

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : A : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.1384/Del/2015, 1385/Del/2015
Assessment Years: 2010-11 & 2011-12

DCIT,
Circle, Rishikesh,
IDPL Campus Veerbhadra,
Rishikesh.

Vs. THDC India Ltd.,
Bhagirathi Bhawan,
Pragtipuram, Bye Pass Road,
Rishikesh.
PAN: AAAC7905Q

ITA Nos.1560/Del/2015, 2733 & 3313/Del/2017
Assessment Years: 2011-12, 2012-13 & 2013-14

THDC India Ltd.,
Bhagirathi Bhawan,
Pragtipuram, Bye Pass Road,
Rishikesh.
PAN: AAAC7905Q

Vs. DCIT,
Circle, Rishikesh,
IDPL Campus Veerbhadra,
Rishikesh.

(Appellant)

(Respondent)

Assessee by : Shri B. Panda, Advocate
Revenue by : Shri Prakhar Viplava Gupta, Sr. DR
Date of Hearing : 26.03.2019
Date of Pronouncement : 28.03.2019

ORDER

PER BENCH:

ITA No.1384/Del/2015 filed by the Revenue is directed against the order dated 18th December, 2014 of the CIT(A), Dehradun, relating to Assessment Year 2010-11.

ITA Nos.1560/Del/2015 filed by the assessee and ITA No.1385/Del/2015 filed by the

Revenue are cross appeals and are directed against the order dated 18th December, 2014 of the CIT(A), Dehradun for assessment year 2011-12. ITA Nos.2733 & 3313/Del/2017 filed by the assessee are directed against the separate orders dated 24th January, 2017 and 29th March, 2017 of the CIT(A), Haldwani for assessment years 2012-13 & 2013-14, respectively. Since common grounds are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order

ITA No.1384/Del/2015 (By the Revenue for A.Y. 2010-11)

2. Facts of the case, in brief, are that the assessee is a joint venture company of the Government of India and the Government of Uttar Pradesh. It is engaged in the business of generation of hydro electricity. It filed its return of income on 28th September, 2010 declaring total income of Rs.96,07,767/- after claiming deduction u/s 80IA at Rs.720,67,93,799/-. It has also disclosed book profit at Rs.492,69,24,248/-. The Assessing Officer, during the course of assessment proceedings observed from the Profit & Loss Account that the assessee has shown 'Other income' of Rs.7,20,33,761/- the details of which are as under:-

Interest on bank deposits	Rs. 22,28,026/-
Interest from employees	Rs.1,16,02,595/-
Interest from others	Rs. 12,27,885/-
Machine hire charges	Rs. 1,57,957/-
Rent receipt	Rs. 9,51,753/-
Sundry receipt	Rs.1,34,59,075/-
Excess provision written back	Rs. 2,48,115/-
Profit on sale of assets	Rs.3,59,11,054/-
Late payment of surcharge	<u>Rs. 62,47,301/-</u>
	Rs.7,20,33,761/-

3. According to the Assessing Officer, the assessee is not entitled to deduction u/s 80IA on the following income:-

Interest from employees	Rs.1,16,02,595/-
Machine hire charges	Rs. 1,57,957/-
Rent receipt	Rs. 9,51,753/-
Sundry receipt	Rs.1,34,59,075/-
Excess provision written back	Rs. 2,48,115/-
Late payment of surcharge	<u>Rs. 62,47,301/-</u>
	Rs.3,26,66,796/-

4. Rejecting the various explanations given by the assessee and relying on the decision of the Hon'ble Supreme Court in the case of *Liberty India vs. CIT, 183 Taxman 349 (2009)* the Assessing Officer held that these incomes were derived from independent source of income and did not have any first degree nexus with the generation of power. The Assessing Officer accordingly denied deduction u/s 80IA on the above items. In appeal, the Id.CIT(A), following the order of his predecessor for assessment year 2009-10, allowed the claim of deduction u/s 80IA on income from excess provision written back and late payment surcharge. He, however, upheld the action of the Assessing Officer in denying deduction u/s 80IA on the remaining amounts.

5. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

“1. The Ld.CIT(Appeals)has erred in law and on facts in allowing the claim of deduction u/s 80IA on income from 'Excess provision written back' and 'Late payment surcharge' in spite of clear cut finding given in the assessment order that these were not derived by assessee from the activity of the eligible business.

2. The Ld.CIT(Appeals) has erred in law and on facts by upholding the submission of the assessee ignoring the decision of the Hon'ble Apex Court in the case of Liberty India Vs. CIT, 183 Taxman 349(2009).

3. The order of Ld. CIT(Appeals) be set-aside and that of the AO be restored.”

6. We have heard the rival arguments made by both the sides and perused the relevant material available on record. We find identical issue had come up before the Tribunal in assessee's own case in the immediately two preceding assessment years i.e., 2008-09 and 2009-10. We find the Tribunal in ITA Nos.3956 & 6457/Del/2012 filed by the Revenue and in CO Nos.91 & 92/Del/2014 filed by the assessee vide order dated 3rd March, 2015 has decided the above two issues in favour of the assessee by observing as under:-

“6. We have heard the Id. DR and perused the relevant material. There is no appearance from the side of the assessee. Here, it is relevant to mention that the appeal was preponed for today at the written request of the assessee's counsel. Despite that, a request for adjournment has been filed, which has been rejected by us. We are, therefore, going ahead with the disposal of these appeals *ex parte qua* the assessee, on merits.

7. It is seen that the entire controversy lies in a narrow compass, as to whether the above items of income qualify for deduction u/s 80-IA. At this juncture, it is relevant to set out sub-section (1) of section 80IA which provides that : `Where the gross total income of an assessee includes any profits and gains *derived by* an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years'. A perusal of the mandate of sub-section (1) manifestly divulges that the deduction is available at the rate of 100% of the profits and gains '*derived from*' the eligible business. The expression '*derived from*' has received the attention of the Hon'ble Apex Court in several cases. In *Liberty India (supra)*, the question was as to whether DEPB/duty drawback is eligible for deduction u/s 80-IB. Repelling such contention raised on behalf of the assessee, the Hon'ble Apex Court held that DEPB/duty drawback are

incentives which are not profits derived from the eligible business and therefore, fail to form part of net profits of the industrial undertaking for the purposes of s. 80-IA or 80-IB. It was specifically held that : `It is evident that s. 80-IB provides for allowing of deduction in respect of profits and gains derived from the eligible business. *The words "derived from" are narrower in connotation as compared to the words "attributable to"*. In other words, by using the expression "derived from", Parliament intended to cover sources not beyond the first degree. On analysis of ss. 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-s. (2), would be entitled to deduction under sub-s. (1) only to the extent of profits derived from such industrial undertaking'. In the case of *Pandian Chemicals vs. CIT (2003) 262 ITR 278 (SC)*, the issue was whether the Interest earned by industrial undertaking on deposits with Electricity Board qualifies for relief under s. 80HH. In this section also, the expression used is `derived from'. Answering the question in favour of the Revenue, the Hon'ble Summit Court held that : `*The words 'derived from' in s. 80HH must be understood as something which has direct or immediate nexus with the appellant's industrial undertaking. Although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The derivation of profits on the deposit made with Electricity Board cannot be said to flow directly from the industrial undertaking itself. Where the words are unequivocal, there is no scope for importing any rule of interpretation as submitted by the appellant'. It is discernible from a survey of the above and several other decisions on the point that the expression 'derived from' is narrower in scope vis-à-vis the expression 'attributable to it.'* An income to be 'derived from' a particular source, must have a direct and immediate nexus with such source. In other words, such income must directly emanate from the eligible undertaking and should not have an indirect nexus alone. If an income is indirectly connected with the eligible undertaking, then that income loses the direct nexus and hence cannot be considered as 'derived from' the eligible undertaking. With the above understanding of the ambit of the expression 'derived from,' we now move forward to determine as to whether the two items on which the Id. CIT(A) directed to allow deduction can be construed as `derived from' the industrial undertaking.

I. Excess provision written back:

8. This amount represented reversal of excess provision of salary made in the past in respect of pay revision which was implemented during the previous year under consideration. The claim of the assessee before the Id. CIT(A) was that since the provision was found to be in excess, it was written back in the accounts as 'Income' during the previous year. There is hardly any need to emphasize that salary paid by an undertaking is part of expenditure otherwise deductible in computing the income derived from the eligible undertaking. If in the preceding year, the deduction was claimed for a higher sum, which reduced the eligible

profit with such higher amount of deduction and the actual expenditure turned out to be less with the result that the excess provision gets written back in the instant year, it cannot be characterized as anything other than part and parcel of profit derived from eligible enterprise. In reality, the excess provision written back is not an income in itself, but, a reduced amount of eligible deduction in the computation of profits derived from eligible enterprise. We, therefore, approve the view taken by the Id. CIT(A) on this issue.

II. Late payment charges:

9. The Id. CIT(A) has recorded that this receipt represented extra payment received by the assessee from its customers on account of late payment of their dues. The character of this receipt has not been disputed by the Id. DR. In essence, the late payment charges are nothing, but, part of sale consideration which cannot be viewed differently. Once deduction is available on sale consideration, there can be no reason to deny deduction on such late payment charges, which are part and parcel of such sale consideration. We, therefore, uphold the impugned order allowing deduction u/s 80IA on this amount.”

7. Respectfully following the decision of the Tribunal in assessee’s own case for the immediately two preceding assessment years and in absence of any contrary material brought to our notice, we do not find any infirmity in the order of the CIT(A) in allowing the claim of deduction u/s 80IA on account of excess provision written back and late payment charge. The submission of the Id. DR that the Revenue has not accepted the decision of the Tribunal and has filed appeal before the Hon'ble High Court cannot be the basis to take a contrary decision in absence of any order of the Hon'ble High Court reversing the decision of the Tribunal on this issue. We, therefore, dismiss the grounds raised by the Revenue and uphold the order of the CIT(A). The appeal filed by the Revenue is accordingly dismissed.

ITA No.1560/Del/2015 (By the assessee for A.Y. 2011-12)

8. The grounds of appeal No.1 and 5 by the assessee being general in nature are dismissed. In ground of appeal No.2, the assessee has challenged the order of the CIT(A) in denying deduction u/s 80IA in respect of the following items:-

- a) Interest from employees
- b) Machine hire charges
- c) Rent receipt
- d) Sundry receipt
- e) Excess provision written back
- f) Late payment of charges

9. After hearing both the sides, we find the Assessing Officer in the instant case, rejected the claim of deduction u/s 80IA on the following income:-

Interest from employees	Rs.1,15,95,623/-
Machine hire charges	Rs. 11,91,915/-
Rent receipt	Rs. 17,49,072/-
Sundry receipt	Rs.1,71,39,022/-
Excess provision written back	Rs. 10,34,829/-
Late payment of surcharge	<u>Rs. 23,47,562/-</u>
	Rs.3,50,58,023/-

10. In appeal, the ld.CIT(A) allowed the claim of deduction u/s 80IA in respect of excess provision written back and late payment of surcharge. He, however, rejected the claim of deduction u/s 80IA in respect of the following four items for which the assessee is in appeal before the Tribunal:-

- a) Interest from employees/other interest income
- b) Machine hire charges
- c) Rent receipt
- d) Sundry receipt

11. We find identical issue had come up before the Tribunal in assessee's own case during assessment year 2008-09 and 2009-10. We find the Tribunal while deciding the cross objection of the assessee against not allowing deduction u/s 80IA on the remaining amount has observed as under:-

“10. In the Cross Objections, the assessee is aggrieved against not allowing of deduction u/s 80IA on the remaining amounts.

I. Interest on employees:

11. The first item is interest which was received against advances to its employees for various purposes, such as, house building, purchase of computer, etc. Even though the employees were engaged in power generation, the fact remains that the interest received by the assessee on loans advanced by the assessee to its employees cannot be characterized as income 'derived from' eligible undertaking. There is no direct nexus of such interest income with the eligible undertaking inasmuch as the immediate source of such income is not the eligible undertaking. Such income may be attributable to the business of the eligible undertaking, but, cannot be held as derived from the eligible undertaking. The view taken by the Id. CIT(A) on this issue is upheld.

II. Machines hire charges:

12. The assessee received hire charges in respect of certain machines which were given on hire to its contractors who were engaged in the erection and construction of the power generation facility. We fail to appreciate as to how such machine hire charges can be considered as derived from eligible undertaking. These do not have any direct nexus with the eligible undertaking. The source of such income is hiring of machines, which is step away from the eligible undertaking. The view taken by the Id. CIT(A) on this score is upheld.

III. Rent Receipt:

13. The assessee received rent from its employees' quarters as well as temporary sheds given to contractors at project sites. Even though such income may be considered as attributable to the eligible undertaking, but, it can by no stretch of imagination, be described as 'derived from' the eligible undertaking. We, therefore, approve the view taken by the Id. CIT(A) on this issue.

IV. Sundry Receipts :

14. These amounts are in the nature of electricity charges, guest house receipts, subsidized transport and miscellaneous receipts from the employees and contractors. The reasons given by us hereinabove for not allowing deduction in respect of the items mentioned above apply with full force in respect of such sundry receipts as well. These receipts cannot be considered as 'derived from' the eligible undertaking. We, therefore, approve the view taken by the Id. CIT(A) on this score.

15. In the result, both the appeals are dismissed.”

12. Respectfully following the decision of the Tribunal in assessee's own case in the preceding years and in absence of any contrary material brought to our notice, we do not find any infirmity in the order passed by the CIT(A) rejecting the claim of deduction u/s 80IA on the items as per the grounds of appeal raised by the assessee. The ground of appeal No.2 raised by the assessee is accordingly dismissed.

13. Ground of appeal No.3 relating to initiation of penalty proceedings u/s 271(1)(c) being premature at this stage is dismissed.

14. Ground of appeal No.4 relating to levy of interest u/s 234B, 234C and 234D being mandatory and consequential in nature is dismissed.

ITA No.1385/Del/2015 (By the Revenue for A.Y. 2011-12)

15. The grounds of appeal raised by the Revenue are as under:-

“1. The Ld.CIT(Appeals) has erred in law and on facts in allowing the claim of deduction u/s 80IA on income from 'Excess provision written back' and 'Late payment surcharge' in spite of clear cut finding given in the assessment order that these were not derived by assessee from the activity of the eligible business.

2. The Ld.CIT(Appeals) has erred in law and on facts by upholding the

submission of the assessee ignoring the decision of the Hon'ble Apex Court in the case of Liberty India Vs. CIT, 183 Taxman 349(2009).

3. The order of Ld. CIT(Appeals) be set-aside and that of the AO be restored.”

16. After hearing both the sides, we find the above grounds are identical to the grounds of appeal in ITA No.1384/Del/2015 for A.Y. 2010-11 filed by the Revenue. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same reasoning the above grounds raised by the Revenue are dismissed.

ITA No.2733/Del/2017 (By the Assessee for A.Y. 2012-13)

17. Grounds of appeal Nos.1 and 2 being general in nature are dismissed.

18. By way of ground of appeal No.2, the assessee has challenged the order passed by the CIT(A) in denying deduction u/s 80IA in respect of the following items:-

- a) Interest from employees/other interest income
- b) Machine hire charges
- c) Rent receipt
- d) Sundry receipt

19. After hearing both the sides, we find the above ground is identical to the ground of appeal taken by the assessee in ITA No.1560/Del/2015 for A.Y. 2011-12. We have already decided the issue and the ground raised by the assessee has been dismissed. Following the same reasoning the ground raised by the assessee is dismissed.

20. Ground of appeal No.3 relating to initiation of penalty proceedings u/s 271(1)(c) being premature at this stage is dismissed.

ITA No.3313/Del/2017 (By the assessee for A.Y. 2013-14)

21. Grounds of appeal Nos.1 and 4 being general in nature are dismissed.

22. In grounds of appeal Nos.2 and 3 the assessee has challenged the order passed by the CIT(A) in denying deduction u/s 80IA in respect of the following items:-

- a) Interest from employees/other interest income including interest on bank deposits.
- b) Machine hire charges
- c) Rent receipt
- d) Sundry receipt

23. After hearing both the sides, we find the above grounds are identical to ground of appeal taken by the assessee in ITA No.1560/Del/2015 for A.Y. 2011-12. We have already decided the issue and the ground raised by the assessee has been dismissed. Following the similar reasoning the ground raised by the assessee is dismissed.

24. In the result, the appeals filed by the Revenue as well as the appeals filed by the assessee are dismissed.

Pronounced in the open court on 28.03.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 28th March, 2019

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Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi