IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI, M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.7609/Mum/2019
(**Assessment Year :2008-09**)
&
ITA No.7643/Mum/2019
(**Assessment Year :2009-10**)

Dy. Commissioner of Income Tax, Central Circle 1(4) Mumbai Old CGO Building (Annexe) M.K.Road Mumbai – 400 020	Vs.	M/s. Grasim Industries Limited (Successor to Aditya Birla Nuvo Ltd) Aditya Birla Centre A-Wing, S.K.Ahire Marg Worli, Mumbai-400 030
PAN/GIR No.AAACI1747H		
(Appellant)	..	**(Respondent**)

ITA No.7640/Mum/2019
(**Assessment Year :2008-09**)

ITA No.7641/Mum/2019
(**Assessment Year :2009-10**)
&
ITA No.7642/Mum/2019
(**Assessment Year :2010-11**)

M/s. Grasim Industries Ltd. (Successor of Aditya Birla Nuvo Ltd.) Aditya Birla Centre A-Wing, S.K.Ahire Marg Worli, Mumbai-400 030	Vs.	Dy. Commissioner of Income Tax, Central Circle 1(4) Mumbai Old CGO Building (Annexe) M.K.Road Mumbai – 400 020
PAN/GIR No.AAACI1747H		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Yogesh Thar & Ms. Ayushi Modani
Revenue by	Shri Rajnish Yadav
Date of Hearing	**04/01/2023**
Date of Pronouncement	**10/01/2023**

आदेश / O R D E R

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

These cross appeals in ITA Nos. 7609/Mum/2019 & 7640/Mum/2019 for A.Y.2008-09 and cross appeals in ITA Nos. 7643/Mum/2019 & 7641/Mum/2019 for A.Y. 2009-10 & appeal in ITA 7642/Mum/2019 for A.Y. 2010-11 respectively arise out of the order by the ld. Commissioner of Income Tax (Appeals)-3, Mumbai in appeal No.CIT(A)-3/IT-10659/2017-18, CIT(A)-3/IT-10698/2017-18 & CIT(A)-3/IT-10812/2017-18 respectively dated 02/07/2015 (ld. CIT(A) in short) against the order of assessment passed u/s.143 (3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 05/06/2015 by the ld. DCIT (LTU)-1, Mumbai (hereinafter referred to as ld. AO).

With the consent of both the parties, the cross appeals for the A.Y.2008-09 is taken up for adjudication as the lead case and decision rendered thereon shall apply with equal force for A.Yrs. 2009-10 and 2010-11 also except with variance in figures.

2. The first identical issue to be decided is as to whether the ld. CIT(A) was justified in upholding the action of the ld. AO in assuming jurisdiction for reopening the assessment u/s.147 of the Act in the facts

and circumstances of the instant case. The interconnected issue involved thereon on merits is as to whether the ld. CIT(A) was justified in deleting the addition made on account of CENVAT credit and consequently reduction in claim of deduction u/s.80IA of the Act in the sum of Rs.2,17,27,798/- in the facts and circumstances of the instant case.

3. We have heard the rival submissions and perused the materials available on record. The return of income for A.Y.2008-09 was filed by the assessee company on 30/09/2008 declaring total income of Rs.182,39,78,434/-. In the return of income, the assessee claimed deduction u/s.80IA of the Act of Rs.37,73,46,886/- in respect of captive power plant units. The assessment was completed u/s.143(3) of the Act on 22/03/2010 determining total income of the assessee at Rs.226,91,32,020/-. In the said assessment, the following additions / disallowances were made:-

(a)	Addition on account of CENVAT credit accounted on net basis and not included in the value of stock in terms of Section 145A of the Act.	-Rs.12,40,25,900/-
(b)	Allocation of Head Office Expenses of the 80IA unit thereby reducing the claim of deduction u/s.80IA of the Act	-Rs.26,64,162/-

3.1. Apart from the above, certain other additions were also made by the ld. AO in the regular assessment completed u/s.143(3) of the Act. This assessment was sought to be reopened by the ld AO vide issue of notice u/s.148 of the Act on 26/03/2015 after recording the following reasons:-

"The return of income in this case (M/s Aditya Birla Nuvo Ltd.) was filed on 30.09.2008 declaring total income of Rs. 182,39,78,434/-. Subsequently, the return was assessed u/s 143(3) wherein the income in assessed at Rs. 226,91,32,020/-

It is seen that the assessee company is claiming deductions U/s 80IA(4) in respect to their Captive Power Gummidipondi. The is incurring expenses on consumption of raw Plants (CCP's) at Veraval and material and other services in direct relation to these Captive Power Plants. The perusal of book entries in respect of expenditure shows that the assessee is booking net of such expenses in P&L account i.e. without including the component of expenses on account of excise/ Cenvat/ Service Tax etc, which is included in these expense invoices. So the net of material / service expense is debited to P&L account and the component of statutory duties/taxes are separately credited directly to "Cenvat Receivable account", without passing them through P&L account.

As per legal provisions of section 80IA(5) the eligible unit has to be looked upon / viewed as standalone unit and in computing the eligible deduction U/s 801A, and all the business expenses including (cess and duties) incurred by these units have to be set-off or reduced from the relevant year business turnover of the respective unit. It is a mandatory provision of the Act for allowing the deduction U/S 801A and accordingly all the direct expenses related to these units have to be reduced in order to arrive at correct and true profits of the units eligible for deduction U/s 801A.

In order to obtain the quantum of excess deduction claimed by the assessee company, notice(s) U/s 133(6) were issued (after taking due approval of CIT-LTU, Mumbai), calling for the information of such CENVAT element as is attributable to the consumption of raw material and other services in direct relation to these captive Power Plants (CPP's). As per the details so gathered it is seen that am amount of Rs 6,15,92,898/- was not included in purchase / cost expenses debited in P&L a/c of these CPP's, and accordingly I have reasons to believe that the assessee company has claimed an excess deduction U/s 80IA(4) to the extent of Rs.6,15,92,898/-. Therefore, there is a reason to believe within the meaning of section 147 of the Income Tax Act, 1961 that the income chargeable to tax, to the extent of Rs. 6,15,92,898/- has escaped assessment, and subsequently come to notice of the undersigned. The fault for the this escapement lies on the part of the assessee, in the sense that Assessee company has failed to disclose true particulars of the deduction claimed u/s 801A.

As there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, I have a reason to believe that income chargeable to tax has escaped assessment for the AY 2008-09, coming within the meaning of section 147 of the Income Tax Act, 1961.

Therefore, notice U/s 147 / 148 of the Act is issued with the prior permission of the CIT(LTU), Mumbai, within the meaning of section 151 of the Income Tax Act, 1961.

3.2. On perusal of the aforesaid reasons, it could be seen that there is absolutely no new tangible material available with the ld. AO to form a belief that income of the assessee had escaped assessment. This is very much evident from the reasons recorded supra that the ld. AO had looked into the very same book entries and the assessment records for arriving at a different facet of the same issue of CENVAT credit. In this regard, it is relevant to address the fact that specific queries were indeed raised by the ld.AO during the course of original scrutiny assessment proceedings on the aspect of CENVAT credit vis a vis its impact on the profits of the company in terms of Section 145 A of the Act and also allocation of expenses for the 80IA unit. In other words, the entire claim of deduction u/s.80IA of the Act was subject matter of detailed examination by the ld. AO during the course of original scrutiny assessment proceedings. This is evident from the section 142(1) notice dated 22/02/2010 issued by the ld. AO vide Question No.6 and Question No.20 thereon. The assessee had filed a detailed reply to the said notice vide letter dated 09/03/2010 vide para 6 and para 19 thereon. The ld. AO had indeed after due examination of the replies of the assessee had proceeded to make an addition of CENVAT credit in the valuation of stock in the sum of Rs.12,40,25,900/- and also on account of allocation of head office expenses to 80IA unit in the sum of Rs.26,64,162/-, among various other additions, in the original scrutiny assessment proceedings. The ld. CIT(A) had granted relief to the assessee by deleting the addition made on account of CENVAT credit and

sustaining certain other additions vide his order dated 09/02/2012. Hence, the entire aspect of the claim of deduction u/s.80IA of the Act was also subject matter of adjudication before the ld. CIT(A). Hence, the assessment order passed by the ld.AO get merged with the order of the ld. CIT(A) on the issue of claim of deduction u/s.80IA of the Act. Accordingly, it was argued by the ld. AR that it is not open to the Revenue to reopen the assessment and revisit the claim of deduction u/s.80IA of the Act on a completely different facet. Reliance in this regard was also placed on the decision of the Hon'ble Gujarat High Court by the ld. AR in the case of QX KPO Services (P.) Ltd. vs DCIT reported in 94 taxmann.com 467 (Gujarat).

3.3. The ld. AO in the re-assessment order had also stated that notice u/s.133(6) of the Act was issued to the assessee calling for information of CENVAT element as is attributable to the consumption of raw material and other services in direct relation to captive power plants of the assessee. This notice u/s.133(6) of the Act was issued on 16/03/2015 to the assessee which is enclosed in page 60 of the paper book filed before us. We find that assessee had duly replied to the said notice u/s.133(6) of the Act seeking certain information vide letter dated 23/03/2015 by furnishing the requisite details called for. This reply letter is enclosed in pages 61-76 of the paper book filed before us. In fact in the said reply, the assessee had merely refurnished the tax audit report annexure filed by it along with return of income before the ld. AO. It is not in dispute that the tax audit report in form 3CA and 3CD together with its annexures were duly filed by the assessee along with the return of income and the same had been taken due cognizance by the ld. AO while completing the original scrutiny assessment proceedings u/s.143(3) of the Act. Hence, the information obtained by the ld. AO u/s.133(6) of the Act in the form

of re-furnishing of data from the tax audit report by the assessee vide reply letter dated 23/03/2015, cannot and does not constitute any tangible material which has come to the possession of the ld. AO post completion of original assessment which enabled him to form a belief that income of the assessee had escaped assessment warranting reopening u/s.147 of the Act. In fact in the said reply the assessee had reiterated the very same turnover figures of the power plants which had already been disclosed in the audit report filed by the auditor in the prescribed form for computation of deduction u/s.80IA of the Act along with original return of income. Hence, there is absolutely no fresh information which had come to the possession of the ld. AO enabling him to form a belief that income of the assessee had escaped assessment.

3.4. Against the original scrutiny assessment order dated 22/03/2019 as stated supra, the ld.CIT(A) vide order dated 09/02/2012 had indeed granted relief to the assessee partially. The Revenue had preferred an appeal against the said order before this Tribunal and assessee had also preferred cross objections against the said order of ld. CIT(A) before this Tribunal. This Tribunal had disposed of the said appeal and cross objections in ITA No. 3178/Mum/2012 and CO No.96/Mum/2013 for A.Y.2008-09 dated 09/12/2015 by upholding the order of the ld. CIT(A) in respect of the addition made on account of CENVAT credit on the valuation of stock vis a vis impact u/s.145A of the Act in the sum of Rs.12,40,25,900/- and deleted the addition made on account of allocation of head office expenses to 80IA unit in the sum of Rs.26,64,162/-, among other issues.

3.5. On perusal of the aforesaid reasons and on hearing both the parties, the only logical conclusion that could be derived by us in the

instant case is that there is absolutely no failure on the part of the assessee in making full and true disclosure of material facts in the original scrutiny assessment proceedings that are relevant for the purpose of framing the assessment. This aspect is relevant in view of the fact that the reopening for A.Y.2008-09 had been made beyond four years from the end of the relevant assessment year and hence, the proviso to Section 147 of the Act would come into operation. Though the ld. AO in the reasons recorded had stated that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, we are unable to comprehend ourselves to accept to this statement of the ld. AO in view of the fact that assessee had given all the relevant details before the ld. AO in the original scrutiny assessment proceedings itself and also in the tax audit report and the audit report filed in the prescribed format in the computation of deduction u/s.80IA of the Act along with original return of income itself. Moreover, even the information that is sought by the ld. AO u/s.133(6) of the Act was also furnished by the assessee by simply refurnishing very same data that is available in the tax audit report and the section 80IA audit report which was already filed along with return of income. There is absolutely no basis for the ld. AO to come to the conclusion that income of the assessee had escaped assessment by way of excess claim of deduction u/s.80IA of the Act in the instant case. The ld. DR vehemently argued that the information sought for u/s. 133(6) of the Act constitute tangible material to the ld. AO which enabled him to form belief that income of the assessee had escaped assessment. As stated earlier, the said information was no new information provided by the assessee to the ld. AO as the assessee had only re-furnished the very same information that is already available with the ld. AO in the assessment record. Hence, it could be safely concluded that there is absolutely no tangible material available

with the ld. AO having live link to form a belief that income of the assessee had escaped assessment. Hence, reopening of the assessment fails on this count itself.

3.6. Further, as stated supra, there is absolutely no failure on the part of the assessee to make full and true disclosure of all material facts relevant for the purpose of framing assessment. Reliance in this regard is placed on the decision of Hon'ble Jurisdictional High Court in the case of Hindustan Lever Ltd., vs. R.B. Wadkar reported in 268 ITR 332 (Bom). Hence, by applying the proviso to Section 147 of the Act we hold that the reopening u/s.147 deserves to be quashed on this count also.

3.7. Further, we find that the ld. AO in the reasons recorded and in the re-assessment proceedings had only sought to examine the very same claim of deduction u/s. 80IA of the Act on a new facet. In this regard, the pertinent question arises as to whether reopening could be made to examine another facet of the same claim of deduction. This was subject matter of adjudication by the Hon'ble Gujarat High Court as rightly pointed by the ld. AR before us in the case of QX KPO Services (P.) Ltd. vs DCIT reported in 94 taxmann.com 467 (Gujarat), wherein it was held as under:-

> **"7.** *It was submitted by learned advocate for the petitioner that the notice of reopening had been issued beyond the period of four years from the end of relevant assessment year, the original assessment having been framed after scrutiny. It is further submitted that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment and hence, the impugned notice is bad in law. Learned advocate has further argued that during the scrutiny assessment, the Assessing Officer had minutely examined benefit of deduction under Section 10B of the Act and had chosen not to make any disallowance in respect of the claim of deduction under Section 10B of the Act, while framing assessment under Section 143 [3] of the Act. It is further submitted that for AY 2008-2009 also, deduction under Section 10B of the Act*

was denied by the respondent and such disallowance was confirmed by the Commissioner of Income-tax [Appeals]. The issued was decided by this Court in Tax Appeal no. 439 of 2016 and the appeal preferred by Revenue was dismissed on 14th June 2016. That, benefit under Section 10B of the Act was granted to the petitioner from the first year of its claim [ie., AY 2007-2008] and subsequent years, and therefore, the petitioner cannot be denied claim for deduction under Section 10B of the Act for the year under consideration. That, the respondent is not permitted to make any disallowance under Section 10B of the Act in case of the petitioner, and therefore, question of escapement of income chargeable to tax would not arise. Hence, it was requested by learned advocate for the petitioner to quash and set-aside the impugned notice of reopening by allowing this petition.

8. *On the other hand, Ms. Mauna M Bhatt, learned advocate for the Revenue vehemently opposed the submissions made by learned advocate for the petitioner and submitted that while filing return for the year under consideration, the petitioner has not fulfilled the condition for claiming deduction under Section 10B of the Act. It is further submitted that though the petitioner was knowing requirement for claiming the benefit under Section 10B, it was not brought to the notice of the respondents during the course of earlier assessment which has resulted into escapement of income. In that view of the matter, reopening of assessment even beyond the period of four years would be permissible. Merely because the Assessing Officer during the course of assessment proceedings had examined the issue would not preclude him from resorting to reopening of the assessment when it has come to the notice of the Assessing Officer that there was no full and true disclosure by the assessee fulfilling the condition of claiming deduction under Section 10B of the Act. That, the Assessing Officer had applied his mind and formed a belief that income chargeable to tax had escaped assessment, that too, on account of failure on the part of the assessee to disclose truly and fully all material facts. Learned advocate for the Revenue further submitted that at this stage, in exercise of judicial review, the Court would not go into the sufficiency of the reasons, as long as it is pointed out that the Assessing Officer had tangible material at his command to form such a belief and he after application of mind, formed such bona fide belief, the Court would not scuttle the reopening process. Ultimately, it was requested by learned advocate for the Revenue to dismiss the present writ application.*

9. *Considering the submissions made by the respective sides and record of this case, it appears that the petitioner had filed its return of income on 30th November 2011 declaring total income at Rs. 10,52,887/=, after claiming deduction of Rs. 56,96,695/= under Section 10B of the Act. Thereafter, the Assessing Officer issued a notice dated 4th September 2013 calling upon the petitioner to furnish various details; including details pertaining to deduction under Section 10B of the Act. It appears from the record that on 19th September 2013, the petitioner furnished required details to the respondent explaining the claim of deduction under Section 10B of the Act [as at Annexure "E" collectively]. The Assessing Officer then was convinced with the explanation given by the petitioner claiming deduction under Section 10B of the Act and accepted the return for the year under consideration by making no disallowance in respect of the claim of deduction under Section 10B of the Act, while framing assessment*

under Section 143 [3] of the Act, by his Order dated 6th January 2014. It also appears from the decision rendered by this Court dated 14th June 2016 passed in Tax Appeal No. 439 of 2016 that for the Assessment Year 2008-2009, deduction under Section 10B of the Act was claimed by the petitioner, which was denied earlier. CIT [A] also disallowed the deduction claimed by the petitioner. In second appeal before the ITAT, the claim made by the petitioner under Section 10B of the Act was allowed by an Order dated 4th November 2015. Against this order, the Revenue preferred Tax Appeal No. 439 of 2016 and this Court was pleased to dismiss the above said Appeal by an Order dated 14th June 2016 for A.Y 2008-2009 and confirmed the deduction under Section 10B of the Act.

10. *From the letter dated 19th September 2013, while furnishing the explanation in support of the claim of deduction under Section 10B of the Act, it cannot be stated that there was any failure on the part of the petitioner in disclosing truly and fully all material facts necessary for its assessment for the year under consideration. The then Assessing Officer, at the time of original assessment as such had scrutinized the claim of deduction under Section 10B of the Act and did not chose to make any disallowance against the claim of deduction under Section 10B of the Act. It is the settled legal position that when a particular claim has been scrutinized by the Assessing Officer at the time of original assessment, as such, the Assessing Officer cannot reopen such assessed case in order to examine another facet of the same claim.*

11. *In light of the facts that the very basis for reopening no longer survives, the assumption of jurisdiction under Section 147 of the Act by the Assessing Officer of issuing notice under Section 148 of the Act is without the authority of law and cannot be sustained.*

3.8. It is also pertinent to note that against this order of the Hon'ble Gujarat High Court, Special Leave Petition (SLP) preferred by the Revenue was dismissed by the Hon'ble Supreme Court which is reported in 99 taxmann.com 301 vide order dated 02/11/2018. Respectfully following this decision, reopening made in the instant case deserves to be quashed on this count also.

3.9. In any case, the perusal of the aforesaid facts clearly prove that assessee had furnished all the relevant details in the return of income and also elaborated those details during the course of original scrutiny assessment proceedings itself. In fact, the ld. AO in the assessment framed u/s.143(3) of the Act had even resorted to disturb the claim of

deduction u/s.80IA of the Act by making additions thereon, which got ultimately deleted by the ld. CIT(A) and by this Tribunal. Hence, the entire gamut of the issue of claim of deduction u/s.80IA of the Act was already subject matter of examination in the original scrutiny assessment proceedings and an opinion has already been framed by the ld.AO. The Revenue seeking to reopen the assessment in this scenario only tantamount to change of opinion, which is not permissible in law. The law is very well settled that no re-assessment could be made merely based a change of opinion. Hence the reopening made in the instant case deserves to be quashed on this count also.

3.10. Even on merits, we find that the main grievance of the Revenue is that the assessee had not debited certain expenses in the eligible unit i.e. 80IA units and thereby had claimed excess deduction u/s.80IA of the Act in the return of income. We find that this aspect has been addressed elaborately by the ld.CIT(A) and the ld. CIT(A) had deleted the said disallowances by placing reliance on various decisions of Tribunals, High Courts and Supreme Court and granted relief to the assessee. Relevant observation of the ld. CIT(A) are as under:-

> *6.3 I have carefully perused the facts of the case and arguments advanced by the AR The AO has observed that the appellant is booking the expenses in its P&L account net of CENVAT which is shown separately in balance sheet under CENVAT receivable account. The AO held that 80-IA unit has to be looked upon viewed as standalone unit and in computing all the business expenses including duties and taxes has to be taken into account to arrive at correct and true profits of the 80-1A units Accordingly, AO reduced the deduction u/s 801A of Rs 2,17 27,798/- and added back to the total income of the appellant.*
>
> *6.4 During appellate proceeding, the appellant submitted that if stand of the AO is accepted i.e. VAT component on expenditure incurred by the 801A eligible unit is to be considered as an expenditure actually incurred by the 801A eligible units, then such VAT credit allowable to main plant*

should also be treated as income of the eligible unit as the Appellant while determining the revenue of 801A eligible unit has adopted rate charged by State Electricity Board to manufacturing plant as market price of electricity generated by the power plant and has made no adjustment on account of VAT credit allowable to main plant on account of electricity purchased by main plant from 801A eligible unit. Accordingly, there will be no impact in the deduction u/s 801A claimed by the Appellant as one side expenditure of eligible unit will be increased and on other side income of the eligible unit will be increased. The appellant also submitted that the cenvat credits are in the nature of reimbursements and bear a direct nexus to the business of the eligible unit and therefore would qualify for the deduction w/s 801A of IT Act, 1961.

6.5 I find that the issue had been settled by Hon'ble Apex court and High Courts in favour of the appellant. The Hon'ble Apex Court in the case of CIT vs. Meghalaya Steels Ltd reported in 383 ITR 217 had decided that the subsidies reimbursed to the assessee for element of cost relating to manufacture or sale of their products bear a direct nexus between profits of assessee's business and reimbursement of such subsidies and therefore such subsidies are eligible for deduction u/s 8018 rws. 801C of IT. Act, 1961. The relevant finding of Hon'ble Apex Court is as under :-

> *"Assistance by way of subsidies which are reimbursed on the incurring of costs relatable to a business, do not fall under the head "income from other sources", which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income. Section 28(iiib) specifically states that income from cash assistance, by whatever name called, received or receivable by any person against exports under any scheme of the Government of India, will be income chargeable to income tax under the head "profits and gains of business or profession" If cash assistance received or receivable against exports schemes are included as being income under the head "profits and gains of business or profession", it is obvious that subsidies which go to reimbursement of cost in the production of goods of a particular business would also have to be included under the head "profits and gains of business or profession", and not under the head "income from other sources"*

The Hon'ble Delhi High Court in the case of CIT vs. Dharam Pal Prem Chand Ltd reported in 317 ITR 353 had decided that:

> *"The finding of the authorities below was that the refund of excise duty was pivoted on the manufacturing activity carried on by the*

assessee. Once such a finding of fact had been returned, there was no need to go further and to examine the immediate and proximate source of refund of excise duty. As a matter of fact, in the questions proposed by the revenue, there was no specific question that the said finding of the authorities below was perverse. There was of course a very broad-based and general question that the order passed by the Tribunal was perverse, in law, and on facts. Such a question was vague. [Para 5]

Further, the language appearing in section 80-1B is 'profit and gains derived from any business'. Therefore, the test of proximity, i.e., direct nexus with the industrial activity is not necessary while claiming a deduction under section 80-1B. [Para 5.2] In the circumstances, the judgment of the Tribunal deserved to be sustained."

The Hon'ble Madhya Pradesh High Court in the case of CIT vs. Siddharth Tubes Ltd reported in 296 ITR 221 had decided that :-

"Held that from the facts placed on record one was not able to say that any refund had been diverted for the purpose other then the business of the industrial undertaking and, therefore, there was no hesitation in holding that the amount refunded had the result of inflating the profits and gains of the industrial undertaking. As the duty of excise had the effect of increasing the profits and gains of the industrial undertaking within the parameters of sections 80HH and 80-1, the relief could be given.

Therefore, refund of excise duty was includible in its profits computed for the purpose of deductions under sections 80HH and 80-I.

The Hon'ble Gujarat High Court in the case of CIT vs. Shah Alloys Ltd reported in 396 ITR 711 had decided that

"Whether interest received on margin money placed for business purpose cannot be treated as income from other sources and, therefore, eligible for deduction under section 80-IA being incidental to business of assessee-Held, yes."

The Hon'ble Meghalaya High Court in the case of Pr. CIT vs. Shree Mahabir Foods Ltd reported in 282 CTR 112 had decided that

"Deduction under section 80-18 would be allowed on the transport subsidy recen from the Government when it was not the case of

> *revenue that the transport subsidy had no bearing on the cost of production of the industrial undertaking of the assessee."*

The Hon'ble Delhi ITAT in the case of JK. Aluminium Co. vs. ITO reported in 292 CTR 112 had decided that

> *"As we have observed from the papers in the paper book, the exempt amount has been paid as is evident from the orders granting the refund which are placed. The Supreme Court after examining the affidavits passed on 11.01.2010 in the case of CIT vs. Dharam Pal Prom Chand Ltd. and after hearing both the parties, eventually dismissed the appeal of the Department against order of Delhi High Court on 22.02.2010. As is clear, the Notification dated 14.11.2002 exempts the amount of paid ensure proper control over the transactions, the Notification only requires the manufacturers to first deposit the excise duty and then claim the refund of the same next month. Thus the refund is assessee's own money itself in a way security deposit which is being refunded on submission of the evidence depositing the same. Therefore, in our view this is not an income at all. Therefore, the A.O, in our view, was not justified in making a separate addition of income and thereby denying the relief eligible u/s 80.IB of the Act on that amount."*

Thus, respectfully following the judicial decisions cited supra and considering the facts of the case, hold that the appellant is eligible to claim the deduction u/s 80IA of I.T. Act. 1961, I direct the AO to delete the disallowance of deduction u/s 80IA of Rs.2.17.27.798/- made in the assessment order. Accordingly, Ground No 2 is hereby Allowed.

3.11. We further find that the similar issue had arose before this Tribunal in the case of Ambuja Cements Ltd vs. Addl. CIT in ITA No.2384 & 3475/Mum/2019 and 1241/Mum/2018 for A.Y. 2010-11, 2011-12 and 2012-13 and ITA Nos. 2958 and 3843/Mum/2019 and 1889/Mum/2018 for A.Yrs. 2010-11, 2011-12 and 2012-13 vide consolidated order dated 07/11/2022 wherein this Tribunal had held as under:-

> *99. In ground no. 6, the assessee has raised the following grievances:* ***On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not justified and grossly erred in confirming the action of***

the AO in treating CENVAT credit availed on inputs and capital goods used in the undertakings eligible for deduction u/s 801A as cost of the eligible undertakings.

100. So far as this grievance of the assessee is concerned, only a few material facts need to be taken note of. During the course of the assessment proceedings, the Assessing Officer noted that while computing the deduction under section 80IA in respect of captive power plants, ports and rail systems, the assessee had debited the expenses directly attributable to the eligible units, net of CENVAT credit availed, wherever applicable, on the expenditure incurred. These CENVAT credits are available under the excise provisions and adjusted against the excise duty liability on goods produced by the related cement manufacturing units. In effect, the component of expenses of statutory duties/ taxes is credited directly to „CENVAT receivable account" without routing it through the profit and loss account. The Assessing Officer was of the view that Section 80A(IA) provides for exemption in respect of „profit derived by an eligible undertaking" for the specified purposes, but the critical words are ***"derived from"*** *and, therefore,* ***"it is only the expenditure, which had a direct and proximate (immediate) nexus with the earning of profit from eligible undertaking that could be taken into consideration for determining such profits"****. It was also noted that the eligible unit is to be viewed as an independent unit on the standalone basis, as Section 80IA(5) requires such an eligible unit to be treated* ***"as if such eligible business were the only source of income of the assessee during the previous year relevant to the assessment year".*** *Accordingly, the Assessing Officer reduced the eligible deductions under section 80IA, by the amount of CENVAT credits attributable to eligible units, as the expenses were not booked through the profit and loss account, and, to that extent, the profits stood distorted/ inflated. These allocations were done on the basis of turnover "in the absence of any item wise details". Aggrieved, inter-alia, by these adjustments on account of CENVAT credit, assessee carried the matter in appeal before the CIT(A) but without success. The assessee is not satisfied and is in further appeal before us.*

101. We have heard the rival contentions, perused the material on record and duly considered the fact of the case in the light of the applicable legal position.

102. We find that Section 80IA(5), which has been heavily relied upon by the assessee, provides that " notwithstanding anything contained in any other provision of this Act, ***the profits and gains of an eligible business t****o which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or*

*any subsequent assessment year, **be computed as if such eligible business were the only source of income of the assessee** during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made". All that this provision does is that it provides for the profits of the eligible unit being treated on a standalone basis, but then in case the Assessing Officer makes an adjustment for the payment which has earned the CENVAT credit, he must also make an adjustment for the corresponding CENVAT credit availed by any other unit of the assessee – other than the eligible unit. If the captive power unit makes a payment of X amount, and in turn, it generates a CENVAT credit of X amount, which is availed by another unit, say Ropar Cement Manufacturing Unit, the hypothetical independence embedded in the profit computation on a standalone basis requires that the Ropar Cement Manufacturing Unit must reimburse the captive power unit for such a CENVAT credit. It cannot be open to the assessee to provide for the expenses which have earned the CENVAT credits, but not to account for the CENVAT credits and the benefits accruing form the same. In any event, the fiction envisages under section 80IA(5) is to enable computation of profits on a standalone basis, rather than to increase the scope of profits itself and allocate notional expenditure to the eligible units. When the eligible units are other units are treated as independent of each other, and the profit computations are on a standalone basis, the eligible unit must get the corresponding credit for the CENVAT credits availed by the other units. Viewed thus, not accounting for the CENVAT credit does not, in our considered view, vitiate the profits of the eligible undertaking, as long as all such credits are fully availed by the other units as is the undisputed position anyway. What the assessee has done is that the expenses are debited net of the CENVAT credit availed. To this extent, we see no infirmity in the stand of the assessee.*

103. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to delete the impugned adjustment on account of CENVAT in the profits of the eligible units. The assessee gets the relief accordingly.

3.12. Even on merits, the addition made by the ld. AO deserves to be deleted in view of the aforesaid decision of this Tribunal.

3.13. In view of the aforesaid observations and respectfully following the various judicial precedents, the reopening made by the ld. AO for

A.Y.2008-09 is bad in law and is hereby quashed. Accordingly, the appeal of the assessee is allowed. On merits, the issue is already covered in favour of the assessee by relying the decision of this Tribunal in the case of Ambuja cements referred to supra. Accordingly, the grounds raised by the Revenue are dismissed.

4. In the result, appeal of the assessee for A.Y.2008-09 is allowed and appeal of the Revenue for A.Y.2008-09 is dismissed.

ITA No.7643/Mum/2019 (Revenue Appeal) & ITA No.7641/Mum/2019 (Assessee Appeal) (Assessment Year :2009-10)

5. The ground raised by the assessee and Revenue for A.Y.2009-10 are exactly identical with those raised for A.Y.2008-09 except with variance in figures. Hence, the decision rendered by us for A.Y.2008-09 for both assessee as well as Revenue appeal shall apply mutatis mutandis for this Assessment year also.

6. The ld. AR drew our attention to the letter dated 17/03/2022 wherein certain additional grounds were raised by the assessee for certain issues for the A.Y. 2009-10 on merits. These additional grounds were stated to be not pressed by the ld. AR at the time of hearing before us. The same is reckoned as a statement made from Bar and accordingly, dismissed as not pressed.

7. In the result, appeal of the assessee for A.Y.2009-10 is partly allowed and appeal of the Revenue for A.Y.2009-10 is dismissed.

ITA No.7642/Mum/2019 (Assessment Year :2010-11)(Assessee Appeal)

8. The only ground to be decided in this appeal is with regard to validity of assumption of jurisdiction u/s.147 of the Act by the ld. AO.

8.1. Though this issue has already been adjudicated hereinabove by us for A.Y.2008-09 and 2009-10 supra, the only difference in A.Y.2010-11 is that the reopening for A.Y.2010-11 had been made within four years from end of the relevant assessment year. Hence, the applicability of proviso to Section 147 of the Act i.e. failure on the part of the assessee to disclose full and true facts relevant for assessment, alone would not be applicable for A.Y.2010-11. However, the other propositions on which reopening was quashed for A.Y.2008-09 and 2009-10 by us supra shall apply mutatis mutandis for A.Y.2010-11 also. Accordingly, the original grounds raised by the assessee are allowed.

9. The ld. AR drew our attention to the letter dated 17/03/2022 wherein certain additional grounds were raised by the assessee for certain issues for A.Y. 2010-11 on merits. These additional grounds were stated to be not pressed by the ld. AR at the time of hearing by us. The same is reckoned as a statement made from Bar and accordingly dismissed as not pressed.

10. In the result, appeal of the assessee for A.Y.2010-11 is partly allowed.

11. TO SUM UP:

ITA No.	AY	Appeal By	Result
7609/Mum/2019	**2008-09**	**Revenue**	**Dismissed**
7640/Mum/2019	**2008-09**	**Assessee**	**Allowed**
7643/Mum/2019	**2009-10**	**Revenue**	**Dismissed**
7641/Mum/2019	**2009-10**	**Assessee**	**Partly Allowed**
7642/Mum/2019	**2010-11**	**Assessee**	**Partly Allowed**

Order pronounced on 10/01/2023 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 10/01/2023
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