

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM
आयकर अपील सं./ITA No. 266/JP/2016
निर्धारण वर्ष / Assessment Year : 2010-11

M/s Anamika Conductors Ltd., B-129 Rajendra Marg, Bapu Nagar, Jaipur.	बनाम Vs.	The ACIT, Range-6, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCA5681P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri G.M. Mehta (C.A.)
राजस्व की ओर से / Revenue by : Smt. R. A. Verma (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 25/10/2017
उदघोषणा की तारीख / Date of Pronouncement: 27/10/2017

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-II, Jaipur dated 01.01.2016 for A.Y. 2010-11 wherein the assessee has taken the following grounds of appeal:

"(1) That Id. CIT(A) was not justified in sustaining the following disallowance/addition:

(a) Rs. 33,87,883/- eligible for deduction under section 80IA of IT Act which was compensation received from M/s Suzlon Energy Ltd. for short generation of power from Wind Mills than guaranteed.

(b) Rs. 8,19,323/- under section 40(a)(ia) of IT Act which was the actual payment of interest to NBFC;

(c) Reduction of Rs. 50,000/- from presumed expenses out of sale of electricity generated from the Wind Mill which is eligible for deduction u/s 80IA of IT Act."

2. Regarding 1st ground of appeal, briefly the facts of the case are that the assessee has claimed deduction u/s 80IA in respect of generation of power through its windmills amounting to Rs. 1,04,76,517/-. The Assessing Officer observed that the receipts from generation of power includes an amount of Rs. 33,87,883/- received from M/s Suzlon Energy Ltd. an account of generation guarantee. As per Assessing Officer, the deduction u/s 80IA is eligible only on the profit derived from the eligible business and the amount of generation guarantee received by the assessee is a mere compensation for the low production and the same should be excluded from the profit eligible for deduction u/s 80IA of the Act and a show cause notice was issued to the assessee to explain its position. After considering the reply of the assessee, the Assessing Officer held that the income earned in the form of generation guarantee is not derived from the eligible business i.e. generation of electricity from the Windmill. Referring to the agreement dated 11.10.2006 entered into by the assessee with M/s Suzlon Energy Ltd., the AO held that the amount received is a mere compensation for the low production from the Windmill and is not against the sale receipts from generation of power. It was further noticed by the Assessing officer that out of Rs. 33,87,883/-, Rs. 10,64,280/- pertains to the year under consideration and the balance amount pertain to the shortfall in the previous financial years. It was further held by the Assessing officer that the energy should have been produced and where the energy was produced but the buyer did not

purchase and instead paid compensation for that, it could have been eligible for deduction u/s 80IA of the Act. However, in the instant case the electricity has not been produced hence, there was no question of deduction. It was held by the AO that merely erecting a Windmill and not producing electricity and getting compensation for the same from the supplier of the windmill cannot be termed as profit derived from generation of wind power. Further, reliance was placed on the decision of Hon'ble Supreme Court in case of Liberty India v. CIT reported in 183 Taxman 349. Accordingly the amount of Rs. 33,87,883/- was treated as profit which is not derived from eligible business and deduction u/s 80IA was accordingly reduced to that extent.

3. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the action of the Assessing Officer and his relevant findings are contained at para 3.3 of his order which is reproduced as under:-

"3.3 I have perused the facts of the case, the assessment order and the submission of the appellant. An amount of Rs. 33,87,883/- has been claimed for deduction under section 80IA and relates to generation guarantee provided by Suzlon Energy Ltd., the seller of windmills. The point No. 7 of the agreement dated 11.10.2006, arrived at between the assessee and M/s Suzlon Energy Ltd., the supplier and erector of the WTM, states that "any shortfall due to non-availability of grid would be considered and accordingly the guarantee generation would be calculated. It is further stated that any variation in the wind upto 10% of generation shall be considered in case of shortfall for calculating generation guarantee. If there is any shortfall in the said guaranteed generation considering the grid shortfall, Suzlon

will reimburse for the shortfall units at MSEB power purchase rate as applicable from time to time.

The above clearly shows that this income relates to penalties imposed on the seller by the assessee company if the machines do not deliver as per the promised performance. These cannot be said to be directly derived from the business of power generation and do not have a first degree nexus with the eligible business. In view of the above, deduction under section 80IA is not allowable on this ground.

Further, as discussed by assessing officer only an amount of Rs. 10,64,280/- pertains to relevant previous year while the others are from prior previous years."

4. During the course of hearing, the Id. AR submitted as under:-
- "Under written agreement with M/s. Suzlon Energy Ltd for the minimum production of Power from the Wind Mills manufactured, supplied and looked after by the former, the wind mills were purchased and got established by the assessee company. For lower production of Power through the Winds Mills, the assessee Company was to be compensated for minimum guaranteed amount by M/s. Suzlon Energy Lid. Since the production was lower than guaranteed amount, the Appellant company was compensated by Rs. 33,87,883/-. The treatment of amount of Rs. 33,87,883/- received for lower production/generation of Power from the Wind Mills supplied, could either be the followings:
- (i) Compensation: Compensation is reimbursement by way of money or other mode for something lost or could not be recovered. In assessee Company's case before incurring total

cost/investment for purchase, acquisition and installation of Wind Mills, it had taken into consideration, the guaranteed units of generated Power so also the consequential deduction u/s 80IA of IT Act for the Wind Mills. After taking into consideration, the actual generation and guaranteed generation of power the assessee company was paid compensation of Rs. 33,87,883/-. Had the Wind Mills generated the power as per the guaranteed units by the manufacturer, the income to the appellant would have been higher through selling the units of generated power so also the deduction u/s 80IA of IT Act. Therefore compensation on account of short power generation for which the assessee Company had made huge investments, should have been treated by the Id. AO at same footing as power generation eligible for deduction under section 80IA of IT Act.

(ii) Capital Receipts: From written agreement/contract with M/s Suzlon Energy Ltd, the assessee company could anticipate that for total value/cost paid for installation of the Wind Mills to the former, these will generate minimum units of power per year which is also eligible for deduction under section 80IB of Income tax Act. The lower generation of power than guaranteed by the Manufacturer being violation and breach of contract. Realizing the breach, the assessee Company was paid compensation of Rs. 33,87,883/- by M/s Suzlon Energy Ltd. Hon'ble Rajasthan High Court, in the case of S. Zoraster & Co. Vs. CIT (2010) 322 ITR 35 (Raj) has held that amount received as compensation on breach of contract is capital receipt, not subject to levy of tax. Id. AO was, therefore, not justified in ignoring the judgment of Hon'ble

jurisdictional High Court and in taxing the capital receipt of Rs. 33,87,883/-. Otherwise also for compensation of Rs. 33,87,883/-, on corresponding expenses or payment was incurred and therefore, the same cannot be treated as revenue receipt.”

5. It was further submitted by the Id AR that the issued is covered by the decision of this Bench in case of M/s Rajasthan State Mines & Minerals Ltd. (*ITA No. 235/JP/2015 & Others*) dated 30.05.2017 wherein under identical facts, the claim of the assessee towards the claim of liquidated damages paid by Suzlon Energy Ltd. due to shortfall in the minimum guaranteed generation of power units was held eligible for deduction u/s 80IA of the Act. The relevant findings are contained at para 35.3 which is reproduced as under:-

"35.3 We have heard the rival contentions, perused the material available on record. The Ld. CIT(A) disallowed the claim on the basis that the first degree in nexus with the operation of the undertaking is missing. The Ld. CIT(A) has followed the decision of his predecessor pertaining to the A.Y. 2010-11. Admittedly, this payment is related to the contract between the assessee and the supplier. The contract is related to the wind mill independent of operation of the wind mill the payment of liquidated damages would not arise. It is only on the operation of the wind mill and the output of the equipment so installed this liability of the payment of damages arises.

In the absence of operation, the issue of payment of such damages would not arise. It is only when the wind mill becomes operational on short fall on the production such payment is made. Hon'ble Madhya Pradesh High Court in the case of CIT vs. Prakash Oils Ltd. (supra) held that the payment made as an liquidated damages for not honouring the contract for sale of oil and deoiled cake, such income is directly derived from industrial undertaking, hence eligible deduction u/s 80IA. In our view, the Ld. CIT(A) erred in holding that such income is not derive from the business of the undertaking. Therefore, we

direct the Assessing Officer to allow deduction u/s 80IA on this receipt. This ground of the assessee's appeal is allowed."

6. Having heard both the parties and gone through the material available on record, we are of the view that issue under consideration is identical to the issue which we have decided in case of M/s Rajasthan State Mines & Minerals Ltd. (supra). Hence, following the same, the assessee is held eligible for deduction u/s 80IA in respect of receipts from M/s Suzlon Energy Ltd. for shortfall in the minimum guaranteed production of the power units. In the result, ground taken by the assessee is allowed.

7. Regarding ground no. 2, the assessee has challenged the disallowance of Rs. 8,19,323/- u/s 40(a)(ia) of the Act in respect of interest payment to various NBFCs. During the course of assessment proceedings, the AO observed that the assessee has made payment of Rs. 8,19,323/- towards interest to various NBFCs wherein assessee has failed to apply the TDS provisions, accordingly in terms of section 40(a)(ia), the Assessing Officer disallowed the sum of Rs. 8,19,323/-

8. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) and among various contentions raised, drawing reference to the second proviso to section 40(a)(ia) of the Act, it was submitted that the assessee has collected the prescribed certificates in respect of all the cash creditors to whom interest was paid without deduction of tax u/s 194A of the Act and relying on the decision of Hon'ble Delhi High Court in case of Ansal Land Mark Township P. Ltd. reported in 377 ITR 635 wherein the second proviso has been held to

be declaratory and curative in nature and effective from 01.04.2005 and where the payee in their income tax return offered the sum for taxation and paid tax thereon, disallowance u/s 40(a)(ia) was not justified. The Id. CIT(A) however referred to the decision of Hon'ble Kerala High Court in case of Thomas George Muthoot Vs. CIT Kottayam reported in 63 Taxman.com 99 wherein it was held that the second proviso to section 40(a)(ia) introduced with effect from 01.04.2013 is only prospective. It was further held by the Id CIT(A) that the recipient has subsequently paid tax will not absolve payer from consequence of disallowance under section 40(a)(ia).

9. During the course of hearing, the Id. AR submitted that the issue is covered in favour of the assessee by the decision of the Hon'ble Tribunal in assessee's own case for A.Y. 2011-12 in ITA No. 818/JP14 dated 16.08.2016 wherein the matter has been set-aside to verify the certificates submitted by the payees in Form 26As. It was further submitted that similar issue was involved in AY 2012-13 in ITA No. 612/JP/17 wherein the matter has been recently heard. It was further submitted that in the instant case, the certificates in the prescribed Form 26A have been duly submitted before the Id. CIT(A) and earlier order of the Coordinate Bench may kindly be followed.

10. In ITA No. 612/JP/17 for AY 2012-13 dated 26.10.2017, we have already examined this issue and the relevant findings are contained at Para 8 which is reproduced as under:

"8. We have heard the rival contentions and perused the material available on record. We find that the Id. CIT(A) has followed the

directions of the Co-ordinate Bench in assessee's own case for A.Y. 2011-12 and has remanded the matter back to the Assessing Officer to verify the certificates from various NBFCs to whom the assessee has paid interest during the year in order to verify where they have offered the same in their return of income and deposited taxes thereon. Further in respect of testing charges of Rs. 1,83,732/-, the Id. CIT(A) has confirmed the disallowance on account of non-deduction of TDS following the decision of the Hon'ble Supreme Court in case of Palam Gas Service and in respect of which there is no dispute. We accordingly do not see any infirmity in the order of the Id. CIT(A) hence, the same is confirmed. The ground of appeal taken by the Revenue is dismissed and the cross objection which is in support of the Id. CIT(A) order is allowed."

11. Following the above, the matter is remanded back to the file of the Assessing Officer to examine the certificates filed by the assessee in Form 26A and where the same is found to be correct, allow the necessary relief to the assessee. In the result, ground of appeal is allowed for statistical purposes.

12. Regarding ground no. 3, the assessee has challenged the sustenance of disallowance of Rs. 50,000/- worth of expenses while computing the income which is eligible for deduction under section 80IA of the Act. Briefly the facts of the case are that during the course of assessment proceedings, the Assessing Officer issued a show cause stating that why corporate expenses such as administrative, traveling, telephone expenses etc. should not be allocated towards business

which is eligible deduction u/s 80IA of the Act. In response, the assessee submitted that there are no administrative expenses as the entire operations of windmills were looked after by M/s Suzlon Infrastructure Services Ltd. and the assessee paid operation and maintenance charges every year to said company. However, the said contention was not accepted by the Assessing officer. The relevant finding of the AO are contained in para 3.2.8 of the assessment order which is reproduced as under:-

"3.2.8 Though the assessee has paid to Suzlon Infrastructure Services Ltd for carrying out operation and maintenance of Wind Mills, the possibility of involvement of incurring certain general expenses such as travelling, telephone expenses and other administrative expenses cannot be ruled out. There must be a regular or at least periodic supervision and pursuance on the part of the assessee and its staff in some way or the other with regard to operation of plant/generation of power, distribution and receipts of sale proceeds thereof. Considering these facts, a reasonable expense which is estimated to be Rs. 50,000/-, can be held to be directly attributable towards carrying out of the eligible business and deduction u/s 80IA is reduced by this amount."

13. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) and the relevant findings of Id. CIT(A) are contained at para 5.3 which is reproduced as under:-

"5.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. The Assessing Officer reduced the deduction under section 80IA by Rs. 50,000/- in the view of involvement of incurring certain general expenses such as traveling, telephone expenses and other administrative expenses which would be incurred for running the Windmill and cannot be ruled out. The contention of the assessee that there is

an agreement with M/s Suzlon Energy Ltd who was solely responsible for running and had guaranteed for generation of Power but the expenses for regular or at least periodic supervision and pursuance on the part of the assessee and its staff cannot be denied. Hence reduction of Rs. 50,000/- in the deduction under section 80IA made by the assessing Officer is upheld.”

14. Before us, the Id. AR submitted that the Id. AO had disallowed Rs. 50,000/-out of expenses incurred in generation of power from the Wind mills. Since the operations of all Wind Mills are being looked after by M/s Suzlon Infrastructure Services Ltd. (a subsidiary of M/s Suzlon Energy Ltd) and no expense was incurred in running of Wind Mills by Assessee Company. Without considering the above facts, the disallowance was sustained by Id. CIT(A) who did not accept the contention of the assessee company. In disallowing Rs. 50,000/- both the lower authorities have avoided the agreement with M/s Suzlon Energy Ltd who was solely responsible for running, maintenance and generation of power from the Wind Mills.

15. We have heard the rival submissions and pursued the material available on record. From perusal of the agreement entered into by the assessee with M/s Suzlon, it is noted that the operation and maintenance of windmills has been entrusted by the assessee to M/s Suzlon who shall arrange for the service provider for a period of 20 years who shall be responsible for routine and breakdown maintenance security arrangements, meter reading and coordination with RVPNL to obtain necessary power credit reports/certificates. Further, replacement of all spares , consumables and labour charges are

included in the overall operation and maintenance cost. In light of the same, the findings of the AO that "there must be a regular or at least periodic supervision and pursuance on the part of the assessee and its staff in some way or the other with regard to operation of plant/generation of power, distribution and receipts of sale proceeds thereof" are not in consonance with the above said agreement. Further, we do not find any rational basis for determining the amount of Rs 50,000 as worked out by the AO which is thus clearly in the nature of adhoc amount which cannot be sustained in the eyes of law. In the result, the ground taken by the assessee is allowed.

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

Order pronounced in the open court on 27/10/2017.

Sd/-

Sd/-

(कुल भारत)

(विक्रम सिंह यादव)

(Kul Bharat)

(Vikram Singh Yadav)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 27/10/2017.

*Santosh.

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

1. अपीलार्थी / The Appellant- M/s Anamika Conductors Ltd.,
B-129 Rajendra Marg, Bapu Nagar, Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT, Range-6, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 266/JP/2016}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar