

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

श्री विजय पॉल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 704/JP/2018
निर्धारण वर्ष / Assessment Years : 2010-11

M/s Rajasthan State Mines & Minerals Ltd., C-89-90, Lal Kothi, Janpath, Jaipur	बनाम Vs.	DCIT Circle-6, Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAACR7857H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P. C. Parwal (CA)
राजस्व की ओर से / Revenue by: Shri Rajendra Jha

सुनवाई की तारीख / Date of Hearing : 06/08/2018
उदघोषणा की तारीख / Date of Pronouncement : 05/11/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT (A)- 2, Jaipur dated 23.03.2018 for Assessment Year 2010-11 wherein the assessee has taken the following grounds of appeal:-

"1. Under the facts and circumstances of the case, the notice issued u/s 148 and consequent order passed u/s 147 is illegal and bad in law.

2. The Id. CIT(A) has erred on facts and in law in confirming the action of AO of reducing the claim of deduction u/s 80IA of Rs. 1,47,82,535/- by apportioning establishment and financial expenses at Rs. 36,83,29,248/- to wind power generation

undertakings eligible for deduction u/s 80IA ignoring that the entire operation and maintenance of wind plants has been given to Suzlon Energy Ltd., and therefore, the said expenditure has no relation to the undertakings eligible for deduction u/s 80IA."

2. In ground No. 1, the assessee has challenged the issuance of notice u/s 148 and the consequent order passed under section 147 of the Act. In this regard, the Id. AR submitted that the assessee had filed its return declaring income of Rs. 81,41,70,667/- on 14.10.2010 after claiming deduction of Rs.14,96,10,989/- u/s 80IA of the Act. The return of income was subsequently revised on 23.03.2012 declaring income of Rs.77,61,60,827/-. It was submitted that in course of assessment proceedings, the assessee vide letter dated 11.05.2012 filed the copy of audit report in Form No. 10CCB as required u/s 80IA(7). Thereafter, the the Assessing officer vide letter dated 25.09.2012 required the assessee to furnish the justification for claiming deduction u/s 80IA. The assessee filed the reply dated 08.10.2012 justifying the claim of deduction u/s 80IA. Thereafter, vide letter dated 05.02.2013, the assessee explained as to why deduction u/s 80IA should be allowed to it with reference to the liquidated damages received from M/s Suzlon Energy Limited and sale of CERs.

3. It was further submitted by the Id AR that the Assessing officer completed the assessment u/s 143(3) on 27.02.2013 at income of Rs. 85,17,09,380/- where he examined the claim of deduction u/s 80IA and allowed the same at Rs.11,15,66,435/- by not allowing the deduction with reference to the liquidated damages and sales of CERs. Against this, the assessee filed an appeal before the Ld. CIT(A) who vide order dated 05.12.2013 affirmed the order of AO. The assessee

filed appeal before the Hon'ble ITAT who vide order dated 12.02.2016 in ITA No.144 & 124/JP/14 has allowed the claim of the assessee.

4. It was further submitted by the Id AR that the AO, after four years from the end of the relevant assessment year, issued notice u/s 148 dated 31.03.2017 for the reason that while claiming deduction u/s 80IA, assessee had only considered direct operation and maintenance expenses for working out the deduction without charging proportionate head office expenses on turnover ratio and therefore, the allowance of deduction to the extent of Rs.1,47,82,534/- has escaped assessment which is on account of failure on part of the assessee to disclose all material facts.

5. It was further submitted by the Id AR that the assessee filed its objection to the issuance of notice u/s 147 vide letter dated 19.06.2017 specifically pointing out that in course of the original assessment proceedings, the report of Chartered Accountant for claim of deduction u/s 80IA was furnished. After examining the same, the AO discussed the allowability of deduction u/s 80IA and reduced the claim of deduction to the extent of Rs.3,80,44,554/-. However, the AO rejected the objection of the assessee vide letter dated 04.07.2017.

6. It was further submitted by the Id AR that before the Id. CIT(A), the assessee pleaded that reopening of assessment after four years when the original assessment is framed u/s 143(3) and the issue of deduction u/s 80IA was examined, is illegal and bad in law. However, the Id. CIT(A) observed that though the assessee has objected to the reopening of assessment but no ground has been taken before her.

Thereafter, relying upon the decision of Hon'ble Gujarat High Court in case of Ajanta Pvt. Ltd. vs. ACIT 78 taxmann.com 48, she confirmed the validity of the order passed u/s 147 of the Act.

7. In light of above factual matrix, it was further submitted before us that the original assessment in this case was completed u/s 143(3). The assessment is reopened after the expiry of four years from the end of relevant AY. Hence, the assessee's case falls in proviso to section 147 wherein the assessment cannot be reopened after the expiry of four years from the end of relevant AY unless any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. It may be noted that in course of original assessment proceedings, assessee filed detailed working of claim of deduction u/s 80IA along with audit report in Form No. 10CCB as required u/s 80IA(7). After considering the same, the AO disallowed the claim of deduction to the extent of Rs.3,80,44,554/- in respect of liquidated damages received from M/s Suzlon energy Limited and sale of CERs. Thus, all the material facts necessary for claim of deduction u/s 80IA was disclosed fully and truly by the assessee. Therefore, it is incorrect on part of the lower authorities to hold that assessee has not disclosed fully and truly all material facts necessary for its assessment on the issue of allowance of deduction u/s 80IA of the Act. Hence, reopening of assessment after the expiry of four years, only on change of opinion is illegal and bad in law.

8. In support of his contentions, the Id AR referred to the decision of the Hon'ble Supreme Court in case of ITO vs. Techspan India Pvt. Ltd.& ANR. (2018) 404 ITR 10 (SC), the decision of the Hon'ble Gujarat High Court in case of Ajanta Pvt. Ltd. vs. DCIT & ANR. (2018) 402 ITR 0072 (Guj) (HC), the decision of the Hon'ble Rajasthan High Court in case of CIT Vs. Hindustan Zinc Ltd. (2016) 241 Taxman 392 (Raj), the decision of the Hon'ble Delhi High Court in case of PCIT Vs. Tupperware India Pvt. Ltd. (2015) 127 DTR 161 (Del.) and the decision of the Coordinate Bench in case of RIICO vs. ACIT in ITA No. 334/JP/2016 & CO No. 4/JP/2016 order dated 07.12.2017.

9. Regarding the decision of the Hon'ble Gujarat High Court in case of Ajanta Pvt. Ltd. vs. ACIT 78 Taxmann.com 48 relied upon by the Id CIT(A) where the assessment for AY 2008-09 was reopened for the reason that assessee has not allocated the common expenditure towards its windmill division in claiming deduction u/s 80IA and the reopening was upheld by the Hon'ble High Court, it was submitted by the Id AR that in the subsequent decision by the Hon'ble Gujarat High Court (referred supra) in case of the same assessee for AY 2011-12, the reopening of the assessment framed u/s 143(3) for the reason of non-allocation of common expenditure was held invalid. Therefore, this being the subsequent decision, it would prevail over the earlier decision.

In view of above, it was submitted by the Id AR that the assessment framed by the AO u/s 147 is illegal and bad in law and the same be quashed.

10. Per contra, the Id DR vehemently argued the matter and relied upon the findings of the lower authorities. It was submitted by the Id DR that there was a clear failure on part of the assessee on not charging the proportionate head office expenses on account of establishment & financial expenses on windmills and these are material facts for the purposes of computation of deduction u/s 80IA and hence, the AO has rightly exercised his jurisdiction in invoking the provisions of section 147 of the Act by issuance of notice u/s 148 of the Act. The Id DR further placed reliance on the decision of the Hon'ble Gujarat High Court in case of Ajanta Pvt. Ltd. vs. ACIT 78 Taxmann.com 48.

11. We have heard the rival contentions and perused the material available on record. Undisputedly, the assessment was initially completed u/s 143(3) vide order dated 27.02.2013 and the same was reopened by issuance of notice u/s 148 dated 31.03.2017 after the expiry of four years from the end of the relevant assessment year 2010-11. The proviso to section 147 is thus clearly attracted and it therefore needs to be examined whether the income which is sought to be brought to tax by the Assessing officer and which has thus escaped assessment is on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment.

12. In this regard, firstly, we refer to the reasons recorded by the AO before issuance of notice u/s 148 which reads as under:

"The assessee filed its return of income for AY 2010-11 on 14.10.2010 declaring total income of Rs. 81,41,70,667/- which was assessed u/s 143(3) at the total income of Rs. 85,17,09,380/- on 27.02.2013.

On going through the records, it was noticed that assessee had not charged proportionate head office expenses on account of establishment & financial expenses on wind mills for the purpose of computation of deduction u/s 80IA.

As per provisions of section 80IA of the Act, the expenses relatable to eligible business either directly or indirectly have to be considered for computation of profit and gains of an eligible business. But the assessee had considered only direct operation and maintenance head office expenses on turnover ratio.

In view of the above facts, I have reasons to believe that allowance of deduction under section 80IA without apportionment of head office expenses amounting to Rs. 1,47,82,534/- has escaped assessment within the meaning of provisions of section 147 of the IT Act, 1961 for the Asstt. Year 2010-11. The escapement was on account of failure on the part of the assessee to disclose all material facts."

13. As per the Assessing officer, the material facts therefore relates to not charging the proportionate head office expenses on account of establishment & financial expenses on windmills for the purposes of computation of deduction u/s 80IA of the Act. As per Assessing officer, there is a failure on part of the assessee to disclose fully and truly such material facts which has resulted in escapement of income whereby the claim of deduction u/s 80IA has been allowed at a higher figure as against the figure which would have been arrived at after apportionment of head office expenses.

14. As per the Id AR, during the course of assessment proceedings, the assessee vide letter dated 11.05.2012 filed a copy of audit report in Form No. 10CCB as required u/s 80IA(7). Thereafter, the Assessing officer vide letter dated 25.09.2012 required the assessee to furnish the justification for claiming deduction u/s 80IA. The assessee filed the reply dated 08.10.2012 justifying the claim of deduction u/s 80IA. Thereafter, vide letter dated 05.02.2013, the assessee explained as to why deduction u/s 80IA should be allowed to it with reference to the liquidated damages received from M/s Suzlon Energy Limited and sale of CERs.

15. We have gone through the audit report in Form No. 10CCB as well as other submissions filed by the assessee during the course of original assessment proceedings completed u/s 143(3) of the Act and find that there is no disclosure or discussion regarding the apportionment of any head office expenses while computing the deduction u/s 80IA of the Act. It is a fact that the assessee has wind power generating undertakings which are eligible for claim under section 80IA and various mining units which are not eligible for such tax holiday. It is also a fact that there are head office establishment and financial expenses. It is therefore reasonable on part of the Assessing officer to hold a prima facie belief that such head office expenses incurred at the entity level should be allocated between the two set of activities – the activities which are eligible for tax holiday and those which are not eligible for tax holiday. At the same time, it could be position of the assessee that certain expenses though incurred at the head office level are not incurred in relation to or have no nexus with

tax holiday units therefore, there was no necessity to allocate these expenses at the first place. Alternatively, the assessee may plead that all expenses incurred in relation to tax holiday units have already been accounted for separately and there is thus no necessity for any allocation of head office expenses. The question is whether such a position of the assessee and the related facts are manifest clearly on the face of the financial statements, the documentation in forms of tax audit report, the tax computation or other documentation/submissions filed either as part of the return of income or during the course of assessment proceedings. If the answer to the same is in affirmative, then clearly, it can be said that there is no failure on part of the assessee to disclose truly and fully all material facts and the reassessment proceedings would then be vitiated and can be held bad in law. However, in the present case, we find that there is nothing on record at the time of completion of original assessment proceedings disclosing the said factual position on part of the assessee. The fact remains that there are expenses incurred at the head office level and there are tax holiday eligible units and non-tax holiday units/undertakings. Unless and until, the assessee makes its position clear and make a complete factual disclosure thereof, it is clearly a case of failure on part of the assessee to disclose full and truly all material facts relating to the computation of deduction under section 80IA and in turn, for the purposes of the completion of assessment proceedings.

16. We have also gone through the various decisions relied upon by the Id AR and find that those decisions have been rendered in peculiar facts and circumstances of the relevant case and are thus distinguishable and doesn't support the case of the assessee. In case

of Techspan India, the issue regarding allocation of common expenses between software development and human resource development divisions was duly contested and decided in the original assessment proceedings and in those facts, the Hon'ble Supreme Court held that it is a case of change of opinion on the same facts and circumstances which were already in knowledge of the AO even during the original assessment proceedings. However, in the present case, the issue of allocation of head office expense was admittedly not examined at all during the course of original assessment proceedings, the examination was limited to matter relating to liquidated damages and sale of CERs and thus, the question of change of opinion doesn't arise regarding allocation of head office expenses. Similarly, in case of Ajanta Pvt Ltd, the matter relating to claim of deduction was held to be minutely examined by the AO during the original assessment proceedings and in that context, it was held that merely because the assessee has not maintained separate profit/loss account and balance sheet for the two businesses, the same cannot be a ground for reopening. Similarly, in case of Hindustan Zinc, there was complete disclosure regarding additional depreciation on captive power plant and the reassessment proceedings were thus held invalid. We have also gone through the other decisions relied upon by the Id AR and find that the same doesn't support the case of the assessee. The decision of the Hon'ble Gujarat High Court in case of Ajanta Pvt. Ltd. (supra) rather supports the case of the Revenue.

17. In light of above discussions and in the entirety of facts and circumstances of the case, we doesn't see any infirmity in AO's exercising his jurisdiction under section 147 of the Act by issuance of

notice u/s 148 of the Act. In the result, the ground of appeal is dismissed.

18. In ground No. 2, the assessee has challenged the confirmation of the action of the AO of reducing the claim of deduction u/s 80IA of Rs. 1,47,82,535/- by apportioning establishment and financial expenses at Rs. 36,83,29,248/- to wind power generation undertakings eligible for deduction u/s 80IA ignoring that the entire operation and maintenance of wind plants has been given to Suzlon Energies Ltd. and therefore, the said expenditure has no relation to the undertakings eligible for deduction u/s 80IA.

19. In this regard, the Id. AR submitted that the AO observed that in working out the claim of deduction u/s 80IA, assessee has not apportioned the head office expenses & other day-to-day management and supervision charges amongst the units eligible for deduction u/s 80IA. The assessee has only considered the direct operation and maintenance expenses for working out the profits of wind power projects as if these projects were automatically set up and were running without any strategic planning, management, directions, etc. Accordingly, the AO allocated the indirect expense claimed under the head establishment and financial expenses proportionately to all units and thereby, disallowed the claim of deduction u/s 80IA at Rs.1,47,82,535/-.

20. It was further submitted by the Id AR that the Ld. CIT(A) held that on perusal of the agreement with M/s Suzlon Energy Ltd., it can be noted that only the operational part is being handled by M/s Suzlon

Energy Ltd. Thus, even the monitoring of these agreements and facilitating the terms and conditions of the agreement and monitoring of the operations would require management, direction, supervision and control. Accordingly, she confirmed the allocation of establishment and financial expenses to wind power units made by the AO.

21. It was further submitted by the Id AR that the AO has considered the employees benefit and establishment and financial expenses and other miscellaneous expenses for proportionate allocation against the Wind power plant. This is incorrect for the reason that whatever expenditure is relatable to the income from the said industrial undertaking has been debited for working out the income of the said units. The lower authorities have not considered this factual aspect. In fact, the assessee maintains the unit wise details of the expenditure of the head office and various mining units. Therefore, the expenditure incurred on administration at these mining units cannot be allocated towards the power generating units.

22. It was submitted by the Id AR that the total expenditure considered by the AO for allocation is Rs.46,57,18,479/- and out of it, the expenditure exclusively in relation to mining units is Rs.23,10,05,852/-. Therefore, this expenditure cannot be allocated to the power generating units. The expenditure at the corporate office is Rs. 23,47,12,627/-. Out of it, the AO himself has considered donation of Rs. 5,12,84,990/- and business promotion expenses of Rs.51,63,000/- debited in corporate office as not relating to power generating units. After excluding the same, the remaining expenditure at corporate office is Rs.17,82,64,637/-. It may be noted that none of these expenses

pertain to the 80IA undertakings in as much as the entire operation and maintenance of the plant has been given to Suzlon Energies Ltd. Therefore, assessee has not to incur any expenditure on salary/ employees benefit, travelling, conveyance and other expenses debited under the various heads of expenses in Corporate Office/ head office. No strategic planning, day to day management and supervision, financial management, marketing management, tendering, work allocation, contract awarding, control etc. is required for operating these power plants by the Corporate Office/ head Office. Therefore, no part of these expenses more particularly expenses on repairs, rates and taxes, land tax, insurance, travelling, conveyance, financial expenses, consultancy charges, etc. can be allocated to the income derived from these power generating units. Hence, withdrawal of deduction u/s 80IA to the extent of Rs. 1,47,82,535/- on this account is grossly unjustified.

23. It was further submitted by the Id AR that similar disallowance was made in AY 2006-07 to 2009-10 & 2011-12 to 2013-14 wherein the Co-ordinate Bench of the Tribunal vide order dated 30.05.2017 set aside the order to the files of the AO to verify the claim of the assessee that the entire expenditure related to operation & maintenance was born by Suzlon Energies Ltd. It may be noted that the assessee has filed the relevant extract of the terms and conditions on which the installation of wind power generating units was given to M/s Suzlon Energy Limited. As per the scope of work, the operation and maintenance of the wind farm for 20 years from the date of acceptance of the wind power project is awarded to M/s Suzlon Energy Limited for which it is to be paid at the rate of Rs.0.40/kwh in the first year and thereafter, with escalations as per Para 5 of the agreement (PB 14).

Thus, it is on record that the entire expenditure relating to operation and maintenance is borne by M/s Suzlon Energy Limited. On this account for the year under consideration, the assessee has incurred expenditure of Rs.1,68,28,131/- in respect of the wind power generating units on which deduction u/s 80IA is claimed. Thus, when the entire details are available on record, even on merit, the allocation of expenditure to the extent of Rs.1,47,82,535/- to the power generating units is incorrect and the corresponding reduction in the claim of deduction u/s 80IA is unjustified and uncalled for. In view of the above, the disallowance out of claim u/s 80IA confirmed by the Ld. CIT(A) be directed to be deleted.

24. We have heard the rival contentions and perused the materials available on record. Regarding the first contention of the Id AR that none of the expenses at the Corporate office pertain to the 80IA undertakings in as much as the entire operation and maintenance of the plant has been given to Suzlon Energies Ltd. It is no doubt true that the operation and maintenance activities are handled by Suzlon Energy and the Id CIT(A) has returned a finding which has not been disputed by the Revenue. However, the fact remains that the assessee activities are still guided towards overall supervision and management of these activities at the strategic and managerial level and to safeguard the interest of the shareholders and the assessee still remains responsible for the activities of these eligible undertakings to the outside world even though at the operational level, the whole of its activities have been outsourced to Suzlon Energies Ltd. Therefore, the contention of the Id AR cannot be accepted that no expenses in furtherance and support of what we have stated above has been incurred by the assessee and

which has no nexus with the eligible undertakings. To our mind, these activities at the strategic, managerial, regulatory and overall oversight level definitely have a nexus with the eligible undertakings and the expenses incurred in relation thereto needs to be allocated to the eligible undertakings.

25. Now, coming to the specifics of the expenditure incurred at the corporate level, on perusal of the details available at the APB 15-16, we find that the establishment expenses at the Corporate office has been shown as Rs 23,47,12,627. The AO has however wrongly took the total establishment expenditure at the entity level at Rs.46,57,18,479/- which includes establishment expenditure incurred in relating to various mining activities. What therefore has to be considered is the establishment expenditure at the corporate office level which comes to Rs 23,47,12,627. Further, on perusal of the said expenditure, we find that expenditure on rates and taxes, land tax, insurance, interest on debentures, business promotion expenses and advertisement expenses cannot be said to have any nexus with the eligible undertakings engaged in generation of energy and thus, these expenses needs to be excluded. Further, the AO has himself excludes the donations while working out the eligible deductions. The remaining expenses in the nature of employee costs and other establishment expenses etc therefore needs to be allocated in the ratio of turnover for the purposes of determining the eligible profits under section 80IA of the Act. The matter is accordingly set-aside to the file of the AO to verify these figures and recalculate the eligible profits for the purposes of section 80IA of the Act. In the result, the ground is partly allowed for statistical purposes.

The appeal of the assessee is thus disposed off in light of above directions.

Order pronounced in the open Court on 05/11/2018.

Sd/-

(विजय पॉल राव)

(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)

(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 05/11/2018

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- M/s Rajasthan State Mines & Minerals Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Circle-06, 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. 704/JP/2018 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar