IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE **S.MANIKUMAR**

and

THE HONOURABLE MR.JUSTICE **D.KRISHNAKUMAR**

T.C.A.Nos.881 to 884 of 2007

M/s.Eagle Press Pvt. Ltd.
1/5, Vaidyanathan Street
Tondiarpet
Chennai – 600 081 .. Appellant in all the TCAs.

versus

The Asst Commissioner of Income-Tax
Company Circle II(1)
Chennai – 600 034 .. Respondent in all the TCAs.

Prayer: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders made in I.T.A.Nos.1749 and 1752/Mds/2003, dated 19.07.2006.

For Appellant in all the TCAs :Mr.N.Devanathan

For Respondent in all the TCAs :Mr.T.R.Senthilkumar
Senior Standing Counsel for Income-Tax

COMMON ORDER

(Order of the Court was made by **S.MANIKUMAR, J.**)

Instant Tax Appeal Nos.881 to 884 of 2007 have been filed, assailing the correctness of the Common Order made in ITA Nos.1749 to 1752/Mds/03 dated 19.07.2006. At the time of filing the Tax Case Appeals, the appellant has raised the following substantial questions of law:

1. Whether in the facts and circumstances of the case, and on the evidence on the record, the order of the Tribunal is not correct in law and perverse in regard to reopening of the assessment in view of:

   (a) Audit party's opinion in regard to interpretation of the provision of Sec.80IA of the I.T. Act, 1961 is not permissible in law in the light of decision of the Supreme Court in the case of IENS (119 ITR 196 (SC)?

   (b) the assessment had become final in the light of passing of an order u/s 143(1)/143(3) and in the absence of issuance of notice u/s 143(2) within time no reassessment is possible?

   (c) the reassessment is not permissible in view of the fact that the Assessing Officer had not considered objections of the assessee against reopening of the assessment?

(d) there is no escapement of income for this assessment year in view of the fact that the depreciation of Windmills had been adjusted against Printing Business income of the assessee and said assessments had become final?

2. Whether on the facts and circumstances of the case the ITAT was right in its interpretation of Sections 80AB, 80IA/80-IA(7) of the I.T. Act, 1961 in regard to denial of relief u/s 80IA to the appellant?

2. However, vide Order dated 11.07.2007, this court, admitted Tax Case Appeal Nos.881 to 884 of 2007 on the following substantial questions of law:

1. *Whether on the facts and circumstances of the case the order of the ITAT is nullity in law in view of violation of principles of natural justice by passing the order exparte?*

2. *Whether on the facts and circumstances of the case, the ITAT was right in its interpretation holding that depreciation on Wind Mills which had been already adjusted for the assessment years 1995-96 and 1996-97 against the profits of Printing Business could artificially be carried forward for the impugned assessment year for the purpose of denial of relief u/s 80IA r/w sections 80AB and 80IA(7), 72 of the Income Tax Act?*

3. *Whether on the facts and circumstances of the case the ITAT was right in its interpretation of Sections 80AB, 80IA, 80IA(5) and 80IA(7) of the I.T. Act, in regard to denial of relief u/s 80IA to the appellant?*

3. The brief facts leading to the filing of the appeals are that M/s.Eagle Press Pvt. Ltd., the appellant herein, is a company registered under the Companies Act, 1957 in 1982, to carry on business in various types of specialised printing. It started a new industrial undertaking by acquiring and installing three windmills in the previous year relevant to the assessment year 1995-96. The appellant purchased the windmills, at a cost of Rs.2,72,56,875/- and windmill qualifies 100% depreciation and as per the assessee's version, windmill qualifies 100% depreciation under Section 32 of the Income Tax Act, 1961 r/w appendix 1, Rule 5 of the Income Tax Rules. The appellant claimed deduction under Section 80-IA from the Assessment years 1997-98 to 2000-2001. However the Assessing Officer issued notice under Section 148 of the Income Tax Act, 1961 in respect of the Assessment Year 1997-98 to 2000-2001 for the purpose of reopening assessment under Section 147, based on audit objections. Assessing Officer, also pointed out that as per the decisions of the Hon'ble Supreme Court in ***CIT v. P.V.S. Beedies Pvt. Ltd.*** reported in ***237 ITR 13 (SC)***, reopening of assessment on the basis of the factual

error pointed out by Internal Audit Party is permissible under the law. Objection of the appellant for reopening on the basis of the change of opinion, has been overruled, following the judgment of the Delhi High Court in ***Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT and another*** reported in ***246 ITR 173 (Del)***. Thus the Assessing Officer, disallowed the claim of deduction under Section 80-IA of the Income Tax Act, 1961. Appeals filed by the assessee before the Commissioner of Income Tax in ITA Nos.24, 25, 26 and 27 of 2003-04/A.III, were dismissed vide common order dated 24.07.2003. Further appeals to the Income Tax Appellate Tribunal in ITA Nos.1749 to 1752/Mds/03 were dismissed, by a common order dated 15.11.2006.

4. Perusal of the common order shows that the appeals were listed for hearing on 12.07.2006. Thereafter, it has been adjourned on several occasions on the request of the appellant. Details of which are hereunder:

> *"These appeals by the assessee were last fixed for hearing on 12.07.2006. It was specifically stated while granting adjournment that no further adjournment shall be given. In the order sheet the words "Last Opportunity" were clearly mentioned and duly bears the signature of the counsel. Adverting to the antecedents of the matter we find that this case*

was first fixed for hearing on 22.03.2004. At the request of the assessee it was adjourned to 25.03.2004. Again prayer was made for adjournment and the case was adjourned to 31.03.2004. Thereafter it was adjourned to 22.4.04, 2.6.04, 29.7.04, 5.9.04, 13.12.04, 5.1.05, 10.3.05, 18.5.05, 27.4.06, 6.7.06 and 12.7.06. On all the occasions either assessee prayed for adjournment or chose not to appear.

2. Last when it was fixed for hearing on 19.7.06 a request for adjournment was made which reads as under:

"The above appeals stands posted for hearing on 19.7.2006.

The Petitioner prays for adjournment for the reasons: viz;

(a) the counsel who is to represent the appeal is under medical treatment for his tooth severe swelling and was advised medical rest on account of extraction of tooth on 18.7.2006 for a week and the assessee is awaiting the coy of the audit objects from the department and had filed requisition under the Right to Information Act in the mean time.

It is therefore humbly prayed that the above appeals be adjourned to some other date.

The inconvenience caused is regretted."

No authorised person did appear to represent the case.

3. Adjournments, at every stage of the proceedings, are the bane of our legal system. They *are a waste of judicial time and a drain on judicial resources. Apart from wasting time they cause unnecessary and highly avoidable aggravation. They derail the legal train. Considering the past history of the case and the fact that as per the order of the Tribunal it was made clear that no further adjournment shall be given in the matter, we reject the adjournment application which is filed without any medical certificate and proceed to decide the matter ex parte, qua the assessee, on merits.*

4. The first common issue pertains to the question whether the conditions precedent for assumption or jurisdiction u/s 147 of the Income Tax Act, 1961 did exist in the facts and circumstances of the case.

5. In the adjournment petition counsel for the assessee did mention that assessee was awaiting the copy of the audit objection from the department and had filed requisition under the Right to Information Act."

5. Details extracted supra, makes it abundantly clear that hearing of the appeals has been adjourned to several dates, only on the request of the appellant, despite clear indication by the Tribunal that no further adjournments would be granted. Having regard to the above, this court is not inclined to accept the contention that the appellant, has been denied an opportunity and thus there was violation

of principles of natural justice, in passing an ex-parte order. In light of the above discussion, the first substantial question of law framed by this court on 11.07.2007 as to, whether on the facts and circumstances of the case, the order of the ITAT is nullity in law, in view of violation of the principles of natural justice, by passing the order exparte, is answered, against the assessee.

6. Going through the orders impugned, we are also, of the view that, the reopening of assessment, has been done in accordance with the provisions and they are also to be sustained in the light of the decision of the Hon'ble Supreme Court in ***CIT v. P.V.S. Beedies Pvt. Ltd.*** reported in ***237 ITR 13 (SC)*** and ***Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT and another*** reported in ***246 ITR 173 (Del).*** On the facts and circumstances of the case, we reject the said contention of the assessee regarding reassessment.

7. When the Tribunal passed the common order, decision rendered in ***Velayudhaswamy Spinning Mills (P.) Ltd. v. Assistant Commissioner of Income-tax*** reported in ***[2012] 21 taxmann.com 95 (Mad.)***, was not rendered. However, when the instant tax appeals are heard, attention of this court was brought to the notice of the said judgment and submissions have been advanced

to apply the same. Mr.T.R.Senthilkumar, learned counsel for the Revenue also submitted that the said judgment is challenged in the Hon'ble Supreme Court. In the earlier orders, even after taking note of the above, this court has allowed the Tax Case appeals, preferred by the assessee by observing that mere pendency would not erase the judgment in ***Velayudhasamy's*** case.

8. Coming to the substantial questions of law 2 and 3 framed on 11.07.2007 and extracted supra, the issue is squarely covered by a decision of this court in ***Velayudhaswamy Spinning Mills (P.) Ltd. v. Assistant Commissioner of Income-tax*** reported in ***[2012] 21 taxmann.com 95 (Mad.)***, wherein, this court, at paragraph Nos.18 to 23 held as follows:

> *"18. From a reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to the initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward*

notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. A fiction created in sub-section does not contemplates to bring set off amount notionally. The fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.

19. In the present cases, there is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised the option under Section 80-IA(2). In Tax Case Nos.909 of 2009 as well as 940 of 2009, the assessment year was 2005-06 and in Tax Case No.918 of 2008 the assessment year was 2004-05. During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the year. The unreported judgment of this court cited supra consdiered the scope of sub-section (6) of section 80-I, which is the corresponding provision of sub-section (5) of section 80-IA. Both are similarly worded and, therefore, we agree entirely with the Division Bench judgment of this court cited supra. In the case of CIT v. Mewar Oil and General Mills Ltd. (No.1)[2004] 271 ITR 311 (Raj); [2004] 186 CTR (Raj) 141, the Rajasthan High Court also considered the *scope of section 80-I and held as follows (page 314 of 271 ITR):*

> *"Having considered the rival contentions which follow on the line noticed above, we are of the opinion that on finding the fat that there was no carry forward losses of 1983-84, which could be set off against the income of the current assessment year 1984-85, the recomputation of income from the new industrial undertaking by setting off the carry forward of unabsorbed depreciation or depreciation allowance from previous year did not simply arise and on the finding of the fact noticed by the Commissioner of Income-tax (Appeals), which has not been disturbed by the Tribunal and challenged before us, there was no error much less any error apparent on the face of the record which could be rectified. That question would have been germane only if thee would have been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out of the priority industry and whether it was required to be set off agains tthe income of the current year. It is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under Section 80-I for the purpose of computing admissible*

deductions thereunder.

In view thereof, we are of the opinion that the Tribunal has not erred in holding that there was no rectification possible under Section 80-I in the present case, albeit, for reasons somewhat different from those which prevailed with the Tribunal. There being no carry forward of allowable deductions under the head depreciation or development rebate which needed to be absorbed against the income of the current year and, therefore, recomputation of income for the purpose of computing permissible deduction under section 80-I for the new industrial undertaking was not required in the present case.

Accordingly, this appeal fails and is hereby dismissed with no order as to costs."

20. From a reading of the above, the Rajasthan High Court held that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under Section 80-I for the purpose of computing admissible deductions thereunder. We also agree with the same. We see no reason to take a different view.

21. The standing counsel appearing for the Revenue is unable to bring to our notice any relevant material or any compelling reason or any contra judgment of other courts to take a different view. He only relied heavily on the Memorandum explaining the provisions in the Finance (No.2) Bill, 1980, [1980] 123 ITR (St.) 154 to support this case and the same reads as follows:

> *"Clause 30(iii). In computing the quantum of 'tax holiday' profits in all cases, taxable income derived from the new industrial units, etc., will be determined as if such units were an independent unit owned by a taxpayer who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, ship or approved hotel will be taken into account in determining the quantum of deduction admissible under the new section 80-I even though they may have been set off against the profits of the taxpayer from other sources."*

22. We are not agreeing with the counsel for the Revenue. We are, therefore, of the view that loss in the year earlier to the initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profits of the eligible business as no such mandate is provided in section 80-IA(5).

23. Under these circumstances, we set aside the order of the Tribunal and answer all the questions in favour of the appellant/assessee and against the Revenue in Tax Case Nos.909 and 940 of 2009 respectively. Accordingly, tax cases are allowed."

In the light of the pronouncement of this court in ***Velayudhaswamy Spinning Mills (P.) Ltd's*** case and inasmuch as the facts and circumstances of the instant appeals, are similar, substantial questions of law 2 and 3 stated supra, are answered in favour of the assessee.

In the result, all the Tax Case Appeals, while answering substantial question of law No.1 framed on 11.07.2007 against the assessee and substantial questions of law 2 and 3 in favour of the assessee, Tax appeals are allowed as indicated. However, there shall be no order as to cost.

(S.M.K., J.)   (D.K.K., J.)
06.07.2016

Index: Yes/No

To

The Income Tax Appellate Tribunal,
Bench 'A', Chennai.

S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.
asr

T.C.A.Nos.881 to 884 of 2007

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