

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.1568/Mum/2019 to 1570/Mum/2019  
(Assessment Years :2005-06 to 2007-08)**

M/s. Tata Petrodyne Limited 5 <sup>th</sup> Floor, Metropolitan Bandra Kurla Complex Bandra East Mumbai – 400 051	Vs.	The Addl. Commissioner of Income Tax, 2(3) Room No.555, Aayakar Bhavan Mumbai – 400 020
<b>PAN/GIR No.AAACT0090N</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Kaushik Bhatia
Revenue by	Shri Murali Mohan
<b>Date of Hearing</b>	<b>13/06/2022</b>
<b>Date of Pronouncement</b>	<b>29/06/2022</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

These appeals in ITA Nos.1568/Mum/2019 to 1570/Mum/2019 for A.Yrs.2005-06 to 2007-08 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-6, Mumbai in appeal No.CIT(A)-6/IT-126/2009-10 dated 01/09/2010 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/12/2007 by the Id. Addl. Commissioner of Income Tax 2(3), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in all these appeals, hence, they are taken up together and disposed of by this common order for the sake of convenience.

2. At the outset we find that there is a delay in filing of appeal of around eight years by the assessee. The assessee has filed complete chronology of events in the affidavit together with the delay condonation petition explaining the reasons for delay. We find that assessee had claimed deduction u/s.80IB(9) of the Act treating each well as an undertaking which was not accepted by the Id.AO in the assessment order passed u/s.143(3) of the Act. Aggrieved, the assessee preferred an appeal before the Id. CIT(A). When the appeal was pending before the Id. CIT(A), the Finance (No. 2) Act 2009 was substituted in Section 80IB(9) of the Act with retrospective effect from 01/04/2000 defining the term undertaking to mean all blocks licensed under a single contract. Accordingly, the assessee fairly withdrew its claim of deduction u/s.80IB(9) of the Act before the Id. CIT(A). Later on, the Hon'ble Gujarat High Court struck down the substituted provisions of Section 80IB(9) of the Act in the decision rendered in the case of Niko Resources Ltd., vs. Union of India Ltd., reported in 374 ITR 369 holding that a substantive law cannot be given retrospective operation. Accordingly, the assessee preferred an application to Central Board of Direct Taxes (CBDT) u/s.119(2)(b) of the Act for claiming deduction u/s.80IB(9) of the Act treating each well as an independent undertaking for the purpose of condonation of delay. This application was rejected by CBDT vide order dated 07/12/2018 which was received by the assessee on 20/12/2018. Thereafter the assessee had filed appeals before this Tribunal after exhausting its alternative remedies. We find that assessee was pursuing alternative remedy in the instant case and hence, the same constitutes

reasonable cause for delay in filing of appeals before us. Even otherwise we find on merits the very same issue has been set aside to the file of the Id. AO in subsequent assessment years by this Tribunal to decide based on the final outcome of the decision of the Hon'ble Supreme Court in the case of Niko Resources Ltd., vs. Union of India. Those subsequent years' matters are pending before the Id. AO and the Id. AO is awaiting the decision of the Hon'ble Supreme Court. Hence, in the interest of substantial justice and to maintain consistency in the views taken by this Tribunal on the subject mentioned issue on merits, we deem it fit to condone the delay in filing of appeals before us and admit the appeals of the assessee for the purpose of adjudication.

3. The only issue to be decided in these appeals is as to whether the assessee is entitled for deduction u/s.80IB(9) of the Act by treating each well as a separate undertaking pursuant to the judgement of the Hon'ble Gujarat High Court in the case of Niko Resources Ltd., vs. Union of India reported in 374 ITR 369. We find that this issue was subject matter of adjudication by this Tribunal in assessee's own case for A.Yrs. 2008-09 and 2009-10 reported in (2018) 68 ITR (Trib.) 38(Mum) dated 28/09/2018 wherein the entire facts together with the decision rendered by the Hon'ble Gujarat High Court in the case of Niko Resources Ltd., referred to supra and the Special Leave Petition of the Revenue being admitted before the Hon'ble Supreme Court against the said decision are narrated in detail. The relevant operative portion of the said judgement are reproduced hereunder:-

*“8. The next issue which arises for consideration relates to assessee's claim of deduction under [section 80IB\(9\)](#) of the Act.*

9. As discussed earlier, the assessee is engaged in the business of prospecting, exploration and production of mineral oil and natural gas. For the assessment year under dispute, the assessee filed its return of income claiming deduction of ₹ 16,95,29,150 under [section 80IB\(9\)](#) of the Act. During the assessment proceedings, when the Assessing Officer called upon the assessee to explain why deduction claimed under [section 80IB\(9\)](#) of the Act should not be disallowed, the assessee vide letter dated 20th October 2010, made elaborate submissions justifying its entitlement / eligibility for claiming deduction under [section 80IB\(9\)](#) of the Act. It was submitted, the assessee is a member of a consortium which has entered into a contract with the Government of India to extract petroleum in Cauvery Off-shore area. It was submitted, as per the production sharing contract (PSC), the assessee was authorised to extract petroleum products from two blocks i.e., Laxmi Field and Gauri Field. It was submitted that as per the Petroleum Tax Code, 1997, PSC participant who begins commercial production of petroleum and natural gas in certain specified States shall be entitled to claim a deduction of 100% of their profits derived from production of petroleum and natural gas from any field in those States for initial five years commencing from the first year of commercial production in such field. It was submitted, in terms of the said provision, the assessee has claimed deduction under [section 80IB\(9\)](#) of the Act in respect of each oil well in the block by considering each oil well as an independent undertaking. It was submitted, the provisions of [section 80IB\(9\)](#) of the Act was amended by [Finance \(No.2\) Act, 2009](#), with retrospective effect from 1st April 2000, by inserting an Explanation which stated that all blocks licensed under a single contract shall be treated as a single undertaking. Thus, as per the amended provision of [section 80IB\(9\)](#) of the Act, the two blocks under the control of the assessee are to be treated as two undertaking for the purpose of deduction under [section 80IB\(9\)](#) of the Act. It was submitted by the assessee, going by the aforesaid provision of considering each block as an independent undertaking, assessee's claim of deduction under [section 80IB\(9\)](#) of the Act would not be allowable, since, the exemption period of seven year for claiming deduction under [section 80IB\(9\)](#) of the Act in respect of CY- OS-90/1 Block expired prior to assessment year 2005-06 and in respect of CB-OS/2 Block the company incurred a loss during the impugned assessment year. The Assessing Officer after considering the submissions of the assessee observed that similar deduction claimed by the assessee in the preceding assessment years were not allowed and the first appellate authority's decision in allowing assessee's claim was not accepted by the Department in assessment year 2005-06, 2006-07 and 2007-08. Accordingly, he disallowed assessee's claim of deduction under [section 80IB\(9\)](#) of the Act. The assessee did not challenge the aforesaid decision of the Assessing Officer in the appeal filed before the learned Commissioner of Income- tax. Subsequently, on the basis of a decision of the Hon'ble Gujarat High Court in *Niko Resources Ltd. v/s Union of India*, 374 ITR 369 (Guj.), wherein, the Hon'ble Gujarat High Court struck down Explanation to [section 80IB\(9\)](#) of the Act as violative of [Article-14](#) of the Constitution of India, the assessee has raised the issue of deduction under [section 80IB\(9\)](#) of the Act before us through additional grounds.

10. The learned Authorised Representative relying upon the decision of the Hon'ble Gujarat High Court in *Niko Resources Ltd.* (*supra*) submitted, since Explanation-1 to [section 80IB\(9\)](#) of the Act has been struck down as ultra-virus, the assessee is entitled to claim deduction under [section 80IB\(9\)](#) of the Act in respect of each oil well by treating them as independent undertaking.

11. The learned Departmental Representative opposing the aforesaid contention of the learned A.R. submitted that while admitting Department's Special Leave Petition against the judgment of Hon'ble Gujarat High Court in *Gujarat State Petroleum Corporation* on identical issue, the Hon'ble Supreme Court has directed the High Courts not to dispose off appeals pending before them on identical issue till the issue is dealt with by the Hon'ble Supreme Court. Thus, he submitted, in view of the aforesaid decision of the Hon'ble Supreme Court the issue cannot be decided in favour of the assessee.

12. In rejoinder, the learned Authorised Representative submitted, the direction of the Hon'ble Supreme Court is confined to disposal of appeals by the High Courts, hence, not applicable to the Tribunal.

13. We have considered rival submissions and perused materials on record in the context of provision contained under [section 80IB\(9\)](#) of the Act. At the outset, it needs to be observed, the activity of prospecting, exploration and production of mineral oil and natural gas undertaken by the assessee, whether satisfies the eligibility conditions of [section 80IB\(9\)](#) of the Act, stands concluded in favour of the assessee by the decisions of the Tribunal as well as the Hon'ble Jurisdictional High Court in assessee's own case for the assessment years 2005-06 to 2007-08 by holding that the activities undertaken by the assessee qualifies for deduction under [section 80IB\(9\)](#) of the Act. Thus, assessee's eligibility to claim deduction under [section 80IB\(9\)](#) of the Act is no more justiciable. However, the larger issue before us is, whether assessee's claim of deduction under [section 80IB\(9\)](#) of the Act in respect of each well by treating them as independent undertaking is allowable qua the provision of [section 80IB\(9\)](#) r/w the Explanation therein. Undisputedly, the assessee all along had claimed deduction under [section 80IB\(9\)](#) of the Act by treating each oil well as an independent undertaking. However, the provision of [section 80IB\(9\)](#) of the Act was amended by [Finance Act, 2009](#) with retrospective effect from 1st April 2000 by inserting an Explanation which provided that for the purpose of computing deduction under the said provision all blocks licensed under a single contract shall be treated as a single undertaking. Thus, by virtue of Explanation to [section 80IB\(9\)](#) of the Act, claiming deduction by treating each oil well as a single undertaking was done away with. The aforesaid factual and legal position has not been disputed by the assessee which is evident from the submissions made by the assessee before the Assessing Officer. In fact, because of insertion of explanation to [section 80IB\(9\)](#) of the Act, the assessee never raised the issue of claim of deduction under [section 80IB\(9\)](#) of the Act in the appeal filed before the learned Commissioner (Appeals). Thus, the

*Departmental Authorities never had the occasion to examine assessee's claim of deduction vis-a-vis the ratio laid down by the Hon'ble Gujarat High Court in Niko Resources Ltd, which in any case of the matter was delivered after disposal of appeal by learned Commissioner (Appeals). Moreover, the aforesaid decision of the Hon'ble Gujarat High Court has been challenged by the Department, before the Hon'ble Supreme Court and while admitting the SLP of the Department the Hon'ble Supreme Court has passed the following order:-*

*"O R D E R  
Delay condoned.*

*Issue notices on the special leave petitions as also on the prayer for interim relief returnable after 10 weeks.*

*Mr. Shashibhushan P. Adgaonkar, Ms. Abha R. Sharma and Ms. Bindi Girish Dave, learned counsel, have entered appearance on behalf of the respondents. No further notice need to be issued to them.*

*Counter affidavit, if any, be filed within six weeks. Rejoinder affidavit, if any, be filed within four weeks therefrom.*

*List the matters after ten weeks. The prayer for interim relief shall be considered on the next date of hearing.*

*As we are entertaining the matter, the High Court(s) where the appeals are pending shall not finalise the same till the matter is dealt with by this Court."*

*14. As could be seen from the aforesaid order, the Hon'ble Supreme Court has directed the High Courts not to finalise the pending appeals on similar issue till the issue is decided by the Hon'ble Supreme Court. Thus, on overall consideration of facts and material on record, we are of the considered opinion, the issue relating to assessee's claim of deduction under [section 80IB\(9\)](#) of the Act as raised in the additional grounds has to be restored to the Assessing Officer for fresh adjudication for the following reasons. Firstly; as stated earlier, due to amendment of [section 80IB\(9\)](#) of the Act by insertion of Explanation, the assessee gave up its claim of deduction under [section 80IB\(9\)](#) of the Act by not raising the issue before the first appellate authority. Only after the judgment of the Hon'ble Gujarat High Court in Niko Resources Ltd. (supra), the assessee at this stage has filed additional grounds claiming deduction under [section 80IB\(10\)](#) of the Act. Since, the issue was neither*

*raised by the assessee before the Departmental Authorities nor the judgment of the Hon'ble Gujarat High Court (supra) was available before them, in all fairness, the issue has to be examined by the Assessing Officer. Secondly, though, it may be a fact that the Hon'ble Gujarat High Court in Niko Resources Ltd. (supra) has struck down Explanation to section 80IB(9) of the Act by declaring it as ultra virus of Article-14 of the Constitution of India, however, it cannot be ignored that no decision of the Hon'ble Supreme Court or the Hon'ble Jurisdictional High Court on the issue is available. Moreover, the Tribunal being a creature of the statute is not competent to examine or decide the constitutional validity/vires of a provision contained in the statute. Had it been a decision of the Hon'ble Supreme Court or the Hon'ble Jurisdictional High Court, the Tribunal would have been bound by the law declared therein. However, the legal position is different when the decision declaring a provision in the statute as ultra vires is by a non-jurisdiction High Court, whose decision is not binding but has persuasive value. In this context we may refer to the following decisions:-*

*i) Comptroller of Estate Duty v/s Shri Ashok Kumar M. Parikh, [1990-] 186 ITR 212 (Bom.); and*

*ii) Taylor Investment Co. (India) Ltd. v/s CIT, [1998] 232 ITR 771.*

*15. Moreover, it is not disputed that the aforesaid decision of the Hon'ble Gujarat High Court has been challenged by the Department before the Hon'ble Supreme Court and the Hon'ble Supreme Court has directed all High Courts not to decide the pending appeals on identical issue till the issue is decided by them. Though, the aforesaid direction of the Hon'ble Supreme Court is to the High Courts, however in our view, as a matter of propriety neither the Tribunal nor the Departmental Authorities should also decide the issue either in favour or against the assessee, but, should wait for the decision of the Hon'ble Supreme Court on the issue. In the aforesaid fact situation, there are two courses open to us, i.e., either to keep the appeal pending till the issue is decided by the Hon'ble Supreme Court or to restore the issue to the Assessing Officer for deciding it by applying the law to be laid down by the Hon'ble Supreme Court on the issue. Considering the fact that the assessee has raised the issue by way of additional grounds which were never raised before the first appellate authority and further, the issue relating to assessee's claim of deduction under section 14A of the Act is restored to the Assessing Officer, we are inclined to restore the issue relating to assessee's claim of deduction under section 80IB(9) of the Act to the Assessing Officer for deciding afresh by applying the ratio to be laid down by the Hon'ble Supreme Court in the appeal pending before them on identical issue as referred to above. Needless to mention, the Assessing Officer before deciding the issue must afford reasonable opportunity of being heard to the assessee. Additional grounds are allowed for statistical purposes.*

*16. In the result, assessee's appeal is allowed for statistical purposes.*

3.1. Accordingly, we deem it fit and appropriate to restore this issue to the file of the Id. AO to decide this issue based on the final outcome of the Hon'ble Supreme Court as directed in the aforesaid Tribunal order. Accordingly, the grounds raised by the assessee are allowed for statistical purposes.

**4. In the result, all the appeals of the assessee are allowed for statistical purposes.**

Order pronounced on 29/06/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(RAHUL CHAUDHARY)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 29/06/2022  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai