

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.867/Mum/2014

(निर्धारण वर्ष / Assessment Years: 2008-09)

M/s. Savita Oil Technologies Ltd. 66/67, Nariman Bhavan, Nariman Point, Mumbai- 400021.	बनाम/ Vs.	DCIT, Central Circle-47 Aayakar Bhavan, M. K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACS7934A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Hiro Rai
Revenue by:	Shri Sanjeev Kashyap

सुनवाई की तारीख / Date of Hearing: 26/05/2022

घोषणा की तारीख /Date of Pronouncement: 24/06/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax(A)-38, Mumbai dated 21.11.2013 for the assessment year 2008-09.

2. At the outset, the Ld. AR of the assessee brought to our notice that the following grounds raised by the assessee is neither being pressed nor does they survive for the reasons given therein as under: -

“(i) Ground.4- Disallowance u/s 14A

In view of order giving effect to CIT(A) order and order u/s 154, not pressed qua balance disallowance of Rs.7,74,722/-

(ii) Ground No. 5 Disallowance as capital expenditure

Since depreciation (Ground No.6) allowed, not pressed.

(iii) Ground No. 6 – Allowance of depreciation

In order u/s 154, AO has allowed depreciation. Hence, does not survive.



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

(iv) Ground No.7- Disallowance of expenses in respect of house property

Allowed in order giving effect to CIT(A) order. Hence, does not survive.

(v) Ground no. 8- Disallowances

Allowed in order giving effect to CIT(A) order. Hence, does not survive.

(vi) Ground No. 9- Long term capital loss

In order u/s 154, AO has allowed. Hence, does not survive.”

3. In the light of the aforesaid written letter of the Ld. Counsel Shri Hiro Rai and since there is no objection from the Department, the aforesaid grounds stand dismissed for the reasons given therein (supra). And the additional ground raised regarding allowability of deduction for payment of education cess having not been argued during the hearing stands dismissed. Therefore, now there are effectively three grounds of appeal remaining for our adjudication and the first ground of the appeal of the assessee reads as under: -

“1 (a) The learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of the Appellant's claim for deduction u/s 80-IA of Rs. 10,47,04,329/-

(b) He failed to appreciate that in the assessment for A.Y. 1998-99 \ deduction under section 80-IA was not allowed to the Appellant on the ground that the eligible undertaking (Silvassa Unit) had not commenced production and that the said assessment is final.

(c) He failed to appreciate that the first year when the claim u/s 80-IA was allowed is A.Y. 1999-2000.



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

(d) The learned Commissioner of Income Tax (Appeals) failed to appreciate that the decision of the CIT(A) in the order dated 25/09/2006 was in the context of allowability of the deduction u/s 80-IA for the A.Y. 1999-2000 as the first year of deduction u/s 80-IA for the Silvassa Unit.

(e) The learned Commissioner of Income Tax (Appeals) erred in holding that the contention of the Appellant that the production relating to A.Y. 1998-99 was only trial production has not been established or proved. He failed to appreciate that that was the finding of the learned Assessing Officer in the assessment order for A.Y. 1998-99.”

4. Ground no. 1 is against the action of Ld. CIT(A) confirming the action of AO disallowing its claim of deduction u/s 80IA of the Income Tax Act, 1961 (hereinafter “the Act”) for its unit at Silvassa on the ground that AY 2008-09 is the eleventh (11th) year of such a claim, whereas according to assessee AY 2008-09 is the tenth (10th) year of claim u/s 80IA of the Act and therefore it is a legitimate claim.

5. Brief facts is that the assessee company made a claim of deduction u/s 80IA of the Act to the tune of Rs.10,46,24,128 (revised to Rs.10,47,04,329) in respect of its industrial unit at Silvassa for the previous year (AY 2008-09) which according to it being the 10 year reckoned from the assessment year 1999-2000, being the initial assessment year when it started commercial production. However, the AO rejected the claim made u/s 80IA of the Act for this year by holding that the AY. 2008-09 was the eleventh year of production of this unit. The AO based his decision on the following facts: (i) That



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

subsequent to the passing of order u/s 143(3) for the assessment year 1998-99 on 30-10-2000, there was search action taken against the assessee company on 16.01.2001 and as a consequence, Block Assessment was made covering the period from 1-4-1990 to 16-01-2001. And resultantly, in the proceedings u/s 158BC for the Block Period, the assessee company's claim of deduction u/s 80IA of Rs.68,97,310 for assessment year 1999-2000 was rejected by the AO on the ground that " *there was no commercial production made in that year and for that reason he held the assessee was not entitled to claim deduction u/s 80-IA for that year*". And the AO noted that against such a decision of AO in Block assessment, the assessee company preferred an appeal before Ld. CIT(A) [i.e, against the rejection of its claim u/s 80-IA for that year, i.e. A.Y 1999-2000] and the assessee company before Ld CIT(A) not only claimed that there was production during assessment year 1999-2000, but there was production even during the assessment year 1998-99 and produced before the Ld. CIT(A) the relevant excise records, etc to support such a claim. And the Ld. CIT(A) recorded all these submissions of assessee company in his Appellate order and concluded by giving remarking "*It is clear that production took place. The Assessing Officer is therefore, directed to allow deduction as claimed*" (bear in mind that the deduction claimed by assessee before Ld CIT(A) was for AY. 1999-2000). And the present AO notes that consequently, the CIT(A)'s order was given effect to and the claim u/s 80IA of the assessee for the assessment year 1999-2000 was allowed/restored. [*In this context, it may be borne in mind*



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

that for the Assessment year 1998-99 wherein assessee didn't claim deduction u/s 80IA of the Act, no action regarding allowance/disallowance of claim of deduction u/s 80IA of the Act was made in respect of Silvassa Unit by Block assessment order/appellate order of Ld. CIT(A).] However, the present AO on the basis of the arguments advanced before the CIT(A) in the appeal against the Block assessment order u/s 158BC for Assessment Year 1999-2000, held in the present assessment order that since the assessee company itself had admitted that there was production in the assessment year 1998-99, and since the CIT(A) has also taken note of the same in her order dated 25.09.2006, the present AO held that the Assessment year 1998-99 was the 1st year of commercial production of this unit (Silvassa) and in such a back-drop ten (10) years has to be reckoned from AY 1998-99 and consequently the assessment Year 2007-08 would be the 10th year and therefore he has accordingly dismissed the claim of deduction u/s 80-IA for the Assessment Year 2008-09 holding the said year as the 11th year of production.

(ii) Coming to disallowance of deduction of Rs.2,86,23,835/- u/s 80-IA of the Act in respect of 4 wind mills, the AO was of the opinion that the assessee has made wrong claim of deduction u/s 80-IA of the Act in respect of these wind mills units to evade payment of legitimate tax. Therefore, the claim of the assessee was disallowed and the amount claimed was consequently added back to income. The main reason for AO to disallow this claim was that the assessee has ignored to take into consideration the losses incurred in these units in the earlier years. As



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

per the AO if the losses of the earlier years in these Wind mills are taken into consideration while working the profit of these units as required as per Section 80-IA(5) of the Act , there would have been losses only in each of the windmill units and so, he disallowed the deduction claimed by the assessee.

6. Aggrieved by the aforesaid action of the AO, disallowing the claim of deduction u/s 80IA of the Act for Silvassa unit & four (4) windmills, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same by passing the impugned order. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

7. Assailing the action of the Ld. CIT(A) in confirming the action of the AO, the Ld. Counsel of assessee Shri Hiro Rai brought to our notice, the relevant facts which are necessary to understand the issue before us. He drew our attention to assessment order where the AO has discussed this issue from page 2, para 1 to page 13. The Ld. Counsel reminded us that the deduction u/s 80IA was available for a period of 10 years for the eligible unit commencing from the year in which manufacture or production commenced. The Ld. Counsel pointed out that AO has erroneously taken the view that the appellant had commenced production in this Unit at Silvassa in the AY 1998-99. Accordingly, he held that the year under appeal, ie AY 2008-09 being the 11th year, the deduction u/s 80IA is not available to the appellant. And the Ld. CIT(Appeals) has confirmed the erroneous view of the AO.



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

8. According to Ld. Counsel, in order to rightly appreciate the issue in hand it is very important to consider what happened in the AY 1998-99 (*which according to present AO is the first year*). It was brought to our notice that for the AY 1998-99, the appellant had claimed depreciation in respect of this Unit (Silvassa); and brought to our notice that deduction u/s 80IA of the Act had not been claimed by the assessee in respect of this Silvassa Unit. It was pointed out to us by the Ld. Counsel that in the original assessment order passed by the AO for the AY 1998-99, the then AO had held that the appellant had not commenced production in the said year and had further held that if at all, there had only been trial run. Accordingly, the AO in the original assessment u/s 143(3) of the Act for AY 1998-99 did not even allow the assessee's claim for depreciation. So according to Ld. Counsel, in such a factual back ground the question of deduction u/s 80IA for the said year (AY. 1998-99) even arose and so the present AO/Ld CIT(A) erred in treating AY 1998-99 as the First year regarding claim of deduction u/s 80IB of the Act. In this context, he drew our attention to pages 7 to 9 of the Paper Book which contain the relevant findings of the AO in the original assessment u/s 143(3) for the AY 1998-99 and referred to page 9, wherein the AO had relied upon the decision of the Hon'ble Bombay High Court had held that trial production does not amount to manufacture for the purposes of Chapter VIA deductions. And the Ld. Counsel pointed out that this assessment order for AY 1998-99 had become final and there is no change in respect of it even as of today. It was also brought to our notice that the appellant had not



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

filed any appeal against these findings of AO in the assessment order and thus the disallowance of the claim for depreciation still remains as it is.

9. The Ld. Counsel thereafter brought to our notice that the deduction u/s 80IA of the Act in respect of the Silvassa Unit was claimed for the first time in the AY 1999-2000. To buttress this fact, the Ld. Counsel drew our attention to the computation of income for the said AY 1999-2000 which is found enclosed at pages 23 and 24 of the Paper Book. At page 24, 100% of Rs. 68,97,310/- the assessee had claimed as deduction u/s 80IA in respect of the Silvassa Unit. The working is found at page 29 of the Paper Book. According to Ld. Counsel in the assessment order for AY 1999-2000, after excluding certain items from the said claim, the said deduction u/s 80IA of the Act was allowed by the AO to the appellant. For proving that fact, he drew our attention to page 37 of the Paper Book which is the relevant portion of the assessment order for the AY 1999-2000. Further, he drew our attention to the fact that the deduction u/s 80IA was available at the rate of 100% for the first 5 years and at 30% for the balance 5 years. The Ld. Counsel also brought to our notice that in the case of the appellant, the commercial production had commenced in the AY 1999-2000 and the 5th year from this year would be AY 2003-04. And therefore, it can be seen that in respect of the assessment for the AY 2003-04, the deduction u/s 80IA in respect of this Silvassa Unit was allowed at 100%. The Ld. Counsel also drew our attention to page 102 of the Paper Book which is the relevant portion of the order for the



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

AY 2003-04 and contended before us that if the first year were the AY 1998-99 as is being stated by the present AO, then the deduction u/s 80IA for the AY 2003-04 would have been at the rate of 30% and not 100%. According to Ld. Counsel, this order of AO for the AY 2003-04 is also final on this issue even as of today i.e. 5th year (100% deduction). Further, it was brought to our notice that thereafter it can be seen from assessment order for the AY 2004-05, (it being the 6th year) the deduction u/s 80IA was allowed by AO @ 30%. (Refer page 91 of the Paper Book). This order also according to Ld. Counsel is final. Further, even in the immediately preceding year, ie AY 2007-08, the assessment order specifically records that this is the 9th year of the claim for deduction u/s 80IA in respect of the Silvassa Unit and for that he drew our attention specifically to page 106 of the Paper Book, at para 3 in this regard, which has been passed on 29-12-2009 and submitted that the said order also became final.

10. In the light of all the above facts according to Ld. Counsel, it is clear that no deduction u/s 80IA of the Act was neither claimed by assessee nor allowed for AY. 1998-99 and even depreciation was not allowed for AY.1998-99. And all along, AY 1999-00 was treated as the 1st year and AY 2003-04 was treated as the 5th year and AY 2004-05 was treated as the 6th year, AY 2007-08 was treated as the 9th year, and therefore the Ld. Counsel wondered as to how the present AO, could have ignored all the aforesaid facts and take the view that the year under appeal (AY. 2008-09) is the 11th year? In this context, he placed reliance upon the decision of the Hon'ble Bombay High Court



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

in CIT v Paul Brothers 216 ITR 548. The Ld. Counsel brought to our notice the facts in that case wherein the assessee had made claim for deduction u/s 80HH and 80J of the Act which was allowed for AY 1980-81 and this became final. Thereafter, the claim was allowed for the next 2 years, which was later sought to be revised u/s 263 by Ld. PCIT and the Hon'ble Bombay High Court holding in favour of assessee observed as under at page 551, 4th para as follows:

“Either in section 80HH or in section 80J, there is no provision for withdrawal of special deduction for the subsequent years for breach of certain conditions. Hence unless the relief granted for the assessment year 1980-81 was withdrawn, the Income tax Officer could not have withheld the relief for the subsequent years.”

11. According to the Ld. Counsel, the same view has been reiterated in CIT v Western Outdoor Interactive P Ltd [349 ITR 309] (Bom), and in CIT v Arts and Crafts Exports 246 CTR 463(Bom). Further, reliance was placed upon the principle of consistency. In this regard, it was submitted that having taken a consistent view right from AY 1999-2000 and onwards as has been brought out above, the present AO could not have turned around and say that AY 1998-99 is the first year of manufacture/production. In this regard, reliance was placed upon the decision of the Hon'ble Supreme Court in Godrej and Boyce Mfg Co. Ltd 394 ITR 449. At page 451, wherein the Hon'ble Supreme Court has held as under:

“While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, there is need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out.”



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

12. Thereafter, the Ld. Counsel drew our attention to the reason attributed by the AO to hold that first year of manufacture of Silvassa Unit was AY. 1998-99 and not as claimed by the assessee as AY. 1999-2000. According to him, the AO had mis-directed himself by the event of search which took place in the case of the appellant on 16-1-2001 and consequent framing of the Block assessment order dated 28-2-2003, wherein the AO had held that the appellant had not commenced production even in the year subsequent to AY 1998-99, ie AY 1999-2000. He accordingly held that the said deduction u/s 80IA was not available even for the said AY 1999-2000 and took our attention to the query at page 42 of the Paper Book and his conclusion at page 46 of the Paper Book. However, it was pointed out to us that the appellant filed an appeal before the Ld CIT(Appeals) challenging the disallowance of the claim u/s 80IA for the AY 1999-00 in respect of the Silvassa Unit and the Ld CIT(Appeals), in his order dt. 5-9-2006, allowed this claim of the appellant. However, in the assessment order for the year under appeal, ie AY 2008-09, at page 10, the present AO has quoted and relied upon this order of the learned CIT(Appeals) wherein the Ld. CIT(A) by his above order held that the production was commenced by the assessee prior to 1st April, 1999. According to Ld. Counsel, the present AO got misled by the observation of Ld. CIT(A)'s order in the First Appellate Block assessment order because in that appeal, the Ld. CIT(A) was considering the action of AO's disallowance of the deduction u/s 80IA for the AY 1999-2000. The Ld. CIT(A)'s observation that production commenced prior to 1st April,



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

1999 meant that by 31st March, 1999 [which was the last day of the previous year relevant to AY 1999-2000] the assessee company was all set to begin commercial production of its products from Silvassa Unit and the AO in the original assessment order for AY.1998-99 while denying the claim of depreciation has disallowed it by stating that assessee had only carried out trial-run at Silvassa Unit which action of AO is final and not disturbed even in Block Assessment. Therefore, the Ld. CIT(A) accordingly, held in the Appellate Block assessment order that the deduction u/s 80IA was allowable to the assessee for the AY 1999-2000 and that the order of the learned CIT(Appeals) on this point i.e. the assessee's claim of deduction u/s 80IA of the Act for the Silvassa Unit for AY 1999-2000 has become final. According to Ld. Counsel by no stretch of imagination can this observation of Ld. CIT(A) be taken to mean that the assessee had commenced production during the AY 1998-99. The Ld. Counsel pointed out that the finality of the assessment order for the AY 1998-99 was in no way affected in any manner by this appellate order in block assessment, which fact can be seen from the order giving effect to the order of the learned CIT(Appeals), and that only the deduction u/s 80IA has been allowed for the AY 1999-2000 and drew our attention to order placed at page 74 of the Paper Book and thus it was pointed out that the findings in the assessment order for the AY 1998-99 have become final and reminded us that even the claim for depreciation had not been allowed in the said order and that the deduction u/s 80IA had neither been claimed nor allowed for the said



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

AY 1998-99. According to Ld. Counsel, the position in law is very clear that for the purposes of Chapter VIA deductions, it is the commercial production and not trial-run/production which will determine the first year of the allowance of the claim. In this regard, he drew our attention to the decision of the Hon'ble Bombay High Court in, CIT v Hindustan Antibiotics Ltd., 93 ITR 548. Therefore, it was submitted by the Ld. Counsel that the present AO and learned CIT(Appeals) were unjustified in taking the view that the AY 2008-09 was the 11th year and accordingly, the claim for deduction u/s 80IA was not available. Therefore, according to Ld. Counsel, from the aforesaid facts discussed, this (AY. 2008-09) is the 10th year of commercial production and the deduction u/s 80IA is clearly allowable and we may allow it.

13. Per contra, the Ld. DR relying on the order of the Ld. CIT(A) contended that since the A.Y.2008-09 is the 11th year, the AO had rightly did not allow the claim of deduction u/s 80IA of the Act which has been confirmed by the Ld. CIT(A) which action of the Ld. CIT(A) does not require any interference from our sides.

14. We have heard both the parties and perused the records. As noted (supra), the Ld. Counsel Mr. Hiro Rai has pain-stakingly took us through the various pages of the assessment orders as well as paper book to show that the assessee had rightly claimed the disallowance u/s 80IA of the Act for A.Y.2008-09 since it was the 10th consecutive year of making such a claim from AY 1999-2000. Whereas the present AO/Ld. CIT(A) is of the opinion that this is the eleventh (11th) year,



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

since production started in AY 1998-99. So we need to see whether the claim of deduction u/s 80IA of the Act for Silvaso unit was allowed for which assessment year first. For that let us see whether the view of the present AO that first year of such a claim was for AY 1998-99, since according to him in this AY 1998-99 assessee had started its production/manufacturing at Silvasa unit. The Ld. Counsel for the assessee had taken us through the assessment order for A.Y.1998-99 which is seen placed at page no. 7 of the paper book wherein we note that the AO while framing the assessment order for the A.Y.1998-99 has admitted in the same that the assessee had only claimed depreciation and did not claim deduction u/s 80IA of the Act. From a perusal of the assessment order (for A.Y.1998-99), the AO while denying the depreciation claimed by the assessee had observed, *“Thereafter certain batches of processed oil were blended on trial basis.....”* And also the AO has observed *“Thus, when the commissioning of various, items was in progress at the plant (Silvassa) till 28.03.1998, it is beyond comprehension that assessee could commercially operate the plant before 31.03.21998. Even if the assessee operated the Plant before 31.03.1998 and sold the proceeds, that can be only towards trial run”*. Thereafter, the AO after taking note of the product/productions/sales figures in a chart observes *“thus it is evident that till April, 1998, there was no commercial production which does not qualify for revenue deduction/expenditure. The commercial production could commence from May 1998. In view of*



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

the facts discussed above, it is evident that during the current year, the assessee only carried trial run.”

15. And thus it can be seen on the basis of the aforesaid facts the AO did not even allow the claim for depreciation wherein he clearly made a finding of fact that in AY 1998-99 the assessee had started only trial run of production. So at this juncture one has to keep in mind that the Hon'ble Jurisdictional High Court in the case of Hindustan Antibiotic Ltd. (supra) held that it is the commercial production and not trial production which will determine the first year of allowance of claim of deduction under Chapter VIA of the Act. So on the aforesaid factual finding of AO and the assessee having not claimed for its Silvassa Unit deduction u/s 80IA of the Act the question of allowing the same doesn't arise. Further, it was also brought to our notice that the assessee for A.Y.1998-99 had claimed deduction u/s 80IA of the Act in respect of profits of its new unit (Thane) which was allowed @ to the tune of Rs.2,93,63,428/- which we note from perusal of the assessment order dated 30.10.1999 for A.Y.1998-99. Thus, we find that the assessee had neither claimed deduction u/s 80IA of the Act nor was allowed such a deduction in respect of its Silvassa Unit for A.Y. 1998-99 and the AO/Ld. CIT(A) erred in presuming so on the basis of mere observations of Ld. CIT(A)'s appellate order in respect of the block assessment order wherein the AO [in block assessment] had disallowed deduction for AY 1999-2000.



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

16. It was brought to our notice by the Ld. Counsel for the assessee that assessee had claimed for the first time deduction u/s 80IA of the Act for deduction for a Silvassa Unit in AY. 1999-2000 which is evident from perusal of the page no. 23 of the paper book wherein statement of income for A.Y.1999-2000 is found placed and we note that the assessee claimed deduction u/s 80IA of the Act @ 100% deduction of Rs.68,97,310/-, which was allowed by the AO. The Ld. AR drew our attention to the page no. 37 of the paper book wherein we note that the AO had allowed the claim of deduction u/s 80IA of the Act to the tune of Rs.68,97,310/- as well as 30% in respect of Thane Unit of Rs.6,22,90,263/- total of Rs.25,584,389/-. Thus we note that the assessee had claimed for the first time deduction for A.Y.1999-2000 for Silvassa Unit which was allowed at 100%. Therefore, this was the first year of assessee claim for deduction u/s 80IA of the Act for its Silvassa Unit and was allowed by the AO.

17. Moreover, we note that as per Section 80IA of the Act, for the first five years, the assessee was entitled to claim 100% deduction and for the rest of the five years, the assessee can claim deduction only 30% of the profits from the eligible unit. Thus since the assessee's first year of claim was in A.Y.1999-2000, the assessee got upto A.Y.2003-04 (five years from AY.1999-2000) 100% deduction (refer page no. 102 of the P.B) and thereafter the assessee received only 30% deduction from AY. 2004-05 (refer page no. 91 of the P.B) deduction u/s 80IA of the Act for Silvassa Unit was granted by the AO at 30% to the tune of Rs.48,31,672/-. And for A.Y.2007-08 i.e. 9th year, the



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

assessee received 30% deduction which is evident from the page 106 of the paper book. Thus from the aforesaid discussion, we find that 10th consecutive year as per the assessment years framed by AO's as referred to (supra) is A.Y.2008-09, since the first year of deduction u/s 80IA of the Act in respect of profits for Silvassa Unit was for A.Y.1999-2000 and ten (10) year has to be reckoned from that year, so AY 2008-09 is the tenth year and therefore, the AO erred in holding that the assessee is not entitled for deduction u/s 80IA of the Act because AY 2008-09 is the 11th years.

18. Therefore, in the aforesaid facts and circumstance, we find that the AO had erred in denying the claim of deduction u/s 80IA of the Act for A.Y.2008-09 and likewise the Ld. CIT(A) also erred in denying the claim of the assessee. Therefore, we are inclined to allow the claim of the assessee u/s 80IA of the Act and direct the AO to allow the claim. Ground no. 1 is allowed.

19. Coming to the ground no. 2 which reads as under: -

“2. (a) The learned Commissioner of Income Tax (Appeals) erred in confirming the reallocation of various expenses on turnover basis (as against on actual basis and partly on turnover basis) and thereby confirming the recomputation of the profits of the eligible unit at Silvassa at the reduced amount of Rs. 11,63,85,209/-.

(b) The learned Commissioner of Income Tax (Appeals) failed to appreciate that profit and loss account alongwith detailed working showing the basis of allocation of various expenses were on record and that it was on the same basis as accepted in the earlier years.



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

The learned Assessing Officer be directed to accept the computation of profits of the eligible unit at Silvassa as made by the Appellant and allow the deduction of Rs. 10,47,04,329/- u/s 80-IA.”

20. The brief facts of the case as noted by the Ld. CIT(A) is as under: -

“14.0 In ground No.4, the appellant contested the action of the Assessing Officer in working out the profits & gains of the eligible Silvassa Unit by wrongly allocating the expenses on the basis of turnover. It is stated in the assessment order that the assessee company carried on different businesses such as manufacturing of lubricants, oil etc. at the two units namely Thane (Non-80IA Unit) and Silvassa (80IA Unit), the other business is generation of power by Windmills at different locations. The A.O noted that the unit-wise analysis of expenditure revealed that the assessee claimed disproportionate expenses in non-80IA unit. The A.O further noted that the assessee failed to substantiate the actual allocation basis with necessary supporting evidences. Therefore, in order to arrive at the correct profits of all the units, the turnover was considered as the basis and all the expenses were debited to Profit & Loss Account which has the character of common / head office expenses were apportioned between the two units namely Silvassa and Thane units in proportion to their respective turnover. The additional expenditure apportioned to the Silvassa Unit was worked out at Rs.20,83,19,965/- and after reducing the same from the profit declared as per Profit & Loss Account of Rs.32,47,05,174/-, the eligible profits of the Silvassa Unit for deduction u/s.80IA were worked out at Rs.11,63,85,209/-. Accordingly, the A.O held that the eligible deduction u/s.80IA of the Act, if any, allowable to the assessee should have been



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

Rs.3,49,15,562/- (30% of Rs.11,63,85,209/-) as against the claim of Rs. 10,46,24,128/-. However, since the entire claim for deduction u/s.80IA of the Act was disallowed, no separate addition was made by the A.O on this issue.”

21. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same, aggrieved by the action of Ld. CIT(A), the assessee is before us.

22. Assailing the action of the Ld. CIT(A) in reducing the deduction u/s 80IA of the Act in respect of Silvassa Unit by allocating the expenses, the Ld. AR brought to our notice that the AO apart from disallowing the claim for deduction u/s 80IA of the Act, the AO has taken the view that, even if the said claim were allowable, it would be of a much lesser amount. According to the AO, the assessee has allocated lesser expenses to the Silvassa Unit, so as to increase the profits of the said Unit, so as to claim a higher deduction u/s 80IA of the Act. The Ld. Counsel drew our attention to the AO’s discussion on this issue at page 24, para 4 to page 27 of the assessment order to show that the AO has allocated further expenses of over Rs. 20 crores to this Unit and accordingly, reduced the profits therefrom. In this regard, it was submitted by the Ld. Counsel that on this issue the relevant pages are page 115 to 142 of the Paper Book. He also drew our attention to page 27 of the assessment order, wherein computation of the total expenses were seen to be recorded at Rs.9,645.84 crores. Out of which, as per the assessee Rs.5,237.93 crores pertained to the non-80IA Thane Unit and Rs.4,264.70 crores pertained to the 80IA Unit at



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

Silvassa. According to Ld. Counsel, it is worth noting that these figures expenses works to 54.3% for the Thane Unit and 44% to the Silvassa Unit. According to him, these are in line with the turnovers of the respective Units at 55% and 45% respectively. According to him, it was unfortunate that, despite such detailed submissions and evidences furnished before him, the CIT(Appeals) has passed cryptic order at (page 21) and has merely upheld the assessment order without considering the detailed submissions and evidences furnished before him. Therefore, according to him, the learned CIT(Appeals) was unjustified to uphold the erroneous action of AO. According to Ld. Counsel, the claim made by the assessee was correct and so it was justified; and the claim was based on meticulous records and evidences maintained despite submissions of all details before both authorities and they erred in reducing the profits on wrong assumption of facts and therefore the same deserves to be interfered with and the claim of assessee be allowed.

23. Per contra, the Ld. DR relied on the order of the Ld. CIT(A) and the AO and submitted that the assessee had booked more expenses for the non-eligible unit (Thane) and thus the profits of the eligible unit (Silvassa Unit) increased and therefore the AO had no other alternative but to reallocate the expenses proportionally as per the turnover which does not require any interference from our side.

24. We have heard both the parties and perused the records. We note from a perusal of page no. 115 of the paper book that it was brought to the notice of AO as well as CIT(A) all relevant information



ITA No.867/Mum/2014

A.Y. 2008-09

Savita Oil Technologies Ltd.

regarding the expenses respectively of eligible Silvassa Unit and the expenses relating to Thane (non-eligible unit). It was brought to their notices that the units at Thane and Silvassa Unit had thereon employees who were engaged directly by the respective units for the manufacturing and production of the products at their respective units. It was brought to the notice of AO/Ld. CIT(A) that payment of salaries and other allowances of such employees were made directly by the respective units and to prove that fact copies of the respective units salary/wage register and records pertaining to each unit separately were furnished. And drew our attention to the muster roll placed at page no. 121 to 126 of the paper book of the employees/workers at Silvassa Unit. It was brought to our notice that other expenses of these units are recorded in their respective accounts maintained for the same. It was also pointed out to us that there were certain common expenses for both units which are incurred by the head office such as marketing, legal, finances, administration, purchases etc. And these expenses (common expenses) including the salaries of the personnel who were engaged for the aforesaid said common jobs were allocated expenses proportionately as per the respective units turnover; and drew our attention to the fact that the Thane factory has 160 employee whereas Silvassa plant had only 55 numbers of employees and this was one of the reason why salary disbursement/expenses in respect of Thane factory was more. It was also brought to our notice that the Thane Plant (refer page no. 120 of the P.B.) mainly caters for lubes production and speciality production for export market. Whereas the



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

Silvassa Plant mainly caters to speciality products for local market. It was brought to our notice that lube production process is more complex when compared to speciality production. Lubes also requires large packing material and hence more direct labour is involved in lube production in Thane than at Silvassa. It was also brought to our notice that the Silvassa is a new plant compared to Thane plant and was more automatised. Hence staff and worker's strength is lesser at Silvassa unit and therefore salary expenses to the staff and workers are low at Silvassa compared to the factory at Thane because Thane is a bigger city and is more close to Mumbai and have regular staff who are more experienced and working there from earlier years. Therefore, the salary disbursement is more in respect of Thane unit than at Silvassa unit. Thus, it was brought to our notice that the salary allocated to Thane is more than Rs.184 crores (more) which fact can be seen to be justified in the aforesaid facts and the AO erred in allocating salary on an average 44.8%. The Ld. Counsel drew our attention to page no. 119 of the paper book which shows the salary allocation to the various Plants. The Ld. Counsel brought to our notice that the direct salary paid to Thane is Rs.5,25,43,987/- and Silvassa was Rs.80,96,808/-. It was brought to our notice that the common expenses (legal, finance, admin and material etc) was to the tune of Rs.14,62,37,41/- of which 55.93% was allocated to Silvassa unit to the tune of Rs.11,14,04,04/- [which is 42.61%]. And lubes marketing cost allocated to the Thane unit was to the tune of Rs.19,68,63,59/- which was 90.92% of the turnover and for Silvasa the amount disbursed was Rs.19,66,788/- which was only



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

9.08% of the turnover. Thus it was shown by the Ld. AR that the allocation was based on turnover of the lubes sales of respective plants. Thus, on the aforesaid facts and circumstances discussed (supra) we note that the AO was wrong to observe that the expenses were allocated more to the non-eligible unit at Thane and expenses were lesser allocated to the eligible unit (Silvassa Unit) which occasioned the AO to allocate more expenses to Silvassa Unit. We note that the total expenses were to the tune of Rs.9,645.84 crores out of which Rs.5,237.93 crores pertained to the non 80IA Unit (Thane) and Rs.4,264.70 crores pertained to the 80IA Unit at Silvassa. Thus, it is seen that the expenses incurred by the assessee for Thane unit was 54.3% and 44% to the Silvassa Unit. Therefore, we are of the considered opinion that the AO erred in re-allocating the expenses and thus reducing the 80IA of the Act profits shown for the unit at Silvassa. Therefore, on the facts and circumstances we direct the AO to accept the computation of profit of the eligible unit at Silvassa as made by assessee and allow deduction accordingly.

25. Coming to the ground no. 3 which reads as under: -

“3 (a) The learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of the claim of deduction u/s 80-IA of Rs.2,86,23,835/in respect of windmills installed at different locations.

(b) He failed to appreciate that the provisions of section 80-IA(5) would apply to the losses pertaining to the first year of the claim (initial assessment year)and thereafter and not to the losses of earlier years when the appellant had not made claim for deduction in pursuance to the option available u/s 80-IA(2).



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

The learned Assessing Officer be directed to allow deduction u/s 80-IA of Rs. 2,86,23,835/- in respect of the windmills installed at different locations.”

26. The facts on this issue as noted by Ld. CIT(A) is as under: -

“The second ground of appeal pertains to the disallowance of deduction u/s.80IA(4)(iv) of the Act amounting to Rs.2,86,23,835/-. It is stated in the assessment order that the assessee claimed the deduction u/s.80IA(4)(iv) of the Act in respect of the windmills installed at different locations namely Satara, Gojegaon-1 & 2 and Karnataka-1 @ 100% amounting to Rs.2,86,23,835/-. The A.O noted that the assessee claimed deduction u/s.80IA(4)(iv) of the Act in respect of the four units separately in the year under consideration irrespective of the losses incurred by the units earlier from its inception and the profit from these Windmill Units cannot be worked out by the assessee independent of its year-wise working for profit & loss. The A.O further noted that the assessee availed the depreciation benefits for Windmills in initial years and 2008-09 after the costs were depreciated, the assessee started claiming benefit u/s.80IA of the Act for 100% deduction on eligible profits, ignoring the losses in earlier years due to the claim of depreciation in those units while working out the eligible profits. During the assessment proceedings, the assessee was required to provide the year-wise statement of the profit & loss account of each windmill (in respect of four windmills for which the deduction u/s.80IA was claimed during the year) as per Companies Act and as per the Income Tax Act after taking into consideration the losses incurred by the Windmill Units.

8.1 According to the A.O., the assessee only submitted that the working of the claim u/s.80IA was correctly made and calls for no interference. The assessee was further required during the assessment



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

proceedings to prepare a-chart of the depreciation for -the four windmill units year to year from the year of its installation and the chart submitted by the assessee was as under:

Statement of Profit & Loss of Windmill as per Income Tax Act for AYrs . 1999-2000 to 2007-08				
Profit & Loss of the Business	Satara	Gojegaon I	Gojegaon II	Karnataka I
AY1999-2000	2,34,62,178	-	-	-
AY 2000-01	2,04,33,632		-	-
AY 2001-02	28,73,740		-	-
AY 2002-03	31,78,374			-
AY 2003-04	27,01,028			2,60,09,457
AY 2004-05	44,66,778			14,01,946
AY 2005-06	97,13,411			30,58,036
AY 2006-07	31,42,413			39,40,745
AY 2007-08	48,37,540			65,70,954
Total	1,23,82,526	6,79,35,578	1,78,57,104	1,38,41,668

6. 2 In view of the above, A.O noted that there were brought forward losses at the beginning of the previous year and the assessee did not consider the same while working out the eligible profits for the year. Accordingly, the A.O worked out the eligible profits as under:

Profit & Loss of the Business				
Unit	Satara	Gojegaon I	Gojegaon II	Karnataka I
Brought forward losses as on 01.04.2007	1,29,82,526	6,79,35,578	1,78,57,104	1,38,41,668
Profit for the Previous Year as per assessee's working in return	38,18,192	1,58,17,126	47,45,725	42,42,793
Eligible profits for the year	91,64,334	5,21,18,452	1,31,11,379	95,98,875

8.3 In view of the above, the AO held that there were no eligible profits to claim deduction u/s 80IA of the Act in respect of the four windmill units. Accordingly, the AO disallowed the claim of deduction u/s 80IA(4)(iv) of the Act amounting to Rs.2,86,23,835/-." "



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

27. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same. Aggrieved by the action of Ld. CIT(A), the assessee is before us.

28. Assailing the action of the AO in disallowing deduction u/s 80IA of the Act in respect of four (4) Windmill Units, the Ld. Counsel pointed out that the AO has erred in disallowing the same by taking note of irrelevant facts of the earlier years. According to him, the AO took note of the losses in earlier years which, though have been set off against other incomes have to be carried forward and set off before arriving at the profits from the said windmill units in the current year. The AO for doing so has relied upon the Section 80IA(5) of the Act for this purpose and held that since there are no profits remaining after set off of unabsorbed losses, the deduction is not available. According to the Ld. Counsel, the Ld. CIT(A) have erroneously confirmed the view of the AO. It is contended by the Ld. Counsel that this is a covered issue and brought to our notice that as per Section 80IA(2) of the Act, an assessee can choose to claim the deduction for any ten (10) consecutive years out of the first 15 years of the commencement of the undertaking. To understand this contention, he gave an illustration. He submitted that suppose an assessee starts making the claim from the year nos. 6 to 15. According to him, the provisions of Section 80IA(5) of the Act would apply only to the losses pertaining to year no. 6 onwards and will not apply to the losses incurred in the year nos. 1 to



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

5. This was exactly the claim of the assessee. According to him, the CBDT Circular 01 of 2016 dated 15.02.2016 reported in 381 ITR 01 (statute) wherein the CBDT has clarified the term “initial assessment year” in Section 80IA(5) of the Act (Relevant portion only) which reads as under: -

“.....In the above sub-section, which prescribes the manner of determining the quantum of deduction, a reference has been made to the term ‘initial assessment year’. It has been represented that some Assessing Officers are interpreting the term ‘initial assessment year’ as the year in which the eligible business/ manufacturing activity had commenced and are considering such first year of commencement/operation etc. Itself as the first year for granting deduction, ignoring the clear mandate provided under sub-section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.

The matter has been examined by the Board. It is abundantly clear from sub-section (2) that an assessee who is eligible to claim deduction u/s 80IA has the option to choose the initial/ first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-section.....”

29. Further, according to Ld. AR, the Mumbai Tribunal’s decision on this issue is in consonance with the aforesaid proposition given by CBDT (supra) Therefore, he wants us to delete the addition of Rs.2,86,23,835/- which was erroneously made by the AO which has been confirmed by the CIT(A).



ITA No.867/Mum/2014

A.Y. 2008-09

Savita Oil Technologies Ltd.

30. Per contra, the Ld. DR relied on the order of the Ld. CIT(A) and the AO and submitted that when the losses are set off as per Section 80IA(5) of the Act, the four(4) windmills would no longer have profits, so no deduction u/s 80IA of the Act was available. So the AO and CIT(A) has rightly disallowed the claim of deduction. And therefore, he does not want us to interfere with the order of the Ld. CIT(A).

31. We have heard both the parties and perused the records. We note that the issue raised by assessee is against the order of the Ld. CIT(A) confirming the action of the AO denying the deduction u/s 80IA of the Act in respect of four (4) windmills by invoking the provisions of Section 80IA(5) of the Act. The assessee claimed deduction u/s 80IA of the Act on the profits earned by it for the business of generation of power by setting up of windmills. It was brought to the notice of the AO that the windmill depreciation u/s 80IA was claimed from A.Y.2007-08 and therefore it was pointed out that the provisions of Section 80IA(5) of the Act will apply from A.Y.2008-09 which is immediate subsequent year from the initial assessment year and it was also pointed out that in respect of Karnataka Windmill-1, A.Y.2008-09 was the initial assessment year and it was also brought to our notice that there was no unabsorbed loss carried forward from A.Y.2007-08 which could have been the basis for adjustment against the profit for A.Y.2008-09 and subsequent years; and there was no unabsorbed loss in the A.Y.2007-08 which could have been called for adjustment against profits of the A.Y.2008-09



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

which is the relevant year under consideration. So, according to assessee the AO/CIT(A) erred in their impugned action. This assertion of fact regarding losses being not carried forward for the initial year of claim u/s 80IA of the Act could not be controverted by the Ld. DR for the revenue and when such is the fact, according to us the AO has erred in holding that there was no profits to claim u/s 80IA of the Act for four (4) Windmill Units and the AO as well as Ld. CIT(A) erred in applying Section 80IA(5) of the Act. For that, we rely on the decision of the Hon'ble jurisdictional High Court (Bom) in the case of CIT Vs. Hercules Hoists Ltd, order dated 14.06.2017 Income Tax Appeal No. 707 of 2014 wherein the Hon'ble High Court held as under: -

“7. It is not disputed that the respondent assessee is entitled for deduction of the profits and gains as contemplated u/s 801A. It is also not disputed that the assessee is entitled for deduction of the profits and gains for the period of 10 consecutive years beginning with initial assessment year. It is further not disputed that the initial assessment year of the assessee's unit is 2009-10, though it started functioning from the year 2005-06. The losses of the years 2005-06 to 2008-09 were absorbed during the relevant years and no losses were carried forward. The only question of debate before the Tribunal was whether the profit earned during the Assessment Year 2009-10 would be entitled for deduction under Section 80IA(5) of the Act without deducting the losses, which were absorbed in the earlier years.

8. The said issue is now no longer res-integra in view of the judgment of the Madras High Court in a case of Velayudhaswamy Spinning Mills P Ltd. & Sudan Spinning Mills (P). Ltd. (supra), the Court observed as under:



*ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.*

“From a reading of the above, it is clear that the eligible business were the only source of income, during the previous year’ relevant to the initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off has taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. A fiction created in subsection does not contemplates to bring set off amount notionally. The fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.”

9. The said judgment of the Madras High Court has been confirmed by the Apex Court, as such has attained finality. Even in the assessee's own case for the previous year, the losses were set off in the relevant years. The Revenue had challenged the said action before this Court in Income Tax Appeal No.2485 of 2013 and it was held that the said action is legal and proper. The said judgment is also upheld by the Apex Court.

10. Considering the above, we do not find any error committed by the Tribunal in allowing the deduction of the profit u/s 80IB(S) of the Act without deducting the losses of the earlier years.

11. In the light of the above, the present appeal is bereft of any substantial question of law. As such, the appeal is dismissed. No costs.”



ITA No.867/Mum/2014
A.Y. 2008-09
Savita Oil Technologies Ltd.

32. In the light of the aforesaid decision of the Hon'ble Jurisdictional High Court since the earlier year losses of the windmills were absorbed during those years and no losses were carried forward, for the initial year, the AO/Ld. CIT(A) erred in denying the claim. Therefore, we hold that the profits earned during the A.Y.2008-09 from the four (4) windmills would be entitled for deduction and the AO is directed to allow it as per law.

33. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 24/06/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 24/06/2022.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai