

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.4245/M/2011
Assessment Year: 1997-98**

The Deputy Commissioner of Income Tax-8(1), Room No.210, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Advance Power Display Systems Ltd., Unit No.08, SDF-I, SEEPZ, Andheri (East), Mumbai – 400 096 PAN: AAACA 5970G
(Appellant)		(Respondent)

**ITA No.4803/M/2011
Assessment Year: 1997-98**

M/s. Advance Power Display Systems Ltd., Unit No.08, SDF-I, SEEPZ, Andheri (East), Mumbai – 400 096 PAN: AAACA 5970G	Vs.	The Deputy Commissioner of Income Tax-8(1), Room No.210/260, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Y.P. Trivedi, A.R. & Ms. Usha Dalal, A.R.
Revenue by : Shri A.B. Koli, D.R.

Date of Hearing : 25.08.2016
Date of Pronouncement : 25.08.2016

ORDER

Per Sanjay Garg, Judicial Member:

The above titled cross appeals one by the Revenue and the other by the assessee have been preferred against the order dated 07.03.2011 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 1997-98.

2. The facts in brief as extracted from the impugned order of the Ld. CIT(A) are that the assessee is a 100% export oriented unit located in SEEPZ,

Andheri (E). It manufactures Switch Mode Power Supplies used in the Computer Industry. The assessee submitted that the raw-material comprises electronic components which are largely imported. It was also submitted by the assessee that the electronic components have very short shelf life. During the previous year ended 31st March 1996, the assessee had purchased raw-materials from Dynamic Systems Limited (USA) and Quality Components and Systems Pte Limited (Singapore) amounting to Rs.9,09,79,393/- against an export order. However, it was alleged by the assessee that the said order was cancelled in the previous year 1996-97 relevant to AY 1997-98. Consequently the raw material imported against this order remained of no use to the assessee. The assessee wrote to Dynamic Systems Limited (USA) and Quality Components and Systems Pte Limited (Singapore) requesting inter alia to take back the material latest by 31st March 1997 otherwise the material will be scrapped by the assessee. Since the assessee factory was in SEEPZ / the goods could not be removed except without the extant approval of the Deputy Commissioner of Customs SEEPZ, Andheri (E), Mumbai. Accordingly assessee after obtaining the permission of the concerned appropriate authority reshipped raw-materials worth Rs.7,18,25,299/- to the respective parties and for the balance raw-material worth Rs.1,91,54,094/- debit notes were raised on the said parties. The assessee before the Assessing Officer (hereinafter referred to as the AO) submitted that as the parties from whom the said raw-material worth Rs.1,91,54,094/- were purchased did not lift the goods, the said raw-materials were lying with the assessee at the risk and cost of the said parties. The assessee was not the owner of the said goods. The said parties were in fact the owner of the said goods. As the ownership of the said stock was not vested with the assessee, the said stock can never be treated as assessee's stock so as to attract the provisions of the Section 28(iv) of the Act. In order to substantiate its averment, the assessee placed following evidences before the AO.

“(a) Letter dated 21st October 1996 of appellant to Quality components

& Systems Pte. Limited vide which Assessee has requested the party to take back the material latest by 31st March 1997 otherwise the material will be scrapped by the appellant.

(b) Letter dated 30th October, 1996 addressed by Quality Components & Systems Pte. Limited to the appellant requesting the appellant to hold the raw-material until further notice.

(c) Letter dated 24th September, 1996 of appellant to Dynamic Systems Limited vide which the appellant has requested the party to take back the material immediately.

(d) Letter dated 10th October, 1996 addressed by Dynamic Systems Limited to the appellant requesting the appellant to hold the raw-material until further notice.

(e) Letter dated 08th February, 2002 addressed by Quality Components & Systems Pte Limited to the appellant permitting the appellant to scrap the said raw-material.

(f) Letter dated 08th February, 2002 addressed by Dynamic Systems Limited to the Assessee permitting the Assessee to scrap the said raw-material.

(g) Letter dated 08th November, 2002 issued by Electronics Regional Test Laboratory (W), addressed to the Assessee stating that the said raw-material was in obsolete condition which could not be utilized for the purpose of production.

(h) Letter dated 09th December, 2002 addressed to the Deputy Commissioner of Customs SEEPZ, Andheri (E), Mumbai by the Assessee seeking permission for destruction of raw-material.

(i) Letter dated 23rd December, 2002 written by the Assessee to the Deputy commissioner of Customs informing that the Assessee has destroyed the said raw-material in the presence of Custom Officers.

(j) Letter dated 24th December, 2002 issued by Deputy commissioner of Customs informing the Assessee that action of destruction in respect of goods belonging to Quality Components & Systems Pte Limited valuing Rs.85,25,169/- has been completed under supervision of customs.

(k) Letter dated 24th December, 2002 written by the Deputy Commissioner of Customs to the Assessee informing that the action of destruction in respect of goods belonging to Dynamic Systems Limited amounting to Rs.73,03,898/- has been completed under the supervision of customs.

(l) Copy of the challan for payment of Customs duty towards clearance of scrap.

(m) Letter dated 28th February, 2005 written by ACIT -8(1) (AO) to the Deputy Commissioner of Customs, SEEPZ-SEZ for information & authenticating the evidence in respect of obsolete raw-material.

(n) Letter dated 22nd March, 2005 written by Deputy Commissioner of

Customs, SEEPZ-SEZ confirming the information & authenticating the evidence in respect of obsolete raw-material.”

3. The assessee submitted that from the aforesaid evidences that it was clear that the assessee was holding the said raw material on behalf of the aforesaid two parties and the said raw-material was totally in obsolete condition and in fact the said raw-material was destroyed in presence of the Customs Authorities. The assessee further submitted that it being in SEEPZ, it was not possible for the assessee to ship any goods out of the premises without complying with the required procedure of the Custom Authorities. The assessee further submitted before the AO that after destruction of the said raw-materials, the Custom Authorities assessed the value of the scrap at Rs.4,46,316/- for the purpose of levying Custom Duty and the Custom Duty of Rs.1,50,211/- was recovered by the Custom Authorities. Thereafter the scrap was disposed off by the Custom Authorities.

The AO, however, did not accept the contention of the assessee and held that the raw material worth Rs.1,91,54,094/- was in good condition and was held as stock in trade. The assessee had not included the same as its closing stock. Thus, it was a benefit accrued to the assessee in terms of sec. 28(iv) of the Act and taxed this amount accordingly.

4. In appeal before the Ld.CIT(A), the assessee explained that the material not shipped back to the vendor was Rs.1,91,54,094/- and the same was not subsequently used by them was destroyed under supervision of Customs Authorities in SEEPZ. This destruction was of material amounting to Rs.1,58,33,067/-. There were two confirmations dated 24th December, 2002 issued by the Deputy Commissioner of Customs for Rs.73,07,898/- and Rs.85,25,169/-. The balance material of Rs.33,25,027/- was utilized by the assessee in the production at zero cost. It was therefore contended that no additions were warranted in this case as the profits from subsequent seats were offered for taxation.

The Ld. CIT(A), considering the submissions of the assessee

observed that it was proved on the file that the material worth Rs.1,58,33,067/- was destroyed by the SEEPZ Board and Customs Authorities on the request of the assessee and the scrap arising from such destruction was sold at Rs.4,46,316/- and a custom duty of Rs.1,50,211/- was imposed by the Customs Authorities on such items. As regards goods of Rs.33,25,027/-, the said goods were utilized by the assessee in its production and was offered for taxation in three financial years i.e. 1997-98, 1998-99 and 1999-2000. The Ld. CIT(A), therefore, observed that to the extent the goods were destroyed, no addition was warranted. However, as regards the remaining amount of Rs.33,25,027/-, it was evident that the assessee had consumed the raw material in its production. Therefore, the benefit under section 28(iv) accrued to the assessee in the year under consideration as the assessee was fully aware that the items lying with him could be used by it for its manufacturing activity. The Ld. CIT(A), therefore, confirmed the addition to the extent of Rs.33,25,027/- in respect of the raw material which was subsequently used by the assessee for its manufacturing activity. He rejected the contention of the assessee that in subsequent year there was high profitability as raw material utilized by it had borne no cost. The Ld. CIT(A), however, observed that the above facts could not be verified from the record nor the Ld. A.R. of the assessee adduced any evidence to show that there was high profitability as compared to earlier years as no evidence in this respect was produced.

Being aggrieved by the above order of the Ld. CIT(A), the assessee has come in appeal before us agitating the confirmation of addition of Rs.33,25,027/-. Whereas the Revenue has come in appeal agitating the action of the Ld. CIT(A) in deleting the remaining part of the additions made by the AO.

5. Before proceeding further, we may point out that this is a fourth round of litigation/appeal before us. In the first round, the assessee has agitated the reopening of the assessment and the consequent additions made by the Assessing Officer (hereinafter referred to as the AO) on account of the material worth Rs.9,09,79,393/- lying with the assessee unused/not taken back by the concerned supplier. The AO reopened the assessment adding the value of the said material into the income of the assessee under section 28(iv) of the Act. Before the Tribunal, the assessee furnished certain additional evidences. Hence, the Tribunal restored the matter back to the file of the AO.

In the set aside proceedings, the assessee pleaded before the AO that the excess material was not utilized rather the same was destroyed by the SEEPZ Board and Customs Authorities on the request of the assessee. The AO, therefore, deleted the additions in this respect. However, the Ld. CIT(A) invoked his revisional powers under section 263 of the Act and held that the AO had not correctly appreciated the facts. He, therefore, directed the AO for denovo assessment. The matter travelled to the Tribunal again. The Tribunal upheld the action of the Ld. CIT(A) in exercising his revisional jurisdiction under section 263 of the Act.

In the third round of appeal, the dispute before the Tribunal was whether an appeal lies to the Ld. CIT(A) against the assessment order passed by the AO while giving effect to the orders passed by the Ld. CIT under section 263 of the Act. The Tribunal, thus, restored the matter to the Ld. CIT(A) holding that the appeal there from lies to the Ld. CIT(A) and directed the Ld. CIT(A) to decide the matter on merits. The Ld. CIT(A), as observed above vide impugned order, has decided the matter on merits holding that no additions were warranted to the extent the excess material lying with the assessee has been destroyed by the SEEPZ Board and Customs Authorities. In respect of the remaining material worth Rs.33,25,027/- the Ld. CIT(A) confirmed the additions.

6. After considering the rival submissions of the parties, we find that the assessee has taken a consistent plea during the all rounds of litigation that the material used by the assessee was taken at no cost and that the corresponding sales were offered for taxation. However, the Ld. CIT(A) has rejected the contention observing that the said fact could not be verified from the record. From the facts of the case, it is revealed that the assessee had not become the owner of the material in question. The third party/suppliers did not collect the excess material lying with the assessee though they had reimbursed/paid back the cost of material to the assessee. The excess material lying with the assessee was of no use to the assessee. Out of the total material imported worth Rs.9,09,79,393/-, the assessee had reshipped the goods worth Rs.7,18,25,299/-. Out of the remaining material worth Rs.1,91,54,094/-, the Customs & SEEPZ Board Authorities have destroyed the material worth Rs.1,58,33,067/-.

7. So far as the remaining material of Rs.33,25,027/- is concerned, the plea of the assessee is that the worth value of the material at the time of use was not that of invoice value. The material at the time of use had reduced to the scrap value which was used by the assessee for its manufacturing activity and the value of the material used was taken at 'zero' cost. The profits from the corresponding sales have already been offered for taxation by the assessee. Under such circumstances, in our view, the Ld. CIT(A) was not justified in confirming the additions of Rs.33,25,027/- at original bill value. Since the assessee has offered the profits from the sales of the goods and the raw material used has been taken at 'zero' value, hence, in our view, the value of the material has already been taxed and adding the bill value of the goods at Rs.33,25,027/- would amount not only to the excess addition but also to the double addition. We, therefore, direct the AO to verify whether the raw material worth Rs.33,25,027/- (as per their original bill value) was used in the manufacturing activity at 'zero' cost and if the corresponding profit from the sale of goods manufactured from the use of the said raw material has been

offered for taxation, then no additions be made in respect of the said value of Rs.33,25,027/-. The action of the Ld. CIT(A) in deleting the remaining additions is upheld.

8. With the above observations, the appeal of the assessee is treated as allowed for statistical purposes whereas the appeal of the Revenue is hereby dismissed.

Order pronounced in the open court on 25.08.2016.

Sd/-
(B.R. Baskaran)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 25.08.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.