

IN THE INCOME TAX APPELLATE TRIBUNAL
‘B’ BENCH : BANGALORE
BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER

ITA Nos.755 - 757/Bang/2023
Assessment Years : 2012-13 to 2014-15

M/s. New Mangalore Port Authority, FA and CAO, Panambur Mangalore-575 010. PAN – AAALN 0057 A	Vs.	The JCIT, Range-1 / ACIT, Circle – 1(1), Mangaluru.
APPELLANT		RESPONDENT

C.O. Nos. 6 to 8/Bang/2023
Assessment Years : 2012-13 to 2014-15
(By Revenue)

Revenue by	:	Shri G Manoj Kumar, CIT (DR)
Assessee by	:	Shri V Srinivasan, Advocate

Date of Hearing	:	05-12-2023
Date of Pronouncement	:	19 -12-2023

ORDER

PER BENCH

This bunch of appeals filed by the assessee are directed against the order dated 10/08/2023 and 16.08.2023 passed by the National Faceless Appeal Centre (NFAC), Delhi arising out of the orders dated 30.12.2014, 21.03.2016 and 30.09.2016 passed by the Assessing Officer u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for A.Ys. 2012-13 to 2014-15 respectively.

Since all these appeals and the cross-objections relate to one assessee, these are heard analogously and are being disposed of by this common order.

ITA No.755/Bang/2023 for the Assessment Year – 2012-13

Ground no.1:

2. The issues involved has relates to upholding of addition to the tune of Rs.18,70,900/- u/s 14A of the Act r.w Rule 8D. The case of the assessee is this that no expenditure incurred to earn said exempt income, therefore, disallowance u/s 14A r.w Rule 8D is not sustainable.

3. We have heard the rival submissions made by the respective parties. We have also perused the relevant materials available on record. We find that the assessee had claimed Rs.67,73,376/- as exempt income but no expenses were attributable towards earning of this income. The income has been derived from UTI Bonds though contended by the assessee but the assessee failed to justify as to why the expenses need not be attributed to earning of this income. Hence addition was made u/s. 14A Rule D. Before the First Appellate Authority, relying upon the judgment passed in the matter of Maxopp Investment Ltd. vs. CIT reported in 402 ITR 640 disallowance u/s. 14A Rule 8D was upheld as the onus to demonstrate that no expenditure had been

incurred towards earning of such exempt income could not be discharged by the appellant. Hence the instant appeal before us.

4. Thus having heard, the Ld.Counsel appearing for the parties and having regard to the facts and circumstances of the matter, we direct the Ld.AO to restrict the disallowance to the extent of exempt income as it is settled principle of law in terms of decisions passed by different courts even in the case of Maxopp Investment Ltd. vs. CIT (supra). This ground of appeal preferred by appellant is allowed for statistical purposes.

This will apply *mutatis mutandis* in all the appeals preferred by the assessee.

Ground no. 2:

This ground relate to the claim of deduction made u/s. 80IA(4)(i) of the Act.

5. The assessee claimed deduction u/s 80IA of the Act in respect of the construction and operation of the new infrastructural facility being Berth No.15 at New Mangaluru port, presently known as Bulk Coal Terminal, which has been disallowed by both the Revenue authorities. Hence, the assessee is in appeal before us.

6. The brief facts leading to the case is that the assessee filed return of income on 30.09.2013 declaring total income at Rs.189,87,36,250/-, which was processed u/s 143(1) of the Act dated 22.01.2015. The case was selected for scrutiny under CASS and notice u/s 143(2) and 143(1) of the Act dated 06/08/2013 were served upon the assessee.
7. Before the Ld.AO, the assessee submitted that income earned by NMPT from Bulk Coal Terminal (Berth No. 15) and filed as follows in regard to the claim for deduction u/s 80IA of the Act.

“1. At present NMPT is having 12 Berths; General cargo is handled in Berth No. 1-7 and POL/Crude/Chemicals in Berth No.9-12. It is using Berth No.8 specifically for the iron ore. Due to increase in traffic, it has planned to build Bulk Coal Terminal (Berth No.15) on BOT basis.

2. Pursuant to tender, concession agreement was entered between Udupi Power corporation Limited (Concessionaire) and NMPT on 09.05.2008 by granting concession period of 30 years, commercial operations were required to be started on or before May 2011. Commercial operation of this berth was started on 18.10.2011.

3. NJWPT is entitled for Rs 9 crores upfront licence fees, Royalty of Rs .19 per metric ton (higher of Minimum. Guaranteed throughput or actual throughput handled) and 50% of Railway marshalling yard charges. NMPT is also entitled to collect ship related charges. Port dues, pilotage, water and any other service charges.

Pursuance to concession agreement, NMPT has handed over necessary land and water from of the concessionaire.

Concessionaire is required to reimburse maintenance dredging done by NMPT on proportionate basis.

NMPT prefers to explore the possibility of claiming deduction u/s 80IA of the Act for e income earned in Bulk coal terminal (Berth no.15).”

8. Upon considering the submissions made by the assessee as above, the Id.AO rejected the claim mainly on two grounds. Firstly, the assessee though required to maintain 2 separate books of account to facilitate computation of income from these enterprises, the same is failed to be maintained and secondly, non filing of Form 10CCB in spite of adequate opportunity provided to the assessee.
9. In order to able the AO to identify the income and expenditure separately for determining the purpose of claiming the deduction u/s 80IA of the Act, the Ld.CIT(A) obtained a remand report from the AO.
10. At the time of hearing of the instant appeal, the Id.Counsel appearing for the assessee submitted before us that following details of the deduction claimed by the assessee and the dates of Form 10CCB were duly filed before the Id.AO in the course of assessment proceedings:

<u>Asst. year</u>	<u>Date of filing Form 10CCB</u>	<u>Deduction claimed in INR</u>	<u>Placed at Page of the Paper Book for the relevant year</u>
2012-2013	28/09/2012	2,15,00,000	Pages 44 to 48 of the PB for AY 2012-13
2013-2014	30/09/2013	3,55,35,975	Pages 44 to 48 of the PB for AY 2013-14
2014-2015	29/09/2014	12,90,51,312	Pages 64 to 68 of the PB for AY 2014-15

11. However, such claim of deduction was not allowed by the Id.AO on the ground of separate books of account not been maintained by the assessee as required by the said

undertaking u/s 80IAI7 of the Act. The Ld.Counsel for the assessee in rebuttal submitted before us that there was an error in computation of profits from Berth No.15 in as much as the amount of deduction claimed for assessment year 2012-13, 2013-14 and 2014-15, actually represented the extend of apportioned expenditure to the undertaking Berth No.15 and it was not the profits earned. Further errors was committed in the revenue and apportioned expenditure of Berth No.15 for which rectification was done by making computation of profit afresh from Berth No. 15 which established that the assessee was entitled to a higher claim u/s 80IA of the Act. In this regard, he has drawn our attention to page No.57 of the paper book filed before us for assessment year 2012-13. It was, however, clarified by the counsel appearing for the assessee that the assessee further filed revised Form 10CCB on 19/03/2019 in support of the said revised deduction claim u/s 80IA of the Act for all 3 assessment year with the following details:-

12.

<u>Asst. year</u>	<u>Date of filing Form 10CCB</u>	<u>Deduction claimed</u>	<u>Enclosed as</u>
2012-2013	19/05/2017	3,59,30,958	Annexure-1 to these submissions
2013-2014	19/05/2017	6,59,33,458	Annexure-2 to these submissions
2014-2015	19/05/2017	9,10,55,960	Annexure-3 to these submissions

13. In this regard, he has drawn our attention to page No.61 of the paper book filed before us. It further appears that for the remand report, the ld.AO alleged that the assessee has not

filed Form No.10CCB along with the return of income whereas the CIT(A) noted the fact of filing revised Form 10CCB on 13/07/2023. In spite of the said observation, the amount made by the Id.AO in the remand report has found to be correct by the CIT(A) and not accepted revised Form 10CCB filed by the assessee before him. It is the case of the assessee that even before the appellate authority, revised claim can be made and which are to be considered by the First Appellate Authority. In this regard, he has relied upon the judgment passed by the Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Stock Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 336 (Bom). He further relied upon the judgment passed by the Chennai Bench in the case of M/s. Karmen International P. Ltd. in ITA No. 765/Chn/2018 in support of the case of non-filing of form 10CCB. In fact in that case, Form 10CCB was not filed at the time of filing of return of income.

13. In respect to the ground of rejection of the claim made u/s 80IA(vi) of the Act by the assessee for not maintaining the separate books of account, the Id.AR vehemently argued to this effect that there is not mandatory requirement for maintaining separate books of account. It is submitted that the extent of profit earned from the eligible undertaking is capable of being computed from the books of account being maintained in order to claim deduction u/s. 80IA of the Act.

He, therefore, relies upon certain judgment passed by the different Hon'ble High Courts, which is as follows:-

- a) Decision of the Hon'ble Punjab & Haryana High Court in CIT Vs. Micro Instruments Co. [388 ITR 46]
- b) Decision of the Hon'ble Mumbai ITAT in M/s Vodafone India Ltd., in ITA No.5598/Mum/2017
- c) Decision of the Hon'ble Hyderabad ITAT in Leo Meridian in ITA No.1254/Hyd/2011 dated 28/03/2013.

14. On the other hand, the Id.Representative of the Department relied upon the order passed by the authorities below.
15. We have heard the submissions made by the respective parties, considered the orders passed by both the authorities below and also perused the materials available on record.
16. The point involved in this particular case is as to whether the ground for rejection of claim made u/s 80IA of the Act for not maintaining books of account by the assessee is sustainable in the instant case.
17. Relying upon the facts already narrated above by us, we would like to observe that the initial dispute of not filing Form 10CCB by the assessee before the Id.AO is being settled in favour of the assessee in view of the details mentioned hereinabove wherein filing of Form no.10CCB in all the respective years have been considered.

18. We have further considered the facts of filing revised from No.10CCB on 19/05/2017 before the 1d.First Appellate Authority has already narrated herein before, fact of which cannot be appreciated and decided in favour of the Revenue. It is also a settled position of law that even before the First Appellate Authority revised fresh claim can be raised particularly keeping in view the ratio laid down in the judgment passed by the Hon'ble Chennai Bench in the case of M/s Karmen International Pvt. Ltd., in ITA No.698/Chny/2018 dated 24/06/2019 wherein claim of deduction u/s 80IA of the Act was allowed though Form No.10CCB was not filed along with the return of income. While dealing with this particular issue, the Ld.Bench was pleased to observe as follows:-

“8.4 Even in appeal, a fresh claim could be admitted by the first appellate authority as decided by the Hon'ble Supreme Court in the case of Jute Corporation of India Limited v. CIT 187 ITR 688(SC) and in the case of National Thermal Power Corporation Limited v. CIT 229 ITR 383(SC). Moreover, the Pune Bench of the Tribunal in the case of DCIT v. Lab India Instrument Pvt. Ltd 277 ITR (AT) 39(Pune) has held that had the legislature intended to disentitle the assessee to make any claim of deduction after the expiry of the period specified under section 139(5) of the Act, it could do so by making a specific provision in this regard. Therefore in the absence of such provision, the assessee was entitled to make any claim of deduction/exemption in the course of assessment proceedings and consequently the Assessing Officer was duty bound to adjudicate upon such claim, even though it was filed after the prescribed period under section 139(5) of the Act. Admittedly, the assessee filed the audit report before inclusion of the assessment and claimed the deduction of .58,45,894/-under section 801A of the Act. In view of the above discussions, we direct the Assessing Officer to accept the audit report and the revised claim of

deduction under section 801A of the Act, otherwise eligible, and decide the issue afresh in accordance with law after giving an opportunity of being heard to the assessee. Accordingly, the ground raised by the assessee is allowed for statistical purposes.

19. After careful reading of the aforesaid order, we find that the ld.Bench was also pleased to relay upon the judgment of the Hon'ble High Court of Delhi in the case of Joint Investments Pvt. Ltd. Vs CIT in 372 ITR 694 holding revised claim of deduction u/s 80IA(iv) of the Act could be filed at any stage, thus, we do not find any reason for the ld.CIT(A) not accepting the claim.

20. We have further analysed the judgment passed by the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Micro Instruments Company (supra), while dealing with the issue of not keeping separate books of account by the assessee, the Hon'ble Court has been pleased to observe as follows:

"We will first deal with the Assessing Officer and the Commissioner of Income tax (Appeal)'s decision to disallow the deduction on the ground at the assessee had not maintained separate books of account.

The assessment order for the earlier assessment year i.e. the assessment year 2001-02 was under section 143(3). That assessment order records that Unit-II had started commercial production in March, 2000, i.e., eleven years after Unit-I came into existence. The order further refers to the audit report filed by the assessee with the return in Form 10-CCB and that on verification it had been noticed that no separate books of

account for Unit-II had been maintained and that the net profit of Unit-II had been arrived at on pro rata basis in view of its net sales as compared to the net sales of Unit-I. What follows in the assessment order on this issue is important. Paragraph 3 of the assessment order reads as under :

"3. In response to query on the subject, the assessee submitted that this is the first year of full operation of Unit-II, as such inadvertently separate books of account have not been maintained. The assessee further submitted that section 80-IB of the Income-tax Act, 1961 does not envisage any such requirement for maintaining separate books of account. In support, the assessee relied upon various case law in this regard. In view of the fact that Unit-II of the assessee firm has been registered with the Sales Tax Department, Haryana as an independent Unit as 'Expansion Unit-II, Micro Instruments Co. Ambala Cantt' with separate registration No. and as per the rules of the Central Excise and Customs Department to the effect that no separate registration is required if a new unit is set-up in the existing premises, the claim of deduction of the assessee under section 80-IB for the Unit-II is considered."

Mr. Putney submitted that the Assessing Officer has not applied his mind to this aspect and that this was not a reasoned order. He submitted, therefore, that the Assessing Officer was, for the assessment year in question, entitled to go into this aspect even in respect of the previous assessment years. We do not agree.

Paragraphs 2 and 3 read together make it clear that the Assessing Officer had applied his mind to the very issues that are sought to be raised in the present proceedings. That the Assessing Officer had applied his mind before passing the assessment order for the year 2001-02 is clear from the queries raised by him and the assessee's answers thereto. A separate compilation of the same was handed over by Mr. Sald Kapoor. For instance, the assessee's chartered accountants, by their letter in reply to the Assessing Officer's queries raised on December 11, 2003, stated as under :

"Your honour has raised the objection that no separate accounts for the new industrial undertaking has been maintained. We wish to submit that this is first year of full operation of Unit-II as such inadvertently the assessee has not maintained the separate books of account. However, from next year onward separate books of account are maintained. However, the assessee firm is fulfilling all the conditions of section 80-IB as stated above.

Further, we wish to submit that section 80-IB does not envisage any such requirement for maintaining separate

books of account. We have worked out the profit of new unit from the books of account produced before your honour and calculation have already been enclosed in the return filed by us. There is no infirmity in the working of the profit of new unit. Our claim is being supported in the following decided cases :"

This letter is not dated but as the opening paragraph indicates it was in continuation of an earlier submission contained in a letter dated December 22, 2003 which in turn stated that it was in respect of the information sought by the Assessing Officer on December 11, 2003.

The issue regarding the assessee not having kept separate books of account in respect of the two units was, therefore, specifically raised by the Assessing Officer and was specifically answered by the assessee. Further, as is evident from paragraph 3 of the assessment order set out earlier, the assessment order itself expressly referred to and dealt with this aspect. The assessment order specifically referred to the assessee's reply and dealt with the issue of the assessee not having kept separate books of account for the two units. It was only thereafter that the Assessing Officer passed the assessment order where, in paragraph 3, he made the observations we set out earlier. The Assessing Officer noted and accepted the assessee's explanation that they had not done so only inadvertently as it was the first year that Unit II was in full operation. The Assessing Officer also noted the assessee's contention that the law, in any event, did not require them to maintain separate books of account and that the assessee had relied upon authorities in this regard. The Assessing Officer also recorded that in respect of Unit II, the assessee had been registered with the Sales Tax Department, Haryana as an independent unit with a separate registration number as well as in accordance with the rules of the Central Excise and Customs Department to the effect that no separate registration is required if a new unit is set up in the existing premises. The claim for deduction was, therefore, considered, to wit, was allowed. There can be no doubt, therefore, that the Assessing Officer was conscious of this issue and had dealt with the same, after taking into consideration the assessee's response in respect thereof.

Even as a matter of law, keeping separate books of account is not a condition precedent to a claim for a deduction under section 80-IB. There was no statutory provision making it mandatory for an assessee to maintain separate books of account. That it may be easier for an assessee to establish a

claim for deduction under section 80-1B in the event of separate books of account being maintained is another matter altogether. That is a question of evidence and not a legal obligation.

39 Section 80-18 itself does not expressly require an assessee to maintain separate books of account to maintain a claim for a deduction thereunder. Nor do we find anything in the section that implies such a requirement. So long as an assessee fulfils all the conditions stipulated in sub -section (2), the section would be applicable. These conditions do not require an assessee to maintain separate books of account in respect of the new undertaking. Nor does sub-section (3), stipulate such a condition. As we will shortly see, where an assessee is required mandatorily to fulfil a particular condition, the legislature expressly included a condition to that effect.

As we mentioned earlier, where an assessee keeps separate books of account that fact would, along with other facts, be relevant while considering whether the assessee fulfils all the conditions of section 80-1B and, in particular, sub-section (2) thereof. It would be relevant, for instance, while considering whether the industrial undertaking concerned is formed by splitting up or a reconstruction of a business already in existence or not. If separate books of account are kept in respect of the new industrial undertaking, it would certainly be a factor in favour of the assessee. That, however, relates to the question of evidence in support of the claim and not to the statutory requirement to maintain separate books of account.

Mr. Kapoor's reliance upon the following judgments in support of his submission to this effect is well-founded.

The Supreme Court in CIT v. Bongaigaon Refineri/ and Petrochemical Ltd. (2012] 349 Ii R 352 (SC) while dealing with a claim under sections 80HH and 80-I held (page 355)

"At the outset, it may be stated that the impugned order of the High Court is cryptic. Ordinarily, we would have remitted the case to the High Court for de novo consideration. The High Court has relied upon its earlier judgment, which, in our view, is not applicable on all fours to the facts of the present case. However, to put an end to the litigation, we are of the view, that though neither section 80H-1H nor section 80-1 (as it then stood) statutorily obliged BRPL to maintain its accounts unit-wise and that it was open to BRPL to maintain its accounts in a consolidated form in order to put an end to the litigation between the tax department and the public sector undertaking we remit the case to the Assessing Officer to ascertain whether the assessee had correctly calculated its net profits for the assessment year 1992-93 in respect of its

petrochemical unit for the purposes of claiming deduction under sections 80HH and 80-I of the Income-tax Act, 1961. In the present case, BRPL has prepared its financial statements on consolidated basis from which it has worked out unit-wise net profits. If not done, it could be done by the auditors even today from the consolidated books of account. Once such working is certified by the auditors the net profit computation (unit-wise) could be placed before the Assessing Officer who can find out whether such profit(s) is properly worked out and on that basis compute deduction under section 80HH/80-I." (emphasis' supplied)

The Supreme Court held that neither section 80HH nor section 80-I statutorily oblige the assessee to maintain its accounts unit-wise. It was open to the assessee to maintain its accounts in a consolidated form. The ratio of the judgment applies to this effect to section 80-IB as well.

A similar view was taken by the Andhra Pradesh High Court in CIT v. 34 Sree Krishna Pulverising Mills [2000] 241 ITR 262 (AP) and by the Gauhati High Court in CIT v. Technotive Eastern P. Ltd. [2002] 255 ITR 253 (Gauhati).

The Gauhati High Court framed the following question of law and proceeded to answer it as follows (page 255)

"(i) Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that no separate accounts are required to be maintained for claiming deductions under sections 80HH and 80-I of the Income-tax Act, 1961 ?.. .

Regarding the first question we find that the law does not require that a separate accounts are required to be maintained for claiming deduction under sections 80HH and 80-I of the Income-tax Act, 1961. Of course, there is a provision of sub-section (5) which is quoted below :

"(5) Where the assessee is a person other than a company or a cooperative society, the deduction under sub-section (1) shall not be admissible unless the accounts of the industrial undertaking or the business of the hotel for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."

That will not help the Revenue in this case as in this case the assessee is a company."

It is pertinent to note that section 80-IB does not even have a provision similar to sub-section (5) of section 80-I of the Act as

it then stood. The absence of a provision in section 80-18 similar to sub-section (5) of section 80-I, in fact, supports the view that section 80-IB does not require an assessee to maintain separate books of account in order to entitle it to claim a deduction thereunder. It indicates that where the Legislature required an assessee to maintain separate books of account, it provided for the same.

Moreover, in these appeals it would make no difference even if keeping separate books of account was required. As we noted earlier the appeals for the assessment years 2003-04 to 2005-06 are liable to be dismissed in view of the Circular No. 21 of 2015. In respect of the subsequent assessment, - years separate books of account were kept.

The contention that the assesseees are not entitled to the deduction under section 80-IB as they did not maintain separate books of account is, therefore, rejected.”

21. As relied upon by the appellant, we have considered the judgment passed by the Mumbai Bench in the case of Vodofone India Ltd. (supra). The Bench has been pleased to observe as follows:

“9. One of the objection raised by the Department is that the assessee has not maintained separate books of account. The assessee had ventured into two different telecommunication services i.e. radio paging services and cellular mobile telephone services. The Id.Counsel for the assessee stated at Bar that the assessee has claimed deduction u/s. 801A of the Act in respect of cellular mobile telephone services only. It is evident from the documents on record that radio paging services were started in May /June 1995 and the cellular telephone services were started in November 1995. Thus, both telecommunication services started after 01/04/1995. Undisputedly, the assessee was not maintaining separate books of account for two different segment of telecommunication services. Separate books of account for the two segments is not a mandatory condition for claiming deduction u/s. 801A of the Act. Our aforesaid view is supported by the decision rendered by the Hon'ble Punjab and Haryana High Court in the case of CIT vs. Micro Instruments Co.(supra). Therefore, the claim of the assessee u/s. 801A of the Act cannot be declined on the ground that

the assessee was not maintaining separate books of account for two different segment of telecommunication services.

The Revenue in support of its submissions has placed reliance on the decision in the case of Arisudana Spinning Mills vs. CIT (supra). We find that the ratio laid down in the aforesaid decision would not apply in the instant case. The need to maintain separate books of account in the said case was necessitated because of the nature of business of the assessee therein. The assessee therein had claimed the benefit of deduction u/s. 801A of the Act in respect of manufacturing activity and trading activity. In the instant case, the assessee is providing telecommunication services. No manufacturing or trading activity was carried out by the assessee except for sale of Pagers. Be that as it may, as pointed earlier there is no statutory requirement for maintaining separate books for two different segments.

20. The Department raised an objection that the assessee is ineligible to claim the benefit of deduction u/s 801A of the Act as it fails to fulfil the conditions of section 801A(3) of the Act. The undertaking has been allegedly formed after merger/reconstruction of two divisions i.e. cellular telephone service division and radio paging service division.

The above argument advanced by the Revenue is contrary to the CBDT Circular No.5 of 2005 (supra). The aforesaid circular in an unambiguous terms explains that, "this deduction is inter alia available to an undertaking providing telecommunication services if such undertaking is formed by splitting up or reconstruction of a business already in existence or by the transfer to a new business of old plant and machinery."

The Circular (supra) further clarifies that the condition introduced by the Finance (No.2) Act, 2004 will not apply to undertakings which have started providing telecommunication services prior to 01-4-2004. Documents on record clearly show that the assessee started providing telecommunication services after 01/4/1995 but before 01/4/2004. Thus, even if the assessee's undertaking is formed after merger/reconstruction, still the assessee would be eligible for deduction u/s.801A of the Act in the light of CBDT circular (supra).

21. In the light of our findings above, we see no infirmity in the order of CIT(A) in coming to the conclusion that the assessee had started telecommunication services after 01/04/1995 and the assessee is eligible for deduction u/s. 801A(4) of the Act. The findings of the CIT(A) on this issue are confirmed and the appeal of Revenue is dismissed. Thus,

both the issues emerging from the appeal of the Revenue are decided in favour of the assessee

22. The Revenue had filed an application for admission of additional evidences. The additional evidences filed by the Revenue are to buttress the arguments that the assessee had commenced telecommunication services prior to 01/04/1995. The additional evidences filed by the Revenue includes communication between assessee with the DoT, invoices to substantiate sale of Pagers and the licence agreement for radio paging services. This case has travelled between Assessing Officer and the Appellate Authorities four times over a period of decade. Four times the assessment order has been passed. The issue that was considered time and again in assessment proceedings and the Appellate proceedings was the assessee's eligibility to claim deduction u/s. 801A of the Act, with reference to assessee's date of start of telecommunication services. Sufficient time was available to the Department to furnish these evidences. For the reasons best known to the Department these additional evidences which are factual and were very much in existence even during at the time of passing first assessment order for AY 2005-06 were not relied upon by the Department.

Dehors, belated filing of these additional evidences, even if these additional documents are admitted, it would not make any material difference. As sale of pagers during FY 1994-95 has already been admitted by the assessee and the same has been reflected in the books of account. In so far as the communication between the assessee and the Telecom Department, it only reflects installation of some junction boxes by the Telecom Department to facilitate paging services to be provided by the assessee. Installation of junction box would in no manner be conclusive to hold that the assessee started telecommunication services — radio paging services. The radio paging services commenced only after assigning of frequency and clearance from WPC Wing of DoT. Therefore, this additional evidences filed by the Revenue would not support the case of Revenue. Hence, the Revenue's application for admitting additional evidences at this belated stage is rejected.”

22. We note that the judgment passed in the case of Micro Instruments Company (supra) was duly taken into

consideration in the matter of M/s Vodafone India Ltd. (supra).

23. Le Meridian

This particular judgment passed by the Hyderabad Bench was also relied upon by the assessee before the First Appellate Authority and before us which was not considered in its proper perspective. We find while dealing with the identical issue, the Ld. Bench was pleased to observe as follows:-

“19. Now coming to the allowability of deduction u/s. 80IB(7B) of the Act with reference to profits and gains of convention centre, the CIT was of the opinion that the assessee has not maintained separate books of account for the convention centre and directed the Assessing Officer to withdraw the deduction already granted to the assessee. In our opinion, in the instant case the assessee had maintained books of account in regular course of business which had been accepted by the Department and no defect has been pointed out in the books of account containing the details of income and expenditure which are supported by vouchers and other documents. The method of accounting followed by the assessee has also been accepted by the Department. The assessee submitted that it has produced books of account and vouchers for verification before the Assessing Officer and after verifying the same the Assessing Officer granted deduction u/s. 80IB(7B). Even if separate books of account are not maintained for convention centre, if the assessee is in a position to show the true and correct profit from the convention centre, the deduction u/s. 80IB is to be granted. Non-maintenance of separate books of account for convention centre itself cannot be a reason for outrightly rejecting the claim u/s. 80IB of the Act. Particularly when books of account maintained by the assessee in the regular course of business had been accepted and no defect has been pointed out either by the CIT or by the Assessing Officer. If the assessee otherwise eligible for deduction u/s. 80IB, the same

is to be granted in the light of the material produced by the assessee by the Assessing Officer.

20. In the present case it is an admitted fact that the assessee has produced the information for availing deduction u/s. 80IB(7B) in Form No. 10CCB duly certified by the chartered accountant and also there is no allegation that the assessee is not entitled for deduction under this section. Further, the assessee has been granted with this deduction in earlier assessment years which is not disturbed by any process of law and it is continued to be granted in subsequent assessment years. Even if separate books of account are not maintained, in that event also the deduction u/s. 80IB(7B) could be granted to the assessee in proportion to the turnover to profit of convention hall and the Tribunal/courts consistently holding that when it is not possible to accurately determine the deduction u/s. 80IB, the profit has to be apportioned on the basis of turnover of each unit. Further recently the Hon'ble jurisdictional High Court in the case of Spectra Shares and Scrips Pvt. Ltd. vs. CIT in ITTA No. 512 of 2011 and ITTA No. 177 of 2012 dated 21st February, 2012 held that:

(a) The Commissioner cannot initiate proceedings with a view to start fishing and roving inquiries in matters or orders which are already concluded; that the department cannot be permitted to begin fresh litigation because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either of the facts disclosed or the weight of the circumstance; that if this is permitted, litigation would have no end except when legal ingenuity is exhausted.

(b) Whether there was application of mind before allowing the expenditure in question has to be seen; that if there was an enquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under sec. 263 merely because he has a different opinion in the matter, that it is only in cases of lack of inquiry that such a course of action would be open; that an assessment order made by the Income Tax Officer cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately; there must be some prima facie material on record to show that the tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation, as lesser tax than what was just, has been imposed.

(c) The power of the Commissioner under sec. 263(1) is not limited only to the material which was available before the Assessing Officer and, in order to protect the interest of the Revenue, the Commissioner is entitled to examine any other records which are available at the time of examination by him and to take into consideration even those events which arose subsequent to the order of assessment.

21. Being so, we are inclined to hold that the assessee's claim u/s 80IB(7B) cannot be denied by the CIT.”

24. Thus, even if separate books of accounts is not maintained, the deduction u/s. 80IB could be granted to the assessee in proportion to the turnover of the eligible unit more so, when it is sufficient that the extent of profit earned from the eligible undertaking is capable of being determined in order to claim deduction u/s. 80IA of the Act as is found the ratio laid down in all the judgment relied upon by the Ld.AR.

25. Thus, taken into consideration the judgment relied upon by the Ld.AR, the appellant's case that the receipts and related expenditure of Berth No. 15 are capable of identification and the profits can be correctly deduced from the books of accounts maintained in normal case is acceptable, in our considered opinion, particularly when the revenue has not been able to show any contrary judgment to that effect. Thus rejection of deduction claimed u/s. 80IA of the Act for A.Ys. 2012-13 to 2014-15 made by the revenue is found to be not sustainable and thus quashed. The revenue is directed to grant relief in terms of the

observation made hereinabove. Thus the assessee's appeal are therefore allowed.

Cross Objection filed by Revenue :-

25. In this regard, the Id.DR has filed following submission and set out the entire submissions.

'It is submitted the cross-objections raised by the revenue at this stage is well and to be considered at all cost. The Ld. AR stand that it cannot be raised at this stage is not a valid one. The facts for adjudication are available on records only the legal ground is different. Further, in support I would like to place reliance on the judgment of this bench in the matter of Blue

Yonder India Private Ltd v. The Deputy Commissioner of Income-tax in IT(TP)A No.1068/BANG/13. The relevant para is reproduced below:

4. The learned counsel for the Assessee while reiterating plea as set forth in the application for admission of additional ground has further placed reliance on the following judicial pronouncements in support of the plea for admission of additional ground.

- CIT vs. S. Nelliappan [66 ITR 722 (SC)] wherein it was held that Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal.*

- Ahmedabad Electricity Co. Ltd. and Godavari Sugar Mills Ltd. vs. CIT [199 ITR 351 (Bom)] wherein it was held that there is nothing in section 254(1) of the Income Tax Act which limits the jurisdiction of the Appellate Tribunal in any manner. The phrase 'pass such order thereon' found in Sec. 254(1) of the Act does not in any way restrict the jurisdiction of the Tribunal but, on the contrary, confers the widest possible jurisdiction of the appellate Tribunal including jurisdiction to permit any additional ground of appeal if in its discretion, and for good reason, it thinks it necessary or permissible to do so. "*

- Notional Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (SC) wherein it was held that the view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income Tax (Appeals) takes too narrow view of the powers of the Appellate Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only*

required to consider the question of law arising from facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

5. We have considered the prayer for admission of additional ground of appeal and are of the view that the additional grounds of appeal deserve to be admitted for adjudication as the facts for adjudication of additional grounds of appeal are already available on record. The judicial precedents cited by the learned counsel for the Assessee supports the plea of the Assessee for admission of additional ground of appeal. We therefore admit the additional ground for adjudication.

So, in light of above findings by this Hon'ble Tribunal, it is clear that the Ld. AR objection is not withstand able and the matter has to be discussed and adjudicated.

Following submissions for Ground 2 of the Appellant:

I place reliance on the order of the Assessing Officer and Commissioner of Income Tax (Appeals) for this ground. The decision of Hon'ble Chennai Bench of ITAT, in the case of Mr. M A Alagappan (ITA No.3280/Mds/2016) is taken into consideration. It is held that even in cases where no expenditure has been incurred, the tax authority has to apply Rule 8D of the Income Tax Rules for the disallowance of expenditure u/s. 14A of the Act. It further held that when a deeming provision is made on the basis of statutory presumption, the requirement of factual evidence is replaced by statutory presumption and the Assessing Officer has to follow the consequences stated in the statute.

Following submission for Ground No.3 of the appellant:

I submit that for claiming the deduction u/s.80IA the appellant has to be eligible under the said section. The section 80IA(4)(i) clearly points out that this section applies only for an enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility (i.e. PORT). Whereas the Appellant is never in the business of developing or operating or maintaining the Berth 15 on which it claims the deduction. In support of my submission I place reliance on following judgments Prakash Nath Khanna v. Commissioner of Income-tax [2004] 135 Taxman 327 (SC), Smt. Tarulata Shyam v. CITI 19771 108 ITR 345, Union of India v. Exide Industries Ltd. [2020] 116 taxmann.com 378/273 Taxman 189/425 ITR 1 (SC). Further this Hon'ble Bench has reiterated the settled position of law in the case of Expat Engineering India Ltd. v. Deputy Commissioner of Income-tax

[2023] 149 taxmann.com 451. The relevant extract is reproduced below:

35. The ld AR submitted that the words used in 40(a)(ii) 'tax levied on the profits' does not refer to interest paid on the TDS and that the when the language is clear and unambiguous literal interpretation of the words must be made. In this regard the Id AR relied on the decision *Union of India v. Exide Industries Ltd.* /20201 116 ta.Vmrrnn.conz 378/273 Ta..vinun 189/425 ITR I (SC). Further it was submitted that legislative easus omissus cannot be supplied by judicial interpretative process and relied on the following decisions in this context . -

(i) *Ajmera Housing Corpn. v. CIT* 12010/ 193 Tarim, 193/326 ITR 642 (SC)

(ii) *Assistant Commissioner v. Velliappa Textiles Ltd* /2003/ 132 Taxman 165/263 ITR 550 (SC)

(iii) *Babita Lila v. Union of India* 120101 73 taxmann.com 32/243 Tavnun 25813871TR 305 (SC)

36. In our considered view this contention of the ld AR is completely out of context as we have already held that Sec. 40(a) (ii) is not relevant to the present issue before us at all. Moreover, the levy of interest on delayed payment of TDS u/s.201(jA) though held to compensatory in nature, the allowability of the same cannot be decided simply based on that. The levy of 201 (JA) is a levy for delay in the remittance of tax that is deducted and not paid into the government account and is levied towards the use of funds belonging to the exchequer. The interest u/s.201(jA) can be equated to the levy of interest u/s.234. Interest u/s.234 is a levy on delay in the payment of income tax and the TDS is nothing but the income tax paid on behalf of the payee and therefore the interest on the same a/s.201(IA) is also in the nature of interest levied on the income tax. On that count also interest on delayed payment of TDS cannot be claimed as a deduction.

I submit that if this Hon'ble Bench permits the deduction on the ground that some person has to claim the deduction of section 80IA, it would amount to grave injustice. This kind of interpretation may lead to claim of double deduction.

Further, due emphasis is to be made on the facts, the concession agreement under BOT entered into with M/s Udupi Power Corporation Ltd. (UPCL), the appellant is only the land owner and Berth No.15 is constructed/developed by UPCL on the land and water front of

appellant allotted to UPCL as per this contract and operation and maintenance of Berth 15 is carried out by UPCL. This fact is apparent on record and the Commissioner of Income Tax (Appeals) has failed to take this under consideration. In support of this reliance is placed on case of Commissioner of Income-tax v. HCIL Kalindee Arsspl [2013] 37 taxmann.com 347 (Delhi) relevant para is reproduced below:

11. Two reasons were given by the Assessing Officer why the claim for deduction under Section 80IA of the Act was rejected and should be denied. The first reason was that the respondent assesseees were involved in works contracts and Explanation to Section 80IA (13) stipulates that benefit under the said Section was/is not available to a contractor earryin' on works contract. The said "clarificatory" explanation was inserted by the Finance Act, 2007 with retrospective effect from 01.04.2000. The CIT (Appeals) in the first appellate order has specifically mentioned that the Finance Act, 2007 received the Presidential assent on 11.05.2007 1(2007) 291 ITR (St.) 17. The returns of income were filed by M/s. HCIL Kalindee ARSSPL (JV) and M/s. [ICIL ARSSPL Triveni (IV) on 01.11.2007. An amendment of this nature invariably attracts attention and is seldom missed. Such amendments become topic of discussion and conversation in the professional circles. To show and establish bona fides, the assesseees had to show some more "tangible material" or basis as to why a clear statutory provision which excludes works contracts was ignored.

The appropriate person for claiming the deduction u/s.80IA is UPCL and without prejudice to the above submissions, this Hon'ble Bench has to satisfy the finding, whether the UPCL has claimed any deduction u/s.80IA before allowing deduction to the Appellant.

Without Prejudice to the above submission, it is submitted that the Commissioner of Income Tax (Appeals) has erred in directly placing the reliance on the CBDT Circular No. 10/2005 dated 16.12.2015, without considering the section 80IA of the act. When the provisions of the act are clear in this regard, the circular can never prevail over the act. In support of this reliance is placed on Jayshree vs. Central Board of Direct Taxes in W.P. No. 2968 & 2970 of 2023, it was held that the circular

cannot prevail over the provisions of the Act.

19. Therefore, this Court is of the view that the CBDT is not empowered to fix the time limit for filing the application for compounding of offences, which is contrary to the provisions of Section 279(2) of the IT Act. Thus in terms of Section 279(2) of the IT Act, the petitioner can file the application for compounding of offences either before or subsequent to the launching of the prosecution.

20. As for as the citation provided by the learned counsel for the petitioner is concerned, in all those citations, the respective High Courts had struck down the provisions of Clause 7(ii) of the said circular doted 14.06.2019 with respect to the prescribed time limit of 12 months and held that at any point of time the application for compounding of offences can be filed i.e., even after the filing of the prosecution and before the disposal of the case.

21. As far as the Judgments provided by the learned counsel for the respondent is concerned, this Court is not in agreement with the same since the said Judgments had only dealt with regard to the holding of power of CBDT in issuance of circulars, guidelines and notifications for the purpose of proper implementation of the relevant provisions of the Act, however, in none of the Judgments, either the Apex Court or the respective High Courts had dealt with regard to the validity of the provisions of the circular, guidelines and notifications issued by the CBDT was not at all challengeable. Only in the present case, the validity of the provisions of CBDT, especially Clause 7(ii) of the said circular, has been challenged. In the said judgments, the other Courts had no occasions to deal with the aspect as to whether the said circular, which was issued by CBDT, is within the scope of the Act or not, further, no arguments were advanced before the other Courts in this aspect. Empowering the CBDT to issue the circular, guidelines, notification will not ipso facto validate the contents of the circular issued by it. The contents of the circular will always be challengeable. The power of CBDT to issue the circular is entirely different aspect from challenging the contents of the circular. Therefore, the said Judgments will not be applicable for the issue decided by this Court.

The para 7.4.3 of the Commissioner of Income Tax (Appeals) order has mentioned that on the sole basis of CBDT Circular No.10/2005 dated 16.12.2005 the appellant is allowed to claim deduction u/s.801A of the Act. Whereas, the appellant is not even fulfilling the eligibility required u/s.801A of the Act.

Without prejudice to the above submission, I submit that it is not a settled principle to not maintain separate books of Accounts. Though in few decisions the Hon'ble Courts has held that there is no requirement of separate books of account it per se does not become rule. Allowing deduction even after not maintaining the separate books of account is rule of exception and casts burden upon the appellant to prove and satisfy the Court the appropriate reasons for not doing so, the reason being the essential condition u/s.80-IA mandates that eligible undertaking income must be capable of being computed separately and the decision in the case of M/s. Arisudana Spinning Mills Ltd. Vs Commissioner of Income Tax, [2012] 26 taxmann.com 39 (SC), the Hon'ble SC held that the appellant ought to

have maintained separate accounts in which case clear picture would have emerged which would have indicated the income accrued from which undertaking.

The Commissioner of Income Tax (Appeals) has very well taken into consideration the facts in the present case and held that Assessing Officer is found correct in disallowing the claim of deduction on following things as mentioned below:

1) The Appellant has modified Form I OCCB to substantiate the revised claim of deduction in the course of appellate proceedings, without any suitable and no specific explanation provided which necessitated to do so.

2) No supporting details and evidences were submitted to justify the quantum claimed either originally or revised claim at all despite specific query being raised at various stage. The difference in quantum amounts to Rs.3,03,97,484/-.

3) The reply dated 20/07/2023 and 13/07/2023 merely states that they have reworked the basis of claiming the common expenditure and during such recalculation it has been observed that the expenditure claimed was higher and after fixation of proper basis and this proper basis has not been substantiated by the appellant. Thus it can be seen that methodology adopted is so ad-hoc that the profits of the unit have been claimed to be almost doubled (85% increase) as a result of some recalculation. Neither the original calculation with details and basis nor revised calculation and basis thereof have been explained with supporting evidences at all.

4) The appellant has not submitted proof for filing of original form I OCCB along-with the ITR nor submitted a copy of the same. The necessary requirement under rule 18BBB is not satisfied.

5) Further the audit report does not certify the P&L account and has merely cross verified the quantum claimed with the audited books of accounts of the entire undertaking.

6) Also, opportunity was granted to explain the basis of quantification with supporting evidences and explanation of auditor was also called for and no response to the same.

I submit that the cases relied by the Ld.AR differs from the present case, for instance if we take the relevant paras in the case of CIT v. Micro Instrumensts Company (P&H), the case of the assessee for the first commencement year only and from next years the separate books of account are maintained.

In the case of CIT v. Bongaigon Refinery and Petrochemical Ltd. [2012] 349 ITR 352 (SC), it made the relevant finding which is

important to be noted and further the Punjab and Haryana Court in the case of CIT v. Micro Instrument Company had relied on those para while allowing deduction. The relevant para is reproduced below:

5. At the outset, it may be stated that the impugned order of the High Court is cryptic. Ordinarily, we would have remitted the case to the High Court for de novo consideration. The High Court has relied upon its earlier judgment, which, in our view, is not applicable on all fours to the facts of the present case. However, to put an end to the litigation, we are of the view, that though neither Section 80HH nor Section 801 (as it then stood) statutorily obliged BRPL to maintain its accounts unit-wise and that it was open to BRPL to maintain its accounts in a consolidated form in order to put an end to the litigation between the Tax Department and the PSU we remit the case to the case to the AO to ascertain whether the assessee had correctly calculated its net profits for assessment year 1992-93 in respect of its petrochemical unit for the purposes of claiming deduction under Sections 80HH and 801 of the 1. T. Act, 1961. In the present case, BRPL has prepared its Financial Statements on Consolidated Basis from which it has worked out unit-wise net profits. If not done, it could be done by the Auditors even today from the Consolidated Books of Accounts. Once such working is certified by the Auditors the net profit computation (unit-wise) could be placed before the AO who can find out whether such profits is properly worked out and on that basis compute deduction under Section 80HH/801.

In the present case the position is not similar, if it would be similar as claimed by the appellant then the appellant auditor would not have modified the Form I OCCB and revised a claim of deduction at the appellate proceedings.

Without prejudice to above submission, it is my humble submission that 3 assessment year are involved in the present case and the not maintaining the separate books of account becomes principle then it will amount to heavy burden on revenue to bifurcate things, which may lead to further ineligible units of assessee to claim the deductions u/s.801A.”

26. We have heard the rival submissions made by the respective parties and perused the materials available on record. In fact, we find from the record particularly, orders passed by

the authorities below that the fact of rejection of the claim made by the assessee u/s 80IA(iv) of the Act is only on the ground of not maintaining separate books of account and non filing of Form 10CCB before the Id.AO, which has already dealt by us in the appeals preferred by the assessee for the respective years and which has been discussed and rejected against the revenue. Since these were consideration and deliberation made by the authorities below, we do not find any reason to entertain cross objection filed by the Revenue particularly when eligibility of the assessee to claim the deduction u/s 80IA of the Act has not been referred by the Id.AO in the remand report filed by the Id.AO. In that view of the matter, we do not find any reason to allow to raise new issues which are not at all mentioned in the assessment orders passed. With the aforesaid observations, we, therefore, dismiss the cross objections filed by the revenue as the same are found to be devoid of any merit.

In the result, the appeal of the assessee is allowed and the cross-objection filed by the Revenue is dismissed.

Order pronounced in the open court on 19th December, 2023

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(MADHUMITA ROY)
Judicial Member

Bangalore,
Dated, the 19th December, 2023.

/Vms/

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore