

**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI G. MANJUNATHA, AM**

ITA No. 3931/Mum/2016

(A.Y. 2012-13)

The Assistant Commissioner of Income Tax 21(1), Room No. 116, 1 st Floor, Piramal Chambers, Parel, Mumbai-400 012	Vs.	M/s. Choudhary Exports A-Block (Basement), Shiv Sagar Estate, Dr. A.B. Road, Worli, Mumbai-400 018
Appellant	..	Respondent
PAN No. AACFC6777E		

Revenue by : M.C. Omi Ningshen, DR

Assessee by : Nikhil Tiwari,
Rajan Vora, AR

Date of hearing: 11-01-2018 **Date of pronouncement :** 24-01-2018

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-33, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-33//Rg21/385/14-15 dated 18-03-2016. The Assessment was framed by the Assistant Commissioner of Income Tax, Ward 21(1), Mumbai (in short ACIT) for the assessment year 2012-13 vide order dated 04-03-2015 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of deduction claimed by assessee under



section 80IA of the Act on wind mills by the Assessing Officer. For this Revenue has raised following ground No.1: -

“1. Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in allowing the deduction u/s. 801A of ₹ 1,36,86,295/- for windmill.”

3. Briefly stated facts are that during the year under consideration, the assessee claimed deduction under section 80IA of the Act amounting to ₹ 1,65,62,770/- for the windmill units at Coimbatore, Dhule and Jethwai. The AO during the course of assessment proceedings noticed that the assessee has set off of the losses from windmill units of ₹ 1,73,50,225/- and ₹ 1,05,78,910/- in AY 2009-10, 2010-11 respectively with non-eligible export business profits. According to AO, the assessee has taken loss of ₹ 1,73,50,225/- of the Jethwai unit in AY 2009-10 ignoring the profit from Dhule unit. Accordingly, the AO disallowed the claim of the deduction under section 80IA of the Act claimed by assessee on account of Coimbatore, Dhule and Jethwai unit at ₹ 1,36,86,295/-. Aggrieved, assessee preferred the appeal before CIT(A), who after considering the entire concept and also following assessee's own case of Tribunal decision for AY 2009-10 in ITA No. 6266/Mum/2012 vide order dated 16-01-2015, allowed the claim of the assessee by observing in Para 18 to 28: -

“20. Further substituted sub—section (2) of section 801A gives an option to the assessee for claiming the deduction under the section for any 10 consecutive assessment year out of 15 years beginning from the year in which the undertaking or the enterprise develops and begin to operate. The 15 years is the outer limit within which the assessee can choose the period of claiming the deduction



21. *Sub—section (5) deals with the quantum of deduction for an eligible business. Section 80 - IA(S) of the Act has to be read along with section 80 - IA(2) of the Act. It is only when the appellant has made a claim for the said benefit of deduction u/s 801A in the returns filed, would he be entitled to the benefit for a period of ten consecutive assessment year. Before putting forth such a claim of benefit in the initial assessment year, all losses and depreciation that the appellant could claim must be set-off against the profits of the taxpayer from other business sources Such losses cannot be carried forward notionally to the initial assessment year. when the deduction u/s.801A is claimed.*

22. *As per the amended provisions of the above section. which came into operation w.e.f. 1 April 2000, the computation of deduction u/s 801A would start with the initial assessment year and the brought forward losses of earlier years which have already been set off against the profits from any other source, there is no need to carry forward the notional losses of the earlier years to the initial assessment It is only when the losses have been incurred from the initial assessment year. the assessee has to adjust loss in the subsequent years and it has to be computed as if eligible business is the only source of income and then only deductions under section 80 IA can be determined. But once the brought forward losses of earlier years have already been set off prior to the initial assessment year. no notional losses can be brought forward for setting off against the income of the initial assessment year.*



23. While deciding a similar issue in the case of *Shevie Exports vs. JCIT*. Range 18(2) Mumbai 33, *Taxmann.com 446 - Mumbai Tribunal*, the Hon'ble ITAT "E" Bench Mumbai has held that

“The fiction created by s. 80-IA(5) is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the initial assessment year. Prior to 1.4.2000, a 80-IA(12) defined the initial assessment year for venous types of eligible assessee. However, after the amendment by the Finance Act. 1999, the definition of initial assessment year' has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as cu/led out in s. 80-IA(2) from which it chooses its' 10 years of deduction out 0115 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in s. 801A(5) The loss prior to the initial assessment year. which has already been set-off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. it is only when the loss have been incurred from the initial assessment year, then the assessee has to adjust loss in the subsequent assessment years and it has to be computed as if the eligible business is the only source of income



and then only deduction u/s 80-/A can be determined. This is the true import of s. 80-IA(5)"

24. Similar view has been taken by the Hon'ble ITAT, Bench "J", Mumbai in the case of MIs Excel Crop Care Ltd Vs DCIT. Central Circle -38, Mumbai, ITA no. 3100, 3101. 5741 & 7155. dated 2510712014.

25 The High Court of Karnataka in the case of Anil H Lad Vs CIT [TS-140-HC-2014 (KAR)] and The High Court of Madras in the case of Velayudhaswamy Spinning Mills Pvt. Ltd Vs ACIT 231 CTR (Mad) 368 have held on this subject as under:

"If before claiming deduction u/s 801A. the loss and depreciation claimed by the assessee in respect of eligible business is set off against the income of the assessee from other sources, the said loss or depreciation cannot again be nationally set off against the profits of eligible business for computing deduction.'

26. Apart from that the CBDT. New Delhi vide circular no. 1/2016 dated 15th February, 2016 has issued necessary clarification of the term "initial assessment year" in section 801A(5) of the I T Act. Vide this circular. it has directed the AOs to allow deduction u/s 801A in giving options to the assessee to claim deduction for 10 consecutive years out of 15 years and to treat initial assessment year' means the first assessment year opted by the



assessee to claim sec. SOIA benefits It is also directed the Revenue Authorities that pending litigations on allowability of deduction u/s 80IA shall also not be pursued to the extent it relates to interpreting "initial assessment year as mentioned in sub section (5) of that section

27 it is also observed that in the appellants own case for A Y. 2009-10 in ITA no 6266/Mum/2012 vide order dated 16.01.2015, the Hon'ble Tribunal has upheld the allowance of deduction u/s 80IA made by the Ld. CIT(A) in the following words -

7. Since the Ld. CIT(A) has followed the decision rendered by Hon'ble Madras High Court and identical view has been expressed in the above cited cases also, we do not find any reason to interfere with his order on this issue.

8 In result, the appeal filed by the revenue is dismissed'

28. In view of the facts and circumstances, the judicial pronouncements cited above and Board's circular in this regard. the action of the AO in disallowing the deduction u/s 80IA is not found justified and hence the same cannot be upheld Therefore, the addition of Rs. 1,36.86,2951- disallowing the deduction u/s 80IA is deleted. Ground of appeal No.2 is accordingly allowed."

Now, Revenue is in appeal before Tribunal.



4. At the outset, the learned Counsel for the assessee stated that this issue is squarely covered in assessee's own case for AY 2009-10 in ITA No. 6266/Mum/2012 dated 16-01-2015, which was finally affirmed by Hon'ble Bombay High Court dismissing the Department Appeal in ITA No. 1144 of 2015 dated 05-07-2017 (copies of which are enclosed in assessee's paper book at pages 103 to 108). We find that the Tribunal in AY 2009-10 in ITA No. 6266/Mum/2012 vide order dated 16-01-2015 has dealt with this issue vide Para 5,6 and 7 as under: -

"5. The Ld CIT(A), however, followed the decision rendered by Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd Vs. ACIT (2010)(38 DTR (Mad) 57, wherein the Hon'ble High Court had held as under:-

6. Adverting to the facts of the case, the initial assessment year in this case starts from 2004-05 since the assessee has opted to claim this deduction only in this assessment year, the initial assessment year cannot be the year in which the undertaking commenced its operations and in this case, the initial assessment year is the assessment year in which assessee has chosen to claim deduction under s. 80-IA. Hence, the provisions of s. 80-IA(5) treating undertaking as a separate sole source of income cannot be applied to a year prior to the year in which assessee opted to claim relief under s. 80-IA for the first time. Depreciation and carry forward loss relief to the unit which claims deduction under s. 80-IA, cannot be notionally carried forward and set off against



the income from the year in which the assessee started claiming deduction under s. 80-IA. At the cost of repetition, we make it clear that the case laws relied on by the Departmental Representative are delivered before the amendment to section by Finance Act, 1999. Before the amendment, the initial assessment year was defined in the Act but after the amendment there is no definition for initial assessment year in the Act and there is option to the assessee in selecting the year of claiming relief under s. 80-IA. In view of this, we are of the opinion that there is no question of setting off notionally carried forward unabsorbed depreciation or loss against the profits of the units and assessee is entitled to claim deduction under s. 80-IA on current assessment year on the current year profit. Accordingly, we allow the claim of the assessee."

By following the above said decision, the Ld CIT(A) held that the provisions of sec. 80IA(5) treating the undertaking as a separate source of income cannot be applied to a year prior to the year in which the assessee opted to claim relief u/s 80IA for the first time. Accordingly the Ld CIT(A) held that the losses of earlier years cannot be notionally brought forward to be set off against current year's income, since the current year is the initial assessment year in which deduction u/s 80IA was claimed.



6. *At the time of hearing, the Ld A.R submitted that the view taken by the Ld CIT(A) is also supported by the following decisions:-*

(a) Excel Crop Care (ITA No.3100/Mum/2010) dated 25-07-2014 (b) CIT Vs. Anil H Lad (102 DTR (Kar) 241) (c) Emerald Jewel Industry Pvt Ltd (53 DTR 262)(Mad) (d) Shevie Exports Vs. JCIT (2013)(156 TTJ (Mum) 525)

7. Since the Ld CIT(A) has followed the decision rendered by Hon'ble Madras High Court and identical view has been expressed in the above cited cases also, we do not find any reason to interfere with his order on this issue."

5. Subsequently, this order of the Tribunal was affirmed by Hon'ble Bombay High Court in Income Tax Appeal No. 1144 of 2015 dated 05-07-2017 dismissing the Revenue's appeal. When this was pointed out to the learned Sr. Departmental Representative, he fairly conceded that the issue is covered in favour of assessee. As the issue is squarely covered in favour of assessee, respectfully following the Tribunal decision for AY 2009-10, which was affirmed by Hon'ble Bombay High Court, we dismiss the issue of Revenue's appeal and confirmed the order of CIT(A).

6. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of additional depreciation claim by assessee of wind mill purchase during the year. For this Revenue has raised following ground No.2:-

"Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in allowing the



additional depreciation of Rs.34,50,717/- on windmill purchased during the year”

7. Brief facts are that the assessee claim additional depreciation of ₹ 34,50,717/- under section 32(1)(ia) of the Act on windmill installed at Tejuva. The AO disallowed the depreciation only on the reasoning that the words (“or the business of generation or generation and distribution of power were inserted by Finance Act 2012 with effect from 01-04-2013 and thus additional depreciation can be claimed with effect from 01-04-2013”). Aggrieved, assessee preferred the appeal before CIT(A), who following the Tribunal order on identical facts for AY 2007-08 in ITA No. 5791/Mum/2010 order dated 22-02-2012 in assessee’s own case allowed the claim of the assessee by observing in Para 36 and 37 as under: -

“36. I have carefully considered the above submissions of the appellant and the findings of the Assessing Officer. It is observed that in the appellant’ s own case for Ay 2007-08 ITA no 5791/Mum/2010 vide order dated 22.022012. the Hon’ble Tribunal has allowed additional depreciation on wind mills purchased during the year treating electricity as an article or a thing in the following words-

"8 The Assessing Officer, in his order, has recorded that the assossee is in the business of manufacture and trading of woolen carpets. The Hon tie Madras High in Texmo Precision Casting (supra), considered the identical situation and held as follows:-

For the application of s. 32(1)(i a) what is required to be satisfied is that the setting up of a new machinery or plant



should have been acquired and installed after 31 March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing and there is no requirement that the setting of a new machinery or plant should have any operational connectivity to the article or thing that was already being manufactured by the assessee.

9 *Similar is the decision in Hi Tech Arai Ltd. (supra) and VTM Ltd. (supra). The revenue has not brought any contrary decision to our notice. It is also not the case of the Revenue that the assessee has not manufactured woolen carpets and dhumes. On this factual matrix, we respectfully following the ratio laid down by the Hon'ble Madras High Court and allow the ground raised by the assessee.*

37. *As the facts in the present year are identical to the facts of A.Y. 2007-08 respectfully following the aforesaid decision of the Hon'ble ITAT, it is held that the appellant is eligible for additional depreciation on Windmill purchased during the year Tejuva. Hence, the addition of Rs. 34,50,717/- made by the AO on this account is deleted. Thus ground of appeal no. 3 is allowed."*

Aggrieved, now Revenue is in second appeal before Tribunal.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee



drew our attention to assessee's own case for AY 2007-08 in ITA No. 5791/Mum/2010 order dated 22-02-2012, wherein, Tribunal exactly on identical facts has allowed the depreciation by observing in Para 7 to 9 as under: -

"7. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record, as well as the case laws cited before us, we hold as follows: -

8. The Assessing Officer, in his order, has recorded that the assessee is in the business of manufacture and trading of woolen carpets. The Hon'ble Madras High Court in Texmo Precision Castings (supra), considered the identical situation and held as follows: -

"For the application of s. 32(1)(ia) what is required to be satisfied is that the setting up of a new machinery or plant should have been acquired and installed after 31st March, 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing and there is no requirement that the setting up of a new machinery or plant should have any operational connectivity to the article or thing that was already being manufactured by the assessee."

9. Similar is the decision in Hi Tech Arai Ltd. (supra) and VTM Ltd. (supra). The Revenue has not brought any contrary decision to our notice. It is also not the



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case of the Revenue that the assessee has not manufactured woolen carpets and dhurries. On this factual matrix, we respectfully following the ratio laid down by the Hon'ble Madras High Court and allow the ground raised by the assessee."

9. We find that this issue is squarely covered in favour of assessee in assessee's own case by Tribunal's decision cited (supra). Respectfully following the same, we confirm the order of CIT(A) deleting the disallowance. This issue of Revenue's appeal is dismissed.

10. In the result, the appeal Revenue is dismissed.

Order pronounced in the open court on 24-01-2018.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 24-01-2018
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.
//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI