IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1955/Bang/2016 : Asst.Year 2010-2011
ITA No.1956/Bang/2016 : Asst.Year 2011-2012
ITA No.1957/Bang/2016 : Asst.Year 2012-2013
ITA No.207/Bang/2018 : Asst.Year 2013-2014

M/s.I.G.Petrochemicals Limited D-4, Jyothi Complex, 134/1 Infantry Rooad, H.No.I-32/38/39/103 Bangalore – 560 001. **PAN : AAACI4115R.**	v.	The Deputy Commissioner of Income-tax, Circle (3)(1)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.S.Parthasarathi, Advocate
Respondent by : Smt.S.Praveena, CIT-DR

Date of Hearing : 03.03.2022		**Date of Pronouncement : 18.03.2022**

O R D E R

Per George George K, JM :

These four appeals at the instance of the assessee pertain to the assessment years 2010-2011 to 2013-2014. Common issues are raised in these appeals, hence, these appeals were heard together and are being disposed of by this consolidated order. In four appeals, in total, three issues are raised, namely –

(i) forfeiture of share warrant whether it is capital or revenue receipt,

(ii) disallowance u/s 40(a)(ia) of the I.T.Act, and

(iii) disallowance u/s 80IA of the I.T.Act.

2. As regards the issue of forfeiture of share warrant whether it is capital or revenue receipt, the same arises only

for assessment year 2010-2011. The disallowance of claim u/s 80IA of the I.T.Act, the issue arises for all the four assessment years. The issue of disallowance u/s 40(a)(i) of the I.T.Act arises for assessment years 2011-2012 to 2013-2014. We shall adjudicate the issues as under:-

Forfeiture of share warrant whether it is revenue or capital receipt (Assessment Year 2010-2011)

3. The assessee is a company engaged in the manufacture of Phythllic Anhydride. For the assessment year 2010-2011, the assessment was completed u/s 143(3) of the I.T.Act vide order dated 15.03.2013. The Assessing Officer added forfeiture amount of Rs.116.25 lakh of share warrant as a revenue receipt. The assessee had treated this amount as capital receipt. The submission of the assessee before the A.O. for ready reference is reproduced below:-

> *"During the year ended 31 March 2008" the Company had received 10% amount towards 15,00,000 Share warrants allotted on 5 March 2008.These warrants were to be convertible in to 15,00,000 Shares of Rs .10 Each of the Company @ Rs. 77.50 per share including a Premium of Rs.67.50 per share at the option of the Warrant holders within a period of 18 months from the date of allotment (i. e 5 March 2008), In case the option is not exercised by the warrant holders" then the amount received would be forfeited*
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> *The share warrant holders have not exercised the option and hence the amount of Rs.116.25 Lakhs was forfeited and credited to Capital reserve in the current year as this is not a trading income and this is a capital receipt. We enclose herewith the copies of the Renunciation letter submitted by the party (A-1).*
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> *We enclose herewith the decided cases reported in page No.303 of Kanga and Palkiwala and vyas a photo copy of the page is enclosed herewith)wherein a similar amount has been treated as Capital Receipt and not subject to Tax.*

Hence we have excluded the above sum as Income and we request you to kindly treat this as a capital receipt."

3.1 The A.O. rejected the contentions of the assessee. The A.O. held that the share warrant forfeited loses its nature of being capital at the point of forfeiture and can use the same for the business of the assessee. Hence, it was concluded by the A.O. that it was a revenue receipt. The observation of the A.O. in holding that it was a revenue receipt, reads as follows:-

"3.4 After carefully considering the submission of the Assessee and before codifying the receipt as capital or revenue it is to be mentioned that, A Share in a Company is nothing but Share in the Ownership of the Company. While the right of the Assessee to share in the ownership of the company stands extinguished on account of the Forfeiture of the share, the Company with all its assets continuous to exist. The Forfeiture only results in One less share holder. It is not as if the "Asset" in which the share was being claimed was also extinguished.

3.5 If an amount is received by the Company in the course of trading transaction, even though it is not taxable in the year of receipt owing to the nature being capital, the amount changes its character when the amount becomes assessee's own money because of limitation or by any other contractual right. When such a thing happens the common sense demands the amount should be treated as income of the assessee.

3.6 In the instant case, the money was received by the Company and it was treated as a capital nature at the point of time it was received, by influx of time the money had become the assessee's own money. Since, it has become the assessee's own money, the nature of such money is Revenue and the same is being taxed accordingly.

3.7 The share warrant Forfeited amount of Rs. 116.25 Lakhs loses its nature of being capital as the money accrued after its forfeiture is being used for business of the company and by the lapse of time the amount has become revenue in nature the same is taxed accordingly.

> *3.8 As discussed above forfeiture of share warrants of Rs. 116.25 Lakhs is being taxed accordingly."*

3.2 Aggrieved, the assessee has raised this issue before the first appellate authority. The CIT(A) confirmed the view of the Assessing Officer. The CIT(A) held that consequent to the forfeiture, the assesee is free to use the forfeited money in any manner whatsoever. The CIT(A) by placing reliance on the judgment of the Hon'ble Apex Court in the case of CIT v. T.V.Sundaram Iyengar and Sons Ltd. reported in (1996) 222 ITR 344 and the judgment of the Hon'ble Madras High Court in the case of CIT v. Aries Advertising (P) Ltd. reported in (2002) 255 ITR 510 concluded that the forfeited amount is revenue receipt. The relevant finding of the CIT(A) reads as follows:-

> *"5. The submissions made by the appellant have been examined. Considering the facts of the case it is very much apparent that consequent to the forfeiture of the amount received, the appellant was completely free to use the said amount in any manner. Therefore the nature of the amount received has changed completely consequent to the forfeiture of the amount by the appellant and it cannot be said that the amount is capital in nature. A similar issue was considered by the Hon'ble Supreme Court in the case of CIT vs. T.V.Sundaram Iyengar and Sons Ltd. (1996) 222 ITR 0344, in which it is held as under.*
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>> The principle appears to be that if an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, commonsense demands that the amount should be treated as income of the assessee.
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>> The assessee had received deposits in course of its business which were originally treated as capital

> receipts. Some of the deposits were neither claimed by nor returned to the depositors. There is no dispute that the deposits were received in course of the carrying on of the business of the assessee. Although it was treated as deposit and was of capital nature at the point of time it was received, by influx of time the money has become the assessee's own money. What remains after adjustment of the deposits has not been claimed by the customers. The claims of the customers have become barred by limitation. The assessee itself has treated the money as its own money and taken the amount to its profit and loss account. There is no explanation from the assessee why the surplus money was taken to its profit and loss account even if it was somebody else's money. In fact, as Atkinson, I pointed out that what the assessee did was the commonsense way of dealing with the amounts. Therefore, the amount was taxable as trade receipt in the hands of the assessee.

5.1 The facts of the case in appeal are very much similar to the case cited above, with the only difference that the appellant has credited the amount to the 'capital reserve' in the balance sheet. However, this alone will not change the nature of the receipt in the hands of the appellant. It is settled law that the entries made in the books of accounts alone cannot determine the nature of a receipt in hands of the assessee. Further it is also observed that on similar facts in the case of CIT v. Aries Advertising (P) Ltd. (2002) 255 ITR 510, the Hon'ble Madras High Court has held as under:

> Once assessee trans/erred amount to the general reserve, it treated the same as the profit. Once this position is clear, then the further question remains as to whether the amount such as above becomes the income of the assessee in its hand That question no more remains res integra. The Supreme Court in the case of CIT v. T. V. Sundaram Iyengar and Sons Ltd. (1996) 979 ITR 344 (SC) has concluded this question as also the claim of the assessee that these amounts which. were in the nature of deposits or credits did not change their character and could not be said to be an income in the hands of the assessee. The Supreme Court, by majority, has answered the question that such amounts after they were treated to be profits, as has happened in this case, changed character and, therefore, could be held to be income particularly because the assessee had become richer by reason of such amount having been treated as a profit and further having been transferred to the general reserve. The situation is no different in the

present case. The amount represents the various credits and deposits during the trading with the Aries Advertising Bureau. They remained for a long time to be recovered (even before the limitation period) and thus remained unclaimed. The amounts were then transferred by the assessee company to the general reserve obviously treating them to be the profits. Therefore, the Supreme Court's decision cited supra applies on all fours. In that view amount being the credit balances written off and transferred to the general revenue account has to be treated as income of the assessee chargeable to income tax.

5.2 Therefore, considering the facts of the case and the judicial decisions cited above, the amount of Rs.1,16,25,000/- received by the appellant consequent to the forfeiture of the share warrants, is held to be revenue in nature. Accordingly the addition of Rs.1,16,25,000/- made by the AO is confirmed. The grounds of appeal raised in this regard are dismissed."

3.3 Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR has filed a paper book enclosing therein the written submissions before the Income Tax Authorities, communication before the Income Tax Authorities, the case laws relied on, etc. The learned AR reiterated the submissions made before the Income Tax Authorities.

3.4 The learned Departmental Representative strongly supported the order of the A.O. and the CIT(A).

3.5 We have heard rival submissions and perused the material on record. Copy of the schedule of balance sheet for the period ending 31.03.2009 and 31.03.2010 are placed at paper book filed on 04.03.2022. At page 1 of the schedule to the account for the year ending 31.03.2009, the scheme of issue of share warrant has been explained in item No.4 in the schedule to the accounts, which provides forfeiture of the

amount when option for share warrant is not exercised. Further, at page 2, the amount of forfeiture is reflected under the head “capital reserve”. The resolution for issuing the warrant and also the explanatory statement pursuant to section 173(2) of the Companies Act, 1956 is also enclosed wherein the terms of the proposed warrant has been brought out under the head “Intention of prospective investor to subscribe to the offer”.

3.5.1 The CIT(A) has placed reliance on the judgment of the Hon’ble Apex Court in the case of T.V.Sundaram Iyengar & Sons (supra). The judgment of the Hon’ble Apex Court was considering an amount which was received in the course of trading transaction. In the present case, the amount received is towards application of share warrants are not received in the course of business activity of the assessee. Therefore, the ruling of the Hon’ble Apex Court in the case of T.V.Sundaram Iyengar & Sons (supra) is not applicable to the facts of the instant case. The assessee has placed reliance on the order of the Delhi Tribunal in DCIT v. CNB Finwiz Limited reported in 159 TTJ 196, which is specifically dealing with the forfeiture of the application money received on account of share warrant. It was held by the Tribunal that the same is not taxable considering the basic nature of receipt, which is on capital account. Similar view was held by the Mumbai Tribunal in the case of M/s.Graviss Hospitality Limited v. DCIT in ITA No.3542/Mum/2013 (order dated 21.11.2014). The Mumbai Tribunal had considered the judgment of the Hon’ble Apex Court in the case of T.V.Sundaram Iyengar &

Sons (supra) and has distinguished the same. The relevant finding of the Mumbai Tribunal in the case of M/s.Graviss Hospitability Limited v. DCIT (supra) reads as follows:-

> *"21. We have heard the rival contentions and perused the relevant finding given by the authorities below and also material placed on record. For the purpose of adjudicating the issue involved, the relevant facts are being reiterated again to understand the nature of controversy. It is an undisputed fact that during the financial year 2007-08, the assessee company had issued equity warrants convertible into equity shares under preferential issue to the public in accordance with SEBI Guidelines, 2000. Such preferred allotment of equity warrants have also been approved by the shareholders of the company and approval was also granted by BSE. Five allottees subscribed to the equity share against each warrant @ Rs. 283.42 per share. At the time of application, allottees had to pay 10% of the value i.e Rs. 28.34 per shares. The balance amount as per the SEBI Guidelines had to be paid within the period of 18 months i.e the warrant holder had to exercise the right for conversion of warrants into equity shares within 18 months from the date of allotment by paying the balance amount. Out of the five allottees, only one allottee had exercised the option to whom equity shares were issued in the financial year 2007-08 itself. The remaining four allottees had only paid 10% of application money as per the details which has been incorporated above. Such an amount aggregated to Rs. 8.50 crores. The amount which was received by the allottees were shown as "share application money" for the said financial year, that is, it was treated as capital receipt in the balance sheet. Once the four allottees did not exercise the right for conversion of warrant into equity shares till the expiry of 18 months (i.e. within the stipulated time), the assessee has transferred the said amount as "warrant forfeiture account". As the forfeiture of equity warrant application was in the nature of capital receipt, the assessee has transferred the forfeiture amount to its capital reserve. Thus the assessee treated it as capital receipt and therefore it was not offered as income.*
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> *22. Now on these facts, we have to examine, whether the decision of Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra) and the decision of Hon'ble Bombay High Court in the case of Solid Containers (supra) are applicable or not, on which heavy reliance has been placed by the Department. In the case of T.V. Sundaram Iyengar & Sons Ltd. (supra), the ITO found that the assessee had transferred an amount of Rs. 17381/- to the P&L account for the year ending 31-3-1982 and Rs. 38975/- for the year ending 31-3-1983. These amounts were not included in the income of the assessee. It was stated by the assessee that these are credit balances standing in favour of customers which were not claimed by them and therefore, the amounts were transferred to the P&L account. It was not in dispute that the amount received by the assessee was in the course of trading transaction. The ITO added it as an income of the assessee for the purpose of income tax assessment. The ld. CIT(A) held that such an amount cannot be treated as income, either u/s 41(1) or u/s 28 of the Act. The Tribunal also upheld the view of the ld. CIT(A). On*

these facts, the Hon'ble Supreme Court held that the money was received by the assessee in the course of carrying on the business and although it was treated as deposits and was in the nature of capital receipt at that point of time, however by efflux of time, money has become own money of the assessee because the claim of the customers have become barred by limitation. Since the assessee itself has treated its own money and taken the money into P&L account, therefore, it was held that by assessee's own admission it has become income of the assessee. The ratio decindi laid down by the Hon'ble Supreme Court will not be applicable on the present case, firstly, the assessee has not received any deposits during the course of trading transaction from the customers but in the form of warrant convertible into equity share which was a capital account; secondly, the assessee has not forfeited the amount and transferred to the P&L account, but directly to the capital reserve under the head "warrant forfeited account". The assessee is definitely not in the business of raising money through issue of share warrant and it is not a receipt in the normal course of business. If a particular amount is not received as trading receipt or during the course of trading transaction, it cannot be later on treated as arising out of trading transaction so as to hold as revenue receipt. Thus the decision of the Hon'ble Supreme Court cannot be held to be applicable on the facts of the assessee's case.

23. Now coming to the decision of Hon'ble Bombay High Court in the case of Solid Containers (Supra). The facts of this case was that the assessee had taken loan of Rs. 6,86,071/- for the business purpose which was written back as a result of consent terms arrived at in a suit. The assessee has claimed this amount as capital receipt even though it had offered interest on the said loan as its income by crediting the same to its P&L account. The A.O. had made the addition on the ground that it was arising out of the business activity and therefore the same was taxable u/s 28(iv) of the Act. The Hon'ble Bombay High Court on these facts held that the loan was taken for the trading activity and ultimately upon waiver of the amount it was retained and utilized for the business purpose and therefore, such an amount is nothing but trading operation transferred to P&L account which is to be held as income of the assessee. For arriving to this conclusion, the Hon'ble Bombay High Court has applied the principle laid down in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra). The Principle laid down by the Hon'ble Bombay High Court is again not applicable on the facts of the present case, firstly, it is not a case of loan taken for the business purpose and it has not arisen out of assessee's own trading activity. Once the amount received or forfeited is on account of trading operation then such an amount can only be treated as assessable income u/s 41(1) or section 28(iv) of the Act. Any amount which is to be held as assessable u/s 28(iv), has to be in the nature of 'benefit' or 'perquisite' or 'money' arising from business or profession can only be treated as business income. In other words, money must arise from business carried on by the assessee. Here in this case the share application money and subsequent forfeiture of said money is neither any benefit nor perquisite arising out of assessee's business as the assessee is not in the business of raising money through issue of share warrant. The assessee has not taken shares forfeited amount to its P&L account. The

> *forfeited amount also cannot be taxed u/s 41(1) because it is not in the nature of trading liability or during the course of trading transaction. It is a trite law that all the receipts in the hands of the assessee would not necessarily be income or deemed to be income for the purpose of income tax, because it will depend upon the nature of receipt and true scope and effect of the relevant taxing provision. If admittedly, the amount of receipt by its nature itself is a capital receipt, then it cannot be treated as a trading receipt unless such a receipt has been received under a trading transaction. The share application money by its nature itself is on capital account and it remains in the nature of capital, even if it has been 17 ITA 3542/M/13 & 4801/M/13 forfeited due to certain circumstances, because it has not arisen out of trading transaction or during the course of business. Such a capital receipt cannot be converted into revenue receipt unless it is found that receiving share application money is the business of the assessee and has arisen out of its business operation. Thus, we hold that the amount of forfeited share application money transferred to "warrant, forfeiture account" in the capital reserve, is a capital receipt only and cannot be taxed as income of the assessee, either u/s 28(iv) or u/s 41(1) of the Act. Accordingly, ground raised by the assessee is allowed."*

3.5.2 With respect to the applicability of section 28(vi) of the Act, the assessee has rightly placed reliance on the judgment of the Hon'ble Apex Court in the case of CIT v. Mahindra & Mahindra Limited reported in 404 ITR 1, wherein it was held that in absence of benefit of perquisite other than in the shape of money, there is no question of bringing the receipt to tax under the said section. The provisions of section 41(1) are not applicable to the facts of the present case as it is not a case of remission of trading liability, which has been claimed as deduction in the preceding years. For the aforesaid reasoning, we allow ground 2 to 4 for assessment year 2010-2011.

3.6 In the result, ground 2 to 4 for A.Y. 2010-2011 are allowed.

Disallowance u/s 80IA of the I.T.Act (Asst.Year 2010-2011 to 2013-2014)

4. The above issue is common for assessment years 2010-2011 to 2013-2014. The nature of facts and adjudication of the issue for assessment year 2010-2011 will apply mutatis mutandis for other assessment years as well.

4.1 Brief facts in relation to the claim of deduction u/s 80IA of the I.T.Act are as follows:

For the assessment year 2010-2011, the assessee had claimed deduction u/s 80IA of the I.T.Act amounting to RS.5,38,54,041. During the course of assessment proceedings, the assessee was asked to justify the claim along with details of the working of the same. The assessee submitted its reply. The gist of the contention of the assessee was that it was engaged in the production of chemical known as Phathalic Anhydride (PA). In order to manufacture the product, the main raw material used is Orthoxyline, which is oxidized in the reactor through catalyst at very high temperatures. Since the said reaction is exothermic in nature as a consequence heat is generated during the production process. To cool down the equipments water is circulated around the equipments and in turn steam is generated. The excess steam so generated is utilized by the assessee to generate power by using steam turbine and generator. The power so generated is utilized by the assessee for the operation of its own plant and the surplus power is sold to Maharashtra State Electricity Board. It was contended that the power plant has been set up with entirely new plant and machinery and no old machinery was used. It was stated that all the requisite registrations and licenses required for setting

up of power plant are duly obtained by the assessee and the power plant is physically separate from the chemical production plant and can function independent of the main plant. It was contended that the assessee generated identifiable marketable commodity, i.e., power and accordingly, was eligible to claim deduction u/s 80IA of the I.T.Act in respect of power plant set up by it. In this context, the assessee relied on various judicial pronouncements including the case of M/s.Textile Machinery Corporation Limited v. CIT reported in 107 ITR 195 (SC), M/s.Tamil Nadu Newsprint and Papers Limited v. ACIT in ITA No.328/Mds/2011 & Ors. (order dated 13th May, 2011) and West Coast Paper Mills Ltd. v. JCIT reported in (2006) 100 TTJ Mum 833. The A.O. however rejected the submissions of the assessee and disallowed the claim of deduction u/s 80IA of the I.T.Act. It was held by the A.O. that there is no independent and separate undertaking and power generated through chemical process is channelized to rotate the turbine which in turn produces electricity and such electricity was not transmitted or distributed to the public and was actually consumed internally.

4.2 Aggrieved, the assessee filed an appeal before the first appellate authority. The CIT(A) rejected the plea of the assessee. The CIT(A) held that the power plant is incapable of producing power when the main chemical plant was not in operation. In other words, it was held by the CIT(A) that the assessee's plant cannot generate power on a standalone basis. It was further held by the CIT(A) that the assessee's

promoter had imported steam turbine with the intention of producing power for captive use only. The relevant finding of the CIT(A) in this regard reads as follows:-

> *"8. In this regard it is also relevant to note that during the year 1996, M/s Mysore Petro Chemicals limited, the promoter of the appellant company, had imported a steam turbine for being used by the appellant for power generation. In this connection the appellant company had claimed before the' Customs authorities that the imported turbine was to be used for generation of power for captive use in the appellant's chemical plant for manufacturing goods for export. Accordingly, the appellant had availed exemption of import duty for importing the steam turbine under notification no.53/97 dated 01.03.1997 of the Customs' Department. It is important to note that for claiming the duty exemption on the imported steam turbine, the appellant has not declared that the said steam turbine was meant for operating an independent power generation unit. On the contrary the exemption was availed by the appellant on the ground that the imported steam turbine. was meant for generating power for captive use in the chemical plant. This clearly indicates the purpose of setting up the power generation units by the appellant company, which is clearly found to be for captive consumption. In fact the main intention of setting up the power generation unit is energy conservation and not power generation. Although the appellant has supplied some of the surplus power generated to MSEB, it is only found to be incidental and cannot lead to the conclusion that the power generation units installed by the appellant was meant for production of power for commercial purpose.*
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> *8.1 Considering the above it is very much clear that the power generating units set up by the appellant cannot be held as independent units / undertakings engaged in the generation of power. These units are found to be completely dependent on the steam produced by the chemical plant for generating power and hence they have no independent existence of their own without the main chemical plants of the appellant. The judicial decisions relied upon by the appellant are not applicable to the instant case as the facts are clearly distinguished, as discussed above. Therefore, the deduction of Rs.5,38,54,041 /- claimed under section 80lA of the Income Tax Act in respect of the TG-2 and TG-3 units, cannot be sustained. Accordingly, the disallowance of the deduction made by the AO is confirmed and the grounds of appeal raised in this regard are dismissed."*

5.2 Aggrieved, the assessee has raised this issue before the ITAT. In the paper book filed, the AR has enclosed the case laws in support of the assessee's claim for deduction u/s 80IA of the I.T.Act. The learned AR reiterated that the assessee's power generation unit is an independent undertaking and can function on a standalone basis and is not dependent on the chemical plant for generation of power. It was further submitted that the assessee had given working of the claim of deduction u/s 80IA of the I.T.Act. The A.O. has brushed aside the same without specifically pointing out any mistake in the claim of deduction u/s 80IA of the I.T.Act. It was further submitted that there is no requirement under the Act for maintaining separate accounts for Industrial Undertaking. It was stated that though the judgments relied on were rendered in context to section 80J of the I.T.Act, they have equal application for section 80IA of the I.T.Act (Section 80J was replaced by section 80IA of the I.T.Act).

5.3 The learned Departmental Representative supported the orders of the Income Tax Authorities.

5.4 We have heard rival submissions and perused the material on record. The assessee has submitted that it is eligible for claim deduction under section 80lA of the I.T.Act in respect of the power generation unit TG2 and TG3. The assessee is primarily engaged in chemical production and the steam which is produced from the chemical plant is used to generate power. One of the pre-requisite for claiming

deduction under section 80lA is that the business should not be formed by splitting up of business already in existence. We note from the facts that the power generation is dependant on the steam that is generated from chemical plant. Owing to this close nexus between chemical plant and power generation, it can be concluded that generation of power is integral part of chemical plant. Any efforts to segregate the activity of generation of power from chemical production would amount to artificially splitting up of existing business and thereby violating the provisions of section 80lA of the Act. Without prejudice to the above finding, existence of an undertaking is a prerequisite for claiming deduction under section 80lA of the Act. In the present case, as the term undertaking has not been defined under section 801A of the Act, reference may be made to Section 2(19AA) of the Act. A bare reading of the definition would lead to a understanding that for an activity to be called as an undertaking it has to constitute business activity. Any combination of a 'unit or division are part of an undertaking which it does not constitute a business activity cannot be treated as 'undertaking' for the purpose of the Income Tax Act. In the present case, the primary business activity of the company is chemical production, the same constitutes business activity taken as a whole (which includes power generation as the activity is closely connected). The activity of power generation by employing couple of assets for the captive use will not constitute business activity considering the dependency when it comes to consumption of raw materials (steam generated from chemical production) and the use of output (largely for

captive use). Given the inseparability of the activities, it cannot be said that power generation is a separate undertaking for the purpose of section 801A of the Act.

5.4.1 Moreover, the observation of CIT(A) in para 8 of his order has not been refuted by the assessee. it has been noted thereunder that for claiming the duty exemption on the imported steam turbine, the assessee has not declared that said steam turbine was meant for operating an independent power generation unit. On the contrary, it was mentioned that the steam turbine is for generating power for captive using chemical plant. Since power conservation happens to be the main objective of the subject activity and not power generation, the benefit of deduction under section 80lA cannot be conferred on the assessee.

5.4.2 The learned AR placed reliance on the ruling of coordinate bench in the case of Tamil Nadu Newsprint and Papers Limited vs. ACIT in ITA No.328-331/Mds/2011. We note that the assessee (in that case) was also engaged in generation of electricity. In addition to two units, which were meant for captive consumption, the assessee had three more full-fledged power units. Given the unique factual pattern it was undisputed that the assessee is eligible for claim of deduction under section 80lA of the Act and also about the existence of 'an undertaking'. The only dispute revolved around eligibility of deduction on captively consumed power units. The facts in the present case can be distinguished from

the facts referred above. The assessee, in the present case, has failed to establish that there is a separate undertaking with respect to the business activity. Similarly, the reliance placed on the ruling of Mumbai ITAT in the case of West Coast Paper Mills Limited v. JCIT reported in 100 TTJ 833, will not come to the rescue of the assessee because the appeal is with respect to allowability of deduction in case of captive generation / use of power. Said case is not dealing with existence of `an undertaking'. In other words, the learned AR has not been able to establish that there is a separate undertaking which is generating power so as to claim the benefit of section 80IA of the Act.

5.5 In the result, the claim of deduction u/s 80IA of the I.T.Act raised for assessment years 2010-2011 to 2013-2014 is rejected.

<u>Disallowance u/s 40(a)(i) of the I.T.Act (Assessment Year 2011-2012 and 2013-2014)</u>

6. For assessment year 2011-2012, the assessee had incurred a sum of Rs.14,57,964 towards foreign remittance. The details of the same are as follows:-

Sl. No.	Head	Total Amounts	TDS compliance
1.	Commission payment	6,11,057	No
2.	Legal fees	3,75,440	No
3.	Books and periodicals	4,21,450	No.
4.	Survey fees	50,017	No
Total		14,57,964	

6.1 The assessee was asked to explain why the above amounts should not be disallowed u/s 40(a)(i) of the I.T.Act for non-deduction of tax at source. It was contended by the assessee that the recipients for these payments does not have any permanent establishment in India. Therefore, it was submitted that as per the DTAA and other provisions of the Act, no TDS has been made. The Assessing Officer after quoting the provisions of section 195 of the I.T.Act, held that the payments made to the foreign party was liable for TDS and the assessee having failed to obtain a certificate for non-deduction of tax or short deduction of tax ought to have deducted tax at source. Having failed to deduct tax at source, the expenditure cannot be allowed as deduction in view of section 40(a)(i) of the I.T.Act. It was further held by the A.O. that payments are made to foreign entities for rendering technical services. As regards payment made for journal/membership/subscription, it was observed by the A.O. that expenditure was in the nature of royalty and assessee ought to have made TDS thereon.

6.2 Aggrieved, the assessee filed an appeal before the first appellate authority. The CIT(A) rejected the claim of the assessee primarily for the reason that the assessee has not furnished any information regarding the nature of services for which payments were made to the foreign parties. Consequently, these payments were treated as technical services and the CIT(A) held that the same is liable to be taxed u/s 9(1)(vii) of the I.T.Act. Accordingly, the CIT(A) confirmed the view taken by the A.O.

6.3 Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR submitted that the matter may be remanded back to the A.O. since he did not consider copies of agreement with the foreign parties (copies of certain invoices are placed at page 27 and 28 of the paper book). It was further contended that the services rendered by the foreign entity are never in the nature of technical or consultancy services and does not come within the purview of section 9(1)(vii) of the I.T.Act.

6.4 The learned DR relied on the order of the Income Tax Authorities.

6.5 We have heard rival submissions and perused the material on record. The A.O. has held that the said services (Commission payment, legal fees, survey fees, book and periodicals) rendered by commission agents are actually in the nature of technical services. Accordingly, it was held that the assessee ought to have deducted tax at source in respect of these payments. Considering that the assessee has not furnished any specific information to the contrary to substantiate that the services rendered were not in the nature of technical and consulting services, the CIT(A) upheld the order of the A.O.

6.5.1 Even before us, the assessee has not furnished any additional evidence or any explanation to controvert the finding of subordinate authorities with respect to applicability of TDS provisions. The learned AR has reiterated the

submissions made before the Income Tax Authorities. The assessee had more than three opportunities to submit detailed explanations on applicability of TDS provisions, the same has not been utilized. Mere reference to the invoices cannot lead to any inference on the actual nature of services rendered / availed. The onus was on the assessee to prove that the amount is not exigible to tax in India and therefore, there is no need to withhold taxes. Since the onus has not been discharged, we are forced to confirm the orders of the Income Tax Authorities. It is ordered accordingly.

6.5.2 In the result, the disallowance u/s 40(a)(i) of the I.T.Act, raised for assessment years 2011-2012 to 2013-2014 is rejected.

20. In the result, the appeal filed by the assessee for assessment year 2010-2011 is partly allowed and the appeals filed for assessment years 2011-2012 to 2013-2014 are dismissed.

Order pronounced on this 18th day of March, 2022.

Sd/-	**Sd/-**
(Padmavathy S)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 18th March, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-3, Bangalore.
4. The Pr.CIT-3, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore