

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.8592/M/2011
Assessment Year: 2006-07**

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| M/s. Supreme Enterprises, Ground Floor, Regent Chamber, 208, Nariman Point, Mumbai – 400 021 PAN: AAAFS 7716D | Vs. | Addl. CIT 2(3), Aayakar Bhavan, M.K. Road, Mumbai |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri S.M. Agrawal, A.R.
Revenue by : Shri Ashwani Rai, (Inspector O & IT) on behalf of
Sr. A.R. Shri Neil Philip, D.R.

Date of Hearing : 06.10.2015
Date of Pronouncement : 16.10.2015

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 15.09.2011 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09. The appeal was earlier heard on 17.06.2015 and was reheard on 06.10.2015 for seeking certain clarifications from the assessee. There are two issues involved in this appeal. The first issue is in respect of claim of deduction u/s. 80ia(4)(iv) for generating power by wind mills. The assessee in this respect has taken the following grounds:

“(i) The Learned Assessing Officer has erred in disallowing claim of deductions amounting to Rs. 6,00,078/- U/s. 801A(4)(iv) read with section 80 IA (2) for Assessment Year 2006-2007 on account of profits earned by Generating Power By Wind Mills on the grounds that eligible income for assessment year 2006-2007 is

adjusted against the deemed notional losses of earlier year.

ii) The Learned Assessing Officer has erred in over looking that assessee has been given an option to claim deduction for any 10 consecutive years out of 15 years and assessee started claiming deduction from assessment year 2005-2006 and therefore initial year for deduction should be considered, the assessment year 2005-2006 and the question of adjusting deemed loss from earlier years prior to assessment year 2005-2006 does not arise.

iii) The Learned Assessing Officer has erred in ignoring that section 80IA(2) has come into force with effect from 01.04.2000 giving option to the assessee to claim deduction for any 10 consecutive assessment year out of 15 years and therefore erred in applying Judgment of Special Bench (Ahmedabad) in the case of Asst CIT V Gold Mine Shares & Finance P Ltd (2008) 113 ITD 209 which is applicable for assessment year 1997-1998 when under old provisions of 80IA were the provisions of the option of 10 consecutive years out of 15 years was not there."

2. Referring to the above grounds of appeal, the Ld. AR of the assessee has submitted that the Assessee is eligible for deduction u/s 80-IA of the Act in respect of the profits out of the generation of electricity out of Windmill activity and the unabsorbed depreciation of the earlier years, since already set off with the ineligible profits of the assessee from hotel business, could not be reduced from profits of eligible business for computing deduction u/s 80-IA of the Act. The Ld AR of the assessee has further stated that this issue is squarely in favour of the assessee by a series of decisions as mentioned below:

- (a) Velayudhaswamy Spinning Mills Pvt. Ltd. vs. ACIT (2010) 231 CTR (Mad) :[2012] 340 ITR 477 (Mad) (High Court) (After considering Special Bench decision).
- (b) CIT vs. Emerald Jewel Industry P. Ltd. [2011] 53 DTR 263 (Mad) (High Court) (After considering the above decision)
- (c) M/s prashant Caterers vs. ITO ITA No. 4226/M/2011 decided on 6.02.2013 (Mumbai Tribunal)

3. Further, the Ld AR has mentioned that in the decisions of Hon'ble Madras High Court, the Special Bench decision in the case of ACIT vs. Gold

Mine Shares and Finance (p) Ltd. 113 ITD 209(SB), which is heavily relied upon by the Ld CIT (A) while dismissing the appeal of the assessee, has been duly considered. The Ld. DR on the other hand has relied upon the findings of the lower authorities on this issue.

4. We have considered the rival contentions. We find that the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd. vs. ACIT (2010) 231 CTR (Mad) 368 (BCAJ) has held that the assessee is entitled to claim deduction u/s 80IA for 10 consecutive years out of 15 years and that initial year of benefit can be opted by the assessee. Losses and depreciation of the years earlier to the initial assessment year which have already been absorbed against profits of other businesses cannot be notionally brought forward and set off against the profits of the eligible business for computing the deduction u/s.80-IA. Similar view has been taken in the decision of Hon'ble Madras High Court in the case of CIT vs. Emerald Jewel Industry P. Ltd (supra) and by the Mumbai Tribunal in the case of M/s prashant Caterers vs. ITO (supra). Respectfully following the same, this issue is accordingly decided in favour of the assessee. The AO is directed to allow the claim of deduction in the light of the above stated decisions.

5. The other issue taken by the assessee is relating to the taxability of the difference between the amount paid less i.e. at net present value and future liability on account of incentive given by the State Govt. of deferred sales tax liability. The relevant ground read as under:

“Ground No.(iv)

“iv) The Learned Assessing officer has erred in not allowing claim of appellant overlooking that appellant was allowed benefit by Sales Tax Department by which Sales Tax payment was deferred for 10 years to encourage installation of Wind Mills and under the scheme the assessee was allowed to pay the Sales Tax Liability at a discounted value or at Net Present Value and the difference between

future liabilities and the present discounted value of the same can not be considered as taxable income amounting to Rs.13,00,700/- for the year ending 31.03.2005 and Rs. 13,25,970/- for the year ending 31.03.2006 taken as income in profit & loss account for Assessment year 2006-2007.”

6. The issue raised vide ground No.(iv) is as to whether the amount of incentive granted by State government under Package Scheme of Incentive and under Power Generation Promotion Policy, 1998 should be treated as capital receipt or taxable revenue receipt. The assessee was allowed benefit by Sales Tax Department by which the sales tax payment was deferred for 10 years to encourage the installation of wind mills for the generation of electric power under the scheme. However, the assessee was allowed to pay the deferred/future sales tax liability prematurely/during the year under consideration at discounted value i.e. at net present value. The AO, however, taxed the difference between the future liability and the present discounted value as income of the assessee.

At the outset, the Ld. A.R. of the assessee has brought our attention to the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Reliance Industries Ltd." (2011) 339 ITR 632 (Bom.) wherein the Hon'ble Bombay High Court, while relying upon the decision of the Hon'ble Supreme Court in the case of "CIT vs. Ponni Sugars and Chemicals Ltd." (2008) 306 ITR 392 (SC), has held that if the object of the subsidy was to set up a new unit in a backward area to generate employment therein, then the subsidy was to be treated on capital account and the sales tax incentive was to be treated as capital receipt.

7. The Ld. AR of the assessee has further submitted that even otherwise it could not be construed as remission of liability, because the State Government had not waived of any of the liability. Had the State Government accepted lesser amount after twelve years or reduced such installments, then it could have been a case of remission/cessation. It was a simple case of collecting the

amount at net present value which was due later on. Therefore, such payment of net present value of a future liability could not be classified as remission or cessation of the liability.

8. We find that the Hon'ble Bombay High Court in the case of "CIT vs. Sulzer India Ltd." in 'ITA No.450 of 2013 and others' decided on December, 5th, 2014 has held that the difference between the net present value of sales tax liability and its future liability is not chargeable to tax under section 41(1) of the Act. It has been held that what the assessee was required to pay after 12 years in six equal installments was paid by the assessee prematurely in terms of the net present value of the same; that the state may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement for premature payment at net present value does not amount to remission or cessation of the assessee's liability, rather, the state obtains a payment prematurely and in terms of the correct value of the debt due to it. The requirements of section 41(1)(a) are not fulfilled in such circumstances.

9. Admittedly, in the case in hand, the sales tax incentive was granted to the assessee under Package Scheme of Incentive and under Power Generation Promotion Policy, 1998 to encourage the installation of wind mill for generation of electric power. The sales tax liability was deferred which was allowed to be paid at a discounted value i.e. at net present value of the future liability. Hence, under the circumstances, the sales tax incentive being provided to the assessee to encourage the setting up of the wind mill thus is to be treated as capital receipt. However, the same, even otherwise also, cannot be treated as remission or cessation of liability in the light of the decision of the Hon'ble Bombay High Court in the case of "Sulzer India Ltd." (supra). So, this issue is also squarely covered in favour of the assessee. This issue is accordingly decided in favour of the assessee.

10. In view of the above observations, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on 16.10.2015.

Sd/-
(R.C. Sharma)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 16.10.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.