IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 6792 OF 2010

The Commissioner of Income Tax-10]
Aayakar Bhavan, M.K. Road,]
Mumbai – 400 020.]
..Appellant

versus

M/s. Reliance Energy Ltd.]
Reliance Energy Centre]
Santacruz (E), Mumbai – 400 055]
..Respondent

Mr. Arvind Pinto for the Appellant.

Mr. P.J.Pardiwala, Sr. Counsel with Mr. B.G.Yewale i/b Rajesh Shah & Co. for the Respondent.

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CORAM : J.P. DEVADHAR &
M.S.SANKLECHA, JJ.

DATE : 26th November, 2012

JUDGMENT (PER M.S.SANKLECHA, J.) :

1 This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (the Act) challenges the order dated 14.05.2010 of the Income Tax Appellate Tribunal (the Tribunal) relating to the Assessment Year 2003-2004.

2. The order dated 14.05.2010 of the Tribunal disposes of two appeals of the revenue for assessment year 2001-02 and 2003-04. The issue arising in both the assessment years is with regard to reopening of assessment under Section 147 and 148 of the Act. However the two appeals with regard to assessment years 2001-02 (being appeal No.6791of 2010) and the present appeal are being disposed of by separate orders as appeal No.6791 of 2010 with regard to assessment year 2001-02 deals with reopening of assessment beyond a period of 4 years from the end of the relevant assessment year. While this appeal is with regard to reopening of assessment within a period of 4 years from the end of the relevant assessment year.

3. The Revenue has formulated the following questions of law for the consideration of this Court.

> a) Whether on the facts and circumstance of the case and in law, the Tribunal was correct in upholding

the order of the CIT(A) in canceling the notice u/s. 148 and the assessment u/s. 147 holding that the re-assessment proceedings initiated based merely of change of opinion without taking into consideration that Explanation 1 to Section 147 of the Act squarely applied to this case?

b) Whether on the facts and circumstances of the case and in law, the Tribunal was correct in upholding the order of the CIT(A) when the assessee did not bring to the notice of the AO, the Maharashtra Electricity Regulatory Committee (MERC) circular which prescribed the 'reasonable rate of return' earned by the assessee on the basis of which tariffs of electricity was to be calculated and on the basis of which the Assessing Officer has now reworked out the eligible profit for deduction ?

c) Whether on the facts and circumstance of the case and in law, the Tribunal was correct in upholding the order of the CIT(A) in deciding that the assessment was reopened on change of mind as the issues decided in the original assessment and re-opened assessment viz. Pricing of power and quantum of profits eligible for deduction, were different and thus it cannot be said that a change of opinion had taken place in the case?

4. The respondent-assessee is engaged in the business of generation and distribution of electricity. Originally the respondent was engaged

only in the distribution of electricity in Mumbai. However, with effect from assessment year 1996-97 it commenced generation of electricity from its plant at Dahanu. As a consequence of establishing of plant for generation of electricity the respondent became entitled to deduction under Section 80IA of the Act.

5 For the assessment year 2003-2004, the respondent had filed its return of income, which was assessed on 24.05.2005 under Section 143(3) of the Act. The Assessing officer by order dated 24.05.2005 determined the respondent's income under the normal provision at Rs.34.91 crores and under Section 115JB of the Act at Rs.215 crores. The aforesaid income was determined after allowing a deduction of Rs.282 crores in respect of the activity of power generation at Dahanu.

6 On 31.03.2008, a notice was issued by the appellant under Section 148 of the Act to the respondent seeking to reopen the assessment for

the assessment year 2003-04. The reasons for the reopening the assessment are recorded as under :

> " In this case, the assessee has filed the return of income for A.Y. 2003-04 on 28.11.2003 declaring total income at Nil and taxable income u/s 115JB at Rs.14,24,89,782/-. The assessment order u/s 143(3) of the act has been passed on 24.05.2005 assessing the total income under normal provisions of the Act at Rs.34,91,44,430/- and u/s 115JB of the Act at Rs.2,15,78,29,379/. In the same assessment order, the assessee has been allowed the deduction u/s. 80IA of the Act at Rs.38,67,924/- (in respect of profit from Elastimold business) and also at Rs.2,82,75,81,809/- in respect of profit from generation activity.
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> Section 80IA (10) of the I.T.Act, 1961 provides that 'where it appears to the AO that owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason the course of business between them is so arranged that the business transacted between them produced to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the AO shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived there from.
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> Tariff for purchase of sale of power is determined on the basis of the normative parameters determined by the

Govt of India under its Notification No. SO 251(E) dated 30.03.1992 issued under the provisions of Electricity Act, 1948. Tariff situates, both for the Central Sector and Independent Power producers (IPPS) were determined on COST PLUS PROFIT BASIS. Profit was determined on the 'return on equity' basis which was to be computed on the paid up and subscribed capital relatable to the generating unit at the rate of 16% of such capital. In this case, the assessee has claimed the deduction u/s 80IA of the Act in respect of generation of power from its power unit located at Dahanu. While filing the return of income for AY 2001-02, the assessee was aware that the profit should not exceed the 16% of its capital during the PY in view of the principles which are the basis for the fixation of tariff. However, the assessee has claimed the deduction u/s 80IA of the Act on the profits of Dahanu Unit which exceeded 16% of its capital. Though the MERC order in case No. 18 of 2003 was not passed till the date of passing of the order u/s 143(3) of the Act in the assessee's case, however, since the assessee was aware of the tariff regulation of restricting its profits to 16% in view of the act (Supra) the claim of deduction u/s 80IA should have been accordingly restricted in the return of income filed by the assessee and this fact should also have brought to the notice of the AO during the course of assessment proceedings. Thus, I am of the view that the claim of excess deduction u/s 80IA of the Act is because of failure on the part of the assessee, by not disclosing these facts truly and fully.

Maharashtra Electricity Regulatory Commission (MERC) in its order in the case no. 18 of 2003 calculated "Clear Profit or Reasonable Rate of return" on the assessee's capital for both generation and distribution of power. On perusal of assessee's records for AY 2001-02, it is observed that incorrect computation of profits without taking into consideration the tariff regulation which provides for clear profit and reasonable rate of return on capital base method has resulted in escapement of income to the extent of Rs.177.08 crores, which is worked out as under :

	Rs. In Crores
Reasonable Profit allowed by MERC while calculating tariff	249.00
Net power transferred from generated unit	3546
Total sales in license area	5880.00
Pro rata Reasonable profit	150.16
80IA deduction computed	581.51
80IA availed after restricting to available total income	261.96
Excess 80Ia deduction availed	110.80

Therefore, I have reason to believe that in the case of the assessee, the income of the assessee chargeable to tax to the extent of Rs.111.80 crores has escaped the assessment for AY 2001-02. This escapement of income is by reason for the failure on the part of the assessee to disclose fully and truly all material fact necessary for the assessment for the assessment year 2001-02.

Issue notice u/s. 148 of the Act. "

7 The respondent resisted the reopening of the assessment. However, the Assessing Officer by an order dated 31.12.2008 besides holding that an amount of Rs.111.80crores had escaped assessment in view of excess deduction claimed under Section 80IA of the Act in the regular proceeding also held that the reopening of assessment was justified as:

(a) the reopening was for a period of less then 4 years from the end of the relevant assessment year the only requirement was that the assessing officer must have a reasonable belief that income has escaped assessment. This belief was formed on the basis of the the order of the Maharashtra Electricity Regulatory Commission (MERC) for financial year 2004-05 determining the tariff for the sale of power by an order dated 01.07.2004 in which the profits attributable to its business of generation of electricity was pegged at 16% return on investment;

(b) Consequently, it was held that a deduction higher than 16% rate of return on investment was claimed as profits for deduction under Section 80IA of the Act in respect of its electric generation business; and

(c) the profits for purposes of deduction under Section 80IA of the Act of the power generation business has to be computed on the basis of reasonable profits in terms of Section 80IA(10) of the Act and not under Section 80IA(8) of the Act as done in the regular assessment i.e. the market value of goods and services(electricity supplied) from respondents electricity generating business to its distribution business;

8 In first appeal, the Commissioner of Income Tax (Appeals) by an order dated 02.06.2009 allowed the respondents appeal for assessment year 2003-04 by following his order in respondent's appeal for Assessment year 2001-02. So far as reopening of assessment for the assessment year 2003-04 was concerned the Commissioner of Income

Tax (appeals) held that the same was not sustainable as the Assessing officer had no reason to believe that income had escaped assessment. This was on account of the fact that the revenue had opened the assessment only for the purposes of application of Section 80IA(10) of the Act when the same was available during the regular proceedings. Therefore, the issue of the claim for deduction under Section 80IA (8) or (10) of the Act was an issue of interpretation and therefore it was a mere change of opinion not warranting reopening of the assessment. On other issues it follows his order dated 02.06.2009 of the Commissioner of Income Tax(Appeals) for the assessment year 2001-02. In view of the above, the Commissioner of Income Tax (Appeals) held that the order dated 31.12.2008 of the Assessing officer cannot be sustained

9 Being aggrieved, the appellant herein preferred an appeal to the Tribunal. The Tribunal by its order dated 14.05.2010 upheld the order of

the Commissioner of Income-Tax (Appeals) dated 02.06.2009 and held that the order dated 31.12.2008 of the Assessing officer is not justified on account of the following:

(a) Section 80IA(10) of the Act can have no application to the present facts as that sub-section postulates that there has to be a close connection between assessee and some other persons. In this case, there is no other person involved. The respondent is engaged in both power generating business as well as power distribution business and there is no transaction with any other person in respect thereto. Therefore, the original order of the assessment dated 23.03.2004 correctly applied Section 80IA(8) of the Act which applies to transaction carried out by an assessee between its eligible business and its non-eligible business so as to determine the market value of goods and services in arriving at its profit. In any event this was also a mere change of opinion not warranting reopening of assessment under Section 147 and 148 of the Act.

(b) the MERC order dated 01.07.2004 was in respect of fixing the tariff at which power has to be supplied and the same would be no relevance in arriving at the profit at the generating plant of the respondent at Dahanu for the purposes of Section 80IA of the Act;

(c) the assessment order dated 24.05.2005 passed in regular assessment dealt with the quantification of deduction under Section 80IA in respect of Dahanu plant had merged into the order of Appellate Authorities namely, the Commissioner of Income Tax (Appeals) and the Tribunal. This is so as the appellate authorities had dealt with the determination of profit for the purpose of deduction under Section 80IA of Dahanu generation plant. Consequently, the Assessing Officer now has no jurisdiction to reopen the assessment under Sections 147 and 148 of the Act as provided in view of the 3rd proviso to Section 147 of the Act.

10 We have heard Mr. Pinto Advocate for the revenue and Mr. Pardiwalla Senior Advocate for the

respondent. We find that both the Commissioner of Income Tax (Appeals) as well as the Tribunal have arrived at a finding of fact that Assessing officer did not have any reasonable belief to come to the conclusion that that there has been any escapement for the assessment year 2003-04. The order of MERC dated 01.07.2004 specifically deals with regard to fixing of the tariff rate at which power has to be supplied to the consumer. It is in the process of fixing of tariff rate for the consumer that 16% return on capital investments is to be taken into account as one of the ingredients to arrive at the tariff rate and has nothing to do with the actual profits which are earned by an activity of the power generation plant. As against that the deduction allowed under Section 80IA of the Act is on the actual profit earned by the power generation plant and has nothing to do with the fixing of the tariff rate for the supply of power to the consumer. Moreover the Tribunal has also correctly held that the jurisdiction to issue a reopening notice for

the assessment year 2003-04 is absent in view of the fact that the profits earned as determined under Section 80IA of the Act with regard to its Dahanu generation plant was the subject matter of appeal before the Commissioner of Income Tax (Appeals) and the Tribunal. Consequently, the original order of assessment dated 24.05.2005 had merged into the order of Appellate Authority *interalia* with regard to the profits earned from the power generation plant at Dahanu for the purposes of deduction claimed under Section 80IA of the Act. The jurisdiction to exercise powers of reopening an assessment is specifically barred in respect of any matter which has been a subject matter of the appeal by the 3rd proviso to Section 147 of the Act. Further the issue of application of Section 80IA (10) of the Act instead of Section 80IA (8) of the Act to arrive at the profit for claiming deduction under Section 80IA of the Act is a mere change of opinion which would not warrant reopening of assessment. The material to reopen the assessment being relied on by the

revenue seems to be the order of MERC dated 01.07.2004 which has nothing to with arriving at profits for purposes of deduction under Section 80IA of the Act but deals with fixing of the power tariff for the consumer and for that purpose takes as one of the ingredients 16% return on investments. Therefore, no fault can be found with the order of the Tribunal dated 14.05.2010.

11 In view of the above, the questions of law as formulated does not raise any substantial question of law. Therefore, the appeal is dismissed with no order as to costs.

(M.S. SANKLECHA, J.) **(J.P.DEVADHAR, J.)**