आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1831/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

Kirloskar Oil Engines Limited,
Laxmanrao Kirloskar Road,
Khadki, Pune – 411003

PAN : AAACP3590P

.....अपीलार्थी / Appellant

बनाम / V/s.

Additional Commissioner of Income Tax,
Range – 9, Pune

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1919/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

Assistant Commissioner of Income Tax,
Range – 9, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Kirloskar Oil Engines Limited,
Laxmanrao Kirloskar Road,
Khadki, Pune – 411003

PAN : AAACP3590P

.....प्रत्यर्थी / Respondent

Assessee by : Shri C.H. Naniwadekar
Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / Date of Hearing : 13-05-2019
घोषणा की तारीख / Date of Pronouncement : 17-07-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These cross appeals by the assessee and the Revenue are directed against the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 01-08-2014 for the assessment year 2009-10. First, we take up the appeal of assessee for adjudication.

ITA No. 1831/PUN/2014, (Assessee's Appeal)

2. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) on the solitary issue of disallowance of expenditure u/s. 14 r.w. Rule 8D.

3. Shri C.H. Naniwadekar appearing on behalf of the assessee submitted that the authorities below have erred in disallowing Rs.2,37,05,448/- u/s. 14A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The assessee has earned dividend income of Rs.12,62,52,672/-. The assessee made suo-moto disallowance of Rs.5,00,000/- u/s. 14A of the Act. In assessment proceedings the Assessing Officer made disallowance under Rule 8D to the tune of Rs.2,42,05,448/-. The assessee challenged the assessment order in appeal before the Commissioner of Income Tax (Appeals) inter alia on the ground of disallowance u/s. 14A r.w. Rule 8D. The Commissioner of Income Tax (Appeals) upheld the findings of Assessing Officer.

The ld. AR submitted that the assessee is only disputing disallowance made by Assessing Officer under Rule 8D(2)(iii). The Assessing Officer while computing average investments has considered all the investments including the investments on which no dividend income is

earned by the assessee. The ld. AR submitted that the prayer of the assessee is limited to the extent that only those investments should be considered while computing disallowance under Rule 8D(2)(iii) that have yielded tax free income. In support of his contentions the ld. AR placed reliance on the decision of Delhi Special Bench in the case of Assistant Commissioner of Income Tax & Anr. Vs. Vireet Investment Pvt. Ltd. & Anr. reported as 165 ITD 27.

4. On the other hand Shri Sudhendu Das representing the Department vehemently defended the findings of Commissioner of Income Tax (Appeals) in respect of disallowance made u/s. 14A r.w. Rule 8D.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The fact regarding earning of dividend income to the tune of Rs.12,62,52,672/- is admitted by the assessee. The assessee has made suo-moto disallowance of Rs.5,00,000/- in respect of exempt income earned. The limited prayer of assessee is that while computing disallowance under Rule 8D(2)(iii) only these investments on which the assessee has earned dividend income should be considered.

6. We find merit in the submissions of assessee. The Special Bench of Tribunal in the case of Assistant Commissioner of Income Tax & Anr. Vs. Vireet Investment Pvt. Ltd. & Anr. (supra) has held that only those investments are to be considered for computing average value of investment which have yielded exempt income during the year. The ground raised by the assessee is allowed in principle. The issue is restored back to the file of Assessing Officer to determine disallowance under Rule 8D in line with the decision of Special Bench of Tribunal (supra).

7. In the result, the appeal of assessee is allowed for statistical purpose in the terms aforesaid.

ITA No. 1919/PUN/2014, A.Y. 2009-10)

8. The Department in appeal has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds :

"1. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition on account of liquidated damages of Rs.12,96,830/- by admitting the new evidences, without giving an opportunity to the A.O. to examine the same at his level and without appreciating that the provision has not been made on a scientific basis?

2. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that depreciation on printers, UPS and other allied items are allowable at higher rate of 60% i.e. rate applicable to computers, without appreciating that these items do not fall within the definition of computers?

3. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs.13,26,000/- made u/s. 40A(2) out of the commission paid to Directors without justifying the reasonableness of the payment to Directors?

4. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in not appreciating that the assessee company which had huge accumulated losses and promoted by the assessee company, and preference shares were purchased and redeemed by the company as a convenient arrangement for tax avoidance through claim of capital loss for A.Y.2007-08 ?

5. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in allowing deduction u/s. 80IA(iv)(4) by considering the initial assessment year for the purpose of claiming deduction u/s.80IA(iv)(4) of the Act, is the first year in which the assessee claimed deduction u/s. 80IA(iv)(4)?

6. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in treating the initial assessment year i.e. first assessment of any ten consecutive years to claim the deduction u/s. 80IA(iv)(4) without considering that the company was at the position of loss in two prior years?

7. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in allowing the deduction u/s. 80IA of Rs.2,23,16,379/- by not applying the ratio of decision of ITAT, Ahmedabad in the case of Goldmine Shares and Finance Pvt. Ltd. ?

8. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that subsidy received from Maharashtra Govt. under Package Scheme of incentive, 2001 is capital receipt while during the course of scrutiny, the AO observed that major amount of subsidy received by the assessee company is by way of reimbursement of taxes paid i.e. VAT to the State Govt. and hence a taxable revenue receipt?

9. The appellant craves leave to add, amend or alter any of the above grounds of appeal."

9. The ld. DR submitted that in ground No. 1 of the appeal, the Revenue has assailed deleting of addition on account of liquidated damages amounting to Rs.12,96,830/- by admitting new evidences. The Commissioner of Income Tax (Appeals) without giving opportunity to examine the additional evidence filed by the assessee deleted the addition. The liquidated damages claimed by the assessee are in the nature of penalty for late delivery of Gensets, therefore, the said expenditure is not allowable.

9.1 In respect of ground No. 4 of the appeal, the ld. DR submitted that the Assessing Officer observed that the assessee has paid commission to the tune of Rs.3,52,00,000/- during the impugned assessment year as compared to Rs.2,85,70,000/- in assessment year 2008-09. Thus, there was increase in payment of commission to Directors by Rs.66,30,000/-. The Assessing Officer invoked the provisions of section 40A(2) and disallowed 20% increase in commission. The Commissioner of Income Tax (Appeals) deleted the addition by following the order in earlier assessment year in assessee's own case. The Department has assailed the findings of Commissioner of Income Tax (Appeals) on similar issue in assessment years 2005-06 to 2008-09 in assessee's own case before the Tribunal.

9.2 The ld. DR submitted that ground Nos. 5 to 7 of the appeal are in respect of single issue of assessee's claim of deduction u/s. 80IA(4)(iv) of the Act. The assessee has installed windmill and has claimed the benefit of deduction u/s. 80IA(4)(iv) of the Act. The assessee has claimed deduction in assessment year 2009-10 as initial assessment year on profits derived from generation of power from windmill. The assessee has installed windmill in the period relevant to the assessment year 2007-08. Thus, the assessment year 2009-10 is the third year of assessee's business of windmill power generation. The assessee had incurred loss from eligible business in the prior years which was required to be set off against the income from eligible business only. However, the losses of eligible business were set off by the assessee against the income from other business. The Commissioner of Income Tax (Appeals) allowed the benefit of deduction u/s. 80IA(4)(iv) by following the decision of Pune Bench of the Tribunal in the case of Poonawala Estate Stud & Agro Farm Pvt. Ltd. Vs. ACIT reported as 136 TTJ 236. The Department has filed appeal before the Hon'ble High Court against the aforesaid decision of Tribunal. The ld. DR submitted that the Ahmedabad Bench of the Tribunal in the case of Goldmine Shares and Finance Pvt. Ltd. in ITA Nos. 4044 to 4049/Ahd/2003 has held that the profit from eligible business for the purpose of determination of quantum of deduction u/s. 80IA, has to be computed after deduction of the notional brought forward loss and depreciation of eligible business even though it may have been allowed to set off against other income in the earlier year.

10. The ld. AR of the assessee submitted that disallowance in respect of liquidated damages was made by the Assessing Officer in assessment year 2008-09. In first appeal the Commissioner of Income Tax (Appeals) upheld the addition made by the Assessing Officer. The assessee carried the issue

in appeal before the Tribunal in ITA No. 918/PUN/2014. The Tribunal has restored this issue back to the file of Assessing Officer for verification. The facts in assessment year under appeal are same. Therefore, the issue raised by the Department in ground No. 1 of the present appeal can be restored back to Assessing Officer with similar directions.

10.1 In respect of ground No. 2 of the appeal, the ld. AR submitted that the Tribunal in assessee's own case for assessment year 2008-09 (supra) has allowed assessee's claim of depreciation @ 60% on UPS and other allied items.

10.2 In respect of ground No. 3 the ld. AR pointed that the disallowance u/s. 40A(2) in respect of commission paid to the Directors was made in assessment year 2008-09. The Commissioner of Income Tax (Appeals) granted relief to the assessee and the same was upheld by the Tribunal in appeal filed by the Department in ITA No. 1153/PUN/2014 for assessment year 2008-09.

10.3 In respect of ground No. 4 relating set off of brought forward capital losses against Long Term Capital Gain. The ld. AR submitted that similar issue had come up before the Tribunal in assessee's own case in assessment year 2007-08. The Commissioner of Income Tax (Appeals) has granted relief to the assessee by following the order of Tribunal in ITA No. 616/PUN/2014 for assessment year 2007-08 decided on 12-02-2018.

10.4 In respect of ground Nos. 5 to 7 of the appeal the ld. AR submitted that the assessee has claimed benefit of deduction u/s. 80IA(4) in respect of profits derived from generation of power from windmill. The assessment year under appeal is the initial year in which the assessee has claimed deduction. The losses incurred by the assessee in eligible business in the

prior years were set off against the income from other business. The Assessing Officer rejected assessee's manner of setting off of prior period losses. According to Assessing Officer the losses from eligible business are required to be set off against the income of eligible business only. The issue is squarely covered by the decision of Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd. Vs. Assistant Commissioner of Income Tax reported as 340 ITR 477, which has been subsequently followed by the Pune Bench of Tribunal in the case of Poonawalla Estate Stud & Agro Farm (P) Ltd. Vs. Assistant Commissioner of Income Tax reported as 136 TTJ 236.

10.5 In respect of ground No. 8 the ld. AR submitted that the Revenue has assailed the findings of Commissioner of Income Tax (Appeals) in allowing benefit of subsidy received under Package Scheme of Incentive, 2001. The assessee has claimed the subsidy as capital receipt, whereas, the Department has held the subsidy as revenue in nature. The Tribunal in the case of Innovative Industries Limited Vs. DCIT in ITA No. 215/PN/2014 for assessment year 2010-11 decided on 24-03-2017 has held subsidy received under Package Scheme of Incentive 2007 as Capital in nature. The subsidy allowed under Package Scheme of Incentive 2001 and Package Scheme of Incentive, 2007 are on same footing.

11. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered various decisions on which the ld. AR has placed reliance to support his contentions. We observe that majority of issues raised by the Revenue in its appeal have already been considered by the Tribunal in assessee's own case in immediately preceding assessment year.

12. In ground No. 1 of the appeal the Revenue has assailed deleting of damages paid by the assessee to its customers for delayed delivery of consignments. The issue is recurring in nature. Similar disallowance was made by the Assessing Officer in the case of assessee in the past. The Tribunal in assessment years 2002-03, 2003-04, 2007-08 and 2008-09 has already considered this issue of liquidated damages/late delivery charges. The Co-ordinate Bench in assessment year 2008-09(supra) has restored this issue back to the file of Assessing Officer for fresh adjudication. Since, the nature of payment of liquated damages in assessment year under appeal is identical, we deem it appropriate to restore this issue to the file of Assessing Officer to decide the issue on similar lines. Accordingly, ground No. 1 of the appeal by the Revenue is allowed for statistical purpose.

13. The ground No. 2 of appeal is qua allowability of higher rate of depreciation @ 60% on UPS and other allied items. The depreciation @ 60% was allowed to the assessee on UPS and other allied items in preceding assessment years. No material has been placed on record by the Revenue to controvert the findings of Co-ordinate Bench in assessment year 2008-09. We find no reason to take contrary view. Hence, we uphold the findings of Commissioner of Income Tax (Appeals) in allowing depreciation @ 60% on UPS and other allied items. Accordingly, ground No. 2 of appeal by the Department is dismissed.

14. The ground No. 3 of the appeal relates to disallowance u/s. 40A(2) on commission paid to Directors. We observe that similar disallowance was made in assessee's own case for assessment years 2007-08 and 2008-09. The Co-ordinate Bench of Tribunal in appeal by the Revenue in ITA No. 1153/PUN/2014 in assessment year 2008-09 upheld the findings

of Commissioner of Income Tax (Appeals) in deleting such disallowance. The Commissioner of Income Tax (Appeals) following the order of Tribunal in assessment year 2007-08 had granted relief to the assessee. In the assessment year under appeal the Commissioner of Income Tax (Appeals) deleted the disallowance of commission paid to the Directors by following the order of earlier assessment year. Since, the disallowance u/s. 40A(2) on the commission paid to the Directors has been consistently decided against the Revenue, and in the assessment year under appeal there is no distinguishing feature, we find no merit in the said ground by the Department. The ground No. 3 of the appeal is rejected for the parity of reasons given in assessment year 2008-09 in assessee's own case by the Tribunal. Accordingly, ground No. 3 of the appeal is dismissed.

15. The ground No. 4 of the appeal is with respect to set off of brought forward capital losses against Long Term Capital Gain of the current assessment year. In assessment year 2007-08 similar disallowance was made by the Assessing Officer. The Commissioner of Income Tax (Appeals) granted relief to the assessee. In appeal before the Tribunal, the Department was unsuccessful in contesting the issue. The relevant extract of the findings of Tribunal on this issue in appeal by the Revenue in ITA No. 963/PUN/2014 for assessment year 2007-08 reads as under :

> *"31. We have heard the rival submissions and perused the material on record. In the present ground, AO had disallowed the claim of long term capital loss for the reason that the transaction was a tax planning devise to evade taxes. Before us, Ld.A.R. has reiterated the submissions made before lower authorities and has submitted that the preference shares were allotted to assessee due to the restructuring exercise carried out as per the mandate of other public financial institutions. It is an undisputed fact that KFIL was promoted by assessee, is a listed company and had huge accumulated losses. The issuance of preference shares to the assessee on account of restructuring exercise undertaken to revive KFIL is an undisputed fact. It is also a fact that the assessee was issued preference shares in earlier years and in those years the transaction was not doubted by the Revenue. Further no material has been brought on record by Revenue to demonstrate that the transaction was a sham. We further find that while deciding the issue in*

favour of assessee, Ld.CIT(A) had relied on the decision of Hon'ble Bombay High court in the case of CIT Vs. Enam Securities Pvt. Ltd., (2012) 345 ITR 64. Before us, Revenue has not pointed out any fallacy in the findings of Ld.CIT(A) nor has pointed out as to why the ratio of decision relied upon by Ld.CIT(A) while deciding the appeal is not applicable to the present facts. Considering the totality of aforesaid facts, we find no reason to interfere with the order of Ld.CIT(A) and thus, the ground of Revenue is dismissed."

No material has been placed on record by the Revenue to show any change in facts or distinguishing the nature of transactions in the assessment year under appeal. Respectfully, following the order of Tribunal, ground No. 4 of the appeal by the Revenue is dismissed.

16. The ground Nos. 5 to 7 of the appeal is with respect to assessee's claim of deduction u/s. 80IA(4) of the Act. The assessee has installed windmill and claimed deduction u/s. 80IA(4) on the profits derived from generation of power from windmill. The assessee has installed windmill in the Financial Year 2006-07. However, the assessee has claimed deduction u/s. 80IA(4) from the assessment year 2009-10. The assessee has set off earlier year losses of eligible business against the profits of other business. The Assessing Officer disallowed assessee's claim on the premise that the prior period losses of eligible business are required to be set off against the income from eligible business only. The Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd. Vs. Assistant Commissioner of Income Tax (supra) has held that loss or depreciation in the year earlier to initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profits of the eligible business for computing the deduction u/s. 80-IA. The relevant extract of the judgment of Hon'ble High Court is reproduced here-in-below :

"14. In the present cases, there is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier

years. During the relevant assessment year, the assessee exercised the option under s. 80-IA(2). In Tax Case Nos. 909 of 2009 as well as 940 of 2009, the assessment year was 2005-06 and in the Tax Case No. 918 of 2008 the assessment year was 2004-05. During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the year. The unreported judgment of this Court cited supra considered the scope of sub-s. (6) of s. 80-I, which is the corresponding provision of sub-s. (5) of s. 80-IA. Both are similarly worded and therefore we agree entirely with the Division Bench judgment of this Court cited supra. In the case of CIT vs. Mewar Oil & General Mills Ltd. (2004) 186 CTR (Raj) 141 : (2004) 271 ITR 311 (Raj), the Rajasthan High Court also considered the scope of s. 80-I and held as follows :

> *"Having considered the rival contentions which follow on the line noticed above, we are of the opinion that on finding the fact that there was no carry forward losses of 1983-84, which could be set off against the income of the current asst. yr. 1984-85, the recomputation of income from the new industrial undertaking by setting off the carry forward of unabsorbed depreciation or depreciation allowance from previous year did not simply arise and on the finding of fact noticed by the CIT(A), which has not been disturbed by the Tribunal and challenged before us, there was no error much less any error apparent on the face of the record which could be rectified. That question would have been germane only if there would have been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out of the priority industry and whether it was required to be set off against the income of the current year. It is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under s. 80-I for the purpose of computing admissible deductions thereunder.*
>
> *In view thereof, we are of the opinion that the Tribunal has not erred in holding that there was no rectification possible under s. 80-I in the present case, albeit, for reasons somewhat different from those which prevailed with the Tribunal. There being no carry forward of allowable deductions under the head depreciation or development rebate which needed to be absorbed against the income of the current year and, therefore, recomputation of income for the purpose of computing permissible deduction under s. 80-I for the new industrial undertaking was not required in the present case.*
>
> *Accordingly, this appeal fails and is hereby dismissed with no order as to costs."*

From reading of the above, the Rajasthan High Court held that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under s. 80-I for the purpose of computing admissible deductions thereunder. We also agree with the same. We see no reason to take a different view.

15. The standing counsel appearing for the Revenue is unable to bring to our notice any relevant material or any compelling reason or any contra judgment of other Courts to take a different view. He only relied heavily on memorandum explaining the provisions in the Finance (No. 2) Bill, 1980, [(1980) 123 ITR (St) 154] to support this case and the same reads as follows :

> *"Clause 30(iii) : In computing the quantum of 'tax holiday' profits in all cases, taxable income derived from the new industrial units, etc., will be determined as if such units were an independent unit owned by a taxpayer who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, ship or approved hotel will be taken into account in determining the quantum of deduction admissible under the new s. 80-I even though they may have been set off against the profits of the taxpayer from other sources."*

We are not agreeing with the counsel for the Revenue. ***We are, therefore, of the view that loss in the year earlier to initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profits of the eligible business as no such mandate is provided in the s. 80-IA(5).****"*

[Emphasized by us]

The Tribunal has been consistently following the law laid down by the Hon'ble Madras High Court and similar view has been taken in the case of Poonawala Estate Stud & Agro Farm Pvt. Ltd. Vs. ACIT (supra). Thus, in view of the settled law, we find no merit in ground Nos. 5 to 7 of the appeal by the Department. Hence, the same are dismissed.

17. The ground No. 8 of the appeal is with respect to subsidy received by the assessee under Government of Maharashtra Package Scheme of Incentive, 2001. The assessee has claimed subsidy received under the aforesaid scheme as capital receipt, whereas, the Department has held the subsidy to be on revenue account. The Co-ordinate Bench of Tribunal in the case of Innovative Industries Limited Vs. DCIT (supra) has considered the issue of subsidy received under Package Scheme of Incentive in detail. After considering catena of judgments the Tribunal held that the incentive received by the assessee under Package Scheme of Incentive, 2007 is in the form of refund of Sales Tax and is a capital receipt not liable to tax. The

Commissioner of Income Tax (Appeals) has granted relief to the assessee by following the aforesaid decision of Tribunal. We find no reason to interfere with the findings of Commissioner of Income Tax (Appeals). Accordingly, the same is upheld and the ground No. 8 of the appeal is dismissed.

18. In the result, the appeal of Revenue is partly allowed for statistical purpose in the terms aforesaid.

19. To sum up, the appeal of assessee is allowed for statistical purpose and the appeal of Revenue is partly allowed for statistical purpose.

Order pronounced on Wednesday, the 17th day of July, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 17th July, 2019
RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Nashik
4. आयकर आयुक्त / The CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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