IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.540 OF 2012

The Commissioner of Income Tax-11,
Mumbai ...Appellant

v/s

Shri Jyoti Prakash Dutta ...Respondent

Mr P.C. Chhotaray for Appellant.
Dr K. Shivaram, Sr. Counsel with Mr Ajay Singh and Ms Neelam Jadhav for Respondent.

CORAM : S.C. DHARMADHIKARI AND
B.P. COLABAWALLA JJ.

DATE : 25th JULY 2014.

P.C. :-

1. It is unfortunate that the Revenue files Appeals year after year pertaining to the same Assessee and raising the same issues and questions which have been raised earlier duly considered and have not been answered in favour of the Revenue by this Court.

2. This is one more instance of the Revenue urging before this Court that firstly a film production unit or a Company

is not an industrial undertaking within the meaning of section 80IB of the Income Tax Act 1961 (for short the said Act). Assuming it is so and conceding that position, in so far as the present Assessee is concerned, now it is urged that the Assessee does not fulfill the condition which would make it eligible or qualified for deduction in terms of the above provisions.

3. In this Appeal, which impugns the order of the Tribunal dated 2nd November 2011 for assessment year 2007-08 , all that the Tribunal has done is to maintain and uphold the view of the Commissioner of Income Tax (Appeals). The Commissioner followed the order passed by the Tribunal in relation to the very Assessee for the assessment years 1998-99, 2001-02. In upholding the claim of the Assessee, the Commissioner also applies the law laid down by this Court in the case of CIT v/s D.K. Kondke, reported in (1991) 192 ITR 128.

4. Mr Chhotaray, learned counsel appearing in support of this Appeal, submits that this Appeal raises substantial questions of law. He reads out the two questions framed and submitted

that the condition for the deduction has not been fulfilled. He referred to condition No.(ii) in sub-section (2) of section 80IB of the Act. It is submitted by him that there is no machinery or plant of the appellant and the business affairs are carried out with hired equipments and machinery. In such circumstances, the Assessee is disentitled to the deduction. Mr Chhotaray submits that it is not the case of the Revenue that the Assessee will be disentitled to the deductions because it is a film production unit. The Revenue accepts the legal position as emerging from the Division Bench judgment of this Court in the case of D.K. Kondke (supra). However, this section applies to any industrial undertaking which fulfills all the conditions and in this case, the Assessee is not fulfilling a very vital condition.

5. It is submitted that the order passed by this Court in the case of M/s A.K. Films Pvt.Ltd. in Income Tax Appeal No.1636 of 2010 decided on 19th April 2011, upholds the view of the Tribunal. In the case of M/s A.K. Films Pvt.Ltd., the Tribunal had noted the arguments of the Assessee that the Assessee must possess plant and machinery and in terms of the above noted

condition or else it does not qualify for the deduction. In this view of the matter, the order passed in this case raises substantial questions of law. Reliance is placed on the judgment of the Supreme Court in the case of Textile Machinery Corporation Ltd. v/s Commissioner of Income Tax, West Bengal, reported in 1977 ITR 195.

6. On the other hand, Mr Shivaram, learned Senior Counsel appearing for the Assessee, submits that the Department is bound by the Tribunal's orders and in the case of the very same Assessee for prior assessment years. He submitted that an attempt as is now being made to question concurrent findings of fact was made earlier as well. In that regard, he invites our attention to the order passed by the Tribunal in the case of the very Assessee for the A.Y. 1998-99. He submits that in paragraph 3 of the said order, same contentions were raised and the Tribunal has not accepted the same. The Tribunal has extended the benefit and allowed the deduction. That view was followed by the Tribunal for A.Y. 2001-02. It is that very order which has been followed for the current Assessment Year. The

Commissioner therefore committed no error of law, much less, any perversity in allowing the deduction. The Revenue's Appeal therefore must be dismissed.

7. Having heard the learned counsel at some length and perusing with their assistance the legal provisions and the order impugned in this appeal, we are of the view that the appeal deserves to be dismissed. In the present case, the deduction is claimed under section 80IB, sub-sections (1), (2) and (3) of the Income Tax Act 1961, which reads as under :-

> "80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B) (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, deduction from such profits and gains of an amount equal to such such percentage and for such number of assessment years as specified in this section.
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> (2) This section applies to any industrial undertaking which fulfills all the following conditions, namely :-
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> (i) it is not formed by splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

(3) The amount of deduction in the case of an industrial undertaking shall be twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains derived from such industrial undertaking for a period of ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) beginning with the initial assessment year subject to the fulfillment of the following conditions, namely :-

(i) it begins to manufacture or produce, articles or things or to operate such plant or plants at any time during the period beginning from the 1st day of April 1991 and ending on the 31st day of March 1995 or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular undertaking;

(ii) where it is an industrial undertaking being a small scale industrial undertaking, it begins to manufacture or produce articles or things or to operate its cold storage plant (not specified in sub-section (4) or sub-section (5) at any time during the period beginning on the 1st day of April, 1995 and

ending on the 31st day of March 2002."

8. A perusal thereof would indicate that where the gross total income of the Assessee in profits and gains derived from any business referred to sub-section (3) to (11), (11A) and (11B) (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 from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section. For the deduction to be claimed under sub-section (3) what is being urged before us is that the conditions which are specified and set out in sub-section (2) would have to be fulfilled. The Assessee before us fulfilled this condition meaning thereby it is not formed by the transfer to a new business of machinery or plant previously used for any purpose. The argument is rather extreme and that there is no plant and machinery. The argument has, also for some time, gone to another extreme that in film production unit, to qualify as 'industrial undertaking' the unit or company must possess plant and machinery of its own and it cannot be

functioning on hired equipments. In the present case, Assessee has not demonstrated any such ownership.

9. We find that such contentions in the case of the same Assessee are entirely misconceived. This very attempt was made by the Revenue and the Tribunal did not accept it in the case of this Assessee as is apparent from the order passed for the Assessment Year 1998-99 by the Tribunal. A copy of this order is at pages 53 to 56 of the paper-book. In this order dated 16th March 2005 in paragraph 3, same argument was canvassed. The argument was that the Assessee hired plant and machinery which amounted to transfer and employed less than 10 persons in the production of the film 'Border'. The Assessee argued that film 'Border' is a first own production by JP Films and other five films have been produced by other producers and the Assessee had only rendered professional services, namely as Director. Then it was pointed out that the word in the section is 'transfer'. It means acquisition by a 'transfer' and not 'hire'. In the present case, if cameraman, editor, sound technicians are engaged by the Assessee and who used their own equipments for filming,

processing, sound recording and mixing or machines are hired on contract basis but they do not transfer these equipments to the Assessee. In such circumstances, the argument that the Assessee is disentitled to the deduction should not be accepted. The Tribunal relying upon the orders passed in the case of film production units held that the case is identical to them. In the case of D.K. Kondke (supra) this Court held that the film production unit or Company is an industrial undertaking and therefore section 80IB of the Act can be invoked by it. We have been shown the orders passed in the case of this Assessee by the Tribunal for the A.Y. 2001-02 and the prior Assessment Year. In both cases, the Revenue brought Appeals to this Court but the Appeals were not entertained. This Court held that the Appeals do not raise any substantial question of law. The order dated 12th June 2009 in ITA No.728 of 2009 is for the A.Y. 2004-05 and in that Appeal, this very controversy was sought to be raised. Relying upon the judgment in the case of D.K. Kondke (supra) this Court dismissed the Appeal of the Revenue.

10. Now, a contention is sought to be advanced that the

view taken consistently by the Tribunal raises a substantial questions of law because the Tribunal had not noticed that section 80-IB is identical to section 15(C(ii) of the Income Tax Act 1961. The Supreme Court judgment in the case of Textile Machinery Corporation Ltd. has been relied upon in that regard.

11. There, the Appellant before the Supreme Court was a heavy engineering concern and claimed to be manufacturing boilers, machinery parts, wagons etc. They set up two new units, a steel foundry division and jute mill division. The steel foundry division started manufacturing some castings, which the Appellant was previously buying from the market, but the castings were mostly used by the other existing divisions of the appellant itself. Raw materials were supplied to the jute mill division by the boiler division of the appellant and after machining and forging, the parts were given back by the jute mill division to the boiler division. The Appellant claimed exemption from tax under section 15C of the Indian Income Tax Act 1922 in respect of the profits from the steel foundry division for the A.Y. 1958-59 and 1959-60 and in respect of the profits from the jute

mill division for the A.Y. 1959-60. The Income Tax Authorities held that the two units were formed by reconstruction of the business already existing within the meaning of section 15C(i) but the Appellate Tribunal, on appeal, held that the Appellant was entitled to the relief under section 15C because the two divisions were new industrial undertakings and that they were not formed by reconstruction of the existing business. The Tribunal found that the machinery in the two divisions were new, they were housed in a separate building and that industrial licences had to be obtained for manufacturing the parts. Noting all these facts, the Tribunal was of the view that the deduction can be claimed but made a reference to the High Court. The High Court gave an answer to that question and which led to Appeal to the Supreme Court. The Hon'ble Supreme Court held that a steel foundry division and the jute mill division were not formed as reconstruction units. Therefore this decision and which essentially deals with the question arising under section 15C(2)(i) and which is identical to section 80-IB(1) cannot therefore be said to be applicable to the facts before us. None would dispute that pre-conditions and which make the Assessee

eligible for deduction have to be fulfilled. However, we have a different condition and which is put in issue. Therefore, this decision cannot be of any assistance to the Revenue's counsel and in the Appeal before us.

12. Equally, we find that when the Tribunal passed an order in the case of very Assessee, and which order could not be successfully assailed by the Revenue, then, instead of following and applying it and maintaining and upholding the rule of consistency, the authorities disobey the same. The Tribunal's order and in the case of very Assessee have during prior Assessment Years considered identical questions and issues. We do not see how the Revenue can repeatedly bring matters before this Court and on same issues in successive years when it has not been able to succeed in its earlier endeavour. This tendency will have to be curbed because factual matters are being reopened by such repeated exercises and we strongly disapprove the same. When the parties have dealt with each other, for number of years and knowing fully well what the issues are, then, the least that is expected from the Department or the Revenue is that it will

abide by the Tribunal's orders and grant the deduction in accordance therewith. More so, when the Tribunals' orders are challenged in this Court but the challenge fails, the very contention raised before the Tribunal but not accepted is sought to be raised. We do not see how a Court of law, that too the highest Court, can be called upon to undertake an exercise to convince the Revenue that what it is urging before it is not tenable either in law or in facts. It is not the function of this Court to pursuade the authorities. They must accept the claims or deductions as in the present case and follow the Tribunal's orders on factual issues. That would uphold rule of consistency and certainty. We find that extreme arguments are canvassed so as to take a chance and try to unsettle the settled matters and things. This tendency has to be curbed and we must come down heavily on parties to curb it, may it be the Revenue.

13. Having found that the Appeal does not raise any substantial question of law, we dismiss the appeal. No costs.

(B.P. COLABAWALLA J.) **(S.C. DHARMADHIKARI J.)**