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**(2010) 04 KAR CK 0275**  
**In the Karnataka High Court**  
**Case No : Income Tax A. No. 128 of 2007**

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|---------------------------------------|------------|
| Commissioner of Income Tax and Others | APPELLANT  |
| Vs                                    |            |
| Wipro Ltd.                            | RESPONDENT |

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**Date of Decision :** 07-04-2010

**Acts Referred:**

Income Tax Act, 1961 — Section 254, 254 (2), 80 HH

**Citation :** (2011) 334 ITR 6

**Hon'ble Judges :** K.L. Manjunath, J;B.V. Nagarathna, J

**Bench :** Division Bench

**Advocate :** M.V. Seshachala, for the Appellant; S.R. Anuradha, for the Respondent

**Final Decision :** Allowed

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## Judgement

K.L. Manjunath, J.—There is a delay of 1232 days in filing the appeal. According to the Learned Counsel for the Appellant the appeal filed by the Appellant is well in time. Since the Tribunal had passed an order earlier on the merits on April 28, 2003 granting relief to the Assessee in part. Later on a miscellaneous petition filed u/s 254 of the income tax Act, 1961, the earlier judgment has been modified by its order dated June 15, 2006. If the order of the Tribunal passed in the miscellaneous petition is taken into account, the appeal is in time.

2. We have heard the Learned Counsel for the Respondent also.

3. On a perusal of the papers we are of the opinion there is no delay, since the appeal is filed being aggrieved by the order passed in the miscellaneous petition filed u/s 254 of the Act.

4. The Revenue has come up in this appeal being aggrieved by the order passed by the income tax Appellate Tribunal in M.P. No. 238/Mum/03 and confirm the order dated April 28, 2003 in I.T. A. No. 7849/Bom/1989 dated June 15, 2006 wherein the order passed by the Tribunal on April 28, 2003 has been modified and complete relief has been granted to the Assessee raising the following

substantial questions of law:

1. Whether the Tribunal was correct in proceeding to exercise jurisdiction u/s 254(2) of the Act in proceeding to hold that the earlier order dated April 28, 2003, requires rectification proceeded to reappraise the various controversies raised by the Assessee and granted relief which had not been granted earlier which will amount to review of its earlier order ?

2. Whether the Tribunal was correct in holding that the relief declined by the Tribunal in its order dated April 28, 2003 under Sections 80HH and 80I of the Act on the ground that the industrial undertaking and the machinery and plant had been installed in the earlier assessment year and not a new unit in the current assessment year for claiming deduction can be reversed by holding that these were new units by relying on certain judgments of various courts ?

3. Whether the Tribunal was correct in appreciating that the machinery and plant had been installed in the assessment year 1984-85 except SCD plant and Haize Boiler which was being used for deodorization and the installed plant and machinery had already commenced operations over which depreciation and extra shift allowance of Rs. 46.36 lakhs had already been claimed and the same could not be rectified ?

5. At the outset Learned Counsel for the Revenue contends that question No. 1 need not be considered by this Court in this appeal and it may be considered in an appropriate case and he requests the court only to consider questions Nos. 2 and 3. In the light of the submission made by the Learned Counsel for the Appellant we have not considered question No. 1 and we are considering only questions Nos. 2 and 3.

6. In order to appreciate the case of the Revenue it would be appropriate for us to explain the background of this case.

7. The dispute is in regard to the assessment year 1985-86. The Respondent/ Assessee is engaged in manufacturing vanaspathi. The Respondent/Assessee by filing the return of income for the relevant assessment year, claimed deduction under Sections 80HH and 80I on the ground that it has established an industrial vanaspathi unit for the first time. According to the Assessee, the Assessee is having an industrial complex at Amalner. In the industrial complex at Amalner it has got several units. Amongst other units, the Assessee was manufacturing domestic vanaspathi which is an old unit.

8. The Assessee claimed deduction under Sections 80HH and 80I on the ground that it has established a new factory for manufacturing industrial vanaspathi. The deduction claimed by the Assessee u/s 80HH has been denied to the Assessee by the Assessing Officer on the ground that the Assessee had not established any new industrial unit and it is only improvising the existing vanaspathi unit by adding few machines. In other words, the Assessing Officer held that the Assessee has only modernized the existing unit by utilizing the same machinery

by adding some more new machinery and such establishment does not amount to establishment of a new industry and did not considered the claim of the Assessee u/s 80HH. Accordingly, the Assessing Officer passed an order of assessment rejecting the claim of the Assessee claiming deduction under Sections 80HH and 80I. Being aggrieved by the order of the Assessing Officer, the Assessee filed an appeal before the Commissioner of income tax (Appeals), which appeal also came to be dismissed by the Commissioner of income tax (Appeals). Aggrieved by the concurrent findings of the Assessing Officer and the Commissioner of income tax (Appeals), an appeal was preferred before the income tax Appellate Tribunal, Bangalore. The Tribunal at the first instance dismissed the claim of the Assessee u/s 80HH by its order dated April 28, 2003, thereafter on an application filed by the Assessee u/s 254 of the Act came to the conclusion that the Assessee has established a new industrial unit and it has used only a few old machines. Therefore, the Tribunal came to the conclusion that the Assessee is entitled to claim the deduction under Sections 80HH and 80I. It also came to the conclusion that the value of the old machinery used was less than 20 per cent, of the value of the new machinery. Therefore, the relief was granted. Being aggrieved by the order of the Tribunal the present appeal is filed.

9. The main contention of the Learned Counsel for the Revenue is that the Tribunal has committed a mistake in granting relief to the Assessee holding that the Assessee has established a new industrial unit for manufacturing industrial vanaspathi and that it has utilized only a few old machines and the percentage of the total investment on the new machinery was less than 80 per cent, and percentage of value of the old machinery is more than 20 per cent, without any basis. According to him the Assessing Officer based on the statement made by the Assessee has considered the case of the Assessee on the merits. According to him no new industrial unit was established by the Assessee for manufacturing industrial vanaspathi. He further contends that the existing old unit has been modernized by purchasing a few machines when the value of the newly purchased machinery is compared when the value of the existing old machinery is more than 20 per cent. Therefore, the Assessee cannot claim deduction under Sections 80HH and 80I even if the case of the Assessee is considered to be the modernizing the existing vanaspathi unit. He further contends that on the facts the Assessing Officer had come to the conclusion that the actual manufacturing process of industrial vanaspathi had commenced one year earlier to the present assessment year and the machinery purchased by the Assessee was not in the present assessment year and it was purchased one year earlier to the present assessment year. Therefore, the said machinery cannot be considered as new machinery in order to consider the claim under Sections 80HH and 80I. He further contends based on the statement made by the Respondent, the Assessing Officer came to the conclusion that the SCD plant was installed on June 25, 1983 and the Haize Boiler was installed on May 29, 1983 and if these two plants were installed on June 25, 1983, the same cannot be treated as new machinery for the

relevant assessment year. He further contends that the remaining assets were shown as addition to the old vanaspathi unit.

10. It is the case of the Revenue that the Assessing Officer considering that in regard to the old machinery, the Assessee had claimed deduction and depreciation, and that the Assessee is not entitled to claim deduction under Sections 80HH and 80I as this machinery cannot be considered as new machinery installed in a new industrial unit or while modernizing the existing unit. He further contends that the Tribunal without considering the actual facts has granted relief as if the industrial unit had commenced its activities only in the relevant assessment year and that the value of the old machinery is less than 20 per cent, of the total value of the machinery in the plant. Therefore, he contends that the order of the Tribunal is perverse and liable to be set aside.

11. Per contra, Smt. Anuradha contends that even if the Assessing Officer had considered the unit as only a modernization of the existing unit since new machinery are added to the existing plant considering the value of the new machinery and using of the old machinery, the Assessee is entitled to claim deduction under Sections 80HH and 80I since the value of the old machinery was less than 20 per cent. According to her the Assessee has fulfilled all the terms and conditions of the provisions of Sections 80HH and 80I. She further contends that by using the new machinery the Assessee has commenced the production of a new product known as industrial Vanaspathi. Therefore, she contends that the Tribunal was justified in reversing the finding of the Commissioner of income tax (Appeals) as well as the Assessing Officer. In order to support her claim she has relied upon the judgment of this Court in the case of Addl. Commissioner of Income Tax, Karnataka Vs. Hutti Gold Mines Co. Ltd., , and also the judgment of this Court in the case of International Instruments P. Ltd. Vs. Commissioner of Income Tax, Karnataka, and also the judgment of the Supreme Court in the case of Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, . Relying upon these judgments she requests this Court to dismiss the appeal.

12. Having heard the counsel on both sides what is required to be considered by us in this appeal is (a) whether the Assessee has established a new industrial unit in the present assessment year, (b) even if new industrial Unit is not established, if it has modernized the existing unit and if new plant and machinery are erected whether the Assessee is entitled to claim deduction under Sections 80HH and 80I, (c) if the Assessee had purchased the machinery in the earlier assessment year and erected the same, whether the Assessee can claim the benefit of Section 80HH in the next assessment year and whether such machinery can be considered as new machinery.

13. The Assessee claimed deduction under Sections 80HH and 80I on the ground it has set up an industrial vanaspathi unit. According to the Revenue the Assessee has addressed a letter on January 20, 1988 stating that it has not mentioned in the return of income for the assessment year 1984-85 as there was

only a trial run in the previous year of assessment. Relying upon the letter dated January 20, 1988, the Assessing Officer has come to the conclusion that no new machinery was erected in the relevant assessment year and no new industrial vanaspathi unit was installed in the present assessment year and did not consider the case of the Assessee under Sections 80HH and 80I. According to the Assessing Officer as per the statement made by the Assessee, machinery was installed not in the relevant assessment year but it was installed in the earlier assessment year and in addition to that the remaining machinery other than SCDs and Haize Boiler were used machinery of the old vanaspathi unit, therefore, he came to the conclusion that the Assessee is not entitled to claim deduction under Sections 80HH and 80I. The purchase of machinery in the earlier year of assessment and erection is not in dispute. As a matter of fact in the return the Assessee has not claimed that it has installed the new machinery during the relevant assessment year. If the Assessing Officer relying upon the letter of the Assessee has come to the conclusion that the machinery was installed in the earlier assessment year whether it is possible for this Court to hold that the machinery installed is new one when the machinery is erected in the earlier assessment year and when it had commenced its business activities. Though the Assessee claimed that it was a trial, the finding of the Assessing Officer is other way. The Assessing Officer has also come to the conclusion that the new machinery purchased are only SCD plants and Haize Boiler and the remaining is old one. On facts the Assessing Officer has also come to the conclusion either the SCD plants or Haize Boiler cannot be considered as the machinery manufacturing industrial vanaspathi. According to him these plants are used only for deodorizing which is the last stage in the manufacturing of vanaspathi. Considering the value of the old machinery and the SCD plant and Haize Boiler installed on June 25, 1983 still the Assessing Officer has come to the conclusion that the value of the old machinery other than these two machinery was more than 20 per cent. If the value of the old machinery is more than 20 per cent., we are of the view that the Assessing Officer is justified in holding that the Assessee is not entitled to claim deduction under Sections 80HH and 80I

14. In this back ground we have to consider the judgments relied upon by the Learned Counsel for the Assessee. In *International Instruments P. Ltd. Vs. Commissioner of Income Tax, Karnataka*, this hon"ble court had an occasion to consider whether a particular unit is a new industrial undertaking and whether an expansion of the business also can be considered as a newly established industrial unit. On the facts their Lordships have come to the conclusion in the said case in order to grant relief u/s 84 of the income tax Act, as then prevailing. We have no quarrel over the legal proposition rendered by this Court. But on the facts of this case, we are of the view that the said judgment cannot be made applicable in order to consider the case of the Assessee as in the instant case even the two plants were erected and installed in the previous assessment year and not in the present assessment year.

15. This Court in *Addl. Commissioner of Income Tax, Karnataka Vs. Hutti Gold*

Mines Co. Ltd., also has considered the case of the Assessee by relying upon the facts of the said case. The facts of the said case are different from the facts of the present case. Therefore, on the facts we cannot grant relief to the Assessee relying, upon the aforesaid judgment.

16. Similarly, the judgment of the Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, of the apex court is also not applicable to the facts of this case as facts involved in the present case are different. In the circumstances, we are of the view that the decisions relied upon by the Learned Counsel for the Assessee have no application to the facts of the said case.

17. In the present case the Tribunal has come to the conclusion that the Assessing Officer has not inspected the unit of the Assessee. According to us, there was no necessity for the Assessing Officer to inspect the industrial unit as he has decided the case relying upon the documents made available to him by the Assessee. In paragraph 5 of its order, the Tribunal has come to the conclusion that the manufacturing of industrial vanaspathi is a different product than the domestic vanaspathi. According to the Tribunal the Assessee had engaged more than requisite labour force in the industrial vanaspathi unit and the Assessee had purchased the installed new plant and machinery in the new unit except the plant and machinery so installed in the previous years relevant to the assessment year 1984-85 and 1985-86.

18. By reading of paragraph 5 of the order it is clear that the Tribunal has not given details about the new plant and machinery installed during the relevant assessment year. On the contrary it has accepted that the plant and machinery purchased were erected in the earlier year of assessment. If such plant and machinery were erected earlier to the present assessment year, that machinery cannot be considered as new machinery in order to claim deduction under Sections 80HH and 80I. If really the Assessee was interested to claim depreciation under Sections 80HH and 80I it should have made out claim during the assessment year when new plant and machinery were erected. It has also not given the value of the plant and machinery purchased during the relevant assessment year. When the Assessee had purchased the new machinery in the earlier assessment year and has installed the same, such unit cannot be treated as new unit for the present assessment year. According to us when new plant and machinery are erected during such relevant assessment year, such unit can be considered as newly established unit. This distinction has not been considered by the Tribunal. Therefore, we are of the view that the question of law framed in the present are to be answered in favour of the Revenue and against the Assessee.

19. Accordingly, the appeal is allowed.