आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 691/Ahd/2014

(**निर्धारण वर्ष /** Assessment Year : 2008-09)

ACIT(OSD) Range-1, Ahmedabad	**बनाम**/ Vs.	**Gujarat Paguthan Energy Corporation Pvt. Ltd.** 6th Floor, Chanakya Building, Off. Ashram Road, Ahmedabad- 380009
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAA CG7 999 P		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से **/Appellant by :**	Smt. Aparna Agarwal, CIT DR
प्रत्यर्थी की ओर से / **Respondent by :**	Shri S. N. Soparkar, AR

सुनवाई की तारीख **/ Date of Hearing**	24/06/2019
घोषणा की तारीख **/Date of Pronouncement**	28/06/2019

आदेश/O R D E R

PER SUDHANSHU SRIVASTAVA - JM:

This appeal is preferred by the Revenue against the order dated 26.12.2013 passed by the Ld. CIT(A)-XXI, Ahmedabad (hereinafter called the CIT(A)) and pertains to Assessment Year 2008-09.

2.0 The brief facts of the case are that the assessee corporation is engaged in the business and generation of electrical energy. The return of income was filed declaring a total income of Rs. 47,92,44,535/- after claiming deduction under sec. 80IA of the Income Tax Act, 1961 (hereinafter called 'the Act') to the extent of Rs. 112,03,60,252/-. The book profit was computed at Rs. 286,03,86,500/-. The case was selected for scrutiny under CASS guidelines and the assessment was completed at a gross total income of Rs. 98,02,16,500/- after making the following additions/disallowances-

1. Disallowance of miscellaneous expenses- Rs. 72,80,514/-
. 2. Disallowance under Sec. 40(a)(ia)- Rs. 28,85,29,912/-.
3. Disallowance of capital expenses- Rs. 3,37,080/-.
4. Disallowance under Sec. 80G of the Act- Rs. 5,82,000/-.

2.1 The Assessing Officer (AO) also recomputed the assessee's claim under Sec. 80IA of the Act. The book profits were computed by the AO at Rs. 3,90,60,30,430/-.

2.2 Aggrieved, the assessee approached the Ld. CIT(A) who partly allowed the assessee's appeal by deleting the disallowance pertaining to miscellaneous expenses and the disallowance under Sec. 40(a)(ia) of the Act. The Ld. CIT (A), however, confirmed the

disallowance pertaining the capital expenses and donations under Sec. 80G of the Act.

2.3 Now, aggrieved, the department is before this Tribunal (ITAT) and has raised the following grounds of appeal:-

> *"1. The CIT(A) has erred in law and on facts by deleting the disallowance of miscellaneous expenditure of Rs. 72.80 lacs despite the fact the same did not pertain to the previous year and the assessee followed mercantile system of accounting.*
>
> *2. The CIT(A) has erred in law and on facts by deleting the disallowance of Rs. 28.85 crores made u/s. 40(a)(ia) despite the fact that the assessee had not deducted tax deducted at source on the said payment of rebate o GUVNL which had a character of interest on which tax deducted at source was required to be deducted u/s. 194A.*
>
> *3. The CIT(A) has not appreciated the fact that actual rebate for early payment would be reduced at the time of payment and not paid back at a later date. The delayed payment charges were voluntarily treated as interest by GUVNL so charge for early payment is also required to be treated as interest on the same analogy.*
>
> *4. The CIT(A) has erred in law and on facts by holding the net interest income is to be excluded from the eligible profit for computation of deduction u/s. 80IA of the Act in absence of any such provision in the Act. the CIT(A) has not appreciated the fact that the assessee has failed to establish a nexus between the interest expenditure and interest income incidental to the eligible business.*
>
> *5. The CIT(A) has erred in law and on facts by deleting the disallowance of deduction u/s. 80IA of Rs. 1.16 crores despite the fact that the assessee had arbitrarily apportioned interest expenditure and bad debts between eligible and non-eligible units resulting in excess claim of deduction u/s. 80IA.*
>
> *6. The CIT(A) has erred in law and facts in directing the AO to allow reduction of Rs. 85.59 crores from Book Profit being earlier years provision for bad debts despite the fact that the same was not claimed by the assessee in the return of income and the AO had given a finding that the conditions of clause (i) to Explanation 1 to section 115JB(2) are not fulfilled."*

3.0 At the outset, the Ld. Authorised Representative (AR) appearing on behalf of the assessee corporation submitted that Ground No. 1 of the department's appeal was covered in favour of the assessee by the earlier orders of the ITAT Ahmedabad Bench for assessment years (AY) 2005-06, 2006-07 and 2007-08. Our attention was drawn to the relevant paragraphs of the ITAT orders placed in the Paper Book in this regard and it was submitted that the Ld. CIT (A) had followed the earlier assessment year's order and had set aside the issue to the file of the AO. The Ld. AR submitted that there was no infirmity the direction issued by the Ld. CIT (A) to modify the order as per the order of the ITAT in A.Ys. 2005-06 and 2006-07 in assessee's own case.

4.0 The Ld. CIT DR placed extensive reliance on the findings of the AO and submitted that the Ld. CIT (A) had erred in law and on facts in deleting the disallowance. She, however, could not controvert the fact that the issue stood cover against the Revenue and in favour of the department by the orders of the ITAT in assessee's own case in A.Ys. 2005-06, 2006-07 and 2007-08.

5.0 With respect to Ground Nos. 2 and 3, wherein the department has challenged the action of the Ld. CIT (A) in deleting the disallowance of Rs. 28,85,29,912/- made under Sec. 40(a)(ia), the Ld.

AR submitted that the Ld. CIT (A) had, on this issue, followed the order of his predecessor and the Revenue's appeal against the order of the Ld. CIT (A) had been dismissed by the ITAT. It was further submitted that for A.Y. 2007-08 also the Tribunal had returned a finding in favour of the assessee and against the Revenue.

6.0 In response, the Ld. CIT DR placed reliance on the findings and observations of the AO but could not controvert the fact that the issue stood covered against the Revenue and in favour of the assessee by the order of the ITAT in A.Ys. 2006-07 and 2007-08 in assessee's own case.

7.0 With respect to Ground No. 4 challenging the action of the Ld. CIT (A) in directing the AO to exclude net interest income for computation of deduction under Sec. 80IA of the Act, the Ld. AR submitted that this issue also stood covered in favour of the assessee inasmuch as the Ld. CIT (A) has followed the orders of his predecessor in A.Ys. 2002-03, 2005-06, 2006-07, 2007-08, 1998-99 and 1999-00. It was further submitted that the ITAT Ahmedabad Bench in assessee's own case for A.Ys. 2005-06 and 2006-07 had accepted the principle of netting of interest income for the purpose of computation of deduction under Sec. 80IA of the Act and, therefore,

the same should be followed and the department's ground should be dismissed.

8.0 The Ld. CIT DR supported the findings and observations of the AO on this issue as well.

9.0 With respect to Ground No. 5 of the department's appeal pertaining to the deletion of disallowance of deduction under Sec. 80IA to the tune of Rs. 1,16,33,381/-, the Ld. AR submitted that the assessee was having two generating units which were eligible for deduction under Sec. 80IA of the Act and the eligibility period for the third unit was over. It was submitted that the assessee had furnished the relevant details of the apportionment of the expenditure between the three units which was on the basis of sales turnover ratio/actual expenditure incurred. It was submitted that as per the AO there was no specific pattern for apportioning provision for bad debts, fuel expenses and interest expenses. The Ld. AR also submitted that the bifurcation done by the corporation was based on the method which had consistently been followed from year to year in the past and that there was no change. It was argued that a method which has been consistently followed in the past and has been accepted by the department should not be disturbed by picking up only specific heads of expenses and reallocating them. It was further submitted that the

Ld. CIT(A) had accepted the correct allocation on Page 14 of the impugned order and had observed that if the correct working is made the effect will be NIL after considering the debit and credit on both the sides whereas the AO had committed an error by taking two different figures. The Ld. AR submitted that the Ld. CIT (A) had returned a factual finding on the issue which was correct and needed no further alteration.

10.0 In response, the Ld. CIT DR placed reliance on the findings and observations of the AO.

11.0 With respect to Ground No. 6 which challenged the action of the Ld. CIT (A) in directing the AO to allow reduction of Rs. 85,59,05,230 from the book profits being earlier year provision for bad debts, the Ld. AR submitted that this ground of the Revenue is misconceived inasmuch as the Ld. CIT (A) has given no such direction. It was submitted that the AO has been directed to verify the claim of the assessee regarding disallowance of amount of provision from A.Y.s 2001-02 to 2008-09 and, thereafter, allow the claim. It was submitted that, thus, there is no direction to allow reduction of the amount stated in the ground and that the same was to be allowed only after verification of the claim by the AO and, therefore, the ground was misconceived.

12.0 In response, the Ld. CIT DR placed reliance on the finding of the AO.

13.0 We have heard the rival submissions and have also perused the material on record. Ground No. 1 of the Revenue's appeal challenges the action of the Ld. CIT (A) in deleting the disallowance of Rs. 72,80,514/-. It is seen that the Ld. CIT (A), while deleting this disallowance pertaining to miscellaneous expenditure. has noted that, admittedly, the impugned expenditure did not relate to the assessment year under consideration and was incurred in earlier year and also pertained to earlier year, but all the same, the same was treated as differred revenue expenditure by the assessee and the claim is made from year to year on the basis of matching concept having regard to the benefit available over number of years from F.Y. 2002-03 i.e. the year in which the expenditure was incurred. The Ld. CIT (A) has noted that a similar claim was disallowed by the AO in AYs 2005-06 and 2006-07 but the disallowance was deleted by the Ld. CIT (A) and the department's further appeal had been dismissed by the Ahmedabad Bench of the ITAT. We have also perused the order of the Ahmedabad Bench for A.Y. 2005-06 in ITA No. 2839/Ahd/2008 wherein, vide order dated 30.03.2012, ITAT had restored the issue to the file of the AO to verify the facts and if it was found that if in A.Y. 2003-04 pro-

rata deduction was claimed and allowed, then for A.Y. 2005-06 also no disallowance was required. We also know that similar directions have been given by the ITAT in A.Ys. 2006-07 and 2007-08 also. Accordingly, the issue of miscellaneous expenditure has rightly been restored to the file of the AO by the Ld. CIT (A). Identical facts had arisen in A.Y.s. 2005-06, 206-07 and 2007-08 and the Ld. CIT (A) has directed the AO to modify the order on the issue as per the directions of the ITAT in A.Ys. 2005-06 and 2006-07. Accordingly, we uphold the restoration of the issue to file of the AO and dismiss ground no. 1 of the department's appeal.

13.1 Coming to the Ground Nos. 2 and 3 which challenge the action of the Ld. CIT (A) in deleting the disallowance of Rs. 28,85,29,912/- by invoking provisions of section 40(a)(ia) of the Act for not deducting TDS on payment of rebate to GUVNL, it is seen that, as per the submission of the assessee, the entire electricity generated by the assessee is sold to the Gujarat Electricity Board (GUVNL) and, thus, the board is the only customer of the assessee. Further, in pursuance of various agreements entered into with various stake-holders, rebate was allowed for prompt payment by the electricity board from the basic sale price fixed. The AO treated the impugned amount as interest payment by the assessee to the electricity board whereas it is the assessee's contention that it was only a rebate allowed in the form

of discount and, therefore, the same was not within the purview of Sec. 40(a)(ia) of the Act. The Ld. CIT (A) has deleted the disallowance by following the order of his predecessor for A.Y. 2006-07 wherein a similar disallowance was deleted and the department's appeal was dismissed by the ITAT. We note that the issue is covered against the Revenue by the order of the ITAT inasmuch as in ITA No. 1031/Ahd/2010, vide order dated 20.09.2013, ITAT has noted in paragraph 21 that it was an undisputed fact that the entire sales of the assessee were to GUVNL and the payments received by the assessee from it were towards sales from the customers. It has been further noted in the order that nothing was brought on record by the Revenue to demonstrate that the rebate given was not in the nature of discount but was in the nature of interest. In the present case before us also the Revenue could not distinguish the facts as noted by the Tribunal in A.Y. 2006-07 with the facts as available in the year under consideration that the A.Y. 2008-09. Accordingly, respectfully following the ratio of the said order we find no reason to interfere with the findings of the Ld. CIT (A) on this issue and we dismissed the Ground Nos. 2 and 3 of the Revenue's appeal.

13.2 Ground No. 4 challenges the action of the Ld. CIT (A) in directing the AO to exclude only the net interest income for the purpose of deduction under Sec. 80IA of the Act. We find that

identical issue has been decided by the ITAT Ahmedabad Bench in assessee's own case for A.Ys. 2002-03, 2005-06, 2006-07, 2007-08, 1998-99 and 1999-00. We also note that the Hon'ble High Court of Gujarat in the case of CIT vs. Nirma Ltd. reported in (2014) 367 ITR 2012 (Guj.) has held that in computing the special deductions under Sec. 80, 80IA and 80HH net incomes not derived from industrial undertaking should be excluded. In reaching this conclusion the Gujarat High Court has relied on the ratio of the judgment of the Hon'ble Apex Court in ACG Associate Capsules Pvt. Ltd. vs. CIT reported in (2012) 343 ITR 89 (SC). Accordingly, respectfully following the orders of the ITAT in assessee's own case as aforementioned as well as the Hon'ble Gujarat High Court in the case of CIT vs. Nirma Ltd. (Supra) we find no reason to interfere with the findings of the Ld. CIT (A) on this issue also and we dismissed Ground No. 4 of the Revenue's appeal.

13.3 Coming to the Ground No. 5 wherein the department has challenged the action of the Ld. CIT (A) in deleting the disallowance of Rs. 1,16,33,881/-, which had been made by the AO by reapportioning the assessee's allocation of claim for bad debts, fuel expenses and interest expenses, we note that in this regard the Ld. CIT (A) has observed and accepted that there is difference in the calculation by the assessee and the calculation made by the AO and

the major difference in the computation was on account of reallocation for provision of bad debts. The Ld. CIT (A) has noted that the eligible profit has to be worked out by adding back the provision for bad debts to profit before tax and, therefore, whatever amount is to be considered as provision, the same would also required to be adjusted for the respective units for the purpose of working out eligible profit. The Ld. CIT (A) has further noted that if as per the AO the provision should be different, then the profit before tax also will have adjusted by the same figure and, therefore, there will be no difference in the profit eligible for deduction for claim under Sec. 80IA of the Act. We find that this observation of the Ld. CIT (A) is logical and correct and the AO has erred in taking two different sets of figures, one for reallocating the provision and the other which has been deducted for the purpose of computation of claim under Sec. 80IA. If the same figure is taken for the provision as well as for the purpose of computation of claim under Sec. 80IA, the resultant effect will be zero. We find no reason, accordingly, to interfere with the findings of the Ld. CIT (A) on this issue as well and we dismiss Ground No. 5 raised by the department.

13.4 As far as Ground No. 6 of the department's appeal is concerned which challenges the action of the Ld. CIT (A) in directing the AO to allow the assessee benefit of reduction of Rs. 85,59,05,230/-, we agree

with the contention of the Ld. AR that this ground of the department is misconceived inasmuch as the Ld. CIT (A) in Para 11.2 of the impugned order has only directed that the AO is to verify the claim of the assessee regarding the disallowance of amount of provision from A.Ys. 2001-02, 2008-09 and allow the claim in view of clause (i) of explanation 1 of Sec. 115JB. We find no infirmity in the order of Ld. CIT (A) in issuing such direction and, undisputedly, the issue is to be decided by the AO after due examination and verification of the assessee's claim in this regard. Accordingly, we dismiss Ground No. 6.

14. In the final result, the appeal of the department's stands dismissed.

This Order pronounced in Open Court on 28/06/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Ahmedabad: Dated 28/06/2019

TANMAY *TRUE COPY*

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।