

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी', मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'C' MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री राजेश कुमार, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Rajesh Kumar, Accountant Member**

**ITA No.7423/Mum/2014
Assessment Year: 2010-11**

ACIT-21(1), Room No.116, 1 st Floor, Piramal Chambers, Parel, Mumbai-400012	बनाम/ Vs.	M/s Choudhary Exports, A-Block (Basement), Shiv Sagar Estate, Dr. A.B. Road, Worli, Mumbai-400018
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No.AACFC6777E		

राजस्व की ओर से / Revenue by	Shri Rajat Mittal-DR
निर्धारिती की ओर से / Assessee by	Shri Rajan R. Vora

सुनवाई की तारीख / Date of Hearing :	07/12/2016
आदेश की तारीख / Date of Order:	28/12/2016

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 07/09/2014 of the Ld. First Appellate Authority, Mumbai. The only ground raised by the Revenue is whether the Ld. Commissioner of Income Tax (Appeal) was correct in not allowing the business loss from the eligible unit for Assessment Year 2006-07 and 2007-08 to be set off from the business income of Assessment Year 2010-11 of the eligible unit before allowing deduction u/s 80IA of the Income Tax Act, 1961 (hereinafter the Act) and further deleting the disallowance of deduction u/s 80IA of the Act of Rs.1,65,52,770/-.

2. During hearing, the ld. DR, Shri Rajat Mittal, defended the addition made by the Assessing Officer. On the other hand, Shri Rajan Vora along with Shri Nikhil Tiwari, defended the conclusion, arrived at in the impugned order, by submitting that in earlier year loss was allowed, therefore, there is no infirmity in the order of the First Appellate Authority. Reliance was placed upon the decision of the Tribunal in the case of ACIT vs M/s Jayant Agro Organics Ltd. (ITA No.5621/Mum/2014) order dated 30/03/2016. This factual assertion was not controverted by the Revenue.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee firm is manufacturer and exporter of

hand knitted woolen carpets durries. It also undertakes generation and supply of electricity through windmill, declared total income of Rs.1,07,54,740/-. The assessment was completed u/s 143(3) vide assessment order dated 14/03/2013. While making the assessment, the ld. Assessing Officer disallowed deduction of Rs.1,65,62,770/- u/s 80IA of the Income Tax Act, 1961 (hereinafter the Act) for the windmill at Coimbatore and Dhulle, resulting into demand of Rs.70,96,030/-. On appeal, before the Ld. Commissioner of Income Tax (Appeal), the claimed deduction was allowed. The Revenue is aggrieved and is in appeal before this Tribunal. It is also noted that the case of the assessee is also covered by the decision of the Tribunal in the case of ACIT vs M/s Jayant Agro Organics Ltd. (ITA No.5261/Mum/2014) order dated 30/03/2016. The relevant portion of the order is reproduced hereunder for ready reference:-

“The Revenue is aggrieved by the impugned order dated 27/06/2014 of the ld. First Appellate Authority, Mumbai. The only ground raised in this appeal pertains to deleting the disallowance of deduction of Rs.1,02,85,478/-, claimed u/s 80IA of the Act, stating that initial assessment year will be the first in which deduction was claimed for the first time, without appreciating the decision in Hercules Hoist Ltd. (2013) 22 ITR (Trib.) 527.

2. *During hearing of this appeal, Shri Ashish Heliwal, ld. DR, advanced arguments, which are identical to the ground raised. On the other hand, the ld. Counsel for the assessee, Ms. Indira G. Anand,*

contended that the impugned issue is covered by the decision of the Tribunal dated 24/02/2016 for A.Y. 2010-11, that to in the case of assessee itself. The ld. Counsel furnished the copy of the aforesaid order ITA No.5056/Mum/2014. This assertion of the ld. Counsel for the assessee was not controverted by the ld. DR.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order dated 24/02/2016 for ready reference and analysis:-

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iv. Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of deduction of Rs. 1,11,14,473/- u/s 80IA stating that "Initial assessment Year" will be the year in which claim of deduction was made for the first time without appreciating that the observations of Mumbai ITAT at para 25 in the case of Hercules Hoist Ltd (2013) 022 ITR (trib) 0527 wherein the Hon'ble ITAT has held that the "Initial Assessment Year" will be the year in which the operations have been commenced. ?

V. Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs. 1,11,14,473/- u/s 80IA without appreciating that in the assessee's case only for AY 2009-10, on the identical issue, Ld CIT(A) has confirmed the disallowance.?

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“The present appeal has been preferred by the Revenue against the order dated 16.05.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

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8. So far as the second issue is concerned, the facts relating to the issue are that the Assessing Officer (hereinafter referred to as the AO) observed that the assessee has been permitted by the Gujarat Energy Development Agency to set up a Wind Farm of capacity 1.6 MW (2 No. WTG of 800 Kw= 1.6 MW) at Village Navadra of Taluka Kalyanpur, in District of Jamnagar, Gujarat. Assessee acquired two windmills in the FY 2005-06 from M/s. Enercon India Ltd. for a sum of Rs.7.4 crores and entered into an agreement with Gujarat Energy Transmission Corporation Ltd. on 21.04.2006 for sale of power. During the FY relevant to AY 2010-11, the assessee generated income of Rs.1,33,71,946/- and after deducting expenses under various heads and depreciation, profit had been arrived at Rs.1,11,14,473/-. This profit derived from wind mill unit had been claimed exempt u/s. 80IA(4)(iv)(a) being 100% of its profit derived from the wind mill project. The AO noted that though the project was started in AY 2006-07, the assessee had claimed deduction u/s. 80IA(4)(iv)(a) for the first time in AY 2009-10 and the year under consideration was the second year of such claim of deduction u/s. 80IA(4)(iv)(a) of the Act. The AO observed that as per the provision of section 80IA(5), while quantifying the amount of deduction under section 80IA, it has to be presumed that the eligible business is the only source of income and hence the losses incurred in earlier year has to be first set off with the profits of eligible business and balance profit, if any is only eligible for deduction under section 80IA. He also further observed that since the assessee had incurred huge losses in earlier year, if the same are set-off from the income of the windmill of this year, deduction under section 80IA would not be available. He further observed that as per the provisions of section 80IA(5), a taxpayer has the option to claim deduction for a period of 10 consecutive assessment years out of 15 years and also such provisions mandate that the eligible business should be fictionally treated as the only source of income of the taxpayer. The AO held that therefore losses incurred in earlier year have to be first set off and balance profit, if any is only eligible for deduction under section 80IA. He further held that the profit from the eligible business for the purpose of determination of the quantum of deduction under section 80IA of the Act has to be computed after deduction of notional brought forward losses and depreciations of eligible units, even though they have been allowed set off against other income in

earlier years. He observed that it is the mandate of law that losses of earlier years though already adjusted against income from other sources, the same are once again to be notionally brought forward and set off against profits of the eligible unit to compute eligible deduction.

9. The Ld. CIT(A) however allowed the claim of the assessee. The Revenue is thus in appeal before us.

10. At the outset, the Ld. A.R. of the assessee submitted that assessee is eligible for deduction u/s 80IA of the Act in respect of the profits out of the generation of electricity out of windmill activity and the unabsorbed depreciation and losses of the earlier years to the initial year in which the assessee started to claim the benefit under section 80IA, since already set off with the ineligible profits of the assessee from other business, could not be reduced from profits of eligible business for computing deduction u/s 80IA of the Act. The Ld. A.R. of the assessee has further stated that this issue is squarely in favour of the assessee by a series of decisions as mentioned below:

(a) Velayudhaswamy Spinning Mills Pvt. Ltd. vs. ACIT (2010) 231 CTR (Mad) :[2012] 340 ITR 477 (Mad) (High Court) (After considering Special Bench decision).

(b) CIT vs. Emerald Jewel Industry P. Ltd. [2011] 53 DTR 263 (Mad) (High Court) (After considering the above decision)

(c) M/s prashant Caterers vs. ITO ITA No. 4226/M/2011 decided on 6.02.2013 (Mumbai Tribunal)

11. Further, the Ld AR has mentioned that in the decisions of Hon'ble Madras High Court, the Special Bench decision in the case of "ACIT vs. Gold Mine Shares and Finance (P) Ltd." 113 ITD 209 (SB), has also been considered.

The Ld. DR on the other hand has relied upon the findings of the AO on this issue.

12. We have considered the rival contentions. We find that the Hon'ble Madras High Court in the case of "Velayudhaswamy Spinning Mills (P) Ltd. vs. ACIT" (2010) 231 CTR (Mad) 368 (BCAJ) has held that the assessee is entitled to claim deduction u/s

80IA for 10 consecutive years out of 15 years and that initial year of benefit can be opted by the assessee. Losses and depreciation of the years earlier to the initial assessment year which have already been absorbed against profits of other businesses cannot be notionally brought forward and set off against the profits of the eligible business for computing the deduction u/s.80IA. Similar view has been taken in the decision of Hon'ble Madras High Court in the case of "CIT vs. Emerald Jewel Industry P. Ltd." (supra) and by the Mumbai Tribunal in the case of "M/s Prashant Caterers vs. ITO" (supra). Respectfully following the same, this issue is accordingly decided in favour of the assessee. The AO is directed to allow the claim of deduction in the light of the above stated decisions.

13. In view of the above, there is no merit in the appeal of the Revenue and the same is accordingly dismissed."

2.2. We find that the Tribunal has discussed the issue in para-8 of the order dated 24/02/2016 and following various decisions including from Hon'ble Madras High Court, wherein, the decision of the Special Bench in the case of ACIT vs Goldmine Shares and Finance Pvt. Ltd. (113 ITD 209)(SB) was also considered. The Tribunal also considered another decision in M/s Prashan Caterers vs ITO (ITA No.4226/Mum/2011) order dated 06/02/2013 and the issue was decided in favour of the assessee, directing the Assessing Officer to allow the claimed deduction u/s 80IA of the Act. Following the aforesaid decision and in the absence of any contrary decision/facts, by the Revenue, we find no infirmity in the conclusion drawn by the ld. CIT(A). Thus, the appeal of the Revenue is dismissed."

Considering the foregoing discussion, before coming to any conclusion, we are reproducing hereunder section 80IA of the Act for ready reference and analysis:-

“Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

80-IA. (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 per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines :

Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the *Explanation* to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

(3) This section applies to an undertaking referred to in clause (ii) or clause (iv) of sub-section (4) 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 undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such 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:

Provided that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of section 2 of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in

pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.

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 machinery or plant by the assessee.

Explanation 2.—Where in the case of an 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.

(4) This section applies to—

- (i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—
 - (a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;
 - (b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
 - (c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Following second proviso shall be inserted after the existing proviso to clause (i) of sub-section (4) of section 80-IA by the Finance Act, 2016, w.e.f. 1-4-2017 :

Provided further that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.

Explanation.—For the purposes of this clause, "infrastructure facility" means—

- (a) a road including toll road, a bridge or a rail system;
- (b) a highway project including housing or other activities being an integral part of the highway project;
- (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
- (d) a port, airport, inland waterway, inland port or navigational channel in the sea;
- (ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

- (iii) any undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone notified by the Central Government in accordance with the scheme framed and notified¹⁵ by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006 :

Provided that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking :

Provided further that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, 2011" had been substituted;

- (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, [2017];

- (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, 2017:

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, [2017].

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;

- (v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—

- (a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified before the 31st day of December, 2005 by the Central Government for the purposes of this clause;

- (b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, 2011;

- (vi) [***]

(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.

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If the language used in the section is analyzed, it provides for deduction at 100% of the profit derived from the eligible business. The section has been amended w.e.f 01/04/2000, which speaks about gross total income of assessee includes any profit & gains derived by an

undertaking from any eligible business referred to in sub-section 4, in accordance with and subject to the provision of this section while computing the total income and the deduction of an amount equal to 100% of the profit & gains derived from such eligible business for ten consecutive years. The substituted sub-section (2) of section 80IA provides an option to the assessee for claiming the deduction under the section for any ten consecutive Assessment Years out of fifteen years beginning from the year in which the undertaking or the enterprise dwells and begin to operate, thus, fifteen year is outer limit within which the assessee can choose the period for claiming the deduction. Section 80IA(5) of the Act deals with quantum of deduction for an eligible business, thus, section 80IA(5) of the Act has to be read along with sub-section (2) of the Act. As per amended provisions, which came into operation w.e.f 01/04/2000, the deduction u/s 80IA of the Act would start with the initial Assessment Year and the brought forward losses of the earlier year, which have already been set off against the profit from any other source, there is no need to carry forward the notional losses of earlier years to the initial assessment. It is only when the losses have been incurred from the initial Assessment Year, then the assessee has to adjust loss in the subsequent years and it has to be computed as if the eligible business is only source of income and then only deduction u/s 80IA can be determined. But once the brought forward losses of the earlier years have already been set off, prior to initial

Assessment Year, no notional losses can be brought forward for setting off against the income of initial Assessment Year. The ratio laid down in the case of Shevi Exports vs JCIT 33 taxman.com 446 (Mum. Trib.) supports our view. Identical ratio was laid down in the case of M/s Excel Crop Care Ltd. vs DCIT (ITA No.3100, 3101, 8741 and 7155 order dated 25/07/2014) Similarly, the Hon'ble Karnataka High Court in Anil H. Lad vs CIT (TS-140-HC-2014(Kar.) and Madras High Court in Velayudhaswamy Spinning Mills Pvt. Ltd. vs ACIT 231 CTR (Mad.) 368. In the light of the foregoing discussion, we find no infirmity in the conclusion drawn by the Ld. Commissioner of Income Tax (Appeal), the appeal of the Revenue is dismissed.

Finally, the appeal of the Revenue is dismissed.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 07/12/2016.

Sd/-

(Rajesh Kumar)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/12/2016

Shekhar, P.S./नि.स.

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

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.

4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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