IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE

BEFORE DR. O. K. NARAYANAN, VICE PRESIDENT

AND

SMT. P. MADHAVI DEVI, JUDICIAL MEMBER

I.T.A No.1262/Bang/2010
(Assessment Year : 2008-09)

Shri. Anil H. Lad,
Prashant Nivas, Krishnanagar,
Bellary Road, Sandur .. Appellant

v.

Deputy Commissioner of Income-tax,
Central Circle - 2(3), Bangalore .. Respondent

Appellant by : Shri. V. Srinivasan, CA
Respondent by : Shri. G. V. Gopala Rao, Commissioner of Income-tax-I

O R D E R

PER DR. O. K. NARAYANAN, VICE PRESIDENT :

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income-tax(A)-VI at Bangalore, dated.29.10.2010 and arises out of the assessment completed u/s.143(3) r.w.s.153A of the IT Act, 1961.

2. The assessee was the proprietor of M/s.VSL Mining Company, till the financial year preceding to the relevant assessment year

involved in the present appeal. The proprietary concern of the assessee was taken over by a company named M/s. VSL Mining Company P. Ltd., in the previous year relevant to the assessment year under appeal. However, the assessee continued to remain as partner of M/s. V. S. Lad and Sons which carries on the business of mining operations of extractions, processing and export of iron ore. The assessee filed the return of income on a total income of ₹ 4,41,22,030/- after claiming a sum of ₹ 1,97,73,931/- as deduction u/s.80IA of the Act.

3. There was a search and survey action in assessee's concerns as well as the associate concerns. In the back drop of the search action, assessment was made by the assessing authority u/s.153A. Naturally, 153A assessments covered even the earlier assessment years. In the course of the assessment proceedings for the impugned assessment year 2008-09, the Assessing Officer disallowed the deduction of ₹ 1,97,73,931/- claimed by the assessee as deduction u/s.80IA. The Assessing Officer has also made an addition of ₹ 24,06,700/- on the ground of seizure of cash at the time of search. He has further made an addition of ₹ 1,68,43,841/- by way of 50% of the disallowance of expenses incurred on running and maintenance of helicopter. The disallowance was made on the ground of personal user. Accordingly,

the Assessing Officer determined a total income of ₹ 8,31,46,500/- as against a total income of ₹ 4,41,22,030/- returned by the assessee.

4. The assessment was taken in first appeal. The Commissioner of Income-tax(A) confirmed the order of the assessing authority disallowed the claim made by the assessee u/s.80IA and upheld the addition of ₹ 1,97,73,931/-. The Commissioner of Income-tax(A) also confirmed the addition of ₹ 24,06,700/- made by the assessing authority on the basis of seizure of cash in the course of search carried out u/s.132. Regarding the 50% disallowance of helicopter expenses, the Commissioner of Income-tax(A) set aside the disallowance and deleted the addition of ₹ 1,68,43,841/-. The grounds raised on levy of interest was disposed off as consequential.

5. The assessee is aggrieved on the two additions sustained by the Commissioner of Income-tax(A) and also in respect of levy of interest u/s.234B and 234C.

6. The relevant grounds raised by the assessee in the above background read as below :

i) The learned Commissioner of Income-tax(A) is not justified in upholding the denial of the deduction claimed u/s.80IA of

the Act amounting to ₹1,97,73,931/- under the facts and in the circumstances of the appellant's case.

ii) The learned Commissioner of Income-tax(A) is not justified in upholding the addition of ₹24,06,700/- being the cash seized by the department under the facts and in the circumstances of the appellant's case.

iii) Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG the appellant denies himself liable to be charged to interest u/s.234B and 234C of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

7. First we will consider the issue of deduction u/s.80IA of the IT Act, 1961.

8. The assessee had installed a windmill in the financial year 2005-06 relevant to the assessment year 2006-07. The assessee had claimed depreciation allowance to the extent of ₹ 33,66,68,484/- on the windmill in the assessment year 2006-07. Therefore, there was no profit to claim further deduction u/s.80IA. In the following assessment year 2007-08, again the assessee could not make out a claim for deduction u/s.80IA as there was a loss of ₹ 3,23,59,655/- for that assessment year. In short even though the wind mill was installed in the period relevant to assessment year 2006-07, the assessee could

not avail the benefit of deduction u/s.80IA for assessment years 2006-07 and 2007-08 for the reason stated above.

9. Therefore, the assessee claimed the deduction for the impugned assessment year 2008-09. The assessee derived a profit of ₹ 1,97,73,931/- from the operation of windmill and claimed the entire amount as deduction u/s.80IA. The depreciation and loss pertaining to the earlier assessment years 2006-07 and 2007-08 were in fact set off by the assessee against the profit generated from other business including mining business carried on by the assessee. Even though the assessee could not claim the deduction u/s.80IA for those assessment years 2006-07 and 2007-08, the depreciation and loss relating to those assessment years have already been set off against the profits generated from other business carried on by the assessee. Therefore, according to the assessee, there was no unabsorbed depreciation and loss to be set off against the profit of ₹ 1,97,73,931/- pertaining to the impugned assessment year 2008-09 and it is therefore that the assessee has claimed the entire profit of the impugned assessment year as deduction u/s.80IA.

10. But the Assessing Officer held that even though the depreciation and loss relating to the earlier assessment years have

already been set off against the profit of the assessee generated from other businesses, it is necessary for the purpose of deduction u/s.80IA to carry forward those depreciation and business loss in a notional manner to set off against the profit of the impugned assessment year and if so set off, there is no profit available in the hands of the assessee to claim deduction u/s. 80IA, even for the impugned assessment year 2008-09. In order to make out the proposition of notional carry forward and set off, the assessing authority has relied on sub-section 5 of Section 80IA.

11. Sub-section 5 of section 80IA reads as follows :

> *(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.*

12. On the basis of the above statutory provision, the Assessing Officer came to the following two grounds :

(i) That the income or loss of the eligible unit has to be worked out on stand alone basis and as only source of income.

(ii) The computation of the deduction u/s.80IA should start with the initial assessment year and the unabsorbed depreciation and loss relating to the initial assessment year and subsequent assessment years up to the eligible assessment year has to be set off against the profit and loss account of the eligible assessment year for which the assessee had made the claim of deduction.

13. On the basis of the above grounds, the Assessing Officer came to a finding that the initial assessment year in the case of the assessee is 2006-07 and the eligible assessment year opted by the assessee to claim deduction is 2008-09 and therefore, the unabsorbed depreciation and loss relating to assessment years 2006-07 and 2007-08 has to be set off against the profit of the impugned assessment year 2008-09. As the unabsorbed depreciation and loss of those assessment years 2006-07 and 2007-08 have already been set off against the profits of other business of the assessee carried on by the assessee for those assessment years, the Assessing Officer further held that the carry forward and set off has to be exercised on a notional basis. In other words, even though no amount is available as unabsorbed depreciation and loss by virtue of the fact that they have been set off against the profits of other business of the assessee for those assessment years, still for the purpose of section 80IA(5), carry forward and set off has to be exercised on a

theoretical basis through the medium of notional carry forward and set off. In coming to the above finding the Assessing Officer has relied on the judgement of the Bombay High Court in the case of Indian Rayon Corporation v. Commissioner of Income-tax (261 ITR 98), for the proposition that the special deduction under Chapter VIA should be restricted to the profits derived from the newly established undertakings.

14. The assessee placed before the Commissioner of Income-tax(A) decision of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57), where the court has held that there was no need of any such notional exercise of carry forward and set off of earlier period depreciation and loss in the process of computing the deduction u/s.80IA. But the Commissioner of Income-tax(A) observed that the facts and circumstances considered by the Hon'ble Madras High Court in the above case are different from the present case and the present case is squarely covered by the Special Bench decision of the ITAT, Ahmedabad, rendered in the case of ACIT v. Gold Mines Shares & Finance P. Ltd (116 TTJ (Ahd) (SB) 705). It has been held by the Special Bench in the said case that in view of the specific provisions of section 80IA(5) of the IT Act, 1961, profit from eligible business for

the purpose of determination of the quantum of deduction u/s.80IA of the Act has to be computed after deduction of the notionally brought forward losses and depreciation of eligible business even though they have been allowed to be set off against other income in the earlier years. Accordingly, the Commissioner of Income-tax(A) dismissed the contentions of the assessee and confirmed the addition of ₹ 1,97,73,931/-.

15. The assessee as well as the Revenue have raised the same set of contentions before us which were already placed before the Commissioner of Income-tax(A) and before the assessing authority.

16. It is a fact that the Special Bench of the ITAT, Ahmedabad in ACIT v. Gold Mines Shares & Finance P. Ltd (116 TTJ (Ahd) (SB) 705), has held that the notional exercise is called for in computing the quantum of deduction u/s.80IA which supports the stand taken by the Revenue.

17. But we find that the decision of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57) has dealt with exactly the same issue and has held that such a notional exercise is not contemplated in the provisions of law

contained in section 80IA(5). Even though the Commissioner of Income-tax(A) has made an attempt to distinguish the facts of the case considered by the Hon'ble Madras High Court, we are afraid that the Commissioner of Income-tax(A) has misconstrued the nature of facts involved in all these cases and he is not justified in distinguishing the facts of the case.

18. To make the matter more clear it is to be stated that the issue considered by the Special Bench of the ITAT, Ahmedabad in ACIT v. Gold Mines Shares & Finance P. Ltd (116 TTJ (Ahd) (SB) 705), and by the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57) and the issue involved in the impugned appeal are all one and the same that whether the exercise of notionally carried forward and set off of depreciation and loss of the eligible business relating to the earlier assessment years is called for when the depreciation and loss of those assessment years have already been allowed to be set off against other income of those assessment years.

19. As the issue raised in all the three cases including the present one is one and the same, we cannot over look the judgement of the Hon'ble Madras High Court only on the basis of a feeble argument that

the facts and circumstances of that case are different from the present case in hand.

20. It is needless to say that the judgement of a constitutional court has got an overriding effect on the decision of a Special Bench of the Appellate Tribunal. Therefore, in the present case, the relevance of the judgement of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57) need not be over emphasized. Therefore, we have to first examine that how far the said judgement of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57) governs the issue in hand.

21. The facts relevant in the case of Velayudhaswamy Spinning Mills are as follows. The assessee in that case is engaged in the business of manufacture of yarn and electricity generation through wind electric generator. It filed its return of income for the relevant assessment year 2005-06 admitting a total income of ₹1,36,36,470/- in normal computation and total income of ₹ 2,95,73,840/- as book profit u/s.115 JB. In the course of scrutiny assessment, the Assessing Officer disallowed the claim of deduction made by the assessee u/s.80IA amounting to ₹ 1,70,76,945/-. The disallowance was made on the

ground that the eligible income of the unit for the impugned assessment year is a negative figure. The negative figure was worked out by the assessing authority by notionally setting off the depreciation and loss of the earlier assessment years treating the year of commencement of business as initial assessment year. In fact, the depreciation and loss of those assessment years have been set off against the income arising from other business carried on by the assessee. In first appeal the Commissioner of Income-tax(A) held that the year of commencement need not be the "initial assessment year" and the initial assessment year is the year in which the assessee makes an effective claim of deduction. As the assessment year 2005-06 is the assessment year in which the effective claim by the assessee has been made, the same should be the initial assessment year and therefore unabsorbed depreciation of earlier years which had already been absorbed against the income arising from other income of the business of the assessee cannot be notionally carried forward and taken into consideration for computing the deduction u/s.80IA. The matter was again taken up by the Revenue before the ITAT, Chennai. The Tribunal reversed the order of the Commissioner of Income-tax(A) and upheld the notional adjustment made by the assessing authority in the light of the Special Bench of the ITAT, Ahmedabad in ACIT v. Gold Mines Shares & Finance P. Ltd

(116 TTJ (Ahd) (SB) 705). The Tribunal allowed the Departmental appeal.

22. It was in this context the matter was further taken up before the Hon'ble Madras High Court by the assessee in an appeal filed u/s.260A, by which the substantial questions of law were framed for consideration of the Hon'ble court, as below :

(a) Whether on the facts and circumstances of the case, the Tribunal is right in law in holding that the appellant is not entitled to claim deduction under s.80IA ?

(b) Whether on the facts and circumstances of the case, the Tribunal is right in law in holding that initial assessment year in s. 80IA(5) would only mean the year of commencement and not the year of claim ?

(c) Whether on the facts and circumstances of the case, the Tribunal is right in law in saying that unabsorbed depreciation of earlier years before the first year of claim, which has already been absorbed, could be notionally carried forward and taken into consideration for computation of deduction under s. 80IA ?

(d) Whether on the facts and circumstances of the case, the Tribunal is right in law in following the decision of the Special Bench in the case of Gold Mines Shares & Finance P. Ltd (supra) when admittedly the said decision was rendered prior to the amendment to s. 80-IA by Finance Act, 1999 ?"

23. From the above questions placed before and considered by the Hon'ble Madras High Court, it is clear that the issue raised in the

present appeal is exactly the same issue adjudicated by the Hon'ble Madras High Court.

24. The Hon'ble Madras High Court while considering the said issue referred to the judgement of the same court dated.23.12.2009 in a Tax Case (Appeal) No.298 of 2004 rendered in the context of section 80I (6). It was held in the said unreported judgement that the cumulative consideration of the principles set out in the decisions considered by the Court that where admittedly the entire depreciation allowance and development rebate for the earlier years were fully set off against the total income of the assessee for those assessment years and no further depreciation allowance or development rebate remained unabsorbed and nothing could be deducted in respect of the set off while determining the deduction u/s.80I of the Act.

25. The above finding was given by the Hon'ble High Court in the said unreported case in reply to the following question placed before their lordships :

> *"Whether the Tribunal was right in holding that for the purpose of allowing deduction under s. 80-I, the brought forward losses and unabsorbed depreciation etc., of the new industrial undertaking need not be taken into consideration, once they have been set off against other sources of income,*

especially in view of the clear provisions of sub-s.6 of s. 80-I, the application of which is mandatory ?"

26. By making a reference to the above unreported judgement and further examining the statutory provisions of section 80IA(5), the Hon'ble Madras High Court has held as follows :

"From a reading of the above, it is clear that the benefit is given to the profits and gains derived from the business of the hotel or business of repairs to ocean-going vessels or other powered craft. The deduction is allowed to the extent of 20 per cent from the profits and gains of the assessee. Sub-s. (5) gives deduction for the period of seven assessment years immediately succeeding the initial assessment year. Sub-s. (6) deals with computing the deduction under sub-s. (1) and it starts with non obstante clause and also it is a deeming provision. The fiction created by the undertaking was the only source of income during the previous year initially and subsequent assessment years. Sub-s. (6) was the subject-matter before this Court in the above-mentioned unreported judgement, wherein this Court had held that while interpreting the above provision, for the purpose of allowing deduction under s. 80-I brought forward losses and unabsorbed depreciation of the new industry need not be taken into consideration once they have been set off from other sources of income earlier. In the present case, we are concerned with the provisions of s. 80-IA. The said provision was introduced by Finance Act, 1999 w.e.f. 1st April, 2000. Provisions of ss.80-I and 80-IA are also more or less identically

worded. Secs. 80-I and 80-IA come in Chapter VI-A of the IT Act……..

"Where any deduction is required to be made or allowed under any section included in this chapter under the head 'C-Deductions in respect of certain incomes' in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

A mere reading of the above provision makes it clear that any income of the nature specified in that section, which is included in the gross total income of the assessee for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provision of this Act shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in the gross total income. Sec.80AB defines "gross total income" which means the total income has to be computed in accordance with the Act before making deduction under this chapter. Heading 'B' deals with "deductions in respect of certain payments" which consists of ss. 80C to 80GGC. Heading 'C' deals with "deductions in respect of certain incomes', which consists of ss. 80H to 80TT. The last heading 'D' deals with 'other deductions', which

consists of ss. 80U to 80VV. Heading 'C' is relevant for considering the issue in these appeals. The relevant provisions that are to be considered are ss. 80-I, 80-IA and 80-IB. In the case of Liberty India v. Commissioner of Income-tax (2009) 225 CTR (SC) 233; (2009) 28 DTR (SC) 73 ; (2009) 317 ITR 218 (SC), the apex Court considered the scope of ss. 80-I, 80-IA and also s. 80-IB of the Act, wherein, it has been held that Chapter VI-A provides for incentives in the form of tax deductions essentially belong to the category of "profit-linked incentives". Therefore, when s. 80-IA/80-IB refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives. Further, it has been held that ss. 80-IB/80-IA are the code by themselves as they contain both substantive as well as procedural provisions. The Supreme Court further observed in the said judgement that sub-s. (5) of s. 80-IA provides for manner of computation of profits of an eligible business. Accordingly such profits are to be computed as if such eligible business is the only source of income of the assessee……..

From reading of sub-s. (1), it is clear that it provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking of an enterprise from any business referred t in sub-s. (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-s. (4), Sub-s.

(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-s. (5) deals with quantum of deduction for an eligible business. The words "initial assessment year" are used in sub-s. (5) and the same is not defined under the provisions. It is to be noted that 'initial assessment year' employed in sub-s. (5) is different from the words "beginning from the year" referred to in sub-s. (2). Important factors are to be noted in sub-s. (5) and they are as under :

"(1) It starts with non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored ;

(2) It is for the purpose of determining the quantum of deduction ;

(3) For the assessment year immediately succeeding the initial assessment year ;

(4) It is a deeming provision ;

(5) Fiction created that the eligible business is the only source of income ; and

(6) During the previous year relevant to the initial assessment year and every subsequent assessment year

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."

27. Thus the Hon'ble Madras High Court has clearly held that where the depreciation and loss of earlier assessment years have already been set off against other business income of those assessment years, there is no need for notionally carrying forward and setting off of the same depreciation and loss in computing the quantum of deduction available u/s.80I. The Hon'ble Court has held further that the year of commencement alone need not be the "initial year", but depending upon the facts of the case and the option exercised by the assessee, the year of claim also can be considered as "initial assessment year". The court has also examined the issue from a different legal angle and held

that the proposition argued by the Revenue is not compatible with the scheme of gross total income conceptualized in the IT Act, especially in the light of section 80AB which are all relevant while considering the deduction u/s.80IA which is falling under Chapter VIA of the IT Act, 1961. Where the earlier depreciation and losses have already been set off, those loss and depreciation do not go to reduce the gross total income of an assessee within the meaning of section 80AB and therefore bringing the notional concept of carrying forward and set off will be contrary to the scheme of section 80AB and concept of gross total income.

28. Now it is clear as we find that this issue is squarely covered by the above discussed judgement of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills P. Ltd. v. ACIT (38 DTR 57). Where such an overriding judgement of the constitutional court is governing the issue, we are not permitted to rely on the decision of the Special Bench of the Ahmedabad Tribunal.

29. Therefore, following the above judgement of the Hon'ble High Court of Madras, we accept the contention of the assessee and reverse the order of the Commissioner of Income-tax(A) on this point and direct the assessing authority to grant deduction to the assessee

u/s.80IA for the quantum claimed by the assessee without diluting the same by the notional deduction of earlier loss and depreciation.

30. This ground is decided in favour of the assessee.

31. The next issue is the addition of ₹ 24,06,700/- in the nature of cash seized in the course of search. We have gone through the detailed submissions made by the assessee before the lower authorities as well as before the Tribunal. The assessee has not explained anywhere the source of this much amount as discernible from the books of account or any other documents. Therefore, the said amount remains as unexplained. Naturally, the assessing authority is justified in adding the said amount of ₹ 24,06,700/- as the income of the assessee. The said addition is accordingly upheld and the issue is decided against the assessee.

32. The third ground is in respect of levy of interest u/s.234B and 234C. This is consequential and the assessing authority shall modify the computation of interest.

33. In result, this appeal filed by the assessee is partly allowed.

Order pronounced on Friday, the 07th day of January, 2011, at Bangalore.

Sd/-	Sd/-
(SMT. P. MADHAVI DEVI) JUDICIAL MEMBER	(DR. O. K. NARAYANAN) VICE PRESIDENT