आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य एवं
श्री राजेश कुमार, लेखा सदस्य के समक्ष ।

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. : 5755/Mum/2014
(Assessment year: 2011-12)

DCIT –Central –Circle -10, Room No.802, 8th Floor, Old CGO Annexe Bldg., M K Road, Mumbai -400 020	**Vs**	M/s Chawla Brothers Pvt. Ltd 317, Pooran Asha Bldg., Narsi Natha Street, Masjid Bunder, Mumbai -400 009 PAN:**AAACC 5084 F**
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by		श्री लव कुमार Shri Love Kumar
Respondent by		श्री जितेंद्र जैन Shri Jitendra Jain श्री महेश ओ राजोरा Shri Mahesh O. Rajora

सुनवाई की तारीख /Date of Hearing : 03-10-2016
घोषणा की तारीख /Date of Pronouncement : 03-10-2016

आदेश
ORDER

श्री अमित शुक्ला, न्यायिक सदस्य
PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against impugned order passed by Ld. CIT(Appeals)-37, Mumbai, for the quantum of assessment proceedings passed under section 143(3) of the Act for the AY 2011-12 on the following grounds of appeal:-

(i) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in deleting the addition of Rs.2,95,11,323/- made by the Assessing Officer by computing ALV at 8|% of the fair market value of the property on the basis of stamp duty rate without appreciating the fact that as per provisions of section 23(1) the ALV is required to be taken higher of reasonable expected rent and actual receipt by the assessee?

(ii) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in relying upon the decision of ITAT, Ahmedabad in the case of Emitici Engineering Limited 58 TTJ 27) without appreciating the fact that surrounding circumstances, i.e. transaction, between related parties and location of property are deciding factors for determining ALV as upheld in that case?

(iii) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in allowing deduction u/s 80IA(4), without appreciating the fact that after setting off of all expenses and depreciation, the assessee did not have any eligible profit to claim deduction from eligible business?".

2. At the outset, the Ld. Counsel submitted that, ground nos. (i) and (ii) stands decided by the Tribunal in assessee's own case in the assessment year 2009-10 passed in ITA No.5490/Mum/2012, whereby, the Tribunal has upheld the order of the CIT(A) in directing the Assessing Officer to compute the ALV at @ 8% of the cost instead of 8% of the fair market value of the property. Regarding second issue raised in ground no.(iii) also, the Ld. Counsel submitted that, this issue too is covered by the decision of The Tribunal for the assessment year 2009-10 which stands decided in favour of the assessee.

3. On the other hand, Ld. DR strongly relied upon the order of the Assessing Officer.

4. After considering the aforesaid submissions and on perusal of the impugned order, we find that, so far as the first issue as raised by the revenue with regard to ground No. (i) & (ii) are concerned, the brief facts are that, the Assessing Officer during the course of assessment proceedings observed that, the assessee company had undergone demerger w.e.f. 01.04.2008 as per the scheme approved by the Hon'ble Bombay High Court, whereby, the resultant company; i.e., M/s Kamani Oil Industries Pvt. Ltd has been entrusted with the business of manufacturing and selling of edible oil and accordingly, all assets and liabilities of the demerged company pertaining to oil undertaking were transferred to the resultant company. It was further observed that in pursuance of the said scheme, the assessee company made available the land and building owned by it to resultant company for an annual rent of Rs.1,20,000/-. The Ld. Assessing Officer was of the opinion that such a large commercial property located at the heart of the city could not be expected to be let out on a petty rental income of Rs.1,20,000/- per annum . Hence, he computed the rental income based on the fair market value of the property under the provisions of section 23(1)(a) of the I.T. Act, which according to him would be 8% of FMV.

5. The Ld. CIT (A) following the earlier year decision of the CIT(A) the for AY 2009-10 held that, ALV should be taken at 8% of the land and building as recorded in the books of accounts of the assessee. We find that the Tribunal has decided this exact issue after observing and holding as under:-

> *"We have carefully perused the orders of the lower authorities. It is not in dispute that the AO has based his findings drawing*

support from the decision of the Tribunal Ahmedabad Bench in the case of EMITICI Engineering Ltd (supra). We find force in the contention of the Ld. AR that the AO has not appreciated the decision in the right perspective. The Co-ordinate Bench of Ahmedabad has upheld the fixing of the ALV at 8% on the cost. That being the clear ratio of the decision and the Ld. CIT(A) has rightfully directed the AO to compute the ALV at 8% of the cost, we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground no.1 is dismissed".

Thus, consistent with the view taken earlier, we also direct the Assessing Officer to compute the ALV @ 8% of the cost as recorded in the books of the assessee company. Accordingly, issue raised vide ground nos. (i) & (ii) stands dismissed.

6. As regards the second issue raised in ground No.(iii), the relevant facts are that, the assessee company is also engaged in the business of the power generation from Wind Mill. It had incurred cumulative losses of Rs.5,32,31,540/- and had earned income of Rs.53,33,272/- during the previous year relevant to the AY 2011-12 out of power generation business which had the net impact of decreasing the overall accumulated loss of the eligible business. The assessee had generated the power and sold to MSEDCL in the current year as well as in the earlier years. Ld. Assessing Officer required the assessee as to why the depreciation and other expenses relating to wind mill, which has been set off against other income in earlier years should not be set off against the income from wind mill during the year. The assessee in response had submitted that it had an option to claim the deduction under section 80IA(4) for any 10 consecutive years out of 15 years beginning from the year in which the

undertaking begins to operate/generate power. That it had considered the financial year 2008-09 that is, AY 2009-10 as the initial year for claim of deduction and the accordingly, unabsorbed depreciation was set off against other units in the earlier years and therefore, same cannot be again set off in the current year. Hence it is eligible for deduction on the profits from AY 2009-10. However, the Assessing Officer did not accept the contention of the assessee and disallowed the claim of deduction under section 80IA(4)(iv) of the Act and adjusted the business loss/ depreciation loss of earlier years of the Wind Mill against the current year's profit to the assessee.

7. The Ld. CIT(A) too following the order of the preceding AYs 2009-10 and 2010-11 allowed the matter in view of the assessee against the Department.

8. We find that this issue has been decided by the Tribunal in favour of the assessee in the following manner:-

> *"We have considered the rival submissions carefully perused the orders of the lower authorities and the decisions relied upon by the assessee. The undisputed fact is that the assessee has fulfilled all the mandatory condition for the claim of deduction u/s 80IA(4). The only dispute relates to the losses which were already set off against other income in the earlier years. It is the case of the Revenue that though the depreciation and the losses have already been set of in the earlier years, the same has to be notionally brought forward and again set off against the current years income. This is contrary to the decision in the case of Velayudhaswamy Spinning Mills Pvt. Ltd (supra) wherein the Hon'ble Court had the occasion to consider the following questions:*

"(a) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the appellant is not entitled to claim deduction under section 80-IA ?

(b) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that initial assessment year in section 80-IA(5) would only mean the year of commencement and not the year of claim ?

(c) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in saying that unabsorbed depreciation of earlier years before the first year of claim, which has already been absorbed, could be notionally carried forward and taken into consideration for computation of deduction under section 80-IA ?

(d) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in following the decision of the Special Bench in the case of Goldmine Shares and Finance (P) Ltd. [2008] 302 ITR (AT) 208 (Ahd.) when admittedly the said decision was rendered prior to the amendment to section 80-IA by the Finance Act, 1999?

16. *The High Court thus observed that*

"in the present case there is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised option u/s. 80IA(2), During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the year. Thereafter, the Hon'ble High Court followed the decision of the Rajasthan High Court in the case of Mewar Oil and General Mills Ltd (supra) and finally concluded that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income u/s. 80-IA for the purpose of computing admissible deductions there under.

17. A similar view was taken by the High Court of Madras in the case of CIT Vs Emerald Jewel Industry (supra) wherein it was held as under:

> *"Assessee is eligible for deduction u/s.80IA in respect of windmill installed by it and the unabsorbed depreciation set off in earlier years could not be reduced from profits for computing deduction u/s. 80-IA".*

18. Though the Tribunal Mumbai Benches in the case of Hercules Hoists Ltd (supra) has taken a contrary view but we find that subsequent to the decision of the Tribunal Mumbai Bench, the Hon'ble High Court of Karnataka in the case of CIT Vs Anil H. Lad 102 DTR 241 has followed the decision of the High Court of Madras in the case of Velayudhaswamy Spinning Mills Pvt. Ltd.(supra) and held that:

> *"If before claiming deduction u/s. 80IA, the loss and depreciation claimed by the assessee in respect of eligible business is set off against income of the assessee from other sources, the said loss or depreciation cannot again be notionally set off against the profits of eligible business for computing deduction.*

19. Now we are confronted with a situation, where on the one hand there are decisions of the Hon'ble High Courts which are in favour of the assessee and on the other hand we have a decision of the Tribunal Mumbai Bench which is in favour of the Revenue. Which decision should get precedence? The answer lies in the decision of the Tribunal Ahemdabad Bench in the case of Kanel Oil & Export Indus. Ltd. Vs JCIT 121 ITD 596 wherein the Tribunal has held as under: "A simple answer would be that the judgment of a High Court, though not of the Jurisdictional High Court, prevails over an order of the Special Bench even though it is from the Jurisdictional Bench of the Tribunal on the basis of the view that the High Court is above the Tribunal in the judicial hierarchy. The Tribunal further observed that this simple view is subject to some exceptions. It can work efficiently when there is only one judgment of a High Court on the issue and no contrary view has been expressed by any other High Court.

20. Before us, the decisions cited by the Ld. Counsel are from the High Courts of Madras and Karnataka which are in favour of the assessee. No contrary decision of any other High Courts have been brought on record before us. Therefore, respectfully following the decisions of the Hon'ble High Courts of Madras and Karnataka, findings of the Ld. CIT(A) are confirmed. Ground No. 2 is accordingly dismissed".

Since the claim of the deduction against the 80IA(4) have been allowed in the earlier orders by the Tribunal accepting the reasoning of the assessee based on High Court decisions, therefore, consistent with the view taken in the earlier years, we also direct the Assessing Officer to allow the deduction under section 80IA(4) in the same light. Accordingly, ground no.(iii) raised by the revenue is dismissed.

9. In the result, appeal of the revenue stands dismissed.

Order pronounced in the open court on 3rd October, 2016.

Sd/-	**Sd/-**
(राजेश कुमार)	**(अमित शुक्ला)**
लेखा सदस्य	**न्यायिक सदस्य**
(RAJESH KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 3rd October, 2016.

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT (Appeal) –29, Mumbai.
4) The CIT-17, Mumbai
5) विभागीय प्रतिनिधि "सी", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "C" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार

आयकर अपीलीय अधिकरण, मुंबई

Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS