

**IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT BENCH, VARANASI**

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA No. 113/Vns/2019
Assessment Year:1998-99

Kamakhya Fresh Foods Ltd., 45, Aamghat, Sahkari Colony, Ghazipur U.P. 233001	v.	The Deputy Commissioner of Income Tax, Circle-3, Varanasi, U.P.
PAN: AACCK 2212P		
(Appellant)		(Respondent)

Appellant by:	ShriSubhash Chand And ShriAshutoshBhardwaj, Advocate(s)
Respondent by:	Shri A.K. Singh, Sr. DR
Date of hearing:	18.04.2022
Date of pronouncement:	20.04.2022

ORDER

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, being ITA No.113/Vns/2019, is directed against an appellate order dated 19.02.2019 in Appeal No.10216/CIT(A)/VNS/2017-18 , passed by learned Commissioner of Income Tax (Appeals), Varanasi (hereinafter called "the CIT(A)") dismissing the appeal filed by the assessee, the appellate proceedings had arisen before ld. CIT(A) from the assessment order dated 01.12.2017

passed by Id. Assessing Officer(hereinafter called “the AO”) u/s. 254/143(3) of the Income-tax Act, 1961(hereinafter called “ the Act”). We have heard both the parties in Open Court through physical hearing mode. This is the third round of litigation before the Income Tax Appellate Tribunal.

2. The grounds of appeal raised by the assessee in memo of appeal filed with Income Tax Appellate Tribunal, Varanasi (hereinafter called “ the tribunal”) , reads as under :

- “1. Because the learned Assessing Officer as well as Commissioner of Income Tax (Appeals) both have erred and acted illegally in not allowing the deduction u/s. 80IB of the IT Act as it stood as on 31.3.1998.*
- 2. Because the assessment is bad on facts & in law and not maintainable.”*

3. This is the third round of litigation before the tribunal. The assessee filed its return of income with Revenue declaring loss of Rs.71,22,987/- , on 30.11.1998. The case of the assessee was selected for framing scrutiny assessment ,and eventually assessment order dated 20.03.2001 u/s. 144 of the 1961 Act was passed by the AO determining total income of the assessee at Rs.3,03,11,280/- , wherein some additions were made by the AO to the income of the assessee and also taking into account the declaration of the assessee in the computation of total income that **“No deduction on account of 80IA have been claimed due to loss during the year”**. The matter went up to tribunal ,andthe Allahabad-tribunal vide appellate order dated 17.08.2010 ,

restored the matter to the file of the AO for fresh decision on the claim of deduction u/s. 80IA filed by the assessee. The AO in the second round of litigation denied the deduction u/s. 80IA to the assessee, vide assessment order dated 12.12.2011 passed u/s. 254/143(3) of the 1961 Act , on the grounds that during set aside proceedings, the assessee could neither produce relevant books of accounts, bills and vouchers etc. nor the assessee could establish the fulfillment of mandatory four conditions cumulatively which are essential for claiming deduction u/s. 80IA of the Act. The matter again went to the tribunal in the second round of litigation , and the Allahabad-tribunal vide appellate order dated 10.3.2016 in ITA No. 98/Alld/2013 again set aside the matter to the file of the AO with following observation:

“In our view, It s incumbent on the Assessing Officer to examine the claim of the assessee whether the assessee is eligible for deduction u/s.80IA, whether the assessee has complied with all the conditions as stipulated u/s 80I/80IA. In view of this fact, in our opinion, the onus is on the assessee to adduce the evidence and material which may prove that the assessee complied with all the conditions as stipulated u/s.80IA.”

3.2 As directed by tribunal, again notices were issued by the AO u/s. 143(2) & 142(1) of the 1961 Act , in the third round of litigation, requiring assessee to produce all books of accounts and evidences /material which may justifiably prove the claim of deduction u/s 80IA of the 1961 Act. The AO also ask assessee to furnish explanation on the issue of fulfillment of essential mandatory conditions as are stipulated u/s 80IA(2) of the 1961 Act , in order to consider allowability of claim of deduction u/s 80IA of the

1961 Act. The assessee did not produce any books of account and other relevant material evidences to justify its claim of deduction u/s.80IA of the 1961 Act . The claim set up by assessee for deduction u/s 80IA of the 1961 Act was rejected by the AO , vide assessment order dated 1.12.2017 passed u/s.254/143(3) of the Act, on the grounds that despite giving ample opportunities to the assessee by the AO , the assessee does not have any documentary evidences to either support its contentions or to establish the fulfillment of essential mandatory conditions as stipulated u/s 80IA(2) of the 1961 Act, for allowing the claim of deduction u/s 80IA of the 1961 Act.

4. The assessee being aggrieved by an assessment order dated 01.12.2017 passed by the AO u/s 254 read with Section 143(3) of the 1961 Act, filed appeal before Id. CIT(A) in third round of litigation , the Id. CIT(A) called for remand report from the AO and again the appeal filed by the assessee was dismissed by Id. CIT(A) , vide appellate order dated 19.02.2019, by holding as under:

“7. I have gone through the submissions of the appellant as well as the facts of the case. Admittedly books of accounts, vouchers, details of employees, actual monthly salary paid to them and their addresses were not available/submitted. The conditions of allo ability of deduction u/s 80IA has been prescribed in sub section (2) of this section. Clause (iv) of this sub section reads as under:

(iv) in a case where the industrial undertaking manufacturing or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.”

8. It is clearly mentioned in this clause that deduction u/s 80IA shall be allowed to an industrial undertaking which fulfills the

conditions that it “employs 20 or more workers in a manufacturing process”, along with other conditions mentioned in sub section (2). Details of employees have not been submitted by the appellant either before the AO or during the course of appellate proceedings. It has merely been submitted that total salary paid to all employees is 21,91,928/-. This amount also includes staff welfare. Further the condition prescribed under clause(iv) of Section 80IA clearly mentions that 20 or more workers are employed in a manufacturing process. Admittedly, the salary has been paid to workers in a manufacturing process as well as the Office. Further there is no evidence that salary or Rs.less than 1 lac is paid to the employees by the assessee during the year under consideration. If salary of Rs.less than 1 lac is paid, only then the number of employees will be excess of 20 making the unit eligible for deduction. **However, it has been discussed above that the deduction is admissible only if 20 or more employees are employed in manufacturing process but in the present case, it is not clear how many employees are employed in the factory and office separately. Further the evidence in the form of bills and vouchers of installation of machinery has also not been produced.** Thus the condition prescribed for allowability of deduction u/s.80IA of the IT Act has not been satisfactorily explained. As directed by the Hon’ble Tribunal, the onus was on the assessee to adduce the evidence and material which may prove that assessee complied with all the conditions as stipulated u/s 80IA of the IT Act. The appellant has not been able to adduce the evidence and material in this regard either during the course of assessment proceedings or the appellate proceedings.

9. In view of these facts, I am of the opinion that the AO was correct in rejecting the claim of the assessee about deduction u/s 80IA. Accordingly, the order passed by the AO is sustained and the appeal is dismissed.”

5. Still aggrieved by the appellate order passed by Id. CIT(A), the assessee has now filed second appeal with tribunal. This is the third round of litigation before tribunal. At the time of hearing before Division Bench, the Id. Counsel for the assessee submitted that dispute in present appeal is

relating to denial of claim of deduction u/s 80IA of the 1961 Act. The Id. Counsel for the assessee submitted that there are no books of accounts, vouchers and other details etc. available with the assessee, because the record room in the office of the assessee was gutted in the fire which took place on the night of 28.03.2002 in the record room of the office of the assessee, which led to destruction of all books of accounts, vouchers and other records of the company . It was submitted that the assessee did not produce books of accounts, vouchers and other relevant details before the authorities. It was submitted by Id. Counsel for the assessee that the dispute here is whether the assessee had employed 20 or more workers in the manufacturing process, as prescribed u/s 80IA(2) of the 1961 Act. The copy of letter dated 30.03.2002 written by assessee to SHO, Thana(Police Station)Gahmar, , Ghazipur , intimating about the fire taking place in the night of 28.03.2002 in the record room of the office is enclosed and filed in paper book filed by assessee at page number 1 . The said paper book is placed on record in file. It was submitted that the assessee is not in a position to submit any details whatsoever in view of the above fire which destroyed all its records including books of accounts, vouchers etc . . It was submitted that there is no evidence available to prove that twenty or more than twenty workers were employed in a manufacturing process, to satisfy condition u/s 80IA(2) of the 1961 Act. It was also submitted that there were DRT proceedings against the company and OTS were entered into by assessee with the bankers to settle their dues ,as there was default in payment of loans availed by assessee from the banks.

5.2 The ld. Ld. Sr. DR, on the other hand , submitted that Fire took place on 28.3.2002 , while the assessment order was framed in the first round of litigation, much earlier on 20.3.2001. The assessee could not produce the detail before the AO as to compliance of mandatory conditions as are stipulated u/s 80IA(2), and hence deduction u/s.80IA was not allowed by the authorities below . It was submitted that tribunal restored the matter back to the file of AO and even in the second round of litigation, the assessee could not produce any details or evidence to justify/substantiate that mandatory conditions as are stipulated u/s 80IA(2) were met, It was submitted that onus is on the assessee to discharge as to the compliances of the conditions prescribed u/s80IA.

6. We have considered rival contentions and perused the material available on record. We have observed that this is the third round of litigation before tribunal. The whole dispute centers around the allowability of claim of the assessee of deduction u/s 80IA of the 1961 Act, which stood rejected by the authorities below. The assessee filed its return of income with Revenue declaring loss of Rs.71,22,987/- , on 30.11.1998. The case of the assessee was selected for framing scrutiny assessment and in the first round of litigation assessment was framed by AO u/s. 144 of the Act vide assessment order , dated 20.03.2001 and the income of the assessee was assessed Rs. 3,03,11,280/- wherein the AO made certain additions to the income of the assessee, while also taking into account the declaration of the assessee in the computation of total income that **“No deduction on account of 80IA have been claimed**

due to loss during the year”. The matter went up to tribunal , and the Allahabad-tribunal vide appellate order dated 17.08.2010 , restored the matter to the file of the AO for fresh decision on the claim of deduction u/s. 80IA filed by the assessee . The AO in the second round of litigation denied the deduction u/s. 80IA to the assessee, vide assessment order dated 12.12.2011 passed u/s. 254/143(3) of the 1961 Act , on the grounds that during set aside proceedings, the assessee could neither produce relevant books of accounts, bills and vouchers etc. nor the assessee could establish the fulfillment of mandatory four conditions cumulatively which are essential for claiming deduction u/s. 80IA of the Act. The matter again went to the tribunal in the second round of litigation , and the Allahabad-tribunal vide appellate order dated 10.3.2016 in ITA No. 98/Alld/2013 again set aside the matter to the file of the AO with the following observation:

“In our view, It s incumbent on the Assessing Officer to examine the claim of the assessee whether the assessee is eligible for deduction u/s.80IA, whether the assessee has complied with all the conditions as stipulated u/s 80I/80IA. In view of this fact, in our opinion, the onus is on the assessee to adduce the evidence and material which may prove that the assessee complied with all the conditions as stipulated u/s.80IA.”

As directed by tribunal, again notices were issued by the AO u/s. 143(2) & 142(1) of the 1961 Act , in the third round of litigation, requiring assessee to produce all books of accounts and evidences /material which may justifiably prove the claim of deduction u/s 80IA of the 1961 Act. The AO also ask assessee to furnish explanation on the issue of fulfillment of

essential mandatory conditions as are stipulated u/s 80IA(2) of the 1961 Act , in order to consider allowability of claim of deduction u/s 80IA of the 1961 Act. The assessee did not produce any books of account and another relevant material evidences to justify its claim of deduction u/s.80IA of the 1961 Act . The claim set up by assessee for deduction u/s 80IA of the 1961 Act was rejected by the AO , vide assessment order dated 1.12.2017 passed u/s.254/143(3) of the Act, on the grounds that despite giving ample opportunities to the assessee by the AO , the assessee does not have any documentary evidences to either support its contentions or to establish the fulfillment of essential mandatory conditions as stipulated u/s 80IA(2) of the 1961 Act, for allowing the claim of deduction u/s 80IA of the 1961 Act. The assessee being aggrieved by an assessment order dated 01.12.2017 passed by the AO u/s 254 read with Section 143(3) of the 1961 Act, filed appeal before Id. CIT(A) in third round of litigation , the Id. CIT(A) called for remand report from the AO and again the first appeal filed by the assessee was dismissed by Id. CIT(A) in third round of litigation ,vide appellate order dated 19.02.2019, by holding as under:

“7. I have gone through the submissions of the appellant as well as the facts of the case. Admittedly books of accounts, vouchers, details of employees, actual monthly salary paid to them and their addresses were not available/submitted. The conditions of allo ability of deduction u/s 80IA has been prescribed in sub section (2) of this section. Clause (iv) of this sub section reads as under:

(iv) in a case where the industrial undertaking manufacturing or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.”

8. It is clearly mentioned in this clause that deduction u/s 80IA shall be allowed to an industrial undertaking which fulfills the conditions that it “employs 20 or more workers in a manufacturing process”, along with other conditions mentioned in sub section (2). Details of employees have not been submitted by the appellant either before the AO or during the course of appellate proceedings. It has merely been submitted that total salary paid to all employees is 21,91,928/-. This amount also includes staff welfare. Further the condition prescribed under clause(iv) of Section 80IA clearly mentions that 20 or more workers are employed in a manufacturing process. Admittedly, the salary has been paid to workers in a manufacturing process as well as the Office. Further there is no evidence that salary or Rs. less than 1 lac is paid to the employees by the assessee during the year under consideration. If salary of Rs. less than 1 lac is paid, only then the number of employees will be excess of 20 making the unit eligible for deduction. **However, it has been discussed above that the deduction is admissible only if 20 or more employees are employed in manufacturing process but in the present case, it is not clear how many employees are employed in the factory and office separately. Further the evidence in the form of bills and vouchers of installation of machinery has also not been produced.** Thus the condition prescribed for allowability of deduction u/s.80IA of the IT Act has not been satisfactorily explained. As directed by the Hon’ble Tribunal, the onus was on the assessee to adduce the evidence and material which may prove that assessee complied with all the conditions as stipulated u/s 80IA of the IT Act. The appellant has not been able to adduce the evidence and material in this regard either during the course of assessment proceedings or the appellate proceedings.

9. In view of these facts, I am of the opinion that the AO was correct in rejecting the claim of the assessee about deduction u/s 80IA. Accordingly, the order passed by the AO is sustained and the appeal is dismissed.”

Thus, it could be seen that Id. CIT(A) denied the benefit of deduction u/s 80IA to the assessee, as the assessee could not produce evidences to justify that it met the statutory conditions as are stipulated u/s 80IA(2) of the 1961 Act before claim of deduction u/s 80IA of the 1961 Act could be allowed to the assessee, firstly that the assessee could not produce evidence to substantiate that it has employed twenty or more worker in the manufacturing process , while secondly , the assessee failed to produce evidence to substantiate the installation of machinery. Even before us ,no evidence to substantiate the employability of twenty or more workers in the manufacturing process , during the year under consideration , has been produced. Similarly , no evidence is produced to substantiate about the installation of plant and machinery during the year under consideration , has been produced even before us . The only plea the assessee is taking is as to the fire which took place on the night of 28.03.2002 which gutted its record room in the office , wherein claim is made that all records, vouchers and books of accounts etc. stood destroyed in the said fire . The assessee has produced one letter dated 30.03.2002 written to SHO , Thana(Police Station)Gahmar, Ghazipur, U.P., wherein it intimated Police about the fire taking place in its record room of the office on the night of 28.03.2002. Be that it may be , the assessee is claiming deduction u/s 80IA of the 1961 Act and hence onus is on the assessee to prove that it has complied with the mandatory conditions as are stipulated u/s 80IA of the 1961 Act, before any deduction can be allowed to the assessee. This is the third round of litigation and the assessee is not able to produce any evidence to justify its claim of deduction u/s 80IA of the 1961 Act. The Id. Sr. DR has rightly

stated that even when assessment order was passed by the AO in the first round of litigation , on 20.03.2001 , which was prior to the fire taking place on 28.03.2002, the assessee could not produce any evidences to substantiate that it met the conditions as are prescribed u/s 80IA of the 1961. The assessee could neither demonstrate as of now, that it has employed during the year under consideration ,twenty or more workers in the manufacturing process , nor it could demonstrate as to the installation of plant and machinery during the year under consideration. The exemption/deduction provisions in the taxing statute are to be strictly construed. Reference is drawn to the **Judgment and order of Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Customs(Imports) v. Dilip Kumar and Company , reported in (2018) 95 taxmann.com 327(SC) , and judgment and order of Hon'ble Supreme Court in the case of Ramnath and Co. v. CIT, reported in (2020) 116 taxmann.com 885(SC)**, wherein it has been held that exemption provisions in taxing statute are to be strictly construed and any ambiguity in the provision is to be held in favour of Revenue. Section 80IA of the 1961 Act is also a exemption/deduction provision which allow deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, and hence is to be strictly construed wherein the taxpayer has to cumulatively satisfy all the stipulated conditions .Section 80IA(2) provides conditions to be fulfilled by newly set up industrial undertaking, inter-alia, such as it should not be formed by splitting up or reconstruction , of a business already in existence ; that it is not formed by the transfer to a new business of machinery or

plant previously used for any purposes; that it manufactures or produces any article or thing, not being any article or thing, specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants , in any part of India; then there are conditions as to the period when the newly set up industrial undertaking shall begins to manufacture or produce articles or things or to operate such plant or plants; that in case the industrial undertaking manufactures or produce articles or things, the undertaking employs , ten or more workers in a manufacturing process carried on with the aid of power , or employs twenty or more workers in a manufacturing process carried on without the aid of power. Thus , the assessee has to cumulatively meet all the stipulated conditions u/s 80IA before any deduction can be allowed, and the onus is on the assessee to demonstrate that it complies with all the stipulated conditions , as it is the assessee who is claiming deduction u/s 80IA from the profits and gains of business. The exemption provisions are to be strictly construed. Even if we accept that books of accounts, vouchers etc. were destroyed in a fire, firstly the assessment order in first round was passed prior to the date of fire , and secondly even if primary evidences are not available, the assessee could have collected secondary evidences to demonstrate its bona-fide In case of installation of plant and machinery during the year under consideration , such as report(s) submitted to Directorate of Industries (DIC), or report submitted under MSME Act, report to Service tax department, report to Excise department etc. indicating installation of plant and machinery , trial runs and commencement of production, reports from machinery suppliers , electricity departments etc. could have been brought on record, to

justify/substantiate its stand . Similarly, for employment of twenty or more worker in manufacturing process, reports/returns submitted under ESI/PF, TDS, or to any other government agencies specifying number/name etc of worker employed ,or payment of wages by bank etc. could have been procured as secondary evidence to justify employability of twenty or more workers in manufacturing process. Despite three round of litigation , the assessee is not able to justify/substantiate the meeting of conditions for claiming deduction u/s 80IA of the 1961 Act. Thus, presumption has to be drawn against the assessee, and we hold that the assessee is not entitled/eligible for deduction u/s 80IA of the 1961 Act as it has failed to meet the conditions cumulatively as are stipulated u/s 80IA(2), and this appeal filed by assessee lacks merit and is dismissed. We order accordingly.

7. In the result, the appeal filed by the assessee in ITA no.113/Vns/2019 for assessment year 1998-99 is dismissed.

Order pronounced on 20.04.2022 at Varanasi, U.P.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER
DATED: 20/04/2022

Sd/-
[RAMIT KOCHAR]
ACCOUNTANT MEMBER

Aks/-

Copy forwarded to:

1. Appellant –Kamakhya Fresh Foods Ltd., 45, Aamghat, Sahkari Colony, Ghazipur, U.P.
2. Respondent–DCIT, Circle-3, Varanasi
3. The Sr. DR, ITAT, Varanasi, U.P.
4. The CIT, Varanasi

Sr. Private Secretary