IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Sri Aby T.Varkey, JM & Dr.Arjun Lal Saini, AM]

I.T.A Nos.563&564/Kol/2011

Assessment Years : 2003-04 & 2004-05

D.C.I.T., Circle-10, Kolkata	-vs.-	Vesuvious India Ltd. Kolkata [PAN : AAACV 8995 Q]
(Appellant)		(Respondent)

For the Appellant : Shri Rajat Kumar Kureel, JCIT, Sr.DR

For the Respondent : Shri Harish Agarwal, AR

Date of Hearing : 20.12.2016.
Date of Pronouncement : 30.12.2016.

ORDER

Per Aby T.Varkey, JM

These are appeals preferred by the Revenue against the orders of CIT(A)-XII, Kolkata dated 18.01.2011 for AY 2003-04 and 2004-05.

2. The Revenue has raised the following ground :-

"On the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in directing to recomputed the deduction u/s 80HHC without reducing the amount of deduction u/s 80IB from the eligible profits."

3. The brief facts of the case as noted by the ld. CIT(A) are that during the previous year relevant to the assessment year under consideration, the appellant in the original return of income has claimed an amount of Rs. 29,79,001/- as deduction u/s 80HHC. Subsequently in the Revised return of income; deduction u/s 80HHC was recomputed and claimed at Rs. 28,79,554/-. Towards the said claim of the appellant a Chartered Accountant's Certificate (along with enclosures) was duly furnished and filed along with the revised return of income. While computing deduction u/s 80HHC under the normal provisions of the Act, adjustment was made in respect of profits eligible for deduction

u/s 80IB. Subsequently, during the course of proceedings u/s 143(3), the assessee vide letter dated 27-03-2006 relying on the decision in the case of Toshica Creations -vs.- ITO (2005) 96 TTJ 651 (Jaipur) had claimed that the deduction u/s 80HHC be allowed from the gross total income without reducing it by deduction available u/s 80IB. The AO did not agree and held that in view of the provisions of Sec.80-IB(13), deduction available u/s 80-IB should be reduced from the profits of the business for the purpose of computing deduction u/s 80HHC.

4. Aggrieved the assessee preferred an appeal before the ld. CIT(A) who was pleased to allow the contention of the assessee and held that the object of Sec.80IA(9) affects allowability of deduction and not computation of deduction. According to him, the aggregate deduction computed under both the sections i.e. Sec.80IA and Sec.80HHC shall not exceed the profit of the eligible business. The ldCIT(Appeals) by placing reliance on the decision of Hon'ble Bombay High Court in the case of Associated Capsules (P)Ltd –vs- DCIT (2011) 332 ITR 42 (Bom) decided the issue in favour of the assessee.

5. Aggrieved by the aforesaid decision of the ld. CIT(A), the revenue is before us and has assailed the said decision of ld. CIT(A) by preferring the instant appeal.

6. The Ld. DR submitted that by virtue of the provisions of Section 80IB(13), the provisions applicable to industrial undertakings to whom deductions under Section 80-IA are granted, would also apply to certain extent. By virtue of the afore stated provisions of Section 80-IB(13), provisions of Section 80-IA(9) would also apply to the industrial units who claim benefit of deduction under Section 80-IB of the Act.

7. According to the ld. DR, So far as Section 80-IA is concerned, it pertains to deductions in respect of profits and gains from industrial undertakings or enterprises

engaged in the business of infrastructure development. According to ld. DR Section 80-IA(9) of the Act specifically provides that when any deduction is claimed and allowed under the provisions of Section 80-IA of the Act, deduction to the extent of such profits and gains cannot be allowed under any other provisions under heading "C. - Deductions in respect of certain incomes" of the Chapter in which Section 80HHC has been included. Similarly, it had been submitted by the learned DR that so far as Section 80-IB is concerned, it pertains to deduction in respect of profits and gains from certain industrial undertakings other than the business of infrastructure development. He further reiterated that Section 80-IB(13) also provides that certain provisions of Section 80-IA would also apply to Section 80-1 B, like the provisions of Sub-Section (5) and Sub-Sections (7) to (12) of Section 80-IA.

8. According to the learned DR, Section 80-IA(9) is clear to the effect that once a deduction is claimed under Section 80-IA, no deduction can be claimed under heading 'C' of Chapter VIA. Section 80HHC is included in heading 'C' of Chapter VIA and therefore, if an assessee claims and is allowed deduction under Section 80-IA or Section 80-IB, he cannot be allowed any deduction under Section 80HHC or any other Section that falls under heading "C" of Chapter VIA of the Act and wanted us to reverse the order of the ld. CIT(A) and uphold AO order.

9. On the other hand, the learn Counsel appearing for the Assessee submitted that the view expressed by the ld.CIT(A) is absolutely correct. According to the learned counsel, the statute wants to give deduction to the Assessee in respect of both the activities, namely in respect of export of goods as well as with respect to activities other than infrastructure development as envisaged u/s 80IB etc. and as the asseesses in all the cases are engaged in the business of export as well as in the eligible business other than infrastructure development as envisaged u/s 80IB etc., the assessee is entitled to claim

deductions in respect of export business as well as activities other than infrastructure development activities envisaged u/s 80IB eligible unit.

10. According to the learned Counsel if there is any confusion or any ambiguity in the tax law, benefit thereof should be given to the assessee and the High Court of Karnataka and Bombay had rightly permitted the assesses to claim deductions under both the. Sections. According to him, it is a well settled position of law that in a case where two views are possible, the view which favours the assessee must be adopted and took our attention to the Hon'ble Supreme Court order in CIT -vs.- Vegetable Products Ltd.(1973) 88 ITR 192(SC) wherein it has been held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted, which is a well-accepted rule of construction. Similar view according to ld. Counsel has been taken in ACIT -vs.- Hindustan Steel Industries (2005) 94 TIT 1094 (AgraTrib) and DCIT- vs.- Oxemberg Fashions Ltd. (2007) 111 TTJ 0737 (Mum). Thus the counsel appearing for the assesses had supported the reasons given by the High Court of Bombay and had submitted that the appeals filed by the Revenue deserve to be dismissed.

11. We have heard both the parties and perused the records. In this case, the issue before us is whether in view of the provision of section 80-IB read with Sec. 80IA(9) deduction u/s 80IB should be reduced from the profits of the business for the purpose of computing deduction u/s 80HHC which AO held is correct; Or, the contention of the assessee that deduction claimed both u/s 80IB and u/s 80HHC must be computed independently, however the total deduction should not be allowed to exceed the profit of the eligible unit as envisaged u/s 80IB(13) read with Sec. 80IA(9) of the Act.

12. For the purpose of better understanding of this issue, relevant extracts of the said sections of the Act have been reproduced herein below :-

80-IB Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings – (1) Where the gross total income of an Assessee includes any profits and gains derived from any

business referred to in sub-sections (3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of the Section, be allowed, in computing the total income of the Assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this Section.

(2) to (12)xxxxxx xxxxx xxxxxxx

(13) The provisions contained in sub-Section (5) and sub-Section (7) to (12) of Section 80-IA shall, so far as may be, apply to the eligible business under this Section."

"80-lA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc. -

(1) to (8) xxx xxx xxx

(9) Where any amount of profits and gains of an (undertaking) or of an enterprise in the case of an Assessee is claimed and allowed under this Section for any assessment year, deduction to the extent of such profits and gains shall not be allowed under any other provisions of this Chapter under the heading "C.-Deductions in respect of certain incomes", and shall in no case exceed the profits and gains of such eligible business of (undertaking) or enterprise, as the case may be."

"**80HHC. Deduction in respect of profits retained for export business.-**(1) Where an Assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this Section applies, there shall, in accordance with and subject to the provisions of this Section, be allowed, In computing the total income of toe assessee, [a deduction to the extent of profits referred to in sub-Section (1B)] derived by the assessee from the export of such goods or merchandise:

Provided that if the assessee, being a holder of an Export House Certificate or a Trading House Certificate (hereafter in this Section referred to as an Export House or a Trading House, as the case may be), issues a certificate referred to in clause (b) of sub-Section (4A), that in respect of the amount of the export turnover specified therein, the

deduction under this sub-Section is to be allowed to a supporting manufacturer, then the amount of deduction in the case of the assessee shall be reduced by such amount which bears to the [total profits derived by the assessee from the export of trading goods, the same proportion as the amount of export turnover specified in the said certificate bears to the total export turnover of the assessee in respect of such trading goods.

(1 A) xxx xxx xxx

(1 B) For the purposes of sub-Sections (1) and (1 A), the extent of deduction of the profits shall be an amount equal to -

(i) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001 ;

(ii) seventy per cent thereof for an assessment year beginning on the 1 st day of April, 2002;

(iii) fifty per cent thereof for an- assessment year beginning on the 1 st day of April, 2003;

(iv) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004;

and no deduction shall be allowed in respect of the assessment year beginning on the 1t day of April, 2005 and any subsequent assessment year. "

13. The Hon'ble Bombay High Court in the case of Associated Capsules Private Limited v. Deputy Commissioner of Income Tax and another, [2011] 332 ITR 42 (Bom) did not agree with the view of the High Court of Delhi and opined thus:-

> *"We find it difficult to subscribe to the views expressed by the Delhi High Court in interpreting the provisions of section 80-IA(9). I n that case, in fact, the counsel for the Revenue had argued (see para 38 of the judgment) that section 80-IA(9) applies at the stage of allowing deduction and not at the stage of computing deduction under other provisions under heading C of Chapter VI-A. It was argued that in the matter of grant of deduction, the first stage is computation of deduction and the second stage is the allowance of the deduction. Computation of deduction has to be made as provided in the respective sections and it is only at the stage of allowing deduction under section 80-IA(1) and also under other provisions under heading C of Chapter VI-A, the provisions of section 80-IA(9) come into operation. While accepting the arguments advanced by the counsel for the Revenue, it appears that the Delhi High Court failed to consider the*

important argument of the Revenue noted in paragraph 38 of its judgment. Moreover, without rejecting the argument of the Revenue that section 80-IA(9) applies at the stage of allowing the deduction and not at the stage of computing the deduction, the Delhi High Court could not have held' that section 80-IA (9) seeks to disturb the method of computing the deduction provided under other provisions under heading C of Chapter VI-A of the Act. In these circumstances, we find it difficult to concur with the views expressed by the Delhi High Court in the case of Great Eastern Exports [2011] 332 ITR 14. For the same reason, we find it difficult to subscribe to the views expressed by the Kerala High Court in the case of Olam Exports [2011] 332 ITR 40.

In the result, we hold that section 80-IA(9) does not affect the computability of deduction under various provisions under heading C of Chapter VI-A, but it affects the allowability of deductions computed under various provisions under heading C of Chapter V I-A, so that the aggregate deduction under section 80-1 A and other provisions under heading C of Chapter VI-A do not exceed 100 per cent of the profits of the business of the assessee. *(Emphasis supplied by us)Our above view is also supported by the Central Board of Direct Taxes Circular No. 772 dated December 23, 1998 ([1999] 235 TR (St.) 35), wherein it is stated that section 80-IA(9) has been introduced with the view to prevent the taxpayers from claiming repeated deductions in respect of the same amount of eligible income and that too in excess of the eligible profits. Thus, the object of section 80-IA(9) being not to curtail the deductions computable under various provisions under heading C of Chapter VI-A, it is reasonable to hold that section 80-IA(9) affects allowability of deduction and not computation of deduction. To illustrate, if Rs. 100 is the profits of the business of the undertaking, Rs. 30 is the profits allowed as deduction under section 80-IA(1) and the deduction computed as per section 80HHC is Rs. 80, then, in view of section 80-IA(9), the deduction under section 80HHC would be restricted to Rs. 70, so that the aggregate deduction does not exceed the profits of the business."*

14. Taking note of the fact that when an assessee qualifies for deduction under separate sections, which could be on percentage of profits or earnings, controversy arises and the Hon'ble Supreme Court observed about the scope of Chapter VIA in such situations was noticed in Joint CIT v. Mandideep Engineering and Packaging Industries Private Limited, (2007) 292 ITR 1 (SC), and held :-

"1. The point involved in the present case is whether sections 80HH and 80-I of the Income-tax Act. 1961, are independent of each other and therefore a new industrial unit can claim deductions under both the sections on the gross total income independently or that deduction under section 80-I can be taken on the reduced balance after taking into account the benefit taken under section 80HH.
2. The Madhya Pradesh High Court in J.P. Tobacco Products P. Ltd v. CIT reported in [1998] 299 ITR 123 took the view that both the sections are independent and, therefore, the deductions could be claimed both under sections 80HH and 80-I on the gross total income. Against this judgment a special leave petition was filed in this court which was

dismissed on the ground of delay on July 21, 2000 (see [2000] 245 ITR (St.) 71). The decision in J.P. Tobacco Products P. Ltd. [1998]229 ITR 123 (MP) was followed by the same High Court in the case of CIT v. Alpine Solvex P. Ltd. in I.T.A. No. 92 of 1999 decided on May 2, 2000. Special leave petition against this decision was dismissed by this court on January 12,2001, (see [2001] 247 ITR (St.) 36). This view has been followed repeatedly by different High Courts in a number of cases against which no special leave petitions were filed meaning thereby that the Department has accepted the view taken in these judgments. See CIT v. Nima Specific Family Trust reported in [2001] 248 ITR 29 Bom ; CIT v. Chokshi Contacts P. Ltd. [2001] 251 ITR 587 (Raj); CIT v. Amod Stamping [2005] 274 ITR 176 (Guj); CIT v. Mittal Appliances P. Ltd [2004] 270 ITR 65 (MP); CIT v. Rochiram and Sons [2004] 271 ITR 444 (R~); CIT v. Prakash Chandra Basant Kumar [2005] 276 ITR 664 (MP); CIT v. S.B. Oil Industries P. Ltd [2005] 274 ITR 495 (P&H); CIT v. SKG Engineering P.Ltd. [2005] 119 DL T 673 and CIT v. Lucky Laboratories Ltd. [2006] 200 CTR (305).

3. Since the special leave petitions filed against the judgment of the Madhya Pradesh High Court have been dismissed and the Department has not filed the special leave petitions against the judgments of different High Courts following the view taken by the Madhya Pradesh High Court, we do not find any merit in this appeal. The Department having accepted the view taken in those judgments cannot be permitted to take a contrary view in the present case involving the same point. Accordingly, the civil appeal is dismissed. No costs."

15. The decision of Hon'ble Bombay High Court in the case of Associated Capsules (P) Ltd. (supra) has been followed by various Tribunals & High Courts in the following cases-

CIT -vs.- Millipore India P. Ltd. (2012) 341 ITR 219 (Kar)

DCIT -vs.- Gujarat Ambuja Cements Ltd. (2011) 57 DTR 179 (Mum)

ACIT -vs.-Ucal Fuel Systems Ltd. (ITA. No. 1519/Mds/2011 dtd. 30-11-2011)

CIT -vs.- Emmbros Metal Pvt. Ltd. (2012) 83 CCH 159 (HP)

CIT -vs.- EssaeTeraoka Ltd. (2012) 21 Taxmann.com 164 (Kar)

16. It is noted that the Co-ordinate bench in the case of EIH Ltd vs DCIT in ITA No.1808/Kol/2007 dt. 11.09.2015 after considering the decision of the Bombay High Court in Associated Capsules (supra) and Delhi High Court in Great Eastern Exports (supra) came to the conclusion that for the purpose of computing deduction u/s 80lA,

the deduction u/s 80HHD need not be reduced as both the deductions are independent of each other, which we agree and concur with the said view.

17. It is also a well settled position of law that in a case where two views are possible, the view which favours the assessee must be adopted. The said view has been affirmed by the Hon'ble Supreme Court in CIT -vs.- Vegetable Products Ltd.(1973) 88 ITR 192(SC) wherein it has been held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted, which is a well-accepted rule of construction. Similar view has been taken in ACIT -vs.- Hindustan Steel Industries (2005) 94 TIT 1094 (Agra Trib) and DCIT- vs.- Oxemberg Fashions Ltd. (2007) 111 TTJ 0737 (Mum) and so applying the same principle when there are divergent views, the view favourable to the assessee is upheld and therefore also we concur with the contention of the assessee and thus confirm the order of the ld. CIT(A).

18. In view of the above, we do not find any infirmity in the order of the ld. CIT(A) and therefore we dismiss the appeals of the revenue.

Order pronounced in the Court on 30.12.2016.

Sd/-	Sd/-
[A.L.Saini]	[Aby T.Varkey]
Accountant Member	Judicial Member

Dated : 30.12.2016.
[RG PS]
Copy of the order forwarded to:
1.Vesuvious India Ltd., P-104, Taratalla Road, Kolkata-700088.
2. D.C.I.T.-Circle-10, Kolkata. .
3..CIT(A)-XII, Kolkata 4. CIT –IV, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches