आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"E" BENCH, MUMBAI

श्री बी. रामकोटय्य, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 321/Mum./2012
(निर्धारण वर्ष / Assessment Year : 2008–09)

M/s. Shevie Exports
304/A, Phonix House
462, Senapati Bapat Marg
Lower Parel, Mumbai 400 013

..... अपीलार्थी / Appellant

बनाम v/s

Jt. Commissioner of Income Tax
Range–18(2), Mumbai

..... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AABFS3445E

राजस्व की ओर से / Assessee by : Dr. K. Shivram a/w Mr. Rahul K. Hakani
निर्धारिती की ओर से / Revenue by : Mr. Girija Dayal

सुनवाई की तारीख / Date of Hearing – 12.02.2013	आदेश घोषणा की तारीख / Date of Order – 10.04.2013

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा / PER AMIT SHUKLA, J.M.

In the present appeal, the assessee has challenged the impugned order dated 7th December 2011, passed under section 263 of the Income Tax

Act, 1961 (for short *"the Act"*) for the assessment year 2008–09, by the learned Commissioner of Income Tax holding that the assessment made by the Assessing Officer is erroneous inasmuch as it is prejudicial to the interests of the Revenue.

2. Facts in Brief:– The assessee is a partnership firm which is engaged in the business of export of hand embroidered items and supplying the same to top fashion houses in Europe and U.S.A. Besides this, the assessee is also engaged in power generation through Wind mills installed in District Dhule, Maharashtra. The return of income was filed for assessment year 2008–09 on a total income of ₹ 3,77,80,540 on 18th September 2008. Along with the said return of income, the assessee had filed audit report in Form–10CCB for claiming deduction under section 80IA with regard to wind mill undertaking. In the said report, the assessee had mentioned that the date of commencement and operation of the undertaking was 29th September 2006, and the initial assessment year from which the deduction has been claimed is assessment year 2008–09. The deduction under section 80IA was claimed at ₹ 7,16,904. Such a return of income was subjected to scrutiny under section 143(3) and the assessment was completed at an income of ₹ 3,80,34,580, vide order dated the December 2010, after making disallowance under the head *"Foreign Travel Expenses"* for a sum of ₹ 1,31,075, disallowance under section 14A at ₹ 59,896 and excess payment of embroidery charges of ₹ 63,070. The deduction claimed under section 80IA as per audit report for a sum of ₹ 7,60,904 was allowed.

3. Thereafter a show cause notice under section 263 was issued by the learned Commissioner of Income–tax on 3rd November 2011 on the ground that the assessment order is erroneous inasmuch as it is prejudicial to the interests of the Revenue mainly on three grounds; firstly, the wind mill was installed in the year 2006 which has commenced its operation on 29th September 2006 and in the first year of its operation i.e., for the assessment year 2007–08, the assessee had shown a loss of ₹ 3,52,47,398, on account

of depreciation and interest and this loss was set–off against export business income of non–eligible units in the assessment year 2007–08 itself. In assessment year 2008–09, the profit of ₹ 7,16,904, has been claimed as deduction under section 80IA without setting off the loss. It was further observed that while completing the assessment in assessee's case for assessment year 2009–10, the claim of deduction under section 80IA at ₹ 19,65,160, has been disallowed by the Assessing Officer on the ground that as per the provisions of section 80 IA, deduction is to be allowed after adjustment of carried forward losses from the wind mill division and this finding of the Assessing Officer was duly supported by the Special Bench decision of Ahmedabad Bench of the Tribunal in ACIT v/s Goldmine Shares And Finance Pvt. Ltd. [2008] 302 ITR (AT) 208 (SB) (Ahd.). The said finding of the Assessing Officer will also be applicable for assessment year 2008–09 also as the profit of ₹ 7,16,904 would be adjusted against brought forward losses of ₹ 3,52,47,398 of earlier assessment year 2007–08 and, therefore, the deduction claimed under section 80IA for a sum of ₹ 7,16,904, has wrongly being allowed. The second ground was that the disallowance of foreign travel expenses has been made on fixed percentage of 4% of the expenses despite that the Assessing Officer has noted that the desired details / documentary evidences were not submitted. The third ground was that the Assessing Officer has failed to examine the generator guarantee claim receivable of ₹ 28,00,000 and also other receivable of ₹ 30,41,000 as no enquiry has been done to find out the exact nature of the sources and other taxability.

4. In response, the assessee filed a detail reply before the learned Commissioner wherein it was contended that all the documents and information on which the proposed revision has been invoked was duly available with the Assessing Officer who had applied his mind in determining the allowability of deduction under section 80IA and the Special Bench decision cannot be the reason for revision under section 263. Secondly, the view taken by the Assessing Officer is a possible view under the law and,

therefore, in view of the various case laws wherein it has been upheld that where the Assessing Officer has taken one possible view, then the assessment cannot be held as erroneous inasmuch as it is prejudicial to the interest of Revenue under section 263. Further, after the amendment in section 80IA by the Finance Act, 1999, an assessee has an option for selecting the year of claiming relief under section 80IA and the assessee has chosen assessment year 2008–09 as the initial assessment year, therefore, there is no question of setting–off notionally carried forward unabsorbed depreciation or loss against the profits of the eligible business unit. The Special Bench decision will not be applicable as the same pertains to the assessment year prior to the amendment. With regard to foreign travel expenses, it was submitted that all the details of foreign traveling expenses and ratio of claim of such expenses with that of export sales were duly produced before the Assessing Officer and also for the earlier years for comparison. Based on the earlier years' parameter, the Assessing Officer has disallowed 4%. Thus, a view has been taken by the Assessing Officer about the nature of disallowability of such expenses. Regarding the amount receivable, it was submitted that the same was already credited to the revenue account in Profit & Loss Account, hence, there is no question of taking any adverse view.

5. The learned Commissioner, however, with regard to the two aspects i.e., the claim of deduction under section 80IA and foreign traveling expenses, set aside the assessment and directed the Assessing Officer to re–examine both the issues after observing and holding as under:–

> *"7. On careful consideration of submission made by the Ld. AR., I do not find any merit therein with regard to both the issues in hand. In respect the deduction u/s 801A, the A.O. has not appreciated the provision of Sec 801A(5) of the Act in proper prospective. The Hon'ble Special Bench has deliberated at length in the case referred above and categorically held that the eligible business has to be considered on stand alone basis. Accordingly, profit of the eligible limit is to be determined after deduction of notional brought forward loses and deprecation of eligible unit even though they were set off in the earlier years. The assessee has not been able to place on record any contrary*

decision in any other court of law. Therefore, there is neither a case of debatable issue nor change of opinion. Since the A.O. has failed to apply correct provision of law, provisions of section 263 are clearly applicable.

8. With regard to foreign travelling expenses also, contention of the assessee can not be accepted in view of the contradiction in the assessment order by the A.O. himself. It is evident that despite the fact that the assessee could not produce relevant documentary evidences, the A.O. went on to make only a negligible disallowance vis-a–vis quantum of claim. It is quite apparent that the A.O. has allowed deduction despite the same being unproved. In such a situation, the order could be considered to prejudicial to the interest of the Revenue, as held in the case of Emery Swoon Manufacturing Co 213 ITR 843 (Rajasthan)."

6. Before us, the learned Counsel submitted that in Form no.10CCB, the assessee has clearly shown that the initial assessment year for claim of deduction was assessment year 2008–09, therefore, there was no question of carry forward of notional loss to be set–off in this year. In support of this contention, he relied upon the judgment of Hon'ble Madras High Court in Velayudhaswamy Spinning Mills Pvt. Ltd. v/s ACIT, [2012] 340 ITR 477 (Mad.) and CIT v/s Emerala Jewel Industry Pvt. Ltd., [2011] 53 DTR 262 (Mad.). Regarding Special Bench decision of the Tribunal in Goldmine Shares And Finance Pvt. Ltd. (supra), the learned Counsel submitted that this decision will not be applicable, as the same was relevant for the provisions applicable in the assessment years 1996–97 and 1997–98, which was prior to the amendment brought in the statute by the Finance Act, 1999. He further submitted that the assessee's claim for deduction under section 80IA and Assessing Officer's decision to allow such a claim was based on various decisions in favour of the assessee at that time and if the same has been allowed by taking one possible view, the same cannot be held to be erroneous and prejudicial to the interests of the Revenue within the meaning of section 263. In support of this contention, he relied upon the judgment of Hon'ble Supreme Court in Malabar Industries Co. Ltd. v/s CIT, [2000] 243 ITR 83 (SC), Grasim Industries Ltd. v/s CIT, [2010] 321 ITR 92 (Bom.) and Ranka Jewellers v/s ACIT [2010] 328 ITR 148 (Bom.). Regarding foreign

travel expenses, he submitted that in earlier years also, on similar facts, disallowance of 4% was made based on the ratio of export sales. Moreover, all the necessary details were filed before the Assessing Officer. Thus, the view taken by the Assessing Officer cannot be held to be erroneous. He submitted that the impugned order canceling the assessment on the aforesaid two issues is erroneous both in law and on facts.

7. On the other hand, the learned Departmental Representative relying heavily upon the order of the learned Commissioner submitted that the Tribunal, Hyderabad Bench, in Hyderabad Chemical Supplies Ltd. v/s ACIT, [2011] 137 TTJ 732 (Hyd.) has upheld the revision order under section 263 on similar grounds. He drew our attention to the relevant facts and findings given by the Tribunal. Further, reliance was also placed on the decision of Pidilite Industries v/s DCIT, [2011] 46 SOT 263 (Mum.) (URO) and drew our specific attention to Paras–4, 5 and 6 of the order wherein the Tribunal has considered the Special Bench decision in Goldmine Shares And Finance Pvt. Ltd. (supra) and also the decision of the Hon'ble Madras High Court in Velayudha Swamy Spinning Mills Pvt. Ltd. (supra). Based on this decision, he made his detail submissions.

8. We have heard the rival contentions and perused the relevant material placed on record and various case laws relied upon by either party. The assessee had set–up a Wind mill at District Dhule, Maharashtra and commencement of its operation was started on 29th September 2006 i.e., assessment year 2007–08. In assessment year 2007–08, the assessee had shown a loss of ₹ 3,52,47,398 on account of depreciation and interest from wind mill undertakingand this loss was set–off against the export business income (which in the present case, can be considered as non–eligible unit) in the assessment year 2007–08. In the assessment year 2008–09, the assessee has earned profit of ₹ 7,16,904 and has claimed deduction under section 80IA by treating the assessment year 2008–09 as initial assessment year. The sole ground for canceling the assessment order under section 263

by the learned Commissioner in this regard is that in the subsequent year i.e., the assessment year 2009–10, the claim of the assessee under section 80IA has been rejected by the Assessing Officer on the ground that the Special Bench decision of the Tribunal, Ahmedabad Bench in Goldmine Shares And Finance Pvt. Ltd. (supra) does not support such a claim.

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).

13. Now coming to the decision of the Mumbai Bench Tribunal in Pidilite Industries (supra) as relied upon by the learned Departmental Representative in this case, the Tribunal was dealing with regard to two

eligible units one Gujarat Unit which was set–up in the year 1995–96 and second Maharashtra Unit in the year 2000–01. With regard to Gujarat Unit, the Tribunal held that pre–amendment definition of initial assessment year would be applicable i.e., provisions which were prior to 1st April 1999 will apply because the assessee had started commercial production in the financial year 1996–97. Regarding second unit, the Tribunal held that the judgment of Madras High Court in Velayudhaswamy Spinning Mills Pvt. Ltd. (supra) will not be applicable because the income from non eligible business was set–off from the loss of eligible business in the year of commencement. In this case, it was not an issue as to whether the losses pertained to prior to initial assessment year or after the initial assessment year. If the losses have been incurred in the eligible unit and has been set–off against the non–eligible unit after the initial assessment year, then the ratio laid down by the Tribunal is in full consonance with the law. However, this is not the case in the instant case because the loss pertained to prior to initial assessment year which have been set–off against the profits of non–eligible units. The beginning of the initial assessment year as adopted by the assessee is assessment year 2008–09 only and, therefore, the loss of assessment year 2007–08 cannot be notionally carried forward within the meaning of section 80IA(5). Thus, the reliance placed by the learned Departmental Representative on the decision of Pidilite Industries (supra), will not be applicable in the present case.

14. The other decision heavily relied upon by the learned Departmental Representative in Hyderabad Chemical Supplies Ltd. (supra) will also not apply to the facts of the present case, as in that case, the wind mill started its operation on 31st March 1999 and the first year of operation was assessment year 1999–2000. Thus, in the assessment year 1999–2000, the definition of *"initial assessment year"* was already there in the Act and there was no provision through which the assessee could have chosen its initial assessment year. This provision was brought in statute w.e.f. 1st April 2000, by virtue of section 80IA. Thus, this decision also will not help the case of the

Department. In assessee's case, as specifically stated in the foregoing paragraphs, the assessee's claim for initial assessment year i.e., assessment year 2008–09 and its claim for deduction under section 80IA made for the first time from assessment year 2008–09, has not been disputed. Thus, the aforesaid judgment relied upon by the learned Departmental Representative will not be applicable to the facts of the present case.

15. Moreover, the claim of deduction under section 80IA was based on possible legal view which has been allowed by the Assessing Officer, therefore, it cannot be held that the same is erroneous in so far as it is prejudicial to the interests of the Revenue. Merely because the Assessing Officer in the subsequent assessment year has followed Special Bench decision which admittedly was rendered with regard to the claim of deduction starting from the assessment year 1996–97 wherein there was no concept of assessee choosing his option of initial assessment year in view of the provisions prior to the amendment, it cannot be held that the assessee's claim of initial assessment year being assessment year 2008–09 and its claim for deduction allowed by the Assessing Officer under section 80IA is erroneous in law. Thus, on this count, we do not find any reason to uphold the cancellation of assessment order under section 263 on the ground that it is erroneous in so far as it is prejudicial to the interests of Revenue.

16. Regarding disallowance of foreign travelling expenses, it is seen that on similar circumstances and facts, the Assessing Officer has disallowed 4% of the expenditure claimed which was based on ratio of such expenses with export sales. Thus, such a view taken by the Assessing Officer cannot be disturbed without any difference in the facts and circumstances of the case. Thus, we do not find any merits in the impugned order passed under section 263 by the learned Commissioner for cancelling the assessment and to re–examine the same. Consequently, we set aside the impugned order passed under section 263 by the learned Commissioner and uphold the assessment order passed by the Assessing Officer.

17. परिणामतः निर्धारिती की अपील स्वीकृत मानी जाती है ।

16. In the result, Assessee's appeal is treated as allowed.

आदेश की घोषणा खुले न्यायालय में दिनांकः 10th April 2013 को की गई ।
Order pronounced in the open Court on 10th April 2013

Sd/-	**Sd/-**
बी. रामकोटय्य	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
B. RAMAKOTAIAH	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED : 10th April 2013

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

(1) निर्धारिती / The Assessee;
(2) राजस्व / The Revenue;
(3) आयकर आयुक्त(अपील) / The CIT(A);
(4) आयकर आयुक्त / The CIT, Mumbai City concerned;
(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
(6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai