IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A'

BEFORE SHRI N.BARATHVAJA SANKAR, VICE-PRESIDENT
and
SHRI GEORGE GEORGE K, JUDICIAL MEMBER

ITA No.294(Bang)/2011
(Assessment year: 2007-08)

Deputy Commissioner of Income-tax,
Circle-1(1), Hubli. ... Appellant

Vs.

M/s.Bellad & Co.
Vidyanagar,
Hubli. ... Respondent
PAN No.AABFB6457D

Appellant by: Shri S.K.Ambastha.
Respondent by : Shri P.Dinesh.

Date of hearing: 02-02-2012
Date of pronouncement: 02-02-2012

O R D E R

Per GEORGE GEORGE, K, JM:

This appeal, instituted by the revenue, is directed against the order of the CIT(A), Hubli, dated 22-12-2010. The relevant assessment year is 2007-08.

2. The grounds raised read as follows:

"1. The order of the CIT(A), Hubli is opposed to law and facts of the case.

2. *The learned CIT(A) erred in holding that the Assessing Officer was incorrect in not giving set off of the loss of the industrial undertaking on the pretext that the profit of the industrial undertaking was eligible for deduction u/s 80-IA of the Act and by virtue of section 80-IA(5) of the Act the loss was required to be carried forward and was not eligible to be set off against the other income of the appellant.*

3. *The learned CIT(A) erred in holding that the unabsorbed depreciation from the windmill business has to be allowed to be set off against other business income u/s 70(1) of the Act.*

4. *The section 80IA(5) starts with non-obstante clause begins with 'Notwithstanding anything contained in any other provisions of the Act.....' non-obstante clause is used usually in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause. In case there is any inconsistency or a departure between the non-obstante clause and another provision, one of the objects of such clause is to indicate that it is the non-obstante clause which would prevail over the other clause. Therefore the provision of section 80IA(5) should prevail over the non-obstante section 70(1) of the IT Act,1961. In view of this the income/loss from the windmill business has to be separately computed and allowed to be carried forward for set off of future income from windmill of the assessee in order to claim benefit for 10 years. Section 70(1) has no application to the present case since windmill business has the tax holiday benefit for 10 years and has to be computed as a separate eligible business.*

5. *For these and such other reasons that will be adduced at the time of hearing it is prayed that the order of the CIT(A) be cancelled and that of the Assessing Officer restored.*

3. Brief stated facts of the case are as follows: The assessee is a partnership firm dealing in automobiles and Sony products and also into generation of electricity from windmills. The assessee filed its return of income for AY 2007-08 declaring income of ₹.11,52,410/- after setting off of depreciation loss

pertaining to windmill installed during the financial year relevant to assessment year under appeal. The AO, in the assessment completed, disallowed loss of ₹1,22,30,626/- by holding thus:

> *"Section 80IA(5) starts with non-obstante clause reading as 'notwithstanding anything contained in any provisions of the Act' which means it overrides all the provisions of the Act. Thus, the income from this source is to be computed independently. The computation to be made is in respect of the eligible business and not in respect of the assessee. It is therefore clear that depreciation in respect of the assets pertaining to the said activities is allowable only to the extent of the income from such activity and any unabsorbed depreciation cannot be set off against any other income. It has to be carried forward for set off only against the income from such business, in subsequent years. This view has been upheld by the Special Bench of Ahmedabad ITAT in the case of ACIT v. Goldmine Shares and Finance Ltd. (2008) 113 ITD 209."*

4. Aggrieved by the assessment, assessee carried the matter in appeal before the first appellate authority. The first appellate authority [CIT(A)], following the order of the Tribunal in ITA No.200/Bang/2010 in the case of *Swarnagiri Wire Insulations P. Ltd. vs. ITO,* decided the issue in favour of the assessee. The AO was directed to allow set off of the entire loss from Windmill business against other heads of income. The CIT(A) held that the order of the Special Bench of the Tribunal

relied on by the AO was overruled by the Hon'ble Madras High Court in the case of *Velayudhaswamy Spinning Mills P. Ltd. vs. ACIT* reported in 231 CTR 368. The revenue being aggrieved is in appeal before us.

5. At the very outset, it was pointed out by the learned AR of the assessee that the order of the Tribunal relied on by the first appellate authority viz., *Swarnagiri Wire Insulations P. Ltd.* (supra) was affirmed by the Hon'ble jurisdictional High Court in ITA No.5050/2010 dated 27-5-2011.

Learned Departmental Representative was not able to controvert the assertion of the learned AR of the assessee.

6. We have heard rival submissions and perused the material on record. The Tribunal, in the case of *Swarnagiri Wire Insulations P. Ltd.* (supra) had considered an identical issue relating to the applicability of sec.80IA(5) of the Act. The finding of the Tribunal is recorded at para.10.1 of the impugned order of the CIT(A) and hence, the same is not reiterated. We find that the facts and the issue considered by the Tribunal are identical and with reference to the issue in the instant case. The Tribunal order cited supra has been affirmed by the Hon'ble jurisdictional High Court in ITA No.5050/2010 dated 27-5-2011. The Hon'ble jurisdictional High Court had followed the judgment of the Hon'ble Supreme Court in the case of *Synco Industries Ltd. vs. Assessing officer(Income tax) & another* reported in (2008) 299 ITR 444(SC). The relevant finding of the jurisdictional High Court is reproduced below:

"5. The Supreme Court had an occasion to consider the same question in the case of Synco Industries Ltd. vs. Assessing Officer (Income Tax) and another reported in (2008) 299 ITR 444 (SC), and at para 13 it has been held as under:

> *13. The contention that under Section 80-I (6) the profits derived from one industrial undertaking cannot be set off against loss suffered from another and the profit is required to be computed as if profit making industrial undertaking was the only source of income, has no merits. Section 80-I (1) lays down that where the gross total income of the assessee includes any profits derived from the priority undertaking/unit/division, then in computing the total income of the assessee, a deduction from such profits of an amount equal to 20% has to be made. Section 80-I (1) lays down the broad parameters indicating circumstances under which an assessee would be entitled to claim deduction. On the other hand Section 80-I (6) deals with determination of the quantum of deduction. Section 80-I (6) lays down the manner in which the quantum of deduction has to be worked out. After such computation of the quantum of deduction, one has to go back to Section 80-I (1) which categorically states that where the gross total income includes any profits and gains derived from an industrial undertaking to which Section 80-I applies then there shall be a deduction from such profits and gains of an amount equal to 20 percent. The words "includes any profits'' used by the legislature in Section 80-I(1) are very important which indicate that the gross total income of an assessee shall include profits from a priority undertaking. While computing the quantum of deduction under Section 80-I(6) the Assessing Officer, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income in order to arrive at the deduction under Chapter VI-A. However, this Court finds that the non-obstante clause appearing in Section 80-I(6) of the Act, is applicable only to the quantum of deduction, whereas, the gross total income under Section 80B(5) which is also referred to in Section 80I(1) is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after*

adjusting the losses of the other division against the profits derived from an industrial undertaking. If the interpretation as suggested by the appellant is accepted it would almost render the provisions of Section 80A(2) of the Act nugatory and therefore the interpretation canvassed on behalf of the appellant cannot be accepted. It is true that under Section 80-I(6) for the purpose of calculating the deduction, the loss sustained in one of the units, cannot be taken into account because Sub-Section 6 contemplates that only the profits shall be taken into account as if it was the only source of income. However, Section 80A(2) and Section 80B (5) are declaratory in nature. They apply to all the Sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and therefore the non-obstante clause in Section 80-I(6) cannot restrict the operation of Sections 80A(2) and 80B(5) which operate in different spheres. As observed earlier Section 80-I(6) deals with actual computation of deduction whereas Section 80- I(1) deals with the treatment to be given to such deductions in order to arrive at the total income of the assessee and therefore while interpreting Section 80-I(1), which also refers to gross total income one has to read the expression 'gross total income' as defined in Section 80B(5). Therefore, this Court is of the opinion that the High Court was justified in holding that the loss from the oil division was required to be adjusted before determining the gross total income and as the gross total income was 'Nil' the assessee was not entitled to claim deduction under Chapter VI-A which includes Section 80-I also."

6. In view of the law laid down by the Apex Court as aforesaid, there is no error in the order passed by the Tribunal. As such, no case for interference is made out. Accordingly, the substantial question of law as framed is answered against revenue and in favour of the assessee. ...."

Since the issue in the instant case is directly covered by the judgment of the Hon'ble jurisdictional High Court cited supra, we are of the view that the order of the first appellate authority directing the AO to set off loss from windmill business against

other heads of income of the assessee is justified and no interference is called for.

7. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 2nd February, 2012.

Sd/-	sd/-
(N.Bharathvaja Sankar)	**(George George K)**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Place : Bangalore

Dated: 2 February, 2012.

Eks

Copy to :

1. Appellant
2. Respondent
3. CIT(A) concerned
4. CIT
5. DR, ITAT, Bangalore
6. Guard file

By Order

Assistant Registrar, ITAT, Bangalore