

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F', NEW DELHI)**

**BEFORE SHRI G. D. AGRAWAL, HON'BLE VICE PRESIDENT
AND SHRI KULDIP SINGH, JUDICIAL MEMBER**

I.T.A. No.1874/Del/2013
(Assessment Year 2004-05)

RRB Energy Ltd., GA-1/B1 Extn. Mohan Coop. Industrial Estate, New Delhi GIR / PAN : AAACV0109N (Appellant)	Vs.	ITO, Ward 15(2), New Delhi (Respondent)
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Appellant by	:	Shri K. Sampath, Adv.
Respondent by	:	Smt. Kesang Y Sherpa, Sr. DR

Date of hearing: 28.12.2015

Date of Pronouncement: 28.01.2016

ORDER

PER KULDIP SINGH, JM:

The appellant, RRB Energy Ltd. (hereinafter referred to as 'the assessee'), by filing the present appeal, sought to set aside the impugned order dated 21.01.2013 passed by Ld. CIT(A) XVIII, New Delhi qua the Assessment Year 2004-05 on the grounds inter alia that:

“On the facts and in the circumstances of the case and in law the Authorities below erred:

- i) in invoking the reassessment proceedings u/s 147/148 of the Income Tax Act, 1961 without any reason or basis or material;*
- ii) in acting u/s 147 r.w.s. 143 (3) of the Act to redo the assessment solely on the basis of change of opinion and in*

- violation of the parameters envisaged under the proviso to section 147 of the Act;*
- iii) in misconstruing the provisions of Section 80IA to deny the exemption there under;*
 - iv) in misreading the facts and accounts to disallow the alleged expenses and other set-offs against power generation income on erroneous grounds;*
 - v) in holding that a sum of Rs.72,94,218/- was incurred on charges relatable to supervision, erection and commissioning on capital account instead of revenue.*

All the above actions being arbitrary, erroneous, untenable and illegal must be quashed with directions for relief.

2. Briefly stated, the facts of this case are: order u/s 143(3) of the Act was passed at the book profit of Rs.6,39,79,655/- u/s 155JB of the Act and consequently notice u/s 148 of the Act along with reasons recorded was served upon the assessee and the assessee has filed objections. Consequent upon the notices issued u/ss 143(2) and 142(1) of the Act, Shri F. A. Shamsi, AR of the assessee company attended the proceedings from time to time.

3. The assessee company is into the manufacturing and installing of wind electric generators (WEGs) in India for harnessing power from wind at different locations in India and claimed deduction u/s 80-IA to the tune of Rs.22,57,278/- for installation of 15 units of WEGs for power generation and the power generated therefrom was sold to Tamil Nadu Electricity Board (TNEB), which is shown at Rs.3,52,77,308/-. The assessee claimed the gross income of these WEGs at Rs.3,46,77,308/- eligible for deduction. The assessee has been claiming deduction u/s 80-IA since 1996-97. The assessee is engaged in power generation and is

eligible to claim deduction u/s 80-IA(4) for ten consecutive assessment years beginning from A.Y. 1996-97 and referred form 10CCB, which lapses in A.Y. 2005-06. The assessee claimed deduction on the basis of WEGs installed in Assessment Year 1998-99, (2 Nos.), Assessment Year 2002-03 (3 Nos.) and the earlier period and is trying to claim deduction u/s 80-IA for such WEGs installed by it for the next ten consecutive Assessment Years. The assessee claimed that the plant has been set up for demonstration unit and this fact has also been observed from the audited report dated 28.10.2004 and the assessee gave primary reasons for installation of WEGs to promote their basic business. The Assessing Officer came to the conclusion that energy unit has been set up for educational or demonstration aids and not for the purpose of power generation. When the declared purpose of the assessee is not power generation then assessee is not eligible for deduction u/s 80-IA.

4. The Assessing Officer also observed that the assessee has claimed expenditure of Rs.72,94,218/- to reduce the prevalent losses and to ensure the guarantee in future under the head supervision of erection and generation expenses and declared the same as capital in nature and disallowed the expenditure to the tune of Rs.72,94,218/- and assessed the total income at Rs.1,89,46,596/-.

5. The assessee carried the matter before Ld. CIT(A) who has dismissed the appeal. Feeling aggrieved, the assessee has come before the Tribunal by way of filing the present appeal.

6. Ld. A.R. challenging the impugned order contended inter alia that the Assessing Officer has committed error by reopening the assessment

completed u/s 143(3) after a period of four years on the basis of change of opinion; that the assessee has disclosed all the material facts at the time of filing its return on the basis of which assessment was completed u/s 143(3); that the Assessing Officer has not decided the objections filed by the assessee to the reopening lying at pages 60-68 of the Paper book and relied upon the judgement of Hon'ble Jurisdictional High Court cited as **RRB Consultants and Engineers (P) Ltd., Vs DCIT, 342 ITR 126 (Del.)**.

7. However, on the other hand, Ld. D.R. to repel the arguments addressed by Ld. A.R., relied upon the orders passed by the Assessing Officer as well as Ld. CIT(A).

8. We have heard both the authorized representatives and perused the material on record in the light of the facts and circumstances of the case and orders of authorities below.

9. **Grounds No.1 ,2 & 3:**

Undisputedly, the assessment of the assessee, on the basis of return of income filed qua the Assessment Year 2004-05 declaring income of Rs.93,95,100/- was completed on 31.05.2005 u/s 143(3) of the Act. Thereafter, assessee was served upon a notice dated 30.03.2011 u/s 148 of the Act after recording the reasons by the Assessing Officer.

10. The Assessing Officer recorded the reasons incorporated in Annexure A annexed with the notice served upon the assessee u/s 148 of the Act, the operative part of which is reproduced as under:

“Annexure -A

Reasons for the Belief that Income has Escaped Assessment in the Case of MIs RRB Energy ltd. for the AY 2004-05. The assessee company is claiming deduction u/s 80-IA on power generation activity w.e.f. the AY 1996-97. On perusal of records for the AY 2004-05, it is noted that the total receipts on which deduction on generation of the WEGs is claimed is as under. The assessee has given two alternate calculations by the assessee in the clause 22 of Form no. 10CCB Report with the qualification that the assessee "reserves a right to claim the benefit u/s 80-IA as per either of the two versions" These are reproduced as under:

<i>Particulars</i>	<i>RS.</i>	<i>Rs.</i>
<i>1. Income from Power Generation</i>	<i>3,52,77,308/-</i>	<i>3,52,77,308/-</i>
<i>2. Less: Depreciation as per I. T.'s Rules.</i>	<i>3,52,77,308/-</i>	<i>3,52,77,308/-</i>
<i>3. Less: Maintenance Charges @ Rs.40,000/- per generator 15 generators claim u/s 80-IA.</i>	<i>-</i>	<i>6,00,000/-</i>
<i>Claim u/s 80-IA</i>	<i>3,52,77,308/-</i>	<i>3,46,77,308/-</i>

1.1. On the basis of the above working, the assessee is claiming deduction u/s 80-IA at Rs.3,52,77,308/- without taking into account expenses on power generation, depreciation on WEGs or giving effect to the unabsorbed depreciation or loss of past assessment ears. This is against the spirit of the section. The profits have to be computed as provided under the head business from section 28 to 43D and that includes depreciation as well. The above table also shows that the assessee is not even debiting notional maintenance charges. It may be noted that the assessee company cannot reserve the right to claim the benefit u/s 80-IA as per either of the two versions" as mentioned above. The assessee's claim is of deduction u/s 80-IA amounting to Rs.3,52,77,308/- without accounting for any appreciation or any other expenses of any sort.

1.2 Without prejudice to the above, even if we assume assessee company is incurring "notional maintenance charges" of Rs.40,000/- per WEGs the following can be noted:

1.2.1. No businesses are run on notional maintenance charges. Businesses have direct and indirect costs. And this business of the

assessee of power generation also bears these costs. The assessee is not' acknowledging it because it suits him from tax angle not otherwise. Thus by not debiting the actual cost, the profits are getting inflated. The business of power generation also has its share of managerial and administrative expenses. The business is not run on thin air.

1.2.2. Moreover as per the requirement of the section the books of accounts are to be maintained separately. The assessee was asked to show the separate set of statement of accounts of power generation business during the course of assessment proceedings for AY 2007-08 and 2008-09. However, the assessee was unable to submit any separate set of books of accounts for this business. The assessee seems to be debiting the expenses to the eligible business in an arbitrary manner as it suits him. The same is not in congruence with the spirit of section. The assessee is bound to have separate books to claim the deduction u/s 80-IA, the assessee therefore is ineligible for deduction on this account.”

1.1 As per the records for the AY 2004-05, the assessee should have been claiming depreciation amounting to Rs.1,03,42,296/- against the WEGs installed for power generation activity (this would be over and above unabsorbed depreciation for earlier years which cannot be quantified at this stage, but would be well over the revenue from power generation, given the huge capital outlay involved in setting up WEGs.) The brought forward depreciation and business loss has to be set off as-per the provisions of Section 80IA(5) i.e. as if the' eligible business is only the source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to an including the assessment year for which the determination is to be made.

1.3 Further, as noted above, over and above the depreciation and brought forward loss, the assessee has to deduct expenses attributable to earning of the power generation income before arriving at the deduction u/s 80IA. The proportion of the receipts of power generation claimed u/s 80IA to the total receipts is to be worked out and then the expenses are to be worked out in same proportion. This working is required to be done as the assessee is

not maintaining separate set of accounts as desired by the section 801A.

1.3.1. The receipts from power generation has to be treated at par with gross profit of the assessee, as assessee is selling WEG's, on which it earns profit. The gross sale is Rs.2,51,49,79,456/- and material consumed is Rs.21,67,99,646/-. Therefore the profit on sale of WEG's is Rs.2,29,81,79,810/-. The Receipts from power generation on which 80-IA is claimed are Rs.3,52,77,308/-. Therefore the proportion of the power generation income is 1.5%

1.3.2 Further, the total expenses other than depreciation and manufacturing expenses are Rs.2,25,58,84,435/-. Thus the proportionate expenses against the power generation receipts are Rs. ,25,82,382/- (1.5% of Rs. 2,25,58,84,435/- = Rs. 3,15,82,382/-)

1.4 Thus against the total receipts on account of power generation of Rs.3,52,77,308/- the cost are working out to be Rs. 4,19,24,678/-(expenses of Rs.3,15,82~382/- + depreciation of Rs.1,03,42,296/-) resulting in a net loss of Rs.66,47,370/-. That means that assessee is actually incurring a loss on account of power generation and when there is no profit then where comes the question of deduction. Hence, the claim of deduction u/s 80IA of the assessee is liable to be disallowed.

1.5 The assessee has claimed benefit of deduction u/s 80IA amounting to Rs.22,57,278/- to which he is not eligible as brought out above, on account of deduction of depreciation, setting-off of brought forward business losses, unabsorbed depreciation as well as allowing deduction of relevant business expenses - Administrative, Financial, Managerial etc.

2. Without prejudice to the above, it is seen that the assessee has claimed expenditure of Rs.72,94,218/- to reduce and prevent losses and to ensure the guaranteed output in future, under the head 'Supervision erection and commissioning expenses'. Since this expenditure was incurred to have longtime benefits it was capital in nature and should have been disallowed.

Section 37 of Income Tax Act, 1961, provides that any expenditure not being expenditure of capital nature laid out wholly

or exclusively for the purpose of business is allowable as deduction in computation of the income chargeable under the head 'Profit and gains of business or profession'.

3. *Thus the assessee has failed to disclose all material facts truly and fully that were necessary for assessment. Here it is relevant to mention the explanation 1 in section 147 that states that "production before the AD of account books or other evidence from which material evidence could with the diligence have been discovered by the AD will not necessarily amount to disclosure with the meaning of the proviso in section 147.*

4. *In view of above facts, I have reason to believe that income chargeable to tax amounting to Rs.95,51,496/- (Rs.22,57,278/- + Rs.72,94,218/-) has escaped assessment in the 'case and the same is to be brought to tax under section: 147/148 of the I.T. Act. Sanction for issue of notice u/s 148 as prescribed u/s 151, to re-assess such income and also any other income chargeable to tax which has' escaped assessment and which comes to the notice subsequently during the course of assessment proceedings, may kindly be accorded."*

10.1 In the backdrop of the aforesaid facts and circumstances of the case, the first question arises for determination in this case is, '*as to whether the Assessing Officer has satisfied the preconditions enunciated u/s 147 for the issuance of reassessment u/s 148 of the Act*'. In order to decide this question first of all we have to determine '*as to whether the issue of deduction claimed by the assessee u/s 81A was raised by the assessee and examined by the Assessing Officer at the time of original assessment on the basis of which order dated 31.05.2005 was passed u/s 143(3) of the Act.*

10.2 Bare perusal of the assessment order dated 31.05.2005 passed by the Assessing Officer u/s 143(3) lying at page 147 of the Paper Book categorically proves that the assessee has claimed deduction u/s 80-IA to

the tune of Rs.22,57,278/- from power generation income of Rs.3,46,77,308/- computed as per depreciation version shown in Form No.10CCB to the extent of net business income and squarely decided by the Assessing Officer.

10.3 Thereafter Assessing Officer after reopening the assessment after four years, again raked up the issue qua deduction claimed by the assessee u/s 80-IA to the tune of Rs.22,57,278/- as is evident in the assessment order dated 28.12.2011 challenged before Ld. CIT(A) and the operative part of the same is reproduced as under for ready reference:

“3. Deduction claim u/s 80-IA of Rs.22,57,278/ -.

3.1) The assessee has 15 units of WEG's installed for power generation and the power generated from them is sold to Tamilnadu Electricity Board the total power generation is shown at Rs.3,52,77,308/-. The assessee has claimed deduction u/s 80IA on Rs.22,45,332/- pertaining to income generated from the units installed in the year 1998-99, 2002-03 and of the earlier years. The gross income of these WEGs is Rs.3,46,77,308/-, which have been claimed to be eligible by the assessee.

3.2) It is relevant to mention here that the first assessment year when the assessee sought deduction u/s BOIA was the year 1996-97. The provisions of section 80IA(1) stipulates the following.

(ix) It is about profits and gains of an undertaking or an enterprise.

ex) Income should be from eligible business as per 80IA(4).

(xi) Allow deduction of 100%.

(xii) It is available for ten consecutive assessment years beginning from the year in which the undertaking or enterprise begins to generate power.

3.3 The above analysis show that deduction is for an undertaking or an enterprise that means one such enterprise engaged in business

eligible for deduction u/s 80-IA. The deduction is available for 10 consecutive assessment years beginning from the first year of claim. The assessee is engaged in power generation and qualifies as eligible business u/s 80-IA(4). The first year of claim in A.Y.1996-97 as evident from form No.10CCS filed by the assessee). The ten consecutive years of the assessee lapse in A.Y.2005-06.

3.4 The claim of the assessee is on the basis of the WEG installed In the AY 1998-99 (2 Nos), A.Y.2002-03(3 No's) and the earlier period. The assessee is trying claim 80-IA deduction for each WEG installed by it for the next ten consecutive assessment years. This will imply that as long as the section 80-IA deduction is there the company shall keep on enjoying the deduction. The deduction is not intended to be made available on rotational basis. It is amply clear that it is available for an enterprise and then beginning from first year of claim continues for ten consecutive years.

3.5 Here it would be relevant to discuss the form No.10CCB (Audit report u/s 80-IA of the LT. Act). The auditors have remarked as per separate report vide clause 22 of form No.10CCB. The relevant portion is "The assessee does not deduct any expenditure/depreciation from the power generation income, while deducting the same from its gross income, on the ground that any expenditure/depreciation pertaining to these wind electric generators relate to its basic business activity of manufacture of wind electric generators, for promotion of which the said generators were installed."

3.6 The above claim of the assessee has been examined as per the provisions of section 80IA. The section SOIA stipulates that where the gross total income of the assessee includes any profits and gains derived by an undertaking from any business referred to section 80-IA(4) then deduction of 100% of profits and gains derived from such business is to be allowed. This means that deductions under clause (ii) sub-section 4 of section 80- IA is available to the person who is in the business of generation and distribution of power. The assessee however is in the business of manufacturing of wind mills. As per assessee's own submission the power plant has been set up as a demonstration unit, as observed from auditors report dated 28.10.2004, wherein the assessee has stated that primary reasons

for installing WEG's was to promote their basic business. The purpose of demonstration unit is to convince the prospective buyers for purchasing windmills manufactured by the assessee. Hence the purpose for which the wind mills have been set up is not power generation but a display unit which is more in the nature of a show piece. This implies the power generation units have been set up as educational and demonstration aids and not for purpose of power generation. Once the declared purpose of the assessee is not power generation then also' the assessee is not eligible for deduction u/s 80-IA. Therefore the assessee is not eligible for deduction u/s 80IA on the basic consideration.

3.7 It may still be not out of place to mention here that one of the primary requirement for being eligible for deduction under section 80IA is that the boo's of account should be separately maintained Since the assessee does not do so this also disqualifies hi for availing any deduction u/s 80-IA. Therefore the assessee is not eligible for deduction u/s 80-IA of I.T. Act in toto.”

10.4 At the time of reassessment, assessee filed comprehensive objections to the reopening of assessment lying at pages 68-70 of the Paper Book raising all the legal and factual grounds against reopening of assessment. It is not in dispute that the issue as to the admissibility of exemption available to the assessee u/s 80-IA of the Act has already been considered by the Revenue for the Assessment Year 2006-07, 2007-08 and returned findings in favour of the assessee.

10.5 Hon'ble Supreme Court in case cited as **CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 651** has settled the issue as to reopening of the assessment by the Assessing Officer by holding that the Assessing Officer is not empowered to reopen the assessment on the issue which has already been examined by him at the time of original assessment. Operative part

of the judgement cited as Kelvinator of India Ltd. (supra) is reproduced as under for ready reference:

“On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987 reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from: 1st April, 1989), they are given a go-by and only one condition has remained, - viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow

the relevant portion of Circular o. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.-A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

10.6 Perusal of reassessment order passed by the Assessing Officer goes to prove inter alia that he has reopened the assessment to examine the issue as to the admissibility of deduction claimed by the assessee u/s 80-IA which issue has been squarely decided by the Assessing Officer in original assessment vide order dated 31.05.2005 u/s 143(3) of the Act; that after reassessment, the Assessing Officer has withdrew the deduction earlier made available to the assessee u/s 80-IA on the ground that deductions are available under clause (ii) of sub-section (4) of Section 80-IA to the person who is in the business of generation and distribution of power despite the fact that the assessee made a categorical submission that the power plant was set up for demonstration and the primary reason for installation of WEGs was to promote the basic business and to convince the prospective buyers for purchasing the windmills manufactured by the

assessee; that the Assessing Officer came to the conclusion that since the windmill was set up for display and not for power generation, the assessee is not entitled for deduction u/s 80-IA of the Act.

10.7 Following the law laid down by Hon'ble Supreme Court in the judgement cited as *Kelvinator of India Ltd. (supra)*, no doubt the Assessing Officer has the powers of reassessment after having reason to believe that the income has escaped assessment but it does not confer powers upon him to reopen the assessment on mere change of opinion. The Assessing Officer has powers to reopen an assessment only on the basis of tangible material sufficient to hold that there has been escapement of income from the assessment. But in the case at hand, the Assessing Officer has apparently exercised the powers to review under the garb of reopening of the issue as to the deduction u/s 80-IA of the Act already decided by him in the original assessment order passed u/s 143(3), which is not permissible u/s 147 of the Act.

10.8 Identical issue has also been decided by the Hon'ble Jurisdictional High Court in the judgement cited as **RRB Consultants and Engineers (P) Ltd. Vs DCIT, (2012) 342 ITR 127 (Del.)**, in favour of the assessee. So, we are of the considered view that the reassessment order dated 28.12.2011 passed by the Assessing Officer and affirmed by Ld. CIT(A) does not withstand the judicial scrutiny and as such, liable to be set aside. Hence, we hereby determine grounds No.1, 2 & 3 of the appeal in favour of the assessee.

11. **Grounds No.4 & 5:**

Grounds No.4 & 5 of the appeal are incidental to the grounds No.1, 2 & 3. When the reassessment proceedings u/s 147/148 of the Act are found to be not sustainable in the eyes of law, the question of disallowance of alleged expenses under the garb of reassessment, does not arise. Identical issue has already been decided by the Revenue in favour of the assessee qua the Assessment Years 2006-07 and 2007-08 by Ld. CIT(A) vide order dated 02.09.2009 lying at pages 86-105 of the Paper Book. Ld. D.R. has failed to point out the different set of facts taking opposite view qua the Assessment Year under consideration i.e. Assessment Year 2004-05. So, Grounds No.4 & 5 are also determined in favour of the assessee.

12. In view of the illegalities and perversities discussed above, the impugned order passed by Ld. CIT(A) is hereby set aside and consequently, appeal under consideration is allowed.

13. Order pronounced in the open court on 28th Jan., 2016.

Sd./-

(G. D. AGRAWAL)
VICE PRESIDENT
Date: 28.01. 2016

Sd./-

(KULDIP SINGH)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	11/1		Sr. PS/PS
2	Draft placed before author	20,28/1		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	28/01/16		Sr. PS/PS
6	Kept for pronouncement	28/01		Sr. PS/PS
7	File sent to Bench Clerk	28/01		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			