IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI

Before Sh. N. K. Saini, Accountant Member

ITA No. 5566/Del/2014 : Asstt. Year : 2010-11

M/s Oakland Bottlers (P) Ltd., 10/46A, West Punujabi Bagh, New Delhi	Vs	Income Tax Officer, Ward-13(4), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAAC)4250B		

Assessee by : Sh. Gautam Jain, CA &
Sh. P. K. Kamal, Adv.
Revenue by : Sh. F. R. Meena, Sr. DR

Date of Hearing : 20.02.2017		**Date of Pronouncement : 27.02.2017**

ORDER

This is an appeal by the assessee against the order dated 24.07.2014 of ld. CIT(A)-XVI, Delhi.

2. Following grounds have been raised in this appeal:

"1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining the disallowance of claim of deduction of Rs.7,58,275/- u/s 80IB of the Act.

1.1 That the learned Commissioner of Income Tax (Appeals) while upholding the deduction has misinterpreted clause (2) of Part C of Schedule XIII read with fifth proviso to 80IB(4) of the Act to conclude that since the undertaking of the appellant is engaged in blending and bottling of IMFL which results in manufacture or production of

distilled/brewed alcoholic drinks, therefore, the undertaking of appellant is clearly not eligible for deduction u/s 80IB of the Act. The finding overlooks the documentary evidence tendered by the appellant to establish that appellant is eligible for deduction u/s 80IB of the Act.

It is therefore, prayed that, disallowance sustained u/s 80IB of the Act may kindly be deleted and appeal of the appellant company be allowed."

3. From the above grounds, it is gathered that the only grievance of the assessee relates to the denial of deduction u/s 80IB of the Income Tax Act, 1961 (hereinafter referred to as the Act) for a sum of Rs.7,58,275/-.

4. Facts of the case in brief are that the assessee filed the return of income on 15.10.2010 declaring an income of Rs.17,69,310/- which was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO noticed that the assessee had claimed deduction of Rs.7,58,275/- on a total profit of Rs.23,54,230/-. He asked the assessee to furnish its justification for claim of deduction u/s 80IB of the Act. In response, the assessee submitted that the assessee company was setup as an industrial undertaking in the State of Jammu & Kashmir for blending and bottling of Indian made Foreign Liquor (IMFL) and that the blending and bottling of IMFL was not covered in the negative list of part C of the

Thirteenth Schedule of the Income Tax Act, 1961. Therefore, it could not be held that the assessee was engaged in the business of distillation and brewing of alcoholic drinks. The AO however, did not find merit in the submission of the assessee and disallowed the claim made by the assessee u/s 80IB of the Act.

5. Being aggrieved the assessee carried the matter to the ld. CIT(A) who sustained the action of the AO.

6. Now the assessee is in appeal. The ld. Counsel for the assessee at the very outset stated that this issue is covered in favour of the assessee vide order dated 13.02.2017 in ITA Nos. 5304 & 5305/Del/2012 for the assessment years 2007-08 and 2008-09 passed by the ITAT Delhi Bench ôEô, New Delhi in assesseeôs own case (copy of the said order was furnished).

7. In his rival submissions the ld. DR strongly supported the orders of the authorities below.

8. I have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that an identical issue was a subject matter of the assesseeôs appeal in the preceding years i.e. the assessment years 2007-08 & 2008-09 in ITA Nos. 5304 & 5305/Del/2012 wherein vide para nos. 15 to 23 of the order dated 13.02.2017 it has been held as under:

"15. Now taking up the basic issue, we notice that in the instant case the edifice of invocation of power u/s 154 is the "tax audit report" was furnished by the appellant along with the return of income. We also notice from the order of assessment placed on record that claim was allowed specifically by stating that appellant is eligible for deduction of Rs. 38,40,090/- u/s 80IA of the Act. In such circumstances once a tax audit report forms part of the assessment record and the same was considered while allowing the claim in the assessment order; then the same report (which is just an opinion) cannot alone be a ground to invoke the power u/s 154 of the Act; more so when the tax auditor in a separate audit report u/s 80IA(5) had stated that appellant is entitled to deduction u/s 80IA of the Act. In any case, even otherwise eligibility of deduction is a vexed question of law and fact; and the same cannot be a subject matter of 154 under the Act.

16. In the case of CIT v. Reliance Industries 228 Taxman 184 (Bom) the fact were that assessee filed its return of income declaring taxable income of Rs.NIL under normal provisions and Rs. 2,429 crores under section 115JB. During assessment, the Assessing Officer disallowed the deduction under section 80HHC while computing the income under section 115JB. The Commissioner (Appeals) directed the Assessing Officer to compute the deduction under section 80HHC. Accordingly, the Assessing Officer allowed the deduction under section 80HHC with reference to the profit as per the accounts, while determining the book profits. The Assessing Officer noticed subsequently that the assessee had reduced 90 per cent of the rent income while computing the deduction under section 80HHC on the book profits, but no deduction was made in respect of other income such as interest, profit and sale of investment, etc. That is how by mistake, the excess deduction was given to the assessee under section 80HHC. Therefore, an order under section 154 was

passed and the Assessing Officer reduced 90 per cent of other income such as interest, profit and sale of investment from eligible business profits while computing the deduction under section 80HHC for the purpose of determining the book profits under section 115JB. This rectification order was challenged by the assessee before the Commissioner (Appeals) who by his order confirmed the addition made by the Assessing Officer to the book profits by way of rectification order passed under section 154. On appeal, the Tribunal inter alia held that there was no mistake apparent on the face of the record to warrant passing of the rectification order. It was held as under:

"11. To our mind, it is an exercise undertaken by the Tribunal essentially with reference to the facts and peculiar to the case of the Assessee before us. The Tribunal was in no error in holding that the powers under Section 154 could not have been resorted to and to initiate and complete an exercise referred in details by it. In effect the initial order of rectification is sought to be further rectified and which is impermissible. More so when the Revenue did not take the matter further from the initial stage and against the order dated 24.07.2006. If the issue was debatable, then, all the more the Tribunal was right in concluding that in the limited nature of the proceedings the Assessing Officer could not have referred to the legal provisions, initial stand of the Assessee and the judgment or orders of the Tribunal brought to his notice. He was not undertaking a fresh exercise nor was he undertaking an exercise enabling him to resort to any other provisions save and except under Section 154. If that was agreed and undisputed position, then, assuming that anything was debatable that could not have been decided in the limited proceedings. Their nature being understood in the factual backdrop and particularly the orders of the Authorities that we are of the opinion that any larger question or controversy need not be decided. So seen, we found that the order under

challenge is essentially rendered in the backdrop of the facts peculiar to the Assessee before us. Beyond that we do not see that the Tribunal was required to go in detail. Since something more was argued and considered before the Tribunal that does not mean that we are obliged to entertain the Appeals of the Revenue. It would be open for the Revenue to raise the legal question in an appropriate proceedings. That cannot be raised in the present case and therefore, we refrain from entertaining the Appeals. The Appeals are devoid of any merit and they are dismissed. No costs".

17. Also in the case of Satish Kumar Aggarwal v. DCIT 8 ITR 424 (Trib) (Del), the facts were that assessee had claimed deduction under section 80HHC on the basis of certificate issued by the chartered accountant and the working supplied with the return of income. The Assessing Officer allowed the claim after due deliberation and section 80HHC working of the assessee was accepted. Subsequently, the Assessing Officer held that there was a mistake apparent from record and by order passed under section 154, the deduction under section 80HHC was reduced. The Commissioner (Appeals) upheld the action of the Assessing Officer. The Tribunal has held as under:

"10. We have heard the rival contentions and perused the material on record. In our view, the assessee furnished a detailed working under section 80HHC along with the chartered accountant's certificate, which was considered by the Assessing Officer, and thereafter order under section 143(3) by way of scrutiny assessment was passed on March 31, 2004. In our view, what is envisaged under section 154 is a glaring and apparent mistake and it does not clothe the Assessing Officer with a power to review his own order. The Income-tax Act provides various remedies to the Department to safeguard interests of Revenue including revision of order

as administrative mechanism under section 263, reopening of assessment under section 147 for income escaped assessment and for glaring mistake rectification under section 154. Merely because there is a power to rectify, each and every decided issue resulting in possible loss of revenue of change of opinion of the Assessing Officer cannot be rectified under section 154. The sine qua non of rectification power is existence of a glaring, patent and obvious mistake, which does not cover each and every decided issue which may result in possible loss of revenue. In our view, the rectifications made in the impugned order under section 154 fall in the category of review of the order by the Assessing Officer which is not covered under section 154. Consequently, we hold that the impugned order under section 154 does not conform to the provisions in this behalf, i.e., rectification of mistake. Under these circumstances, we have no alternate but to set aside the impugned order passed by the Assessing Officer under section 154 and allow the assessee's claim in this behalf. Since we have held the proceedings under section 154 to be bad in law we do not go into merits.

11. In the result, the assessee's appeal is allowed on the above terms."

18. We thus find considerable cogency in the submission of the assessee's counsel that assessment order passed u/s 143(3) of the Act after considering the relevant material and otherwise also there is no mistake apparent from record which can be rectified u/s 154 of the Act; therefore the notice u/s 154 and order passed are illegal, bad in law and without jurisdiction and grounds raised are allowed.

19. Having regard to above, since we have held the proceedings under section 154 to be bad in law; there is no

need to decide other issues on merits. Accordingly, grounds 3 to 3.2 become redundant and infructuous

*20. Taking up **ITA No. 5305/D/2012 for Assessment Year 2008-09**, the appellant has raised following grounds of appeal.*

"1 That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in sustaining the disallowance of claim of deduction of Rs. 10,15,214 u/s 80IB of the Act.

1.1 That the learned Commissioner of Income Tax (Appeals) while upholding the deduction has misinterpreted clause (2) of Part C of schedule XIII read with fifth proviso to 80IB(4) of the Act to conclude that, blending and bottling of IMFL is an ineligible activity. The finding overlooks the documentary evidence tendered by the appellant to establish that, appellant is eligible for deduction u/s 80IB of the Act.

1.2 That the learned Commissioner of Income Tax (Appeals) has proceeded to rely upon Board Circular and, auditors observation mechanically without appreciating the submission and evidence placed on record by the appellant company and as such, conclusion so arrived in disregard of the law is not tenable.

2 That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in confirming the levy of interest under sections 234B of the Act."

21. We have already held while disposing off ITA No. 5304/D/2012 that order made u/s 143(3) of the Act dated 30.12.2009 for AY 2007-08 entitling the deduction

u/s 80IA of the Act was valid and could not be subject matter of rectification u/s 154 of the Act. The consequent effect of the aforesaid finding is that claim made u/s 80IA of the Act stands allowed in the initial assessment year 2007-08 in assessment framed u/s 143(3) of the Act. The Hon'ble Delhi High Court in the case of CIT v. Delhi Patra Prakash Ltd. 355 ITR 14 (Del.) has been pleased to consider to question as to whether the ITAT was right in holding that requisite conditions to be fulfilled for allowability of deduction u/s 80I ought to be satisfied, not only in the first or the initial year, but in all the assessment years in which the deduction u/s 80I is claimed by the assessee. The Hon'ble High Court at para 74 to para 80 has been pleased to hold as under:

"74. In the present case, the claim of the assessee under section 80-I of the Act was examined and allowed by the Assessing officer for three years preceding the assessment year 1991-1992. It is relevant to note that assessments in the earlier years i.e. relating to assessment years 1988-89, 1989-1990 and 1990-1991 has not been disturbed by the Assessing Officer and there has been no change that could justify the Assessing officer adopting a different view in the assessment years 1991-92 and thereafter. As stated hereinbefore, in certain cases where the issues involved have attained finality on account of the subject matter of dispute having been finally adjudicated, the question of reopening and revisiting the same issue again in subsequent years would not arise. This is based on the principle that there should be finality in all legal proceedings. The Supreme Court in the case of Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 had held as under:-

".....that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time

must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity...."

75. In the facts of the present case, where although the Assessing officer has allowed the assessee deduction under section 80-I of the Act in the preceding years, one may still have certain reservations as to whether the issue of eligibility of Unit nos. 2 and 3 fulfilling the conditions has been finally settled, since the question has not been a subject matter of any appellate proceedings in the years preceding the assessment year 1991-92. However, there is yet another aspect which needs to be considered. By virtue of section 80-I(5) of the Act, deduction under section 80-I of the Act is available to an assessee in respect of the assessment year (referred to as the initial assessment year) relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning or the company commences work by way of repairs to ocean-going vessels or other powered craft. Such deduction is also available for the seven assessment years immediately succeeding the initial assessment year. Surely in cases where an assessee is held to be eligible for deduction in the initial assessment year, the same cannot be denied in the subsequent assessment years on the ground of ineligibility since the set of facts which enable an assessee to claim to be eligible for deduction under section 80-I of the Act occur in the previous year relevant to the initial assessment year and have to be examined in the initial assessment year. In such cases, where the facts on the basis of which the deductions are claimed are subject matter of an earlier assessment year and do not arise in the current assessment year, it would not be possible for an Assessing Officer to take a different view in the current assessment year without altering or reopening the

assessment proceedings in which the eligibility to claim the deduction has been established.

76. In cases where deduction is granted under Section 80-I of the Act, the applicability of the Section is determined in the year in which the new industrial undertaking is established. The qualification as to whether any industrial undertaking fulfills the condition as specified under Section 80-I of the Act has to be determined in the year in which the new industrial undertaking is established. Although the deduction under Section 80-I of the Act is available for the assessment years succeeding the initial assessment year, the conditions for availing the benefit are inextricably linked with the previous year relevant to the assessment year in which the new undertaking was formed. In such circumstances, it would not be possible for an Assessing Officer to reject the claim of an assessee for deduction under Section 80-I of the Act on the ground that the industrial undertaking in respect of which deduction is claimed did not fulfill the conditions as specified in Section 80-I(2) of the Act, without undermining the basis on which the deduction was granted to the assessee in the initial assessment year. This in our view would not be permissible unless the past assessments are also disturbed.

77. The Assessing Officers over a period of three years being assessment years 1988-89, 1989-1990 and 1990-1991 have consistently accepted the claim of the assessee for deduction under 80-I of the Act and it would not be open for the Assessing Officer to deny the deduction under Section 80-I of the Act on the ground of non fulfilment of the conditions under 80-I(2) of the Act without disturbing the assessment for the assessment years relevant to the previous year in which the Unit Nos.2 & 3 were established.

78. This view has also been accepted by a Division Bench of Gujarat High Court in the case of Saurashtra Cement & Chemical Industries (supra). In that case, the Gujarat High Court held that where relief of a tax holiday had been granted to an assessee in an initial assessment year in which the conditions for grant of tax holiday had to be examined, denial of relief in the subsequent years would not be permissible without disturbing the assessment in the initial assessment year. The relevant extract from the decision of the Gujarat High Court in Saurashtra Cement & Chemical Industries (supra) is quoted below:—

"The next question to which the Tribunal addressed itself, and no our opinion rightly, was whether the Tribunal was justified in refusing to continue the relief of tax holiday granted to the assessee-company for the assessment year 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80J similar to the one which we find in the case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the initial year of assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted."

79. The Division Bench of the Bombay High Court in the case of Paul Brothers (supra) has also adopted the view expressed by the Gujarat High Court in the case of Saurashtra Cement & Chemical Industries (supra).

80. Following the aforesaid decisions, we hold that in facts of the present case Unit Nos. 2 & 3 cannot be stated to have been formed by splitting up or in reconstruction of existing business."

22. Also Hon'ble Supreme Court in the case of Shasun Chemicals and Drugs Ltd. v. CIT 388 ITR 1 (SC) has held as under:

"It is on this satisfaction that for the Assessment Year 1996-97 also the expenses were allowed. Once, this position is accepted and the clock had started running in favour of the assessee, it had to complete the entire period of 10 years and benefit granted in first two years could not have been denied in the subsequent years as the block period was 10 years starting from the Assessment Year 1995-96 to Assessment Year 2004-05. The High Court, however, disallowed the same following the judgment of this Court in the case of Brook Bond India Ltd (supra). In the said case it was held that the expenditure incurred on public issue for the purpose of expansion of the company is a capital expenditure. However, in spite of the argument raised to the effect that the aforesaid judgment was rendered when Section 35D was not on the statute book and this provision had altered the legal position, the High Court still chose to follow the said judgment. It is here where the High Court went wrong as the instant case is to be decided keeping in view the provisions of Section 35D of the Act. In any case, it warrants repetition that in the instant case under the very same provisions benefit is allowed for the first two Assessment Years and, therefore, it could not have been denied in the subsequent block period. We, thus, answer question No. 1 in favour of the assessee holding that the assessee was entitled to the benefit of Section 35D for the Assessments Years in question."

23. Respectfully following the aforesaid judgments, we allow the claim of the appellant of deduction of Rs. 10,15,214/- u/s 80IB of the Act and grounds 1 to 1.2 raised are allowed. Ground 2 is consequential."

9. Since the facts of the present case are identical to the facts involved in the aforesaid referred to case, so respectfully following the order dated 13.02.2017 in assesseeôs own case for the assessment years 2007-08 & 2008-09 in ITA Nos. 5304 & 5305/Del/2012, the impugned order passed by the ld. CIT(A) is set aside and AO is directed to allow the claim of the assessee for deduction u/s 80IB of the Act.

10. In the result, the appeal of the assessee is allowed.

(Order Pronounced in the Court on 27/02/2017)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 27/02/2017
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR