

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
' B' BENCH : CHENNAI

[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.(SS)A. No. 06/CHNY/2018
निर्धारण वर्ष /Assessment year : Block Assessment period
01.04.1986 to 31.03.1996
01.04.1996 to 30.01.1997

The Deputy Commissioner
of Income Tax
Central Circle 1(4)
Chennai.

Vs. Shri. K T Kunjumon,
Buddha Street, Ashok Nagar,
Directors' Colony,
Kodambakkam,
Chennai 600 024.

(अपीलार्थी/Appellant)

**[PAN ACZPK 1724A]
(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Mrs. M. Subashree, IRS, JCIT.
प्रत्यर्थी की ओर से /Respondent by : Shri.B. Ramakrishnan, C.A.

सुनवाई की तारीख/Date of Hearing : 07-02-2019
घोषणा की तारीख /Date of Pronouncement : 12-02-2019

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

This is an appeal filed by the Revenue, which is directed against an order dated 31.01.2018 of Id. Commissioner of Income Tax (Appeals)-18, Chennai. Of the three grounds raised by the Revenue, grounds 1 and 3 are general needing no specific adjudication. Ground No.2, being the only effective ground is reproduced hereunder:-

'2.The Id. CIT(A) has erred in allowing the assessee's claim of deduction u/s. 80IA of the IT Act thereby deleting the disallowance of Rs. Rs.2,20,23,331/- made by the Assessing Officer(AO) in the assessment order passed u/s 143(3) r.w.s.158BC'r.w.s. 264 of the IT Act on 31.03.2016, in the assessee's case for the Block Period 01.04.1986 to 31.03.1996 & 01.04.1996 to 30.01.1997.

2.1 Having relied on the decision of Hon'ble Bombay High Court in the case of CIT Vs Jyothi Prakash Dutta (ITA No. 540/2012) to hold that the assessee is entitled to deduction u/s. 80IA of the IT Act, the Id. CIT(A) ought to have appreciated that the said decision was in the context of deduction u/s. 80IB of the IT Act and the film production unit of the case discussed therein was not formed by the transfer to a new business of machinery or plant previously used for any purpose, whereas in the present case it is denial of deduction u/s. 80IA on the ground that the camera, lenses etc. are hired from the outdoor unit and that the assessee has accepted that they are re-using the old machinery for various separate projects, and as such is distinguishable to the facts of the present case.

2.2. The Id. CIT(A) ought to have appreciated the findings of the AO in the assessment order under consideration that the assessee has not fulfilled any of the conditions laid down in clause (i) to (iii) subsection (2) to section 80IA of the IT Act and since the assessee has not brought out any new evidence even during the appeal proceedings to counter the holdings of the AO and as such the Id.CIT(A) ought to have upheld the denial of deduction u/s 80IA of the IT Act in the said assessment order passed u/s. 143(3) r.w.s.158BC r.w.s. 264 of the IT Act on 31.03.2016, in the assessee's case for the Block Period 01.04.1986 to 31.03.1996 & 01.04.1996 to 30.01.1997".

2. Genesis of this Department appeal is an assessment done on 31.03.2016 by Deputy Commissioner of Income Tax, Central Circle 1(4), Chennai, pursuant to Tribunal directions in IT(SS) No.23/Mds/2012, dated 31.01.2013. What was held by this Tribunal in

the above order in so far as it relates to the issue on hand is reproduced hereunder:-

'2.In this appeal filed by the Revenue, the brief facts are that the assessee was mainly carrying on the business of production, distribution and exploitation of movie films. There was a search under section 132 of the Income Tax Act, 1961 ('the Act' for short) on 20- 01-1997. The block assessment proceedings were initiated and notice u/s 158BC was issued. In response to that the assessee filed the return of income and the block assessment was completed on 29-01-1999. The Assessing Officer in the original assessment order allowed deduction under section 80- IA of the Act. Thereafter, the Commissioner of Income by exercising power u/s 263 of the Act set aside the assessment order passed by the Assessing Officer by order dated 10-3-2010 and directed him to re-do the assessment. Accordingly, the assessment was completed wherein sec. 80-IA claim was disallowed. Against the assessment order passed in pursuance of sec. 263 order passed by the CIT, the present appeal has been filed wherein the assessee has raised the specific ground that he is eligible for 80IA deduction. The CIT(Appeals) by considering the submissions of the assessee allowed the claim of sec. 80-IA of the Act. It was submitted before the CIT(Appeals) that one Mr. Francis Joseph is also engaged in the film production and the facts are identical in his case and the Chennai Bench of the Tribunal vide its order dated 17-08- 2004 in I.T.A No. 183/Mds/1997 has allowed the claim of deduction u/s 80-IA and therefore the claim of the assessee also has to be allowed. After considering the submissions of the assessee the CIT(Appeals) allowed the deduction u/s 80-IA by taking into consideration the decision of the Tribunal in the case of Francis Joseph, supra. When this appeal was called for hearing the learned counsel for the assessee submitted that the Revenue carried the matter in appeal against the order of the Tribunal in the case of Francis Joseph in ITA No. 183/Mds/1997 dated 17-08-2004. The Hon'ble jurisdictional High Court in Tax Case (Appeal) No. 1318 of 2005 dated 22- 06-2012 held that on the second question framed, viz. "Where, in the facts and circumstances of the case, the Tribunal was right in holding that the producer of a feature film is an 'industrial undertaking' engaged in the manufacture of production of goods for the purpose of section 80-IA, it has been held in favour of the assessee.

3. Insofar as first question framed is concerned, the Hon'ble jurisdictional High Court has held as under :

"10. As far as the first question of law as to whether the assessee is eligible for the benefit under Section 80IA of the Income Tax Act is concerned, except for the question as to whether the assessee's activity is manufacture or production, we do not find any discussion as to whether the assessee had satisfied other criteria in the section, particularly Sub-clause (ii) to sub-section (2) to section 80-IA of the Income Tax Act, which reads as under :

"80IA (1)

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:-

(i) it is not formed by splitting up, or the reconstruction.....

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

11. In the absence of any such discussion on the above and as pointed out in the decision of the Bombay High Court reported in (1991) 192 ITR 128 (Commissioner of Income-Tax v. D.K. Kondke), it is but necessary that the Assessing Officer has to re-work whether the assessee had satisfied all the conditions mentioned in Section 80IA of the Income Tax Act.

12. In the circumstances, if the assessee is able to prove that it is not formed by the transfer to a new business of machinery or plant previously used for any purpose, then the assessee would qualify for deduction, since he had already qualified on the other condition, namely, manufacture of an article or thing."

4. The learned counsel for the assessee has submitted that in view of the decision of the Hon'ble Jurisdictional High Court (supra), the issue has to go back to the Assessing Officer to decide the issue in the light of the observations made by the Hon'ble jurisdictional High Court.

5. On the other hand, the learned DR fairly conceded the submissions made by the assessee.

6. We have heard both the sides, perused the records and gone through the orders of the authorities below. The only issue in this appeal is whether the assessee is eligible for the deduction under section 80-IA or not. The CIT(Appeals) while granting the deduction u/s 80-IA relied on the decision of the Tribunal in the case of Francis Joseph in ITA No. 183/Mds/1assessee997 dated 17-08-2004. The very same decision was carried in appeal by the Revenue before the Hon'ble jurisdictional High Court and in that case the Hon'ble High Court has held that the benefit of section 80-IA is available subject to satisfaction of the conditions laid down by sub-clause (2) to sec. 80-IA of the Act and remitted the matter back to the Assessing Officer to examine the issue afresh. We therefore set aside the order passed by the CIT(Appeals) and remit the matter back to the file of the Assessing Officer in the light of the decision of the Hon'ble jurisdictional High Court in the case of Francis Joseph in Tax Case (Appeal) No. 1318 of 2005 dated 22-06-2012. In the circumstances, the appeal filed by the Revenue in ITA No. 23/Mds/2012 stands allowed for statistical purposes".

Pursuant to the above order, Id. Assessing Officer made a re-examination of the claim of assessee for deduction u/s.80IA of the Income Tax Act, 1961 (in short 'the Act'), and verified whether it satisfied the conditions laid down subsection (2) of Section 80IA of the Act. Id. AO came to a conclusion that assessee had not satisfied three of the sub clauses namely clauses (i), (ii) and (v) of the said Sub Section. According to the Id. AO, assessee was producing movies sine Nineteen Eighties and production of a new movie, though it could be construed as a new project was nothing but splitting up or reconstruction of a business already in existence. Further, as per the Id. AO, assessee also could not show that it was not formed by the transfer to a new business of a machinery or plant previously used for

any purpose. Ld. AO noted that assessee through its letter dated 27.02.2015 had admitted using machinery owned by it, other than items like camera and lenses which were hired from outside parties for the new film projects undertaken during the relevant previous year. Ld. AO also came to a conclusion that assessee could not satisfy clauses (v) since all its personnel like artists, music director, cinematographer, cameraman, associate camera men, lyrics writer, art director etc were employed on contract basis. Thus, according to the Ld. AO assessee had not employed more than ten workers for manufacturing purpose. Effectively, he held that assessee had not satisfied clauses (i) (ii) and (v) of Sub Section (2) of Section 80IA of the Act and denied the claim of deduction of Rs.2,20,23,331/-, made under the said Section.

3. Assessee's appeal before Ld. CIT(A) was successful. Ld. CIT(A) relying on the judgment of Hon'ble Bombay High Court in the case of *CIT vs. Jyoti Prakash Dutta (2014) 367 ITR 568* held that assessee had satisfied the conditions stipulated in Sub Section (2) of Section 80IA of the Act and was thus eligible for the deduction claimed by it.

4. Now before us, Ld. Departmental Representative strongly assailing the order of the Ld. CIT(A) submitted that assessee was using

already existing machinery and therefore it could not be stated that there was any new industrial undertaking which came into existence during the relevant previous year. According to her, assessee was only doing a new project in the same line of business of producing cinemas and every new project in the nature of a new cinema could not be termed as a new industrial undertaking, which was eligible for deduction u/s.80IA of the Act. As per the Id. DR, assessee admittedly had used machinery which were already used for its other movie projects. Further, as per the Id. DR, assessee could not show it had employed more than ten persons in the process of producing a movie. As per the Id. DR, the judgment of Hon'ble Bombay High Court in the case of *Jyoti Prakash Dutta (supra)* was in relation to Section 80IB of the Act and not Section 80IA of the Act, and had no applicability here. Thus, according to her Id. CIT(A) fell in error in giving the benefit of Section 80IA (2) to the assessee.

5. Per contra, Id. Authorised Representative strongly supported the order of the Id. Commissioner of Income Tax (Appeals).

6. We have considered the rival contentions and perused the orders of the authorities below. Hon'ble Bombay High Court had clearly held in the case of *Jyoti Prakash Dutta (supra)* that an assessee which was a film production unit, and which was not founded by

transfer to a new business any machinery or plant previously used for any purpose, was entitled for deduction u/s.80IB of the Act. No doubt, the judgment was rendered by the Hon'ble Bombay High Court in the context of Section 80IA of the Act. Section 80IA of the Act as it stood before its substitution by Finance Act, 1999 is reproduced hereunder:-

‘‘80-IA Deduction in respect of profits and gains from industrial undertakings, etc., in certain cases.—(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or a hotel or operation of a ship or developing, maintaining and operating any infrastructure facility or scientific and industrial research and development or providing telecommunication services whether basic or cellular including radio paging, domestic satellite service or network of trunking and electronic data interchange services or construction and development of housing projects or operating an industrial park or commercial production or refining of mineral oil in the North-Eastern Region or in any part of India on or after the 1st day of April, 1997 (such business being hereinafter referred to as the eligible business), to which this section applies, 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 the percentage specified in sub-section (5) and for such number of assessment years as is specified in sub-section (6).

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence:

***Provided** that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such*

industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(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:

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-clause (b) of clause (iv) which begins to manufacture or produce an article or thing during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2000, apply as if the words “not being any article or thing specified in the list in the Eleventh Schedule” had been omitted;

(iv) (a) in the case of an industrial undertaking not specified in sub-clause (b)

or sub-clause (c), it begins to manufacture or produce articles or things or to operate such plant or plants, at any time during the period beginning on 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 industrial undertaking;

(b) in the case of an industrial undertaking located in an industrially backward State specified in the Eighth Schedule or set up in any part of India for the generation, or generation and distribution, of power, it begins to manufacture or produce articles or things or to operate its cold storage plant or plants or 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, 2000:

Provided that in the case of an industrial undertaking set up in any part of India for the generation, or generation and distribution, of power, the period ending shall have effect as if for the figures “1998”, the figures “2003” had been substituted;

(c) in the case of an industrial undertaking located in such industrially backward district as the Central Government may, having regard to the prescribed guidelines, by notification in the Official Gazette, specify in this behalf, as an industrially backward district of Category A or an industrially backward district of Category B, and, it begins to manufacture or produce articles or things or to operate its cold storage plant or plants at any time during the period beginning on the 1st day of October, 1994, and ending on the 31st day of March, 2000;

(d) in the case of an industrial undertaking being a small scale industrial undertaking, not specified in sub-clause (b) or in sub-clause

(c), it begins to manufacture or produce articles or things or to operate its cold storage plant at any time during the period beginning on the 1st day of April, 1995 and ending on the 31st day of March, 2000;

(v) 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.

Section 80IA of the Act was substituted by Sections 80IA and Section 80IB by Finance Act, 1999 w.e.f. 01.04.2000. Section 80IB of the Act which came into the statute on 01.04.2000 is reproduced hereunder:-

“(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 3(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.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely :-

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided *that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section ;*

(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 :

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-section (4) shall apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.— For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :-

- (a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India ;
- (b) such machinery or plant is imported into India from any country outside India ; and
- (c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.— Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent. of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with ;

- (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”.*

Conditions stipulated in Sub Section (2) of both the Sections are more or less pari materia .The block assessment period for which this appeal relates is 01.04.1986 to 30.01.1997, and the applicable law is Section 80IA of the Act as it stood before 01.04.2000. Therefore we

cannot say that Id. CIT(A) fell in error in applying the judgment of Hon'ble Bombay High Court in the case of *Jyoti Prakash Dutta (supra)*, which was in relation to section 80IB of the Act. We also find that the project of the assessee on which it had claimed deduction u/s.80IA of the Act was not formed by splitting up or reconstruction of a business already in existence. Assessee was running a production house and each new project for a new film, in our opinion cannot be considered as split up or reconstruction of the business already in existence. It may be true that assessee had used machinery already available with it, alongwith hired machinery for the new film project. However, nothing has been brought on record by the Revenue to show that there was any transfer of used machinery or plant to a new business. That production of a cinema film would amount to manufacturing or processing of goods has been clearly spelt out by CBDT in Circular No.24 (F. No.6/22/68-IT (A-I), dated 23.07.1969. Now coming to the question whether assessee had employed more than ten persons, admittedly, list mentioned by the Id.AO at para 3 (i) of this order clearly indicate that there were more than ten persons working for the film project. Just because such persons, were not regular employees of the assessee, would not mean that they were not employed by the assessee for the purpose of new production project. In the circumstances, we are of the opinion that Id. CIT(A)

was justified in allowing the claim of deduction under Section 80IA of the Act to the assessee. We do not find any reason to interfere with the order of the Id. CIT(A).

7. In the result, the appeal of the Department stands dismissed.

Order pronounced on Tuesday, the 12th day of February, 2019, at Chennai.

Sd/-
(N.R.S. GANESAN)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(ABRAHAM P. GEORGE)
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai
दिनांक/Dated: 12th February, 2019.
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |