IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND MS. RANO JAIN, ACCOUNTANT MEMBER

ITA No.57/Chd/2016
(Assessment Year : 2012-13)

The D.C.I.T., Yamuna Nagar Circle, Yamuna Nagar.	Vs.	M/s Yamuna Power & Infrastructure Ltd. Sardana Nagar, Ambala Road, Jagadhri. PAN: AAACY0554A
(Appellant)		(Respondent)

Appellant by	:	Shri Sushil Kumar, CIT DR
Respondent by	:	Shri Sudhir Sehgal
Date of hearing	:	31.03.2016
Date of Pronouncement	:	06.04.2016

O R D E R

PER RANO JAIN, A.M. :

The appeal filed by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals), Panchkula dated 26.11.2015, relating to assessment year 2012-13, passed under section 250(6) of the Income Tax Act, 1961 (in short 'the Act').

2. Briefly, the facts of the case are that the assessee established two wind mills in District Jaisalmer, Rajasthan a 20 Mega Watt (MW) at village Gorera and 25 MW at village Soda Mada on 30.3.2004 and 24.1.2004

respectively. The assessee claimed deduction under section 80IA of the Act of Rs.95,00,547/- @ 100% on the income earned from the business of wind power generation projects. The Assessing Officer noted that on all these wind power plants, the assessee had incurred losses for assessment years 2004-05 to 2006-07. These losses were set off by the assessee company against the income derived from the business of cable jointing etc., which does not qualify for deduction under section 80IA of the Act. The assessee also earned and declared income from the business of wind power project for the assessment years 2007-08 to 2012-13.Referring to the provisions of section 80IA(5) of the Act, the Assessing Officer observed that the brought forward losses of the eligible business need not to be set off against the income from the eligible business, even though if they were set off against the non-eligible business in the respective years. The Assessing Officer further noted that after setting off of the losses for assessment years 2004-05 to 2006-07 against the income for assessment years 2007-08 to 2012-13, there were still brought forward losses of Rs.390.36 lacs, which were to be set off against the income from the wind mill projects. This exercise renders the income from the eligible business at nil and, therefore, exemption claimed by the assessee at Rs.95,00,547/- was not allowable.

3. Before the learned CIT (Appeals), the assessee stated that as per section 80IA(2), the deduction at the

option of the assessee can be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and beings to operate any infrastructure facility. As per section 80IA(2), the first previous year for the purpose works out to assessment year 2004-05 and end year works out to assessment year 2019-2020. The assessee had option to start claiming deduction from any of the assessment years within this time frame. Once the assessee exercises this option, then it becomes eligible to claim the deduction continuously for ten years but these ten years cannot go beyond the period of fifteen years. The year in which the assessee exercises option becomes the initial assessment year. In this case, the initial assessment year is assessment year 2008-09. Therefore, the provisions of section 80IA(5) are applicable from initial assessment year i.e. assessment year 2008-09 and not assessment year 2004-05. The Assessing Officer made the disallowance by holding that assessment year 2004-05 is the initial assessment year. The contention of the assessee was that this disallowance is legally and factually not correct.

4. After considering the submissions of the assessee, the learned CIT (Appeals) noted that same issue was decided by him in assessee's own case for assessment year 2010-11 also. After intensively quoting his findings

for assessment year 2010-11, the learned CIT (Appeals) allowed the appeal of the assessee on this ground.

5. Aggrieved by this, the Department has come in appeal before us, raising following grounds of appeal :

> *"1. On the facts and in the circumstances of the case, the: Ld. C!T(A) has erred in law that deleted the addition made on account of disallowances of Rs.95,00,547/- claimed u/s 801'A of the I.T. Act.*
>
> *2. It is prayed that the order .of the Ld. CIT (Appeal) be set-aside and that of the A.O. be restored.*
>
> *3. The appellant craves leave to add or amend the grounds of appeal before the appeal is heard and disposed off."*

6. The learned D.R. while arguing before us, relied on the order of the Assessing Officer submitting that by not considering the year of start of manufacturing as the initial year, the assessee gets an undue benefit in the form of claiming excess deduction under section 80IA of the Act at its own option.

7. The learned counsel for the assessee submitted before us that similar issue was involved in the earlier assessment year i.e. assessment year 2010-11, whereby the CIT (Appeals) had deleted the addition so made by the Assessing Officer, against which the Department preferred an appeal before the I.T.A.T. and I.T.A.T., Chandigarh Bench in ITA No.1062/Chd/2014 has decided the issue in favour of the assessee. His contention was that since the CIT (Appeals)

has also relied on his order for assessment year 2010-11, the claim of the assessee in this year may also be allowed. Further a Circular of CBDT No.I/2016 dated 15.2.2016 was also brought to our notice by the learned counsel for the assessee. In this Circular, the CBDT had clarified that an assessee who is eligible to claim deduction under section 80IA of the Act has the option to choose the initial year from which it may desire to claim deduction for ten consecutive years out of a slab of fifteen years as prescribed under Sub-section (2) of section 80IA of the Act. Therefore, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction under section 80IA of the Act. In view of this, the officers of the Department were directed to allow the deduction under section 80IA of the Act after duly satisfying as to the compliance of the eligibility condition. It was also instructed that the pending litigation of allowability of deduction under section 80IA of the Act was also not to be pursued to the extent which relates to interpreting initial assessment year as mentioned in sub-section (5) to section 80IA of the Act.

8. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. From the perusal of the order of the I.T.A.T., Chandigarh Bench in assessee's own case for assessment year 2010-11 in ITA No.1062/Chd/2014 dated 10.2.2016, we observe

that exactly the similar issue arose in assessee's case in and the CIT (Appeals) in the present year has relied on his own order for assessment year 2010-11. The issue was decided by the I.T.A.T. in favour of the assessee in the following terms :

> *8. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. On perusal of the order of the learned CIT (Appeals) we see that he has given very detailed findings on the issue as follows :*
>
> > *"4.10 After considering the AO's observations, appellant submission and the provisions of section 80IA(2) and (5) of the Act, it is noted that the initial assessment year for section 80IA means the assessment year specified by the assessee at his option to be the initial year. The initial year falls in any of the 15 assessment years at the option of the assessee starting from the previous year in which the enterprise begins operating and maintaining the infrastructure facility. Under section 80IB and also u/s 80IC, 80ID and 80IE, the first year in which the production is started is taken as initial previous year whereas, after the amendment in provisions of section 80IA w.e.f. 01.04.2000 the initial assessment year is at the option of the assessee. It may be first year of the commencement of activity or a subsequent year as selected by the assessee for the purpose of claiming deduction u/s 801 A of the Act. In the appellant's case, the first year of commencement of activity was A.Y. 2004-05 but as section 80IA(2) permits the appellant has opted A.Y. 2008-09 as the initial assessment year*

for availing deduction for 10 consecutive assessment years starting from A.Y. 2008-09.

4.11 Now coming to the computation of deduction, the applicable section is 801 A(5) which provides deduction for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year on the profit and gain from the eligible business as if such eligible business was the only source of income of the assessee during the previous year relevant to the initial assessment year or to every subsequent assessment year upto and including the assessment year for which the determination is to be made. In the instant case, the provisions of section 80IA(5) would be applicable from previous year relevant to A. Y. 2008-09. Any profit or loss arising from the wind mills business would be considered for the computation from A.Y. 2008-09 to subsequent consecutive 10 assessment years. Therefore, the losses pertaining to previous years prior to A.Y. 2008-09 will not be taken into consideration for calculating the amount of deduction u/s 80IA of the Act. This view is also supported by the decisions of Hon 'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (supra) and Hon 'ble Karnataka High Court in the case of Anil H Lad (supra).

4.12 Therefore, in view of above discussions on the applicability of provisions of section 80IA(2) and (5) and judicial pronouncements, the AO was not justified in disallowance of claim of deduction of Rs. 1,09,82,471/- u/s 801 A of the Act. The AO is directed to delete the addition made on this account. This ground of appeal is allowed. "

9. On perusal of the above, we do not find any infirmity in the order of the learned CIT (Appeals) as the only controversy to be decided is

whether for claiming deduction under section 80IA of the Act, the losses which were incurred by the eligible business in the period earlier to the initial year are to be notionally carried forward to the initial assessment year and be adjusted before claiming deduction under section 80IA of the Act. We have also perused the judgment of the Karnataka High Court in the case of Anil H. Lad. (supra), whereby adjudicating the same issue, the Hon'ble Court has analyzed the judgment of the Madras High Court in case of Sri Velayudhaswamy Spinning Mills (P) Ltd. (supra), which has been relied very heavily by the assessee. The findings of the Hon'ble Court are at paras 9 and 10 of the judgment, which reads as under :

> *"9. The Madras High Court in the aforesaid Velayudhaswamy's case interpreting the very provision held, from a reading of sub-section (1) Section 80-IA, it is clear that it provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) i.e. referred to as the eligible business, there shall, in accordance with and subject to the provisions of the section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100 per cent of the profits and gains derived from such business for ten consecutive assessment years. Deduction is given to eligible business and the same is defined in sub-section (4). Sub-section (2) provides option to the assessee to choose 10 consecutive assessment years out of 15 years. Option has to be exercised. If it is not exercised, the assessee will not be getting the benefit. Fifteen years is outer limit and the same is beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure*

activity etc. Sub- section (5) deals with quantum of deduction for an eligible business. The words "initial assessment year" are used in sub-section (5) and the same is not defined under the provisions. It is to be noted that 'initial assessment year' employed in sub-section (5) is different from the words "beginning from the year" referred to in sub-section (2). Sub-section (5) starts with non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored; for the purpose of determining the quantum of deduction; for the assessment year immediately succeeding the initial assessment year, thereby a fiction is created by introducing a deeming provision and therefore, it is clear that the eligible business were the only source of income, during the previous year relevant to initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. Fiction created in sub- section does not contemplates to bring set off amount notionally. Fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.

10. Therefore, keeping in mind the object with which these provisions are introduced, it is clear that an

assessee is given the benefit of 100% deduction of the profits and gains from the eligible business. The quantum of deduction is to be calculated when the claim for deduction is made. If before claiming deduction, the loss and depreciation claimed by the assessee even in respect of eligible business is setoff against income of the assessee or other source, the said loss or depreciation is already absolved, it does not exist. For the purpose of determining the quantum of deduction under sub-section (5) of Section 80IA, the revenue cannot take into consideration the loss and depreciation which is already setoff against the income of the assessee from other source and compute the profit under Section 80IA. Therefore, the approach of the Tribunal is in accordance with law. The Assessing Authority and the Commissioner committed a serious error in setting off the profit earned by the assessee under Section 80IA against the losses and depreciation of the eligible business which is already setoff from other source before such a claim is putforth. Thus, there is no error committed by the Tribunal in setting aside the order passed by the Assessing Authority as well as the lower Appellate Authority. The substantial question of law is answered in favour of the assessee and against the Revenue."

10. This view has also been upheld by the Mumbai Bench of the Tribunal in the case of Shevie Exports (supra), whereby all the judgments relied on by the assessee as well as the Revenue have been considered and the Bench has given findings at paras 9 to 12, which reads as under :

"9. Section 80IA, which has been substituted w.e.f. 1st April 2000, provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking from any eligible business

referred to in sub–section 4, there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income, the deduction of an amount equal to 100% of the profits and gains derived from such business for 10 consecutive years. Substituted sub–section (2) of section 80IA, provides that an option is given to the assessee for claiming any 10 consecutive assessment year out of 15 years beginning from the year in which the undertaking or the enterprise develops and begin to operate. The 15 years is the outer limit within which the assessee can choose the period of claiming the deduction. Sub–section (5) is a non–obstante clause which deals with the quantum of deduction for an eligible business. The relevant provisions of sub–section (5) of section 80IA, reads as under:–

> *"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."*

10. From a plain reading of the above, it can be gathered that it is a non–obstante clause which overrides the other provisions of the Act and it is for the purpose of determining the quantum of deduction under section 80IA, for the assessment year immediately succeeding the initial assessment year or any

subsequent assessment year to be computed as if the eligible business is the only source of income. Thus, the fiction created is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the initial assessment year. Prior to 1st April 2000, the initial assessment year was defined for various types of eligible assessees under section 80IA(12). However, after the amendment brought in statute by the Finance Act, 1999, the definition of "initial assessment year" has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in sub–section (2) of section 80IA from which it chooses its 10 years of deduction out of 15 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in section 80IA(5). The loss prior to the initial assessment year which has already been set–off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. It is only when the loss have been incurred from the initial assessment year, then the assessee has to adjust loss in the subsequent assessment years and it has to be computed as if eligible business is the only source of income and then only deduction under section 80IA can be determined. This is the true import of section 80IA(5).

11. In the decision of Goldmine Shares and Finance Pvt. Ltd. (supra), decided by the Special Bench of the Tribunal, the claim of deduction by the assessee had started from assessment year 1996–97 onwards and the assessee had claimed deduction under section 80IA starting from the first year itself i.e., assessment year 1996–97. Thus, the Special Bench was dealing with the operation of section 80IA(5) where the assessee had

first claimed the deduction in the assessment year 1996–97 and for subsequent assessment years. This aspect of the matter has been very well elaborated by the Madras High Court in Velayudhaswamy Spinning Mills Pvt. Ltd. (supra) after considering the Special Bench decision of the Tribunal in Goldmine Shares And Finance Pvt. Ltd. (supra) and relevant provisions of the Act i.e., pre amendment and post amendment have come to the same conclusion:–

> *"From reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. Fiction created in sub-section does not contemplates to bring set off amount notionally. Fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.*

14. In the present cases, there is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised the option under s. 80-IA(2). In Tax Case Nos. 909 of 2009 as well as 940 of

2009, the assessment year was 2005-06 and in the Tax Case No. 918 of 2008 the assessment year was 2004-05. During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the year. The unreported judgment of this Court cited supra considered the scope of sub-s. (6) of s.80-I, which is the corresponding provision of sub-s. (5) of s. 80-IA. Both are similarly worded and therefore we agree entirely with the Division Bench judgment of this Court cited supra. In the case of CIT vs. Mewar Oil & General Mills Ltd. (2004) 186 CTR (Raj) 141 : (2004) 271 ITR 311 (Raj), the Rajasthan High Court also considered the scope of s. 80-I and held as follows:–

> *"Having considered the rival contentions which follow on the line noticed above, we are of the opinion that on finding the fact that there was no carry forward losses of 1983-84, which could be set off against the income of the current asst. yr. 1984-85, the recomputation of income from the new industrial undertaking by setting off the carry forward of unabsorbed depreciation or depreciation allowance from previous year did not simply arise and on the finding of fact noticed by the CIT(A), which has not been disturbed by the Tribunal and challenged before us, there was no error much less any error apparent on the face of the record which could be rectified. That question would have been germane only if there would have been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out of the priority industry and whether it was required to be set off against the income of the current year. It is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under s. 80-I for the purpose of computing admissible deductions thereunder.*

In view thereof, we are of the opinion that the Tribunal has not erred in holding that there was no rectification possible under s. 80-I in the present case, albeit, for reasons somewhat different from those which prevailed with the Tribunal. There being no carry forward of allowable deductions under the head depreciation or development rebate which needed to be absorbed against the income of the current year and, therefore, recomputation of income for the purpose of computing permissible deduction under s. 80-I for the new industrial undertaking was not required in the present case. Accordingly, this appeal fails and is hereby dismissed with no order as to costs."

From reading of the above, the Rajasthan High Court held that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under s. 80-I for the purpose of computing admissible deductions thereunder. We also agree with the same. We see no reason to take a different view."

12. This judgment has been further followed by the same High Court in CIT v/s Emerald Jewel Industry (P) Ltd. [2011] 53 DTR 262 (Mad.). From the above, ratio of the High Court, it is amply clear that sub–section (5) of section 80IA will come into operation only from the initial assessment year or any subsequent assessment year. The option of choosing the initial assessment year is wholly upon the assessee in the post amendment period i.e., after 1st April 2000 by virtue of section 80IA(2)."

11. In view of the judgment of the Karnataka High Court, which has also been relied on by the Mumbai Bench of the Tribunal and in the background that no judgment of the Hon'ble Jurisdictional High Court has been cited before us, we hold that choosing of initial assessment year for claiming deduction under

section 80IA of the Act in a block of ten years out of fifteen years is with the assessee i.e. it is the option of the assessee to choose the initial assessment year for claiming deduction under section 80IA of the Act. Further, the loss claimed by the assessee in respect of eligible business is to be set off against the income of the assessee from other ineligible business as in respect of assessment years and there is not need to notionally carry forward these losses up to the initial assessment year and write off the same out of the profits of eligible business.

12. The appeal of the Revenue in ITA No.1062/Chd/2014 is dismissed.

9. In view of the above, since no distinguishing facts were brought to our notice, respectfully following the order of the Coordinate Bench, we dismiss the grounds of appeal raised by the Revenue.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on this 6th day of April, 2016.

Sd/- Sd/-

(BHAVENESH SIANI)
JUDICIAL MEMBER

(RANO JAIN)
ACCOUNTANT MEMBER

Dated : 6th April, 2016

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,
ITAT, Chandigarh