

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and B.R.BASKARAN, AM

I.T.A. No. 237 /Coch/2012
Assessment Year : 2007-08

M/s. Kinfra Exports Promotion Industrial Parks Ltd., Kakkanad, Kochi-30 [PAN:AABCK 0004G]	Vs.	The Deputy Commissioner of Income-tax, Circle-1(3), Ernakulam.
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	Smt. Preetha S. Nair, Adv.
Revenue by	Shri M. Anil Kumar, CIT(DR) and Smt. Susan George Varghese, Sr. DR

Date of hearing	25/04/2013
Date of pronouncement	28/06/2013

ORDER

Per B.R.BASKARAN, Accountant Member:

The appeal filed by the as is directed against the order dated 29-06-2012 passed by the Ld. CIT(A)-II, Kochi and it relates to the assessment year 2007-08.

2. The grounds of appeal urged by the assessee give rise to the following two issues:

(a) Whether the Ld. CIT(A) was justified in holding that the assessee is not eligible for deduction u/s. 80IA of the Act.

(b) Whether the Ld. CIT(A) was justified in holding the interest income is assessable under income from other sources and hence, impliedly, not eligible for deduction u/s 80IA of the Act

3. The facts relating to the two issues are stated in brief. The assessee is a Kerala State owned public limited company, engaged in the business of providing

infrastructural facilities to industries. It runs an industrial park at Kakkanad, Kochi. The assessee was granted licence by the Government of Kerala for distribution of power within the industrial park area. Accordingly, during the financial year 2004-05, the assessee laid a network of new distribution lines and allied equipments to facilitate power distribution to the units located in the park. During the year under consideration, the assessee claimed deduction u/s. 80IA(4)(iv)(b) of the Act in respect of income generated from the activity of distribution of power. Both the tax authorities rejected the claim of the assessee, though for different reasons, which are discussed infra in a subsequent paragraph. The assessee received a sum of Rs.82,31,289/- as interest from bank deposits and security deposits. The assessee treated the same as its business income and accordingly claimed deduction u/s. 80IA of the Act. The Assessing Officer, by relying on the following case laws, held that interest is assessable under the head income from other sources and assessed accordingly.

- (a) Collis Line (P) Ltd. vs. ITO (135 ITR 390).
- (b) CIT vs. Dr. V. Gopinathan (248 ITR 449).
- (c) Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT (227 ITR 172).

The Ld CIT(A) also confirmed the said decision of the Assessing Officer. Thus the deduction claimed by the assessee u/s 80IA in respect of interest income was rejected by both the authorities. Aggrieved, the assessee has filed this appeal before us.

4. We have heard the rival contentions and perused the record. The controversy in the first issue surrounds around the provisions of sec. 80IA(4)(iv) of the Act. Hence, it is necessary to refer to the said provision and for the sake of convenience, we extract the relevant portions of the same below:-

"80IA (1) 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) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years.

.....

(4) This section applies to---

(i)

(ii)

(iii)

(iv) an undertaking which, -

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2009 (amended later as 2011)

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2009 (amended later as 2011)

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March 2011.

Explanation _ For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004".

5. The case of the assessee is that it is covered by clause (b) of sec. 80IA(4)(iv), since it is transmitting or distributing electricity by laying a net work of new transmission or distribution lines. There is no dispute with regard to the fact that that the assessee has laid the net work of transmission or distribution lines during the time period specified in the above said section. The assessing officer took the view that the assessee has to cumulatively comply with clauses (a) to (c) of sec. 80IA(4)(iv) in order

to become eligible for deduction u/s 80IA of the Act. Since the assessee is not generating power as specified in clause (a), the has taken that view that the assessee becomes ineligible to claim deduction u/s 80IA of the Act, since there is a failure on the part of the assessee to comply with clause (a). Accordingly, the assessing officer rejected the claim made by the assessee. The Ld CIT(A), however, held that the clauses (a) to (c) of sec. 80IA(4)(iv) are mutually exclusive and accordingly he did not agree with the view entertained by the assessing officer. However, the Ld CIT(A), by placing reliance to the proviso under clause (b) of sec. 80IA(4)(iv) of the Act, held that the deduction u/s 80IA has to be restricted to **the profits derived from laying of such network of new lines of transmission or distribution**. Accordingly, the Ld CIT(A) held that the mere distribution of power does not make the assessee to be eligible to claim deduction u/s 80IA of the Act within the meaning of sec. 80IA(4)(iv) of the Act. Since the assessee has claimed deduction u/s 80IA in respect of profit derived from sale of electricity purchased from Kerala State Electricity Board, the Ld CIT(A) also rejected the claim of the assessee.

6. Before us, the Ld D.R supported the view taken by the AO and accordingly contended that the assessee can claim deduction u/s 80IA only if it complies with all the three clauses, viz., Clauses (a), (b) and (c) of sec. 80IA(4)(iv) of the Act. Now the question that arise for our consideration is whether the three clauses enumerated in sub section 4(iv) of section 80-IA are mutually exclusive. In this regard, it is worth referring to the budget speech rendered by the then Finance Minister in Parliament on 27.02.1999, (236 ITR (St.) 25), which reads as under:-

"The financial condition of most of State Electricity Boards is extremely precarious. Many of the State Electricity Boards wish to remedy the situation by unbundling generation, transmission and distribution activities to separate companies. **I propose to treat the activities of transmission and distribution of power, set up after 1.4.1999, as eligible activities for fiscal incentives available to infrastructure units.** I am sanguine that this proposal will facilitate the restructuring and rehabilitation of the State Electricity Boards."

Thus it is seen that the legislative intention was to afford the tax benefit to all undertakings which were engaged in any of the three activities. We also notice that the clauses (a) and (b) of sub. Sec. 4(iv) to sec. 80IA was introduced with effect from 1.4.2000 and clause (c) was introduced only with effect from 1.4.2005, i.e., they were not introduced in one go. Accordingly, in our view, the three clauses, referred above are mutually exclusive to each other. Our view finds support from the decision of the Jaipur Bench of the Hon'ble ITAT in the case of DCIT Vs. Maharaja Shree Umaid Mills Ltd., reported in (2009) 29 SOT 278, wherein the has observed as under:-

"These three types of undertakings referred to in the said sub-clauses (a), (b) and (c) are different and independent of each other. Thus while dealing with one sub-clause, inference need not and cannot be drawn from the other sub-clause."

Accordingly, we uphold the view taken by Ld CIT(A) that clauses (a), (b) and (c) of sec. 80IA(4)(iv) are mutually exclusive.

7. The next issue relates to the interpretation of clause (b) of sec. 80IA(4)(iv) of the Act. The Ld CIT(A) has taken the view that the said clause provides exemption only to the profit derived from laying a network of new transmission or distribution lines. Since the assessee was deriving income from sale of electricity, the Ld CIT(A) has held that the assessee is not eligible for deduction u/s 80IA in respect of profit derived from distribution of power. For arriving such a conclusion, the Ld CIT(A) has placed reliance on the proviso to clause (b) of sec. 80IA(4)(iv) of the Act.

8. At the cost of repetition, we extract below clause (b) and the proviso there under to sec. 80IA(4)(iv) of the Act.

(iv) an undertaking which,----

(a)

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2009 (amended later as 2011)

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

A plain reading of clause (b) suggests that an undertaking which starts transmission or distribution by laying a network of new transmission or distribution lines during the time period specified above shall be eligible for deduction u/s 80IA of the Act. However, the confusion starts on reading of the proviso. A plain reading of the proviso suggests that the deduction shall be allowed in relation to the profits derived from laying of such network of new lines for transmission or distribution.

9. For an undertaking, which has started the activity of distribution of power, the expenditure incurred on laying a network of new transmission or distribution lines would be a capital expenditure and hence the question of making any profit there from shall not arise. Hence, in order to understand the legislative intention and also the view of the revenue, we may refer to the Circular issued by the Central Board of Direct Taxes (CBDT). The Ld Counsel for the assessee invited our attention to Circular No.779 dated 14.9.1999 issued by the CBDT, which is reported in (1999)(240 ITR (St.) 3). Paragraph 39.3.2 of the said circular explains the amendment brought in by Finance Act, 1999 by inserting sec. 80IA of the Act. For the sake of convenience, we extract below the relevant portions of the Circular, referred above.

"39.3.2 To augment transmission and distribution of power in the country, similar benefits are also extended to undertakings setting up new transmission or distribution lines on or after 1-4-1999 on profits derived there from, as are available for generation or generation and distribution of power. The profits thereof shall be eligible for deduction if the undertaking sets up network of new transmission or distribution lines on or after 1-4-1999 but before 31-3-2003 under the restructured provisions of section 80-IA of the Income-tax Act. **The deduction shall be confined to the profits derived from transmission or distribution of power through the new network**".

As per the Circular, the intention of the proviso is to restrict the deduction u/s 80IA only in respect of profit derived from transmission or distribution of power through the new network of transmission or distribution lines.

10. We shall also try to understand the meaning of the proviso to clause (b), extracted above. Sub-sec. (1) of sec. 80IA provides that the profits and gains derived by an undertaking referred to sub-section (4) are eligible for deduction u/s 80IA of the Act. Clause (iv) of sub-section (4) of sec. 80IA includes an undertaking which **starts transmission or distribution** by laying a network of new transmission or distribution lines at any time during the time period specified in that clause. Hence profits and gains derived by such kind of undertaking are eligible for deduction under sub-sec. (1) of sec. 80IA of the Act upon satisfying the main condition that the transmission or distribution was carried out by laying a network of new transmission or distribution lines. The proviso, however, states that the deduction shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution. The proviso appears to throttle down the benefit given by the main enactment.

11. At this stage, we feel it pertinent to discuss about the implications of a "proviso" inserted to an enactment. It is a well established rule of construction that a "proviso" cannot enable something to be done which is not to be found in the enacting clause itself, on the ground that otherwise the proviso would be meaningless and senseless (West Derby Union Vs. Metropolitan Life Assurance Society 1897 AC 647). It cannot be used as a lever to force plain words in the enactment to which it is appended, away from their natural meaning (IRC Vs. Johan Daw Staurt Ltd 91950)9 31 TC 274 (HL)). Where the language of the main enactment is clear, a proviso can have no repercussion on its interpretation so as to exclude from it by implication what clearly falls within its terms. (M.S.M. Railway Vs. Bezwada Municipality AIR 1944 PC 71; CIT Vs. Murlidhar Mathurawalla Mahajan Association 91948)(16 ITR 146 (Bom)).

12. In the preceding paragraphs, we have extracted relevant portions from the speech of the Finance Minister and also relevant portions from the circular issued by CBDT explaining the provisions of clause (b) of sec. 80IA(4)(iv) of the Act. On consideration of the same and also the legal effect of the proviso discussed above, in

our view, the harmonious construction of clause (b) and the proviso there under, would be that the deduction u/s 80IA of the Act shall be allowed in respect of the profits derived from transmission or distribution of power through the new network. Had the intention of the parliament was to give deduction only to the undertaking which undertakes the work of laying network of new transmission or distribution lines and not to the undertaking which transmits or distributes the power, then clause (b) would have been worded accordingly and there would have been no necessity to insert a proviso for the said purpose.

13. In view of the foregoing discussions, we are not able to agree with the view entertained by the Ld CIT(A) with regard to the proviso to clause (b) of sec. 80IA(4)(iv) of the Act. Accordingly, we set aside the order of Ld CIT(A) and hold that the assessee is eligible for deduction u/s 80IA(4)(iv)(b) of the Act in respect of the profits derived from distribution of power through the new network.

14. During the course of hearing, the Ld D.R submitted that the assessee was not entitled to charge more than the rates prescribed by the KSEB and accordingly expressed the view that the possibility of making profit from distribution of power is remote. The Ld A.R, in response thereto, filed an extract of the financial statement showing following details:-

Sale of Electricity		135048010
Electricity connection charges		455351

		135503361
Purchase of power	104639853	
Electricity Duty	5869037	
Operation & Maintenance	935068	

		111443958

Net income		24059403
		=====

The Ld D.R pointed out that the assessing officer did not examine the above said workings, since he took the view that the assessee is not eligible for deduction u/s 80IA of the Act. We find force in the submissions made by Ld D.R. As pointed out by Ld

D.R, there was no occasion for the AO to verify the computation made by the assessee, since he had rejected the claim of the assessee outright. We notice that there was no occasion for the Ld CIT(A) also to examine the workings made by the assessee. Accordingly, in our view, the workings furnished by the assessee require examination at the end of the assessing officer. Accordingly we set aside this issue relating to examination of the workings furnished by the assessee for claiming deduction u/s 80IA of the Act to the file of the assessing officer with the direction to examine the working furnished by the assessee and take appropriate decision with regard to the quantum of deduction in accordance with the law.

15. The next issue relates to the deduction claimed by the assessee u/s 80IA of the Act in respect of interest income earned from bank deposits and security deposits. Both the tax authorities rejected the said claim made by the assessee. The Ld CIT(A), in this regard, has placed reliance on the decision of Hon'ble Supreme Court in the case of Pandian Chemicals (262 ITR 278) and also on the decision of Hon'ble Punjab Haryana High Court in the case of Nahar Exports Ltd (288 ITR 494).

16. The Ld A.R contended before us that the interest income was earned on the deposits made in the regular course of business. However, the moot point is that the deduction u/s 80IA is allowed in respect of "Profits and gains" **derived from** the eligible undertaking. The question is whether the interest income can be considered as "Profits and gains derived from the eligible undertaking" or not, even if it is assumed for a moment that interest income was assessed as business income. There is a difference between "income from business" and "Profits and gains derived from the eligible undertaking". Not all the business income can be classified as "Profits and gains derived from the eligible undertaking". As explained by the Hon'ble Supreme Court in the case of CIT Vs. Sterling foods (237 ITR 579), for application of the words "derived from", there must be a direct nexus between the profits and gains and the undertaking. In the instant case, the nexus of interest income with the business of the undertaking is not direct but incidental. The source of interest income is only bank deposits and

security deposits. Hence, in our view, the Ld CIT(A) was right in law in rejecting the claim of deduction u/s 80IA of the Act in respect of interest income.

17. In the result, the appeal filed by the assessee is treated as partly allowed.

Pronounced accordingly on 28-06-2013.

sd/-
(N.R.S.GANESAN)
JUDICIAL MEMBER

sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 28th June, 2013

GJ

Copy to:

1. M/s. Kinfra Exports Promotion Industrial Parks Ltd., Kakkanad, Kochi-30.
2. The Deputy Commissioner of Income-tax, Circle-1(3), Ernakulam.
- 3 The Commissioner of Income-tax(Appeals)-II, Kochi.
- 4.The Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, COCHIN