IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1803/Del/2018 : Asstt. Year : 2014-15

NHPC Ltd., NHPC Office Complex, 4th Floor, Finance Division, Sector-33, Faridabad-121003	Vs	DCIT, Circle-II, Faridabad
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACN0149C		

Assessee by : Sh. Ved Jain, Adv.
Revenue by : Sh. M. N. Shete, Sr. DR

Date of Hearing: 23.11.2021		**Date of Pronouncement: 15.02.2022**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the orders of the ld. CIT(A), Faridabad dated 13.02.2018.

2. Following core grounds have been raised by the assessee:

> *"2.(i) On the facts and circumstances of the case, the ld. CIT(A) has erred both on facts and in law in confirming the action of the AO in not allowing deduction amounting to Rs.5,98,71,388/- claimed by the assessee u/s 80IA of the Income Tax Act, 1961."*

3. The assessee filed return of income on 02.10.2014 declaring total income of Rs.73,19,81,030/-. The assessee is a Government of India Enterprises and was engaged in the business of generation of electricity, construction contracts and consultancy services.

4. The issue involved relates to disallowance of Section 80IA claim on the other income received from contractors at 5 production units. It was submitted that this other income consists of electricity recovery from the contractors for the power consumed and other recoveries from the contractors.

5. At the outset, both the parties brought to our notice that the issue stands adjudicated by the order of Co-ordinate bench of the ITAT in assessee's own case for the earlier years.

6. We have gone through the order of the Co-ordinate Bench of ITAT for the A.Y. 2011-12 in ITA No. 466/Del/2016 and 297/Del/2016 order dated 26.07.2019 wherein the appeal of the assessee has been allowed. For the sake of ready reference, the relevant part of the said order involving the same issue is reproduced below:

"9. AO disallowed an amount of Rs.2,99,54,875/- by not considering the same for the purpose of computation of deduction u/s 80IA of the Act on the ground that only profit obtained from generation and distribution of power and not from other income is eligible for deduction u/s 80IA.

10. Ld. CIT (A) by following his own order rendered in AY 2010-11 upheld the order passed the AO that income derived from sources other than generation and distribution of power is not eligible for deduction u/s 80IA and dismissed the ground raised by the assessee.
11. However, the ld. AR for the assessee contended that the said order passed by the ld. CIT (A) for AY 2010-11 has been set aside by the coordinate Bench of the Tribunal vide order dated 08.05.2019 in ITA No.3650/Del/2015 & 3738/Del2015 for AY 2010-11 and now the issue in controversy is fully covered.

12. On the other hand, ld. DR for the Revenue in order to repel the arguments addressed by the ld. AR for the assessee contended that income directly derived from industrial undertaking is liable u/s 80IA and relied upon the decision of Hon'ble Supreme Court in Conventional Fastners vs. CIT, Dehradun (2018) 256 taxman 61 (SC), Hon'ble Uttaranchal High Court in Conventional Fastners vs. CIT, Dehradun 88 taxmann.com 163 and coordinate Bench of the Tribunal in the case of Conventional Fastners vs. ITO in ITA No.6016/Del/2017 order dated 18.05.2018.

13. Undisputedly, assessee has claimed deduction u/s 80IA qua URI-I, Chambera-II, Dhauliganga and Rangit projects and given the project-wise income detail of such other income as under:-

s. No.	Particulars	URI-I	Chamera-II	Dhauli-Ganga	Rangit	Total
1	Rent / Hire Charges from contractors			3,545	16,500	20,045
2	Rent / Hire Charges Employees				340	340
3	Rent/ Hire Charges - Others	1,477,599	64,212		149,378	1,691,189
4	Other Income (Balances, Expenses, Liabilities No longer required written back	13,689,631	1,191,081	3,917,023	1,657,727	20,455,462
5	Township recoveries	368,347	1,205,197	963,426	836,301	3,373,271
6	Excess on physical verification of stores-O&M-Written Back		3,959			3,959
7	Lease recovery	425,227	174,301	606,806	177,603	1,383,937
8	Electricity recovery	315,877	555,341	601,893	499,518	1,972,629
9	Telephone recovery	-	-	41,803	5,157	46,960
10	Cable charges	88,500	127,840	87,800	113,700	417,840
11	Guest house recovery	22,912	126,019	335,464	104,848	589,243
	Total	16,388,093	3,447,950	6,557,760	3,561,072	29,954,875

14. The ld. AR for the assessee relied upon the decision rendered by Hon'ble Delhi High Court in the case of Pr. CIT vs. Bharat Sanchar Nigam Ltd. 388 ITR 371 wherein meaning of word "derived from" while computing deduction u/s 80IA of the Act has been explained.

15. Coordinate Bench of the Tribunal in assessee's own case for AY 2010-11 (supra) decided the identical issue in favour of the assessee by returning following findings :-

"47. We find that the AAR in the case of National Fertilizers Limited 193 CTR 498(AAR) held that the expenses incurred to earn these other incomes should be excluded from the debit side of the profit and loss account for computing the deduction u/s 80-I of the Act. The relevant extract of the judgment is as below:

"(2)question No. 2 in AAR/532/2001 that the expenses of Rs.2,76,03,364 and Rs.12,12,74,426 (it is stated that the correct figure is Rs.11,02,56,561) allocated by marketing office and corporate office and interest expenditure of Rs.71,65,99,045 allocated by the corporate office and on question No. 2 in AAR/533/2001 that expenses of Rs.2,56,44,186 and of Rs.12,94,59,292 allocated by corporate office and marketing office and interest expenditure of Rs.8,49,30,952 allocated by corporate office should be excluded from the debit side of the profit and loss account of the industrial undertaking for the purpose of deduction under section 80-I of the Income-tax Act, 1961; the fact that the allocated interest income from corporate office Rs.5,22,94,939 and Rs.3,97,44,811 credited to profit and loss account of Vijaipur unit in the assessment years 1995-96 and 1996-97 is of no consequence as both interest income and interest expenditure are liable to be excluded for the purpose of deduction under section 80-I of the Act."

48. Further, the Hon'ble Delhi High Court in the case of Pr. CIT vs. Bharat Sanchar Nigam Limited reported in 388 ITR 371 explaining

the meaning derived from while computing the deduction u/s 80-IA of the Act, has held as under:

"8. The question arose in the context of the Assessee being asked to explain why certain specific items categorized as 'other income' and 'extraordinary item' in the Profit and Loss Account in assessment year 2004-05 should not be excluded from the profit and gains of the Assessee. According to the Revenue, these items could not be considered as profits and gains 'derived from' the eligible business for the purpose of deduction under Section 80 IA. The said six items were:

(i) Extra Ordinary Items
(ii) Refund from Universal Service Fund
(iii) Interest from others
(iv) Liquidated Damages
(v) Excess provision written back
(vi) Others including sale of directories, publications, form, waster paper, etc.

9. The AO held that the six items of income could not be said to be derived from the business of the Assessee and added the income therefrom to the returned income of the Assessee. In the appeal by the Assessee, the Commissioner of Income Tax (Appeals) ["CIT (A)"] agreed with the AO that three of the above items, viz. Extraordinary Items, Refund from Universal Service Fund and Interest from Others, did not form part of the profit derived from eligible business. However, the Assessee's plea regarding the other three items as being derived from the business was accepted by the CIT (A).

10. The Assessee filed appeals and the Revenue filed cross appeals before the ITAT. The ITAT in the impugned orders concluded that with sub-section (2A) beginning with a non-obstante clause, the legislative intention of making available to an undertaking, providing telecommunication services, the benefit of deduction of 100% of the

profits and gains "of the eligible business" was explicit. Indeed, the legislature appears to have made a conscious departure in adopting for sub-section (2A) a wording different from that appearing in sub section (1). Under Section 801A (1), what is available for deduction are profits and gains "derived by an undertaking or an enterprise from any business referred to in sub-section (4)" whereas in Section 80-IA (2A) what is available for deduction is "hundred percent of the profits and gains of the eligible business". The following conclusion reached by the ITAT in para 13.11 of the impugned order correctly encapsulates the legal position as far as the interpretation of Section 801A (2A) is concerned.

"13.11 Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise 'who fall under subsection (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play."

11. As a result, the orders of both the AO and the CIT (A) to the extent they deny the Assessee, which in this case is in the business of providing telecommunication services, deduction in respect of the above items in terms of Section 80IA(2A) are unsustainable in law and have rightly been reversed by the IT AT."

49. Further, the Hon'ble Gujarat High Court in the case of Nirma Industries Ltd. Vs DCIT (2006) 283 ITR 402 has held as under:

"27. Insofar as question No. 2 is concerned, according to the Tribunal s. 80-I of the Act uses the phrase 'derived from' and hence the interest received by the assessee from its trade debtors cannot be taken into consideration for the purpose of computing profits derived from an industrial undertaking. The Tribunal has failed to appreciate that it is not the case of the AO that the interest income is not assessable under the head 'Profits and gains of business'. It is only while computing relief under s. 80-I of the Act that the Revenue changes its stand. When one reads the opening portion of s. 80-I of the Act it is clear that words used are: "gross total income of an assessee includes any profits and gains derived from an industrial undertaking". Once this is the position then, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the prescribed percentage is to be allowed. That, in fact, the gross total income of the assessee included profits and gains from such business, and this is apparent on a plain glance at the computation in the assessment order. Both in relation to Vatva Unit and Mandali Unit the computation commences by taking profit as per statement of income filed along with return of income. Therefore, the same item of receipt cannot be treated differently: once while computing the gross total income, and secondly at the time of computing deduction under s. 80-I of the Act. Therefore, on this limited count alone, the order of the Tribunal suffers from a basic fallacy resulting in an error in law and on facts. The Tribunal instead

of recording findings on facts proceeded to discuss law. This litigation could have been avoided if the parties had invited attention to basic facts.

28. Neither the approach nor the reasons advanced by the Tribunal deserve acceptance. It is an incorrect proposition to state that interest paid by the debtors for late payment of the sale proceeds would not form part of the eligible income for the purpose of computing relief under s. 80-I of the Act. The reliance on the general meaning of the term interest as well as drawing distinction between the source of sale proceeds and the source of interest is erroneous in law in the case of CIT vs. Govinda Choudhury & Sons (supra) the apex Court was called upon to decide as to the nature of interest received by the assessee therein. In the case before the apex Court the assessee who was executing Government contracts found itself involved in disputes with the State Government with regard to the payments due under the contracts and upon reference to arbitrators, the award included the principal sum as well as the interest for delay in payment of the principal sum. The assessee claimed that the interest was of the same nature as other trading receipts, but it was held by the Tribunal that the same was 'Income from other sources'. The apex Court laid down:

"The assessee is a contractor. His business is to enter into contracts. In the course of the execution of these contracts, he has also to face disputes with the State Government and he has also to reckon with delays in payment of amounts that are due to him. If the amounts are not paid at the proper time and interest is awarded or paid for such delay, such interest is only an accretion to the assessee's receipts from the contracts. It is obviously attributable and incidental to the business carried on by him. It would not be correct, as the Tribunal has held, to say that this interest is totally de hors the contract business carried on by the assessee. It is well settled

that interest can be assessed under the head 'Income from other sources' only if it cannot be brought within one or the other of the specific heads of charge. We find it difficult to comprehend how the interest receipts by the assessee can be treated as receipts which flow to him de hors the business which is carried on by him. In our view, the interest payable to him certainly partakes of the same character as the receipts for the payment of which he was otherwise entitled under the contract and which payment has been delayed as a result of certain disputes between the parties. It cannot be separated from the other amounts granted to the assessee under the awards and treated as 'Income from other sources'".

50. In view of the above quoted decisions, we are of the considered view that the disallowance made of Rs.4,46,54,883/- while computing the deduction allowable u/s 80-IA of the Act is not justified. Hence, we set aside the orders of the lower authorities and direct the Assessing Officer to recompute the deduction allowable to the assessee u/s 80-IA of the Act without excluding Rs.4,46,54,883/- . Thus, this ground of appeal of the assessee is allowed."

16. Following the decision rendered by the coordinate Bench of the Tribunal on the issue in controversy discussed above, the arguments addressed by the ld. DR and the case laws relied upon are not applicable to the facts and circumstances of the case, thus we are of the considered view that making disallowance by the AO and confirmed by the ld. CIT (A) to the tune of Rs.2,99,54,875/- while computing the deduction allowable u/s 80IA is not sustainable and all the items of income qua which deduction has been sought by the assessee u/s 80IA are allowable deduction and order passed by the AO and ld. CIT (A) is not sustainable. So, the order passed by the lower authorities is set side directing the AO to recompute the deduction allowable to the assessee u/s 80IA without excluding

amount of Rs.2,99,54,875/- disallowed by the AO. Consequently, ground no.2 is determined in favour of the assessee."

7. Since, the issue before us is similar to the issue adjudicated by the Tribunal, in the absence any material change in the factual contents and the legal proposition, we are of the considered view that the disallowance made by the AO while computing the deduction is allowable u/s 80-IA of the Act.

8. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 15/02/2022.

Sd/-	Sd/-
(Amit Shukla)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 15/02/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR