आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.718/Mds/2011**

निर्धारण वर्ष / Assessment Year : 2000-01

M/s Sterlite Industries (India) Ltd. No.1, Sai Flats, No.55, Pillaiyar Koil Street, Kanagam, Tharamani, Chennai - 600 113. PAN : AABCS 4955 Q	v.	The Assistant Commissioner of Income Tax, Company Circle VI(4), Chennai - 600 034.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकर अपील सं./**ITA No.1008/Mds/2011**

निर्धारण वर्ष / Assessment Year : 2000-01

The Assistant Commissioner of Income Tax, Company Circle VI(4), Chennai - 600 034.	v.	M/s Sterlite Industries (India) Ltd. No.1, Sai Flats, No.55, Pillaiyar Koil Street, Kanagam, Tharamani, Chennai - 600 113.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Dr. Anita Sumanth, Advocate

राजस्व की ओर से /Revenue by :Sh. M. Swaminathan, Sr. Standing Counsel

सुनवाई की तारीख/Date of Hearing : 22.08.2016

घोषणा की तारीख/Date of Pronouncement : 23.09.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the assessee and Revenue are directed against the same order of the Commissioner of Income Tax (Appeals)–V, Chennai, dated 01.02.2011 and pertain to assessment year 2000-01. Therefore, we heard both the appeals together and disposing of the same by this common order.

Let's first take assessee's appeal in I.T.A. No.718/Mds/2011.

2. The first issue arises for consideration is deduction claimed by the assessee under Section 80-IA of the Income-tax Act, 1961 (in short 'the Act') in respect of interest, management fees and corporate guarantee commission.

3. Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the assessee claimed deduction under Section 80-IA of the Act in respect of interest income received from deposits, management fees and corporate guarantee commission. According to the Ld. counsel, these receipts were inextricably linked to the business of the assessee. Therefore, according to the Ld. counsel, the assessee is eligible for deduction under Section 80-IA of the Act

while computing taxable income. Referring to the judgment of Apex Court in ACG Associated Capsules Pvt. Ltd. (2012) 343 ITR 89, the Ld.counsel submitted that at the best, only the net profit shall be taken into consideration. The Ld.counsel submitted that netting of the expenditure / interest has to be allowed while computing the taxable income.

4. On the contrary, Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that interest income, management fees and corporate guarantee commission are not derived from the industrial undertaking, therefore, the same is not eligible for deduction under Section 80-IA of the Act. Referring to the order of the CIT(Appeals), the Ld. Sr. Standing Counsel submitted that the assessee has received interest income to the extent of ₹5,14,989/-, management fees to the extent of ₹3,54,36,933/- and corporate guarantee commission to the extent of ₹1,64,90,412/. The Assessing Officer and the CIT(Appeals) found that they are not derived from the eligible business of the assessee. Therefore, by placing reliance on the judgment of Apex Court in Sterling Foods (237 ITR 579) found that the income to the extent of ₹5,24,43,323/- received as interest income, management fees and

corporate guarantee commission, etc. would not form part of eligible business, therefore, the assessee is not eligible for deduction under Section 80-IA of the Act.

5. The Ld. Sr. Standing Counsel for the Revenue has also submitted that the CIT(Appeals) has placed his reliance on the judgments of Apex Court in Pandian Chemicals v. CIT (262 ITR 278) and in Liberty India v. CIT (317 ITR 218). In view of these judgments of Apex Court, according to the Ld. Sr. Standing Counsel, the assessee is not eligible for deduction under Section 80-IA of the Act of the amount received from interest income, management fees and corporate guarantee commission.

6. We have considered the rival submissions on either side and perused the relevant material available on record. We have carefully gone through the provisions of Section 80-IA of the Act. Section 80-IA of the Act clearly says that where the gross total income of the assessee includes profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) of Section 80-IA of the Act. Section 80-IA(4) of the Act clearly says that the provisions of Section 80-IA of the Act is applicable to an enterprise on the business of developing, operating

and maintenance or developing, operating and maintaining of any infrastructure facility which fulfills the conditions laid down therein. Therefore, it is obvious that the income shall be derived from the business of developing or operating and maintaining or developing or operating and maintaining any infrastructure facility. In the case of present assessee, it is not the case of the assessee that interest income, management fees and corporate guarantee commission were derived directly from the business of developing or operating and maintaining or developing or operating and maintaining of infrastructure facility. The only contention of the assessee before this Tribunal is that interest, management fees and corporate guarantee commission are inextricably linked to the business of the assessee. Merely because there was a nexus between the business and the receipt of income, we cannot say that the income was directly derived from the business undertaking. This Tribunal is of the considered opinion that for claiming deduction under Section 80-IA(4) of the Act, the income shall have to be derived from business of developing or operating and maintaining or developing or operating and maintaining of infrastructure facility. Therefore, interest income received from deposits, management fees and corporate guarantee commission are not eligible for deduction

under Section 80-IA of the Act. In fact, the CIT(Appeals) has rightly placed his reliance on the judgment of Apex Court in Sterling Foods (supra), Pandian Chemicals (supra) and Liberty India (supra).

7. We have carefully gone through the judgment of Apex Court in ACG Associated Capsules Pvt. Ltd. (supra). In the case before the Apex Court, the issue was deduction claimed by the assessee under Section 80HHC of the Act. After referring to Explanation (baa) to Section 80 HHC of the Act, the Apex Court found that 90% of net interest or net rent, which was included in the profit of the business of the assessee as computed under the head "Profits and gains from business or profession" was eligible for deduction under Section 80HHC of the Act. In the case before us, it is the deduction under Section 80-IA of the Act. There is no provision like Explanation (baa) to Section 80HHC in 80-IA of the Act for including all the miscellaneous income for the purpose of computing deduction under Section 80-IA of the Act. In the absence of specific provision like Explanation (baa) to Section 80HHC of the Act, this Tribunal is of the considered opinion that the entire miscellaneous income has to be excluded since they are not derived from industrial undertaking. Therefore, the question of netting would not arise for

consideration. This Tribunal is of the considered opinion that the judgment of Apex Court in ACG Associated Capsules Pvt. Ltd. (supra) would not be applicable to the facts of the case. In view of the above discussion, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

8. The next ground of appeal is with regard to disallowance of deduction under Section 80-IA of the Act in the computation of book profit under Section 115JA of the Act.

9. Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the Assessing Officer disallowed the claim of the assessee by placing reliance on sub-section (4) of Section 80-IB of the Act. Referring to sub-section (4) of Section 80-IB of the Act, Dr. Anita Sumanth submitted that the deduction under Section 80-IB of the Act shall be 100% of profits and gains derived from industrial undertaking for five assessment years. The deduction of profit from book profit would be applicable as a statutory deduction. Merely because there was restriction of the profit at the rate of 30% in the normal computation that cannot be a reason to disallow the claim of

the assessee. Therefore, the statutory restriction of the claim to 30% cannot be a reason for disallowing the claim of the assessee.

10. On the contrary, Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the assessee claimed deduction at the rate of 100% of the profit in the case of CCR Silvassa and ACSR Rakholi. However, in respect of JFTC Silvassa of the reserves, the assessee claimed deduction only at the rate of 30%. The Assessing Officer after examining the case under Section 115JA(v) of the Act, found that before the introduction of 80-IB(4) and 80-IB(5) by Finance Act 1999, there was a reference about 115JB in Section 80-IA(2) with sub-clause (iv). The change was effected in Section 115-JA consequent to splitting of Section 80-IA into Section 80-IA and 80-IB by Finance Act 1999 with effect from 01.04.2000. Therefore, the assessee is eligible for deduction under Section 80-IA or subsequently under Section 80-IB after amendment to the extent of 100% for the first five years and 30% for next five years and the deduction of profit from the book profit would be applicable during the period in which the assessee is eligible for 100%. In the absence of any express provision for allowing the deduction when the assessee itself claims at the rate of

30% at the normal computation, according to the Ld. Sr. Standing Counsel, the CIT(Appeals) has rightly confirmed the order of the Assessing Officer.

11. We have considered the rival submissions on either side and perused the relevant material available on record. Sub-section (4) of Section 80-IB of the Act clearly says that in case of industrial undertaking in the industrially backward State, specified in 8th Schedule shall be 100% of the profits and gains derived from the industrial undertaking for five assessment years beginning with initial assessment year and thereafter 30% of the profits and gains derived such industrial undertaking eligible for deduction.

12. We have carefully gone through the provisions of Section 115JA of the Act. Explanation (v) to Section 115JA of the Act clearly says that the profit derived from the industrial undertaking located in industrially backward area as referred to in sub-section (4) and sub-section (5) of Section 80-IB of the Act is eligible for deduction of 100% of the profits and gains under sub-section (4) and sub-section (5) of Section 80-IB of the Act. This sub-section, as rightly pointed out by the Ld.counsel for the assessee, does not restrict the deduction allowed under Section 80-IA or under Section

80-IB of the Act, as the case may be. This Section merely says that the assessee is eligible to claim deduction at 100% of he profits and gains for the first five assessment years. For the first five assessment years, the assessee is eligible for 100% of the profits and gains and in the next year, in the case of company, the assessee is eligible for 30% of the profits. Therefore, the 30% of the profits and gains allowed under Section 80-IA of the Act has to be reduced from the book profit computed for the purpose of Section 115JA of the Act. Therefore, this Tribunal is unable to uphold the orders of the lower authorities. Accordingly, the orders of the lower authorities are set aside and the Assessing Officer is directed to reduce 30% of the profits and gains, which was computed under Section 80-IB(4) of the Act, from the book profit for the purpose of computing taxable income under Section 115JA of the Act.

13. Now coming to the Revenue's appeal, the first ground is with regard to addition of ₹61 Crores for the purpose of computing book profit under Section 115JA of the Act.

14. Shri M. Swaminathan, the Ld. Sr. Standing Counsel, submitted that this issue was considered by this Tribunal in the

assessee's own case for assessment years 1998-99 and 1999-2000 and this Tribunal found that the assessee estimated the profit at ₹233.26 Crores for the purpose of computing profit under Section 155JA of the Act and addition was also made to the extent of ₹61 Crores in the normal computation. The Ld. Sr. Standing Counsel submitted that by referring to the method of accounting followed by the assessee and the judgment of Apex Court in Apollo Tyres (255 ITR 273), this Tribunal decided the issue in favour of the assessee which is reported in 6 SOT 497. Therefore, according to Ld. Sr. Standing Counsel, the issue is covered in favour of the assessee by earlier order of this Tribunal.

15. We have heard Dr. Anita Sumanth, the Ld.counsel for the assessee also. The Ld.counsel submitted that this issue is covered in favour of the assessee for the assessment years 1998-99 and 1999-2000.

16. We have considered the submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld. Sr. Standing Counsel for the Revenue and the Ld.counsel for the assessee, the very same issue was considered by this Tribunal for the assessment years 1998-99 and 1999-2000

and this Tribunal deleted the similar addition made by the Assessing Officer. Both, the Ld. Sr. Standing Counsel for the Revenue and the Ld.counsel for the assessee very fairly brought to the notice of the Tribunal that the issue is covered in favour of the assessee. We have carefully gone through the order of this Tribunal. In view of this order of the Tribunal for assessment years 1998-99 and 1999-2000, the addition made by the Assessing Officer to the extent of ₹61 Crores is not justified. Accordingly, the CIT(Appeals) has rightly deleted the addition. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

17. The next ground of appeal is with regard to depreciation claimed by the assessee on the purchase of steel.

18. Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the assessee claimed depreciation on bogus purchase of steel. The assessee could not produce purchase bills before the Assessing Officer or the CIT(Appeals). The CIT(Appeals) by placing reliance on the order of this Tribunal for the block period, presumed that the assessee has purchased the steel which was used for fabrication of plant. The Ld. Sr. Standing

Counsel further submitted that block assessment proceeding was set aside by this Tribunal on the ground that there was no search material found during the course of search operation and the order is barred by limitation. This Tribunal had no occasion to discuss the matter on merit. When this Tribunal has not discussed the matter on merit and no evidence like bills for purchase of steel was produced, according to the Ld. Sr. Standing Counsel, the matter needs to be verified by the Assessing Officer. Therefore, the Ld. Sr. Standing Counsel submitted that the matter may be remitted back to the file of the Assessing Officer for reconsideration.

19. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the CIT(Appeals) considered the issue elaborately in the block assessment proceeding and found that the assessee is eligible for depreciation. The Ld.counsel further submitted that this order of the CIT(Appeals) was considered by this Tribunal and the appeal of the assessee was allowed on the ground that there was no search material and the order of the Assessing Officer was barred by limitation. According to the Ld. counsel, even though this Tribunal had not considered this issue on merit and the finding recorded by the CIT(Appeals) with regard to purchase of

steel, the finding recorded in block assessment by the CIT(Appeals) cannot be ignored by the Tribunal since the Commissioner is having coterminous power as that of the CIT(Appeals), who passed the impugned order now under challenge before this Tribunal. In the block assessment, the CIT(Appeals) has examined the issue and found that the assessee has purchased the steel which was used in fabrication of plant. Therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

20. We have considered the rival submissions on either side and perused the relevant material available on record. The issue before this Tribunal is with regard to depreciation on the so-called purchase of steel. The Revenue claims that the assessee has not produced bills and vouchers for purchase of steel, and the claim is bogus. From the material available on record, it appears that the assessee purchased steel to the extent of ₹267,66,84,018/-. The Assessing Officer found that the copies of bills to support the purchase are not produced. The CIT(Appeals), by referring to the order of block assessment, found that the assessee is eligible for depreciation.

21. We have carefully gone through the order of this Tribunal for block period. The block assessment was made under old scheme, i.e. under Section 158BC of the Income-tax Act. Under the old scheme of block assessment, the Assessing Officer was expected to confine himself to the material found during the course of search operation. Therefore, this Tribunal found that in the absence of search material, there cannot be a block assessment under Section 158BC of the Act. The Tribunal further found that the order of the Assessing Officer was also barred by limitation. The assessment now under consideration before this Tribunal is a regular assessment under Section 143(3) of the Act. Under the old scheme of block assessment, the Assessing Officer was empowered to frame assessment in respect of undisclosed income under Section 158BC of the Act on the basis of the material found during search operation and also regular assessment in respect of income disclosed in regular course under Section 143(3) of the Act. Now, admittedly, no assessment is in existence in respect of undisclosed income for want of search material and the order of Assessing Officer itself was barred by limitation. Therefore, this Tribunal is of the considered opinion that placing reliance on the order of the

CIT(Appeals) for the block period, which was admittedly set aside by this Tribunal, is not justified.

22. The CIT(Appeals) is expected to examine the genuineness of purchase of steel independently on the basis of the material available on record and thereafter record his own finding with regard to acquisition and existence of the capital asset. Unfortunately, the CIT(Appeals) has not taken any pain to ascertain the genuineness of purchase of steel and the acquisition / existence of the capital asset. Therefore, as rightly submitted by the Ld. Sr. Standing Counsel for the Revenue, the matter needs to be re-examined. Accordingly, the orders of the lower authorities are set aside and the issue with regard to depreciation is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter afresh on the basis of bills and vouchers that may be produced by the assessee for purchasing the steel and thereafter decide the issue afresh, in accordance with law, after giving a reasonable opportunity to the assessee.

23. The Revenue has also raised a ground regarding depreciation on account of capitalization of foreign exchange fluctuation consequent to block assessment. Since the main issue

of depreciation is remitted back to the file of the Assessing Officer, this Tribunal is of the considered opinion that all the issues of depreciation shall be reconsidered by the Assessing Officer, in accordance with law, after giving a reasonable opportunity to the assessee.

24. The next ground of appeal is with regard to disallowance under Section 14A of the Act.

25. Shri M. Swaminathan, the Ld. Sr. Standing Counsel, submitted that the Assessing Officer disallowed the claim of the assessee to the extent of ₹2.93 Crores and the CIT(Appeals), however, allowed the claim of the assessee on the ground that the assessee has invested its own funds. According to the Ld. Sr. Standing Counsel, irrespective of investment out of its own funds, the assessee has to necessarily incur expenditure on managerial level for the purpose of taking decision to make investment. Therefore, according to the Ld. Sr. Standing Counsel, the CIT(Appeals) is not justified in allowing the claim of the assessee.

26. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that the assessee invested its own funds,

therefore, the assessee has not incurred any expenditure at all. Hence, there cannot be any disallowance. Therefore, according to the Ld. counsel, the CIT(Appeals) has rightly allowed the claim of the assessee.

27. We have considered the rival submissions on either side and perused the relevant material available on record. The assessment year under consideration is 2000-01. Therefore, Rule 8D of Income-tax Rules, 1962 is not applicable for the year under consideration. Therefore, reasonable estimation has to be made for the expenditure incurred by the assessee. Now before this Tribunal, the assessee submits that no expenditure was incurred and the assessee's own funds were invested. The assessee being a company, has to entrust the matter to some of the executives for making investment. Therefore, the salary paid to the executives, who were entrusted the work of investment, is definitely a cost incurred by the assessee for taking administrative decision to invest in the shares which yielded exempted income. The managerial function performed by the executives need to be taken into consideration for the purpose of estimation of disallowance. Since Rule 8D is not applicable, this Tribunal is of the considered opinion

that a reasonable estimation has to be made. This Tribunal, wherever Rule 8D of Income-tax Rules, 1962 is not applicable, is uniformly making 2% disallowance of investment. Accordingly, the orders of the lower authorities are set aside and the Assessing Officer is directed to estimate the disallowance at 2% of investment made by the assessee.

28. The next ground of appeal is with regard to deduction claimed by the assessee under Section 80HHC of the Act.

29. Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the CIT(Appeals) directed the Assessing Officer to verify Form 10CCAC and thereafter decide the matter. Therefore, the Ld. Sr. Standing Counsel placed his reliance on the grounds of appeal raised by the Revenue.

30. On the contrary, Dr. Anita Sumanth, the Ld.counsel for the assessee, submitted that since the CIT(Appeals) directed the Assessing Officer to verify Form 10CCAC, the Revenue cannot have any grievance at all.

31. We have considered the rival submissions on either side and perused the relevant material available on record. Deduction under

Section 80HHC of the Act was denied on the ground that the assessee has not filed Form 10CCAC, which was a pre-condition for allowing deduction under Section 80HHC of the Act. Therefore, the CIT(Appeals) directed the Assessing Officer to verify Form 10CCAC. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

32. The Revenue has raised one more ground with regard to set off of losses by the assessee while computing book profit.

33. Shri M. Swaminathan, the Ld. Sr. Standing Counsel for the Revenue, submitted that the CIT(Appeals) directed the Assessing Officer to compute the book profit after setting off of losses by the assessee-company. According to the Ld. Sr. Standing Counsel, the claim cannot be set off.

34. We have heard Dr. Anita Sumanth, the Ld.counsel for the assessee, also. It is not known what kind of claim was made by the assessee to set off while computing the book profit. In the absence of details of claim for set off for deduction under Section 80HHC of the Act, this Tribunal is of the considered opinion that the matter needs to be reconsidered. Accordingly, the orders of the authorities

below are set aside and the issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall reconsider the matter in the light of the material that may be filed by the assessee, in accordance with law, after giving a reasonable opportunity to the assessee.

35. In the result, both the appeals of the assessee and Revenue are partly allowed for statistical purposes.

Order pronounced on 23rd September, 2016 at Chennai.

sd/-	sd/-
(एस जयरामन)	(एन.आर.एस. गणेशन)
(S. Jayaraman)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 23rd September, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-V, Chennai-34
4. आयकर आयुक्त/CIT, Chennai-III, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.