

आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM

आयकर अपील सं. / ITA Nos.733 to 736/PUN/2017
निर्धारण वर्ष / Assessment Years : 2004-05 to 2006-07 & 2009-10

Assistant Commissioner of Income Tax,
Ichalkaranji Circle, Ichalkaranji

.... अपीलार्थी/Appellant

Vs.

Parikh Shankarlal Kundanmal,
9/439-8-B, Station Road,
Ichalkaranji, Distt.-Kolhapur

PAN : ABIPP0423H

.... प्रत्यर्थी / Respondent

प्रत्याक्षेप सं./CO Nos.22 to 25/PUN/2018
निर्धारण वर्ष / Assessment Years : 2004-05 to 2006-07 & 2009-10

Shankarlal Kundanmal Parikh,
9/439-8-B, Station Road,
Ichalkaranji, Distt.-Kolhapur

PAN : ABIPP0423H

... प्रत्याक्षेपक/ Cross objector

Vs.

Assistant Commissioner of Income Tax,
Ichalkaranji Circle, Ichalkaranji

.... प्रत्यर्थी / Respondent

Assessee by : M.K. Kulkarni
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / Date of Hearing : 16.05.2018	घोषणा की तारीख / Date of Pronouncement: 31.05.2018
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आदेश / ORDER**PER SUSHMA CHOWLA, JM:**

This bunch of four appeals filed by the Revenue are against the order of CIT(A)-2, Kolhapur, dated 06.01.2017 relating to assessment years 2004-05, 2005-06, 2006-07 and 2009-10 against order passed under section 143(3) r.w.s. 254 of the Income-tax Act, 1961 (in short 'the Act'). The assessee has filed Cross Objections against the appeals of Revenue.

2. This bunch of four appeals and Cross Objections relating to same assessee were heard together and are being disposed of by this consolidated order for the sake of convenience. In order to adjudicate the issue reference is being made to facts in ITA No. 733/PUN/2017 and the CO No. 22/PUN/2018.

3. The Revenue in ITA No.733/PUN/2017 has raised the following grounds of appeal:-

1. *Whether on the facts and the circumstances of the case and in law the CIT(A) was correct in holding that when the assessee exercises the option for the initial assessment year, only losses / unabsorbed depreciation (UAD) of the year beginning from the initial assessment year are to be brought forward and not the losses / unabsorbed depreciation (UAD) of earlier years which have already been set off against the other income of the assessee, for the purpose of claiming deduction u/s 80IA(4) of the Act, 1961 thereby ignoring the provisions of section 80IA(5) ?*

2. *On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) is justified in treating the Sales tax benefits i.e. Subsidy as capital receipt by ignoring the findings of the Hon'ble Supreme Court in the case of CIT v/s. Sawhney Steel & Press Works Ltd, (228 ITR 253) wherein the subsidy is treated as revenue receipt.*

3. *The appellant prays that the order of Ld. CIT(A) 2, Kolhapur be vacated and that of the Assessing Officer be restored.*

4. *The appellant leave to add, alter, amend and modify the above grounds raised at the time of proceedings before the Hon. Tribunal.*

4. The assessee in CO No.22/PUN/2018 has raised the following grounds of objections:-

- 1) *On the facts and circumstances of the case and in law the appeal filed by the Revenue is not admissible for adjudication since ground No. 1 of the appeal memo is covered issue in favour of the Respondent-Assessee since many judicial precedents speak unanimously in favour of the assessee (Respondent-assessee herein).*
- 2) *On the facts and circumstances of the case and in law and since the judgment of the Hon'ble Madras High Court in the case of **Velavudhswamv Spinning Mills Ltd. v. ACIT (2010) 38 DTR (Mad) 57** travelled upto Hon'ble Supreme Court in SLP filed by the Department the Hon'ble Supreme Court dismissed the SLP by means of a 'speaking order'. It is now the law of the land and cannot be challenged in any appeal or Revision Proceedings. The appeal of the Revenue is liable to be dismissed declaring it as 'not admitted'.*
- 3) *On the facts and circumstances of the case and in law the directions of Ld. CIT(A) to A. O. to include sales-tax benefits for the purpose for the purposes of deduction under S. 80IA cannot be interfered with since the decision is based on various judicial precedents.*
- 4) *The appellant craves to leave, add/amend or alter any of the above grounds of appeal.*

5. The grounds of appeal No. 1 raised by the Revenue is against the adjustment of brought forward losses/unabsorbed depreciation against the claim of deduction under section 80IA(4) of the Act.

6. Briefly, in the facts of the case, the assessee had declared total income at Nil in the return of income filed on 31.10.2004. The case of the assessee was picked up for scrutiny and the order was passed under section 143(3) of the Act at Nil. Subsequently, the Commissioner-II, Kolhapur found that the claim of deduction under section 80IA(4) was erroneous. The assessee preferred an appeal before the Tribunal which decided the appeal in ITA Nos. 583 & 584/PUN/2009 relating to assessment years 2004-05 and 2005-06, vide order dated 24.11.2010 and directed the Assessing Officer to reframe the assessment de-novo after giving reasonable opportunity of hearing to the

assessee. The Assessing Officer issued show cause notice to the assessee and asked the assessee to furnish the necessary details of claiming the deduction under section 80IA(4) of the Act r.w.s. 80B of the Act. The Assessing Officer asked the assessee to state the Scheme of State Government under which Sales Tax benefit was availed by the assessee along with the conditions of the scheme. The assessee furnished the written submissions and also produced the books of account before the Assessing Officer. The Assessing Officer noted that the assessee was doing business in trading of Yarn and Cloth, Twisting of Yarn, dealer in reliance mobile, dealer in PVC pipe and was engaged in generation of electricity through Wind Mill. The assessee claimed the subsidy received by it to be capital subsidy. As regards the claim under section 80IA of the Act the claim of assessee that assessment year 2004-05 was the initial assessment year. Referring to the observations of the Commissioner under section 263 of the Act the Assessing Officer also made reference to the assessment completed for assessment year 2006-07 and observed that the assessee had installed the Wind Mill for the period relevant to the assessment year 2002-03 and depreciation was claimed at Rs.1.77 crores. The said loss was adjusted against other income of the assessee and for this reason the assessee was showing profit for and from the assessment year 2003-04. The Assessing Officer while completing the assessment for assessment year 2006-07 further noted that the deduction under section 80IA of the Act was claimed ignoring the provisions of section 80IA(5), where it is provided that the eligible profit of the business should be computed as such eligible business were the only source of income during the year i.e. initial assessment year and subsequent years. The Assessing Officer thus recasted the profit and loss account for Wind Mill in assessment year 2006-07 to show that there was no profit for the initial assessment year and up to assessment year 2006-07 and held the assessee not eligible for deduction

under section 80IA(4) of the Act as there was unabsorbed depreciation of Rs.27,18,071/-. The Assessing Officer in view thereof denied the claim of deduction under section 80IA(4) of the Act for assessment year 2004-05 also in the case of the assessee.

7. The Commissioner of Income Tax (Appeals) vide para 5.1 first decided the issue of deduction under section 80IA of the Act. The Commissioner of Income Tax (Appeals) noted that the assessee had set up a Wind Mill Unit in Satara in assessment year 2002-03 and the Assessing Officer had held that the said assessment year was the initial assessment year and therefore the unabsorbed depreciation for the assessment year 2002-03 had to be notionally carried forward and set off against the Wind Mill profits of the subsequent years. The Assessing Officer had taken note of unabsorbed depreciation of Rs.1.77 crores of assessment year 2002-03 and Rs.1,73,92,942/- of assessment year 2003-04 being brought forward to assessment year 2004-05 and held that there were no positive profits in the assessment year 2004-05 to be allowed as a deduction. Similarly, for the assessment years 2005-06 and 2006-07, the Assessing Officer noted that the deduction under section 80IA as unabsorbed depreciation was still not fully set off. For the assessment year 2009-10 the Assessing Officer noted that said unabsorbed depreciation for Satara Wind Mill had been fully absorbed but the assessee had installed another Wind Mill in Tamilnadu in assessment year 2007-08 and unabsorbed depreciation of that Wind Mill had to be set off against the Wind Mill profits which resulted in a negative figure and hence deduction claimed under section 80IA(4) was denied. The Commissioner of Income Tax (Appeals) referred to the order of Tribunal in the case of M/s. RDS Construction Company, Kolhapur in ITA Nos.377 to 383/PUN/2013 relating to assessment years 2004-05 to

2010-11, order dated 06.11.2015 and CBDT Circular No. 1/2016 dated 15.02.2016. The issue of initial assessment year has been settled in favour of the assessee wherein the assessee had an option to choose the initial assessment year for the purpose of deduction under section 80IA of the Act. In view of the ratio laid down by the Tribunal and CBDT Circular, the Assessing Officer was directed to allowed deduction under section 80IA of the Act, where the assessee had chosen the initial assessment year for the Satara Unit to be assessment year 2004-05 and that of the Tamilnadu Unit to be assessment year 2009-10. In respect of Sales Tax benefits whether the same was derived from the Wind Mill business, the Commissioner of Income Tax (Appeals) held that where the assessee had been granted Sales Tax benefits by the Government of Maharashtra under its policy to promote generation of electricity through non-conventional means then the said benefits were inextricably linked and derived from the Wind Mill and hence the assessee was held to be entitled to claim deduction under section 80IA of the Act from such Sales Tax benefits.

8. The Revenue is in appeal against the order of Commissioner of Income Tax (Appeals) on both the counts. The assessee has also filed Cross Objections in support of the order of the Commissioner of Income Tax (Appeals).

9. The learned Departmental Representative for the Revenue pointed out that the second issue raised in the present appeal is covered against the assessee by the order of Tribunal in the case of Dy. Commissioner of Income Tax Vs. Indo Enterprises Pvt. Ltd. in ITA No. 1362/PUN/2011, relating to assessment year 2008-09 and M/s. Patankar Wind Farm Pvt. Ltd. Vs. Dy. Commissioner of Income Tax in ITA No. 169/PUN/2016, relating to assessment

year 2003-04, order dated 22.12.2017. In respect of second issue the Id. DR for the Revenue placed reliance on the order of Assessing Officer which special reference to the order of Assessing Officer in assessment year 2006-07.

10. The Id. AR for the assessee in respect of grounds of appeal No. 1 placed reliance on the CBDT Circular clarifying initial assessment year under section 80IA(5) of the Act and also referred to the year wise details of income offered by the assessee in assessment years 2002-03 to 2005-06 and the depreciation claimed and pointed out that the depreciation claimed before initial assessment year was adjusted against the business income of the assessee from other business and no unabsorbed depreciation was available, denying the benefits of deduction under section 80IA(4) of the Act. He also pointed out that the issue now stands covered by the Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax Vs. Velayudhaswamy Spinning Mills (P) Ltd. Special Leave to Appeal (c) No. 33475 of 2012, order dated 5th September, 2016 (SC) wherein SLP was admitted and after hearing was dismissed.

11. In respect of second issue the Id. AR for the assessee stated that the said issue is covered by the order of Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Meghalaya Steels Ltd. reported in 383 ITR 217 (SC) and stressed that where Hon'ble Calcutta High Court in the case of Merino Ply & Chemicals Ltd. Vs. Commissioner of Income Tax reported in 209 ITR 508 (Cal.) had held that transport subsidies were inseparably connected with business carried on by the assessee.

12. On perusal of record and after hearing both the learned Authorized Representatives, the first issue which has arisen in the present bunch of

appeals filed by the Revenue and even in the Cross Objections raised by the assessee relate to the claim of deduction under section 80IA(4) of the Act. The assessee had established a Wind Mill Unit in Satara in assessment year 2002-03, in which it claimed deduction on account of depreciation. The assessee also had income from trading of Yarn and Cloth, Twisting of Yarn and was dealer in reliance mobile, dealer in PVC pipe. The Ld. AR for the assessee has further filed on record the copy of the return of income filed for assessment year 2002-03 along with audit balance sheet and profit and loss account and has pointed out that the part of the said depreciation was adjusted against the other income. The balance unabsorbed depreciation was adjusted against the business income from other businesses shown by the assessee in assessment year 2003-04. Consequently, the assessee for the first time claimed the deduction under section 80IA(4) of the Act on the resultant profit income shown in assessment year 2004-05, treating the said assessment year to be the initial assessment year.

13. The issue raised in the present bunch of appeals is whether while deciding the issue of eligibility of claim of deduction under section 80IA(4) of the Act, the undertaking is to be taken on standalone basis and the depreciation loss arising in the earlier years were to be notionally carried forward against the profit shown by the said Wind Mill Unit in subsequent year/s. The answer to the question is negative. In cases, where the assessee was engaged in other business i.e. other than generation of electricity through Wind Mill and the loss arising from Wind Mill business on year to year basis were adjusted against other business and the resultant loss to be carried forward becomes Nil; then where the assessee had exercised its option of claiming the deduction under section 80IA(4) of the Act in the initial assessment year, then the said loss

which have already been adjusted against other business income, cannot be notionally carried forward for computing the aforesaid deduction. In this regard first and foremost CBDT Vide Circular No. 1/2017 dated 15.02.2016 has recognized the concept of initial assessment year i.e. the first year opted by the assessee for claiming deduction under section 80IA of the Act. The second part of issue is that once the assessee had exercised its option of the first year of claiming the deduction i.e. 10 years out of block of 15 years then the provisions of section 80IA(5) are applicable only from the initial assessment year. In other words, the losses in the years earlier to the initial assessment year having already been adjusted against profits of other business, cannot be notionally brought forward and set off against the profits of eligible business, where no such mandate was provided in section 80IA of the Act. Such was a proposition laid down by the Hon'ble Apex Court in the case of Assistant Commissioner of Income Tax Vs. Velayudhaswamy Spinning Mills (P) Ltd. (supra) wherein the delay was condoned on admission of SLP and the SLP were dismissed.

14. Now, coming to the details of brought forward loss as depicted for the assessment order for assessment year 2006-07, which has been relied upon by the Assessing Officer to deny the claim of deduction under section 80IA(4) of the Act. It may be pointed out at the outset that the Assessing Officer had taken loss of the Wind Mill on account of depreciation and carried forward against the Wind Mill income shown by the assessee from year to year and computed that there was no positive income available in the hands of the assessee. However, the assessee had filed on record the details showing that from assessment year 2002-03 the assessee had income from other business against which the depreciation was adjusted in assessment years 2002-03 and

2003-04. In assessment year 2002-03, the income shown by the assessee was Rs.96,84,665/- and the depreciation was claimed at Rs.1,80,71,345/- and the balance loss was Rs.83,86,680/- was adjusted against the income of assessment year 2003-04 from other business at Rs.83,21,585/-. The balance loss with the assessee was Rs.65,095/- to be carried forward. The assessee for assessment year 2004-05 had shown income from Wind Mill at Rs.48,68,121/- and after adjusting brought forward unabsorbed depreciation of Rs.65,095/-, the balance income was Rs.48,03,026/-, against which the assessee had claimed the deduction under section 80IA of the Act at Rs.48,03,026/-. In the years subsequent thereto i.e. assessment years 2005-06 and 2006-07 there were no brought forward unabsorbed depreciation and the deduction under section 80IA was claimed against the income declared by the assessee from Wind Mill activity. The assessee has furnished on record the copies of the audited balance sheet, profit and loss account and the return of income along with computation of income for assessment years 2002-03 and 2003-04 and claim of the assessee in this regard has been verified. In the totality of the facts and circumstances there is merit in the plea of the assessee and consequently the assessee was entitled to claim deduction under section 80IA(4) of the Act from assessment year 2004-05 onwards. Upholding the order of Commissioner of Income Tax (Appeals) the grounds of appeal No. 1 raised by the Revenue is dismissed and the grounds of cross objections Nos. 1 and 2 stand allowed.

15. Now, coming to the second issue which is also arising in series of cases before the Pune Bench of the Tribunal. The latest decision decided on 22.12.2017 in the case of Dy. Commissioner of Income Tax Vs. Indo Enterprises Pvt. Ltd. (supra) and M/s. Patankar Wind Farm Pvt. Ltd. Vs. Dy.

Commissioner of Income Tax (supra) the Tribunal held that the assessee was not entitled to treat the Sales Tax incentive as income from eligible business, against which the assessee was entitled to claim the deduction under section 80IA of the Act. The Tribunal had elaborately considered the issue at length and also the reliance of the Authorized Representative for the assessee on the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Meghalaya Steels Ltd. (supra) which has also been relied upon by the Id. AR of the assessee. However, the Tribunal held that the Sales Tax subsidy received by the assessee on generation of power was revenue in nature in turn carrying on the ratio laid down of the Co-ordinate Bench of the Tribunal in the case of Rasiklal M. Dhariwal (HUF) Vs. Dy. Commissioner of Income Tax in ITA Nos. 575/PUN/2007 & 150/PUN/2008 relating to assessment years 2003-04 and 2004-05, order dated 31.03.2011. The relevant findings of the Tribunal are as under :

"7. We have heard extensive submissions made by the representatives of rival sides and have perused the orders of the authorities below. We have also considered various decisions on which reliance has been placed by respective sides. The Department in both the appeals has raised solitary issue assailing the findings of Commissioner of Income Tax (Appeals) in allowing benefit of deduction u/s. 80IA(4) of the Act to the assessee on sales tax subsidy received on power generation. The questions that have emerged for adjudication from the submissions made by both the sides are:

- (i) Whether sales tax subsidy received by assessee on generation of power is capital or revenue in nature? and*
- (ii) If the sales tax subsidy is held to be revenue receipt, whether it is eligible for deduction u/s. 80IA(4) of the Act?*

8. The assessee has received sales tax subsidy from State Government under a scheme for a period of 6 years as an incentive for establishing / running windmill power generation units.

9. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Ponni Sugars & Chemicals Ltd. & Ors. reported as 306 ITR 392 has held that for determining the nature of subsidy "purpose test" has to be applied. If the object of subsidy scheme is to enable the assessee to run business more profitably then the receipt is on revenue account. On the other hand, if the object of incentive under the subsidy scheme is to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy is on capital account. The Hon'ble Apex Court further held that form or the mechanism through which the subsidy is disbursed is irrelevant.

10. The Co-ordinate Bench of the Tribunal in the case of *Rasiklal M. Dhariwal (HUF) Vs. Dy. Commissioner of Income Tax (supra)* had occasion to consider the nature of subsidy received in the form of sales tax incentive for generation of power in the State of Maharashtra. The Tribunal after analyzing the scheme of subsidy threadbare concluded that the subsidy received under the scheme is revenue receipt. The relevant extract of the findings of Tribunal on this issue are as under :

“16. In this background, we may now revert back and examine the Scheme under which the assessee has availed of the sales-tax benefit. In the present case, as noted earlier, the State Government vide its Resolution dated 12.3.1998 modified its existing policy for the purposes of promoting wind energy generation in the State of Maharashtra. This policy has been formulated in the background of the fact that the earlier policy of the State Government on generation through non conventional sources in January, 1996 did not achieve the desired results. In the said policy, nine different incentives have been laid out, which have been extracted by us in earlier part of this order. The dispute before us is in relation to the sales-tax benefits. The Preamble of the policy itself reflects the area which is sought to be addressed by the policy which is “the problems being faced by promoters of wind energy generation”. It is quite clear that the sales-tax benefit is not intended to be granted for creation of or bringing into existence any new asset. It is also clear that there is no prescribed criteria as to the manner in which such incentives are to be utilized. The claim of the assessee is that the sales-tax benefit is granted having regard to the qualifying investment, which is stated to be towards investments in plant and machinery, new building, land development, technical development and design of wind products. According to the appellant, the incentive being linked to the qualifying investment shows that it is intended as a recoupment of the fixed cost already incurred by the assessee and, therefore, such incentives are to be regarded as capital in nature. In our considered opinion, such purpose, as articulated on behalf of the appellant is not emerging from the Scheme of the State Government. Rather, the emphasis on of the grant of sales-tax benefit is on actual running of the plant and that too under prescribed efficiency levels. In fact, in the Resolution dt 1.10.1999 staggered plant load factors achieved by the unit entitled the unit to varying levels of sales-tax benefit. Therefore, it could not be said that the sales-tax benefit is available merely on commencement of generation. We are conscious that mere timing of the grant of subsidy is not relevant. However, in the present case, it is not the timing of the subsidy alone but the grant is linked to achieving operational efficiencies and that too for only six continuous years. If a unit which is otherwise eligible for incentive, does not achieve the plant load factor of 12% or above, it would not be entitled to receive the sales tax benefit. Therefore, in our considered opinion, though the object of the Scheme is to promote generation of energy through non conventional sources but the same is sought to be achieved by the Government in the form of supporting the units to perform more efficiently and profitably.

17. In fact the Hon'ble Supreme Court in the case of *Ponni Sugars & Chemicals Ltd. (supra)* clearly noted that the subsidy received therein was to be utilized only for repayment of term loans taken by the assessee for setting up new units/expansion of existing business. In the present case, there is no such restriction or obligation on the part of the assessee to utilize the incentives availed. In fact, on this aspect the instant scheme is akin to the scheme noted by the Hon'ble Supreme Court in the case of *Sahney Steels (supra)* wherein the assessee was found free to use the money in its business entirely as it liked. In the present case also, the assessee is not obliged to spend the money for

any particular purpose. Thus, applying the purpose test to the facts of the present case and keeping in mind the objects behind the payment of incentive subsidy, we are satisfied that the sales-tax benefits received by the assessee under the instant Scheme are in the course of carrying on its trade more profitably and therefore such receipt cannot be characterized as capital in nature. Thus, the assessee fails on this Ground."

The aforesaid decision of Co-ordinate Bench answered the first issue raised in the present set of appeal i.e. the sales tax subsidy received by assessee on generation of power is revenue in nature. In the light of above findings the alternate plea raised by assessee by way of application under Rule 27 is rejected.

11. The Id. AR has placed reliance on the decision of Hon'ble Gujarat High Court in the case of Garden Silk Mills Vs. Commissioner of Income Tax and Another (supra) to contend that the subsidy in the form of sales tax incentive is capital receipt. The Id. AR has not drawn any parity between the sales tax subsidy held as Capital in the said case and the sales tax subsidy in question in the appeals in hand. Merely for the reason that that the subsidy therein was in the nature of sales tax incentive would not ipso facto lead to conclusion that all Sales Tax Subsidies would be capital in nature. The 'purpose test' as expounded by Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Ponni Sugars & Chemicals Ltd. & Ors. (supra) has to be applied to determine the nature of subsidy. Garden Silk Mills Vs. Commissioner of Income Tax and Another (supra), the assessee had set up the unit in a backward area, which made it entitled to receive 75% of the Capital investment over a period of eight years from the date of commencement of commercial production. The sales tax exemption was fixed at Rs.50.07 crores being 75% of Capital investment. The Hon'ble Gujarat High Court held that scheme is oriented towards and was subservient to the investment in fixed capital assets. The purpose of the sales tax incentive was not to give assessee assistance in carrying out the business operations but to encourage he setting up of industry in backward area. Thus, in the facts of the case, the Hon'ble High Court held sales tax incentive as capital receipt. Since, facts in present case are distinguishable, the ratio laid down in Garden Silk Mills Vs. Commissioner of Income Tax and Another (supra) would not apply.

Similarly, in the cases of Commissioner of Income Tax Vs. Chaphalkar Brothers (supra) and DCIT Vs. Inox Leisure Ltd. (supra) entertainment subsidy/exemption of sales tax as subsidy was given to promote construction of multiplex theatres. The subsidy was given to recoup capital investment and thus, was held to be capital receipt. Since, the facts of the above referred cases are entirely different, they would not in any manner support the connections of the assessee."

16. The next issue decided by the Tribunal was whether the Sales Tax subsidy received by the assessee was eligible for deduction under section 80IA(4) of the Act. The Tribunal held the assessee was not entitled to the said claim relying on the decision of Pune Bench of the Tribunal in the case of M/s. Patankar Wind Farm Pvt. Ltd. Vs. Dy. Commissioner of Income Tax in ITA

Nos.2225 & 2226/PUN/2013 relating to assessment years 2004-05 and 2005-06, order dated 10.04.2015. The relevant extract of the findings of Tribunal are as under :

“12. The issue raised in both the appeals is in relation to the claim of deduction under section 80IA of the Act.

13. The brief facts of the case are that the assessee was engaged in the business of wind power generation and was also dealing in land purchases and sale and land development. The case of the assessee was taken for scrutiny and the Assessing Officer noted from Annexure – 1 to the statement showing computation of taxable income that the assessee had considered sum of Rs.43,48,161/- under the head sale of sales tax benefit as power generation receipts, on which deduction under section 80IA of the Act was claimed. The Assessing Officer show caused the assessee as to why deduction be allowed under section 80IA of the Act when the receipts of sale of sales tax benefit were not derived from the business of power generation and there was no nexus of such receipts with that of windmill power generating. In reply, the assessee explained that it was engaged in the business of manufacture and sale of alternate source of energy i.e. energy generated from wind farm. Further, the contention of the assessee was that with a view to encourage installation of wind energy generator units, the State Government had published a policy on 12.03.1998, according to which, sales tax benefit was available equivalent to the qualifying investment on wind energy generation projects. The said benefit was allowed subject to certain conditions, one such condition was that the wind energy generated from the wind power plants had to be sold to Maharashtra State Electricity Board at a fixed rate of 225 paisa per unit. Another condition was that the plant had to successfully operate every year with a minimum of 12% plant load factor. In case, the said 12% load factor is not obtained, the sales tax benefit would not be available under the scheme. The sales tax benefit, which was equivalent to the amount of investment in plant & machinery, new building, etc. was to be disbursed in six equal installments over a period of six years under the condition that the plant had successfully operated every year with a minimum of 12% plant load factor. As per the assessee, since the sales tax benefit was inextricably linked to the industrial undertaking carrying on the activity of wind generation energy, it was entitled to the deduction under section 80IA of the Act. Relying on the ratio laid down by the Hon'ble Supreme Court in Pandian Chemicals Ltd. Vs. CIT (2003) 262 ITR 278 (SC) and also the ratio laid down in CIT Vs. Sterling Foods (1999) 237 ITR 579 (SC), the Assessing Officer observed that for claiming the benefit under section 80-I / 80-IA, there should be direct nexus between the undertaking and the related income. Further, words which were earlier used i.e. 'attributable to', have been replaced with the word 'derived from' and in view of the definition, the sales tax benefit availed by the assessee which was permitted to be sold, does not have any incidental nexus with the running of undertaking perse, but has direct nexus to the State Government's benefits schemes. The Assessing Officer held that the benefit given to the assessee do not qualify for deduction under section 80IA of the Act. Another aspect noted by the Assessing Officer was the calculation of deduction under section 80IA of the Act. Considering the notional carry forward unabsorbed depreciation, the Assessing Officer noted that the assessee had not considered the brought forward depreciation loss on notional basis in respect of windmill i.e. machine No.1 and 2 before claiming the deduction under section 80IA of the Act. The Assessing Officer noted that the assessee had two business units i.e. wind power generation and the other of dealing in land purchase, sale and land development. As per the Assessing Officer, while computing the deduction

under section 80IA(4)(iv)(a) of the Act, the assessee had not correctly computed the deduction under section 80IA(5) of the Act. Where, as per the Assessing Officer, the income of both the units should have been computed separately as individual units and deduction was required to be allowed only if there were profits and gains of eligible units. As per working of Assessing Officer, the income from windmill unit after adjustment of brought forward losses of the earlier year, the balance was loss to be carried forward to the next year and hence, the assessee was not entitled to the claim of deduction under section 80IA of the Act.

14. The CIT(A) after taking note of the judicial decisions on the issue, pointed out that the expression 'derived from' was narrower in scope than the expression 'attributable to' and consequently, within the meaning of expression 'derived from' as used in section 80IA of the Act, the same should be understood as profit directly arising from the business and not incidental to. The CIT(A) further held that the sale of sales tax subsidy received by the assessee sold to the outside parties, was not the direct result of any generation or distribution of power and it was further held that just because the assessee got this benefit by virtue of its windmill generation, it could not be said that the sale of such benefit was part of main activity. Accordingly, it was held that the profit derived by the assessee on sale of sales tax benefit was to be assessed as income from other sources, on which the assessee was not entitled to the claim of deduction under section 80IA of the Act. With regard to the re-computation of the deduction allowable to the assessee under section 80IA of the Act on the profits generated from windmill power generation, the CIT(A) noted the provisions of the Act and observed that since section 80IA(5) starts with a non-obstante clause overriding the effect of provisions of section 80AB of the Act also mandates that the profits of eligible business would have to be computed as if they were the only source of income. Against the gross receipts from the said wind power generation, the expenditure incurred in earning the income from the eligible business would have to be deducted and only on the net income deduction under section 80IA of the Act was to be allowed. In view of the provisions of section 80IA(5) of the Act, wherein it has been laid down that for the purposes of determining the quantum of deduction under subsection (1), the profits and gains of the eligible business, i.e. the windmill has to be computed as if the windmill was the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year. The deduction under section 80IA(1) of the Act is allowable at the option of the assessee for any 10 consecutive assessment years out of 15 years beginning from the year in which the undertaking or enterprise begins to operate the infrastructure facility. A harmonious construction of sections 80IA(1), 80IA(2), 80IA(5) and 80AB of the Income Tax Act, 1961 makes it clear that these sections do not give any right to the assessee to first set off depreciation against the other income in the initial assessment year when the undertaking begins to operate and then start claiming deduction under section 80IA(1) of the Income Tax Act 1961 on the plea that since unabsorbed depreciation has already been set off against income from other sources, there was no such unabsorbed depreciation which could be set off against the receipts of power generation during the year under consideration and, therefore, the entire profit after deducting normal expenditure is allowable for deduction under section 80IA(1) of the Income Tax Act, 1961. The CIT(A) further held that the depreciation on windmill ought to have been deducted from the receipts generated from the business of generation of power, by treating the said business on a standalone basis and the contention of the assessee in this regard, was rejected. The Assessing Officer was directed to re-compute the carried forward losses from the windmill from the initial assessment year after giving opportunity to the assessee to rebut so that there was no mistake in setting off the loss computed as if the windmill was only the business of the assessee.

15. *The assessee is in appeal against the order of CIT(A).*

16. *The learned Authorized Representative for the assessee pointed out that the issue arising in the present appeal is in relation to the sales tax subsidy received i.e. whether it is part of the business receipt and is entitled to the deduction under section 80IA of the Act. The learned Authorized Representative for the assessee further pointed out that the receipt is similar in nature as considered by the Pune Bench of the Tribunal in Rasiklal M. Dhariwal (HUF) Vs. DCIT in ITA No.575/PN/2007 & 150/PN/2008 relating to assessment years 2003- 04 & 2004-05, vide order dated 31.03.2011, the Tribunal held the receipt to be a revenue receipt. It was further pointed out by the learned Authorized Representative for the assessee that the sales tax subsidy received by the assessee was an integral part of the business income and hence was business receipt, which had been declared as business receipts by the assessee. However, the deduction under section 80IA of the Act had not been allowed on such sales tax subsidy by the Assessing Officer by applying the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Sterling Foods (supra). It was further contended by him that in the case of the assessee, there was only one unit producing electricity through two windmills, on which it was receiving the deduction under section 80IA of the Act and since the assessee had only one source of income, then the said subsidy received by the assessee was derived from the business undertaking. Further reliance was placed on the ratio laid down by the Hon'ble Gauhati High Court in CIT Vs. Meghalaya Steels Ltd. (2013) 34 taxmann.com 34 (Gauhati) and by the Hon'ble Delhi High Court in CIT Vs. Koshika Telecom Ltd. (2006) 287 ITR 479 (Delhi) and Hon'ble Bombay High Court in CIT Vs. Valiant Glass Works (P.) Ltd. (2014) 50 taxmann.com 268 (Bombay). The plea raised by the assessee was that since the rate of sale of power was very low, which resulted in losses and hence, the sales tax subsidy was granted to the assessee which is in inextricably linked to the business income.*

17. *The learned Departmental Representative for the Revenue placing reliance on the order of CIT(A) pointed out that the sales tax incentive was other income, on which benefit of section 80IA of the Act was not allowed by the Panji Bench of the Tribunal in ACIT Vs. M/s. Shaiv Distilleries (P) Ltd., in ITA No.179/PNJ/2014, relating to assessment year 2009-10, vide order dated 14.08.2014.*

17. The issue arising before us is identical to the issue before Pune Bench of the Tribunal in M/s. Patankar Wind Farm Pvt. Ltd. (supra), which had referred to Hon'ble Apex Court in the case of Commissioner of Income Tax Vs. Meghalaya Steels Ltd. (supra) which has been vehemently relied upon by the Id. AR for the assessee before the Tribunal. Following the parity of the reasoning we hold that the Sales Tax subsidy received by the assessee is revenue receipt to be taxed in the hands of the assessee and the assessee is not entitled to claim the deduction under section 80IA of the Act on such subsidy. The order of Commissioner of Income Tax (Appeals) on this count is

thus reversed and the grounds of appeal No. 2 raised by the Revenue is thus allowed and the ground of Cross Objections No. 3 raised by the assessee is dismissed.

18. In the result, appeals of Revenue and the Cross Objections by the assessee are partly allowed.

Order pronounced on this 31st day of May, 2018.

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 31st May, 2018.

RK

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Kolhapur;
4. The Pr. CIT-2, Kolhapur;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य मामला / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune