. reported in 305 ITR 227. The relevant extract of the judgment is reproduced as under:

The core issue, therefore, is whether non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a 'mistake apparent from the record'? Both, the Tribunal and the High Court were right in holding that such a mistake can be said to be a 'mistake apparent from the record' which can be rectified under section 254(2). [Para 40]

15.1 We are conscious to the fact that the appeal was decided by the ITAT in the case of the assessee in ITA number 4375/Ahd/2008 vide order dated 16th August 2010 rejecting the same in limine on the reasoning that nobody from the side of the assessee presented the case. The issue was decided by the ITAT without going into merit of the facts of the case.

15.2 Before going to into the issue whether there is a mistake apparent from record in the light of the judgment of Hon'ble Supreme Court as discussed above, it is pertinent to note that the order of the AO and the learned CIT (A) got merged with the order of the ITAT. Therefore, if any rectification is required of a mistake being apparent from record that can only be effected in the order of the tribunal and not in the order of the AO or the learned CIT (A). However the assessee, has not challenge the order of the ITAT on the reasoning that there is a mistake in the order of the ITAT. To our understanding, the order of the ITAT has reached to its finality. Accordingly we do not find reason to interfere in the order of the learned CIT (A). Hence the ground of appeal of the assessee is dismissed.

15.3 In the result appeal of the assessee is dismissed

16. In the combined result, both the appeals of the assessee are dismissed.

Order pronounced in the Court on 14/12/2021 at Ahmedabad.

**Sd/-
(RAJPAL YADAV)
VICE PRESIDENT**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 14/12/2021
Manish

(True Copy)