IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 5650/MUM/2016
Assessment Year: 2004-05

ACIT Circle-2(3)(1), R. No. 552, 5th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Tata Chemical Ltd. Bombay House, 24, Homi Mody Street, Fort, Mumbai-400020. **PAN No. AABCT4059M**
Appellant		**Respondent**

Revenue by	:	Ms. S. Padmaja, DR
Assessee by	:	Mr. Atul T. Suraiya, AR
Date of Hearing	:	18/04/2018
Date of pronouncement	:	28/06/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the Revenue. The relevant assessment year is 2004-05. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-6, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) r.w.s 147 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed read as under:

1. Whether on the facts and in the circumstances of the case in law, Ld. CIT(A) erred in holding that re-assessment proceedings were invalid as there was no failure on the part of the assessee or any new material or information was in

the possession of AO has reason to believe that proceedings u/s 147 were held to be valid without appreciating that explanation 1 of section 147 makes clear that production before the assessing officer of books of account or other evidences from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure.

2. Whether on the facts and in the circumstances of the case in law, Ld. CIT (A) erred in holding that re-assessment proceeding was invalid on account of change without appreciating that the income has escaped assessment on account of wrong claims made by the assessee.
3. Whether on the facts and in the circumstances of the case in law, Ld. CIT (A) was right to quash 148 proceedings treating the same being based on change of opinion or having no failure on the part of the assessee to disclose material facts even when proviso to Sec. 147 was not applicable and Expln. 1 of Sec. 147 was applicable.

3. Briefly stated, the facts are that the assessee is engaged in the business of manufacture of soda ash and fertilizers. It filed its original Return of Income (RoI) for the assessment year (AY) 2004-05 on 01.11.2004 declaring total income of Rs.3,49,71,39,843/- under normal provisions and Rs.2,81,15,45,486/- u/s 115JB of the Act. Thereafter, the assessee filed revised RoI on 20.04.2005 declaring total income of Rs.3,71,48,26,981/-. Subsequently, the assessee filed a second revised RoI on 29.03.2006 declaring total income of Rs.3,20,13,93,148/- under normal provisions and Rs.2,81,15,45,486/- u/s 115JB of the Act. The Assessing Officer (AO) completed the assessment u/s 143(3) on 07.12.2006 determining total income at Rs.3,29,65,12,164/- under normal provisions and Rs.23,39,16,883/- u/s 115JB of the Act. Thereafter, the AO reopened the assessment by issuing notice u/s 148 on 26.05.2008 with the reason that the assessee's income has escaped

assessment to the extent of Rs.48.46 crores by allowing excess deduction u/s 80IA. The reasons recorded by the AO for reopening are extracted below:

> "In this case, the assessment was completed u/s. 143(3) on 07.12.2006 determining the total income at Rs.329,65,12,164/-. It is seen from the records that income has escaped assessment for the following reasons:
>
> 1. While computing the deduction u/s. 80-IA
>
> (i) the profit on production of steam is wrongly determined on notional basis (since the steam is not a marketable product) thereby allowing excess deduction of 80-IA.
>
> (ii) the sale value of power has been adopted as per the GEB rate, but the same has not been adopted for working out the cost of production. Thus, the assessee has suppressed the cost of production and inflated the profits resulting in excess deduction 80IA claim.
>
> (iii) certain pass through components like Fuel Adjustment Charges (FAC) electricity duty etc. has not been considered for arriving at the market value of the electricity.
>
> (iv) separate accounts for the power plant and set off losses incurred by the eligible business has not been worked out (i.e. power plants in the initial year against assessee's income from other plant without adjusting the same against profits of power plants eligible for 80-IA deduction).
>
> (v) though the assessee is booking average 9% of book depreciation to 80IA units, the IT depreciation claimed is only 28% which enable the assessee to show higher profit for the 80IA units and claim excess deduction.
>
> In view of the above, I have reason to believe that income to the extent of Rs.48.46 crores has escaped assessment for AY 2004-05 by allowing excess deduction u/s 80IA. Therefore, the assessment is hereby re-opened as per provisions of section 147 by issuing notice u/s 148."

4. Aggrieved by the action of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held that (i) the case was originally completed u/s 143(3) on 07.12.2006 after considering both the revised and the original RoI; the AO allowed deduction u/s 80IA at Rs.48,46,94,833/- in respect of power produced by the power plant at Mithapur, (ii) the Commissioner of Income Tax (in short 'CIT') had also issued show cause notice u/s 263 for the impugned assessment year wherein he discussed the claim of deduction u/s 80IA and stated that major part of the refund got delayed on account of the reason attributable to the assessee, therefore, he directed to exclude the interest u/s 244A for the period 01.04.2004 to 29.03.2006, therefore, it is clear that the original order was held to be erroneous and prejudicial to the interest of revenue only to the extent of granting interest u/s 244A and not on the issue of claim of deduction u/s 80IA, (iii) a notice u/s 263 was issued on 05.03.2007 proposing to revise the assessment on the issue of allowability of deduction u/s 80IA for AY 2003-04, however, the said proceeding was dropped by the CIT vide order dated 26.03.2008, (iv) the AO while passing the order for AY 2001-02 has discussed the issue regarding claim of deduction u/s 80IA on the new power plant at Mithapur at para 19 (page 21) of the assessment order.

The Ld. CIT(A) thus observed that the issue has been examined on various occasions for different assessment years by the AO and the claim of deduction has been allowed. On the basis of the above reasons, the Ld. CIT(A) thus observed that there was no new tangible material which came to the notice of the AO requiring him to issue notice u/s 148 of the Act. The Ld. CIT(A) held that the reopening done by the AO was based on

mere change of opinion. Therefore, relying on the judgment of the Hon'ble Supreme Court in *CIT v. Kelvinator of India Ltd*. (2010) 320 ITR 561 (SC), he allowed the ground of appeal filed by the assessee against the reopening done by the AO.

5. Before us, the Ld. DR submits that the reopening has been done within four years and reliance is placed on the decision in *Export Credit Guarantee Corporation of India Ltd. v. Addl. CIT* (2013) 30 taxmann.com 211 (Bom) and *DCIT v. Tivoli Investment & Trading Co. Pvt. Ltd.* (ITA No. 7713/Mum/2012) for AY 2006-07 by ITAT 'E' Bench Mumbai.

6. On the other hand, the Ld. counsel of the assessee submits that the reasons recorded for AY 2002-03 and 2004-05 were exactly the same and were on the same date and the Tribunal has dismissed the departmental appeal for AY 2002-03. The Ld. counsel further submits that the case of the assessee is distinguishable from the decision in *Export Credit Guarantee Corporation of India Ltd* (supra) relied on by the Ld. DR on the fact that in the instant case there is no note of statement of any change in accounting policy which has been overlooked by the AO during the original assessment proceedings.

7. We have heard the rival submissions and perused the relevant materials on record. In *Export Credit Guarantee Corporation of India Ltd* (supra), during the year in question, there was a change in accounting policy as a result of which the provision for estimated recovery in respect of claims paid and outstanding for recovery for a period of three years for more as on the balance sheet date has been estimated at

Rs.100/- for each claim in substitution of the individual assessment/estimate made earlier.

In the instant case there is no note or statement of any change in accounting policy which has been overlooked by the AO during the original assessment proceedings.

In *Tivoli Investment & Trading Co. Pvt. Ltd*. (supra), it has been mentioned that 'the AO may receive information, post assessment, of similar property/s fetching a much higher rent for the relevant year than that assessed in the assessee's case. The same would definitely lead to a bona fide reason as to escapement of income, leading to initiation of re-assessment proceedings'.

In the instant case, no such information has come to the knowledge of the AO.

7.1 Similar issue arose before the Co-ordinate Bench in the case of the assessee for the AY 2002-03 in ITA No. 6647/Mum/2013. The Tribunal held that (i) the assessment year 2002-03 is the second year of claiming the benefit of deduction u/s 80IA on the income of new power plant located at Mithapur, the deduction was claimed for the first time in the AY 2001-02, (ii) the assessment order for AY 2001-02 was framed u/s 143(3) on 29.03.2004, wherein the claim of the assessee was examined in detail and thereafter only the benefit of deduction was allowed after recomputing the same as was allowable to the assessee, (iii) when the original assessment proceedings for the AY 2002-03 were carried on, the query was raised by the AO with regard to the claim of deduction

u/s 80IA on the Mithapur Power plant, the same was replied by the assessee vide letter dated 23.12.2004, the AO completed the original assessment u/s 143(3) on 10.01.2005.

On the basis of the above facts, the Tribunal held at para 26 the following:

> "26. Thus, from the perusal of the above explanations and discussions made in the assessment orders it is clear that requisite material was obtained by the AO which was duly considered an only thereafter, the benefit of deduction was allowed to the assessee as was available in the assessment order passed u/s 143(3). Under these circumstances, it is not legally permissible to reopen the case merely reappraising same material and reviewing the decision already taken by the AO. It is well settled law that reopening based upon change of opinion of the AO is not permissible in the eyes of law. Thus, on this ground as well, the reopening has been rightly held as invalid by Ld. CIT(A)."

7.2 The Hon'ble Bombay High Court in the case of *CIT v. Western Outdoor Interactive Pvt. Ltd.* (2012) 349 ITR 309 (Bom) has held that whether a benefit of deduction is available for a particular number of years on satisfaction of certain conditions and under the provisions of the Act, then without withdrawing or setting aside the relief granted for the first AY in which claim was made and accepted, the AO cannot withdraw the relief for subsequent assessment years. This ratio was laid down in the context of section 80A of the Act. Subsequently, similar issue was upheld in *CIT v. Arts & Crafts Exports* (2012) 246 CTR 463 (Bom).

The Hon'ble Delhi High Court in the case of *CIT v. Tata Communication Internet Services Ltd.* (2012) 204 Taxman 606 (Del) has held that bar as provided u/s 80IA(3) is to be considered only for the first year of a claim for deduction u/s 80IA and not in the subsequent years. In that case, the AO had raised the issue of splitting up or reconstruction of already existing business in the subsequent year, when in the first year of claim this issue was not disturbed.

Again the Hon'ble Bombay High Court in *CIT v. Paul Brothers* (1995) 216 ITR 548 (Bom), *Direct Information (P) Ltd. v. ITO* (2011) 203 Taxman 70 (Bom) has held that once a benefit of deduction was extended in respect of a provision for a particular number of years then unless the benefit is withdrawn for the first year, it cannot be withdrawn subsequent years, particularly, when there is no change in the facts.

7.3 Facts being identical, following the order of the Co-ordinate Bench in assessee's own case for AY 2002-03 and the ration laid down in decisions at para 7.1 hereinbefore, we uphold the order of the Ld. CIT(A).

8. In the result, the appeal filed is dismissed.

Order pronounced in the open Court on 28/06/2018.

Sd/-	Sd/-
(C.N. PRASAD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 28/06/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai