IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no. 2234/Mum./2024
(Assessment Year : 2012–13)

M/s Celerity Power
903, Peninsula Tower-1,
Peninsula Corporate Park,
Off. Senapati Bapat Marh, ……. Appellant
Lower Parel West,
Mumbai - 400013
PAN : AAHFC 6011A

v/s

Asst. Commissioner of Income Tax-19(1),
Piramal Chamber, Lalbaug,
Mumbai – 400012 ..... Respondent

ITA no. 2302/Mum./2024
(Assessment Year : 2012–13)

Asst. Commissioner of Income Tax-19(1),
Piramal Chamber, Lalbaug, ……. Appellant
Mumbai – 400012

v/s

M/s Celerity Power
903, Peninsula Tower-1,
Peninsula Corporate Park,
Off. Senapati Bapat Marh, ... Respondent
Lower Parel West,
Mumbai - 400013
PAN : AAHFC 6011A

Assessee by : Mr. Nitesh Joshi
Revenue by : Mr. Virabhadra S. Mahajan, Sr. DR

Date of Hearing – 03/10/2024	Date of Order – 20/12/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The assessee and Revenue have filed the present cross-appeal against the impugned order dated 01/03/2024, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, ["*learned CIT(A)*"], for the assessment year 2012-13.

ITA No. 2302/Mum./2024
Revenue's appeal – A.Y. 2012-13

2. In its appeal, the sole grievance raised by the Revenue is against the grant of deduction under section 80-IA of the Act to the assessee.

3. The brief facts of the case pertaining to this issue, as emanating from the record are: The assessee is a partnership firm engaged in the generation of hydro-power. For the year under consideration, the assessee filed its return of income on 27/09/2012 declaring a total income of Rs. Nil after claiming deduction under section 80-IA of the Act. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, it was observed that the assessee was constituted on 09/09/2011 and the power generation from the plant, for which the assessee is claiming deduction under section 80-IA of the Act, commenced on 09/10/2009. Accordingly, the assessee was asked to explain how the conditions for claiming deduction under section 80-IA of the Act are fulfilled. In response, the assessee submitted that the power business was brought

into the firm by one of its partners, M/s Celerity Power LLP, which was formed on 28/03/2010 by way of conversion of Celerity Power Pvt. Ltd., under section 56 read with the Third Schedule of the Limited Liability Partnership Act, 2008. Thus, it was submitted that Celerity Power Pvt. Ltd. carried out the power generation activity from 09/10/2009 till 27/09/2010, when it was converted into M/s Celerity Power LLP, following which the LLP undertook the power generation business and with effect from 09/09/2011, the assessee firm undertook the power generation business. It was further submitted that the benefit of deduction under section 80-IA of the Act was claimed in respect of this undertaking for the first time in the year under consideration, though M/s Celerity Power LLP took alternate ground in their appellate proceedings for the assessment year 2011-12 for the claim of deduction under section 80-IA of the Act. The assessee further submitted that the benefit of deduction under section 80-IA of the Act is attached to an undertaking and not to the ownership of the undertaking, as the ownership of the undertaking may change, but the deduction, once available, would continue to be available for the residual term to the owner, i.e. the successor as long as the identity of the undertaking remains unchanged. The Assessing Officer ("*AO*") vide order dated 27/03/2015 passed under section 143(3) of the Act disagreed with the submissions of the assessee and held that in the instant case, the power generation unit came into existence from 09/10/2009 but it was reconstructed on 09/09/2011 with different shareholding pattern. Thus, it was held that in the present case, the power generation unit was formed by the transfer to a new business of machinery or plant previously used for any purpose as per the provisions of section 80-IA(3) of the Act and therefore, the business

activity of the assessee does not qualify for deduction under section 80-IA of the Act. The AO further held that in M/s Celerity Power LLP there were only two partners, whereas now in the assessee firm, there are three partners and thus the same amounts to reconstruction for the purpose of section 80-IA(3) of the Act. Accordingly, the AO held that the conditions for eligibility for deduction under section 80-IA of the Act are not satisfied in the present case and thus, the assessee is not eligible to claim deduction under section 80-IA of the Act. Therefore, the deduction under section 80-IA of the Act was rejected by the AO.

4. The learned CIT(A), vide impugned order, allowed the ground raised by the assessee on this issue and held that the AO missed the crucial fact that the deduction is undertaking specific and the undertaking remains the same in all the assessment years and only the ownership changed from company to LLP to firm. Accordingly, the learned CIT(A) held that in the present case, it cannot be claimed that there was a splitting-up or reconstruction of the business already in existence. The learned CIT(A) also took into consideration the fact that the AO did not deny the deduction claimed by the assessee under section 80-IA of the Act in subsequent assessment years, i.e. 2013-14, 2014-15 and so on. Being aggrieved, the Revenue is in appeal before us.

5. We have considered the submissions of both sides and perused the material available on record. In the present case, the assessee is a partnership firm and has claimed deduction under section 80-IA of the Act with respect to the profits of the undertaking from the business of generation of power. The undertaking, which is in the business of power generation, was formed on

09/10/2009. It is further an admitted fact that at the time of its formation, i.e. on 09/10/2009, the ownership of the power generation undertaking was with Celerity Power Pvt. Ltd. Subsequently, the Private Limited Company was converted into a Limited Liability Partnership by the name of M/s Celerity Power LLP, w.e.f. 28/03/2010, and the ownership of the power generation undertaking vest with the LLP. Thereafter, on 09/09/2011 the assessee firm was constituted, wherein M/s Celerity Power LLP was admitted as a partner along with two other partners, namely, Mr. Raj Shroff and Mrs. Preeti Shroff, having profit sharing ratio of 10%, 45% 45%, respectively. On 09/09/2011, when M/s Celerity Power LLP was admitted as a partner in the assessee firm, it introduced the power generation undertaking as capital in the assessee firm. Thus, the power generation undertaking, which was formed on 09/10/2009, was owned by the assessee firm in the year under consideration.

6. It is evident from the record that the AO disallowed the claim of deduction under section 80-IA of the Act on the ground that the undertaking has been formed by way of reconstruction and the machinery or plant previously used by M/s Celerity Power LLP has been transferred to the assessee in the year under consideration, therefore the conditions for eligibility as provided under section 80-IA(3) of the Act are not satisfied in the present case. On the contrary, as per the assessee, there is no dispute regarding the fact that the power generation undertaking was formed on 09/10/2009 and in the year under consideration, the same undertaking has been succeeded by the assessee firm. Thus, as per the assessee, there has been a mere change of ownership of the power generation undertaking, which

cannot be considered as a reconstruction of the undertaking already in existence.

7. We find that in the present case, undisputedly the power generation undertaking was formed on 09/10/2009 and there is not even a whisper in the assessment order that the same has been formed in the year under consideration. The AO has placed much emphasis on the provisions of section 80-IA(3) of the Act, which reads as follows: –

> *"(3) This section applies to an undertaking referred to in clause (ii) or clause (iv) of sub-section (4) which fulfils all the following conditions, namely :—*
>
> *(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :*
>
> *Provided that this condition shall not apply in respect of an undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;*
>
> *(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:"*

8. Therefore, from a plain reading of the provisions of section 80-IA(3) of the Act, it is evident that one of the conditions for the claim of deduction under section 80-IA of the Act is that the undertaking should not have been formed by splitting up or reconstruction. Therefore, the year of formation of the undertaking becomes relevant. At the same time, it is pertinent to note that the deduction granted under section 80-IA of the Act is qua the "*profits and gains derived by an undertaking or an enterprise from any business referred to in sub- section (4)"* of section 80-IA of the Act. Therefore, from a cumulative reading of the provisions of section 80-IA of the Act, it is ostensible that the impediment as provided under the provisions of section 80-IA(3) of

the Act is only qua the undertaking and the same cannot be extended to the ownership of the undertaking. In the present case, there is no allegation by the Revenue that on the date of formation of the power generation undertaking, i.e. on 09/10/2009, the conditions as stipulated in section 80-IA(3) of the Act were not satisfied. Therefore, we are of the considered view that the findings of the AO that since the ownership of the power generation undertaking was transferred from M/s Celerity Power LLP to the assessee, in the year under consideration, the assessee is not eligible to claim the deduction is not in conformity with the provisions of section 80-IA of the Act.

9. We find that the Hon'ble Allahabad High Court in Commissioner of Income-tax, Ghaziabad v/s Prisma Electronics, reported in [2015] 377 ITR 207 (Allahabad) while dealing with the provisions of section 80-IB(2)(i) of the Act which is *pari materia* to the provisions of section 80-IA(3) of the Act in a similar factual matrix, observed as under: –

> *"8. From a perusal of the aforesaid provision, the emphasis is on the formation of the undertaking, which is not formed by splitting up or reconstruction of an existing business. The formation of the undertaking should not be confused with the ownership of the business. If the undertaking is formed by splitting up or by reconstruction, in that case, the undertaking will not be qualified for claiming exemption. In the instant case, the undertaking was already in existence and was not formed by splitting up or by reconstruction of the business. The undertaking was admittedly formed in the year 2002 and not in the year 2004. In 2004, the ownership of the business changed from a proprietorship firm to a partnership firm, wherein two persons were inducted as partners. On the conversion of the proprietorship firm into a partnership firm there was no transfer of plant and machinery to the new firm. In the instant case, there was only transfer of the industrial undertaking as a whole along with assets and liabilities."*

10. We further find that the Hon'ble jurisdictional High Court in Commissioner of Income-tax v/s Gaekwar Foam and Rubber Co. Ltd.,

reported in [1959] 35 ITR 662 (Bombay), while dealing with the provisions of section 15 C of the Income Tax Act 1922, which are corresponding to section 80J of the Act, held that if the ownership of a business or an undertaking changes hands not ostensibly but in reality and effectively, that would not be reconstruction.

11. As regards the findings of the AO that the assessee is claiming deduction in respect of the power generation undertaking for the first time in the year under consideration and therefore there is no merit in the submission of the assessee that the ownership of the undertaking may change, but the deduction, once available, would continue to be available for the residual term to the new owner, we find that as per the provisions of section 80-IA(2) of the Act, the deduction under section 80-IA of the Act can be claimed, at the option of the assessee, in any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking generates power. Therefore, it is pertinent to note that the statute itself creates a distinction between the availability of the deduction, from the year in which the undertaking generates power, and the claim of deduction, which can be any ten consecutive assessment years out of fifteen years. In the present case, undisputedly the power generation unit commenced its operation on 09/10/2009 and therefore the deduction under section 80-IA of the Act was available to be claimed from the assessment year 2010-11. However, undisputedly no deduction was claimed in the first year of operation. We find that M/s Celerity Power LLP, by way of an alternate ground before the learned CIT(A), claimed deduction under section 80-IA of the Act in the assessment

year 2011-12. From the perusal of the order dated 30/03/2015 passed by the learned CIT(A) in the case of M/s Celerity Power LLP for the assessment year 2011-12, forming part of the paper book from pages 532-569, we find that the learned CIT(A), after accepting the plea of the taxpayer that the benefit of the section is attached to the undertaking and not to its ownership, in principle agreed with the claim of M/s Celerity Power LLP under section 80-IA of the Act. Further, from the perusal of the order dated 16/11/2018 passed by the coordinate bench of the Tribunal in Revenue's appeal being ITA No. 3637/Mum./2015, against the aforesaid order passed by the learned CIT(A) in M/s Celerity Power LLP, we find that no ground was raised challenging the findings of the learned CIT(A) that the benefit of the section is attached to the undertaking and not to its ownership.

12. Therefore, in view of the facts and circumstances of the present case, legal position and judicial pronouncements as noted above, we find no infirmity in the impugned order in allowing deduction under section 80-IA of the Act to the assessee in the present case. Accordingly, the grounds raised by the Revenue are dismissed.

13. In the result, the appeal by the Revenue is dismissed.

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Assessee's appeal – A.Y. 2012-13

14. Ground No. 1, raised in assessee's appeal, pertains to observations of the learned CIT(A) in para-5.7.7 of its order, wherein it directed the AO to verify the deduction of the assessee in the assessment year 2021-22 onwards on the basis that the assessee has claimed that assessment year 2012-13 was

the first year of deduction, while M/s Celerity Power LLP has claimed assessment year 2011-12 as the first year of deduction. During the hearing, the learned Authorised Representative submitted that no deduction has been claimed by the assessee under section 80-IA of the Act in the assessment year 2021-22 and therefore, the aforesaid findings of the learned CIT(A) are completely extra-juridical. Having considered the submissions of both sides and perused the material available on record, we are of the considered view that whether the assessee is entitled to claim deduction under section 80-IA of the Act in the assessment year 2021-22 is an issue which can only be examined in that year if any such claim is made by the assessee. Any finding or direction in this regard, at this stage, is completely unwarranted, since the year under consideration in the present appeal is the assessment year 2012-13. Therefore, the aforesaid directions by the learned CIT(A) in paragraph 5.7.7 are deleted. As a result, ground no. 1 raised in assessee's appeal is allowed.

15. The issue arising in ground no.2, raised in assessee's appeal, pertains to the addition on account of the sale of Renewable Energy Certificates.

16. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee disclosed an income from the sale of Renewable Energy Certificates amounting to INR 4,14,29,310. The assessee claimed deduction under section 80-IA of the Act on the aforesaid amount. Since the Renewable Energy Certificate is a by-product of the hydro-power plant unit and received on the production of power, as secondary in nature and not directly attributable to the power plant

for which incentive under section 80-IA is given, the assessee was asked to show cause why the income from the sale of Renewable Energy Certificates be not treated as "*income from other sources*". The AO, after considering the submissions of the assessee, held that to be eligible for deduction under section 80-IA of the Act, the manufacturing activity must be of first-degree source and not otherwise. It was further held that since the income from the sale of Renewable Energy Certificate is nothing but an ancillary profit and beyond the first-degree source, the same is not an eligible business within the meaning of section 80-IA of the Act. Accordingly, the amount of INR 4,14,29,310 was treated as "*income from other sources*", and accordingly, taken out from the total income for the purpose of calculation of deduction under section 80-IA of the Act.

17. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee on this issue and held that the income from the sale of Renewable Energy Certificate is a separate income and it has to be treated as "*income from other sources*" only. Being aggrieved, the assessee is in appeal before us.

18. We have considered the submissions of both sides and perused the material available on record. We find that the issue of whether the income from the sale of Renewable Energy Certificate is a capital receipt came up for consideration before the coordinate bench of the Tribunal in DCIT v/s M/S. Dwarikesh Sugar Industries Ltd, in ITA No. 312/Mum./2019, wherein the coordinate bench after considering the decision of the Hon'ble Andhra Pradesh

High Court in CIT v/s My Home Power Ltd, reported in [2014] 365 ITR 82 (AP), observed as follows: –

> *"7. Considered the submissions of the learned Counsel for both the parties and perused the material on record. While going through the judicial pronouncements relied upon by the learned Counsel for the assessee, we find that the issue for our adjudication is squarely covered by the aforesaid decisions relied upon by the learned Counsel wherein in one of the cases relied upon in CIT v/s My Home Power Ltd., [2014] 365 ITR 082 (AP) (supra) filed by the Revenue, the Hon'ble Andhra Pradesh High Court held that the Tribunal had factually found that Carbon Credit was not off–shoot of business but off–shoot of environmental concerns and no asset was generated in course of business but it was generated due to environment concerns. Further we find that the Hon'ble A.P. High Court agreed with the factual analysis as the assessee carried on business of power generation and Carbon Credit was not even directly linked with power generation. It is held that on sale of excess Carbon Credits income was received and the Tribunal correctly held that it is capital receipt and could not be a business receipt or income. As a matter of convenience, the observations of the Hon'ble A.P. High Court in CIT v/s My Home Power Ltd., [2014] 365 ITR 082 (AP) (supra) is reproduced below:–*
>
> > *"ITAT have considered the aforesaid submission and ITAT are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns". ITAT agree with this factual analysis as the Assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."*
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> *8. Since the issue in hand is mutatis mutandis covered by the aforesaid decision of the Hon'ble A.P. High Court as well as other decisions referred to above, respectfully following the same, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground raised by the Revenue."*

19. We find that in another decision the coordinate bench of the Tribunal in Satia Industries Ltd. vs. National Faceless Assessment Centre, reported in [2023] 151 taxmann.com 358 (Amritsar - Trib.) held that income earned from the sale of Renewable Energy Certificates (REC)/carbon credits is a capital receipt and not business income.

20. During the hearing, the learned Departmental Representative did not bring on record any decision in favour of the Revenue on this issue. Therefore, respectfully following the decisions of the coordinate bench of the Tribunal, cited supra, we are of the considered view that the income from the sale of Renewable Energy Certificate is a capital receipt and thus is not chargeable to tax. Accordingly, on this issue, the impugned order is set aside and ground no.2 raised in assessee's appeal is allowed.

21. In view of our findings rendered in respect of ground no.2, the issue arising in ground no.3 is rendered academic and therefore is left open.

22. Ground no.4 raised in assessee's appeal pertains to the levy of interest under section 234B and section 234C of the Act, which is consequential in nature and therefore, needs no separate adjudication.

23. In the result, the appeal by the assessee is allowed.

24. To sum up, the appeal by the Revenue is dismissed, while the appeal by the assessee is allowed.

Order pronounced in the open Court on 20/12/2024.

Sd/-	**Sd/-**
OM PRAKASH KANT **ACCOUNTANT MEMBER**	**SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 20/12/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai