

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T.RAJANI

+ I.T.T.A. No.521 of 2017

% 11-9-2017

The Prl. Commissioner of Income Tax-1,
Visakhapatnam

... Appellant

Vs.

\$ M/s. Devi Sea Foods Ltd., 9-14-8/1,
C.B.M. Compound, Visakhapatnam

... Respondent

! Counsel for Appellant: Mr. K.Raji Reddy,
Senior Standing Counsel

Counsel for Respondent: ---

< Gist:



> Head Note:

? Cases referred:
Nil.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T.RAJANI

I.T.T.A. No.521 of 2017

Judgment: (per V.Ramasubramanian, J.)

The Revenue has come up with the above appeal under Section 260A of the Income Tax Act, 1961, raising the following substantial questions of law:

i) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in directing the Assessing Officer not to set off the losses pertaining to years prior to the initial assessment year while computing deduction under Section 80IA of the Act?

ii) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was correct and justified in allowing deduction under Section 80IA of the Income Tax Act, 1961 without considering the fact that sub-section (5) of said Section provides for computing the profits and gains of an eligible business as if such eligible business was the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the deduction is to be made? and

iii) Whether the Appellate Tribunal has erred in not appreciating the fact that the loss and depreciation on windmills in earlier years had to be set off notionally for computing the deduction in terms of Section 80IA(5) of the Income Tax Act as held by the Special Bench of the Ahmedabad Tribunal in the case of *ACIT v. M/s. Goldmine Shares and Finances Pvt. Ltd. (2008) 113 ITD 209*, wherein it was clarified that as per the specific provision of deduction under Section 80IA(5), for determination of quantum of deduction under Section 80IA profit from eligible business has to be computed after deduction of notional brought forward losses and depreciation of eligible business, even though they have been allowed to set off against other income in earlier years?

2. Heard Mr. K.Raji Reddy, learned Senior Standing Counsel for the Department.

3. The respondent/assessee filed a return of income for the assessment year 2009-10 declaring a total income of Rs.12,73,89,990/-. The return was processed under Section 143(1). The case was selected for scrutiny.

4. It was noticed then that the assessee has claimed deduction under Section 80IA towards profit from the activity of generation of power from its windmill unit. The assessee was seen to have commenced generation of power from the financial year 2004-05, but the deduction under Section 80IA had been claimed for the first time for the assessment year 2009-10.

5. By an order of assessment dated 31-01-2013, the Assessing Officer denied deduction claimed under Section 80IA, on the ground that the expression "initial assessment year" referred to in Section 80IA would mean the year in which the assessee commenced its eligible business; that as per sub-section (5) of Section 80IA the assessee should determine the profit available for deduction, as if the eligible business is the only business and accordingly the notional losses brought forward from earlier assessment years should be set off against the profit of the current financial year; and that as per the decision of the Special Bench of the Ahmedabad Tribunal in the case of **ACIT v. Goldmine Shares and Finances Pvt. Ltd.** [2008 (113) ITD 209], the

profit from eligible business has to be computed after deduction of the brought forward notional losses and depreciation of eligible business, even though they have been set off against other income in the earlier years.

6. The CIT (Appeals) confirmed the order of the Assessing Officer, by dismissing the appeal filed by the assessee. Aggrieved by the order of the CIT (Appeals) dated 15-11-2013, the assessee filed a further appeal before the Income Tax Appellate Tribunal. The Tribunal allowed the appeal following the decision of the Madras High Court in the case of **Velayudhaswamy Spinning Mills Pvt. Ltd. v. ACIT** [(2012) 340 ITR]. Aggrieved by the said order, the Revenue is before us.

7. In order to find an answer to the substantial questions of law raised by the Revenue, it is necessary first to take note of Section 80IA of the Income Tax Act:

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

(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines:

Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the *Explanation* to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

(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:

Provided that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of section 2 of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or plant by the assessee.

Explanation 2.—Where in the case of an undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

(4) This section applies to—

(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—

(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or

a corporation or any other body established or constituted under any Central or State Act;

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Provided further that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.

Explanation.—For the purposes of this clause, "infrastructure facility" means—

(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;

(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(d) a port, airport, inland waterway, inland port or navigational channel in the sea;

(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006:

Provided that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking:

Provided further that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures,

letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, 2011" had been substituted;

(iv) an undertaking which,—

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2017;

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2017:

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2017.

Explanation.—For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;

(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—

(a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified³⁴ before the 31st day of December, 2005 by the Central Government for the purposes of this clause;

(b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, 2011;

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(6) Notwithstanding anything contained in sub-section (4), where housing or other activities are an integral part of the highway project and the profits of which are computed on such basis and manner as may be prescribed, such profit shall not be liable to tax where the profit has been transferred to a special reserve account and the same is actually utilised for the highway project excluding housing and other activities before the expiry of three years following the year in which such amount was transferred to the reserve account; and the amount remaining unutilised shall be chargeable to tax as income of the year in which such transfer to reserve account took place.

(7) The deduction under sub-section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant,

as defined in the *Explanation* below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form 40 duly signed and verified by such accountant.

(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date:

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means—

- (i) the price that such goods or services would ordinarily fetch in the open market; or
- (ii) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA.

(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.

(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom:

Provided that in case the aforesaid arrangement involves a specified domestic transaction referred to in section 92BA, the amount of profits from such transaction shall be determined having regard to arm's length price as defined in clause (ii) of section 92F.

(11) The Central Government may, after making such inquiry as it may think fit, direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to any class of industrial undertaking or enterprise with effect from such date as it may specify in the notification.

(12) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the

expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger—

(a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

(12A) Nothing contained in sub-section (12) shall apply to any enterprise or undertaking which is transferred in a scheme of amalgamation or demerger on or after the 1st day of April, 2007.

(13) Nothing contained in this section shall apply to any Special Economic Zones notified on or after the 1st day of April, 2005 in accordance with the scheme referred to in sub-clause (iii) of clause (c) of sub-section (4).

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1)."

8. Sub-section (1) of Section 80IA provides for a deduction of an amount equal to 100% of the profits and gains derived from any business referred to in sub-section (4) for 10 consecutive assessment years, in cases where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4). The business referred to in sub-section (4) is actually termed as the eligible business.

9. Sub-section (4) of Section 80IA categorises eligible business into five types. Broadly, they are: (i) any enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility, (ii) any undertaking providing telecommunication services etc., (iii) any undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone,

(iv) an undertaking which is set up for the generation or generation and distribution of power, if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2017 and
(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant.

10. Sub-section (2) of Section 80IA gives the assessee an option to claim the deduction for any 10 consecutive assessment years out of 15 years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility. Sub-section (5) which contains a non-obstante clause stipulates that the profits and gains of an eligible business to which sub-section (1) would apply shall, for the purposes of determining the quantum of deduction, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year.

11. While interpreting the non-obstante clause in sub-section (5) of Section 80IA, the Income Tax Appellate Tribunal pointed out that the purpose and object of sub-section (5) is to provide for the manner of determination of the quantum of deduction, but not to deal with the initial assessment year. The Tribunal held that it is sub-section (2) which gives a clear choice to the assessee to decide the year from which the assessee wants to claim deduction.

12. Keeping the above in mind, if we have a look at the decision of the Madras High Court in **Velayudhaswamy Spinning Mills Pvt. Ltd. v. ACIT** [(2012) 340 ITR], it is seen that the Madras High Court drew a distinction between the expression “initial assessment year” employed in sub-section (5) and the expression “beginning from the year” referred to in sub-section (2). The relevant portion of the judgment of the Madras High Court in *Velayudhaswamy Spinning Mills Pvt. Ltd.*, reads as follows:

“Important factors are to be noted in sub-s. (5) and they are as under:

It starts with non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored; (2) it is for the purpose of determining the quantum of deduction; (3) for the assessment year immediately succeeding the initial assessment year; (4) it is a deeming provision; (5) fiction created that the eligible business is the only source of income; and (6) during the previous year relevant to the initial assessment year and every subsequent assessment year. From reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to 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 not 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.

Fiction created in sub-s. (5) does not contemplate to bring set off amount notionally Fictions created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.”

13. We respectfully agree with the interpretation sought to be given by the Madras High Court in *Velayudhaswamy Spinning Mills Pvt. Ltd.* Therefore, the Tribunal was right in following the decision of the Madras High Court.

14. The Tribunal also relied upon CBDT Circular No.1/2016, dated 15-02-2016, whereby it was clarified that once an initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction under Section 80IA for 10 consecutive years, beginning from the year in respect of which he has exercised such option. The relevant portion of the CBDT Circular No.1/2016 reads as follows:

“The matter has been examined by the Board. It is abundantly clear from sub-section (2) that an assessee who is eligible to claim deduction under Section 80IA has the option to choose the initial/first year from which it may desire the claim of deduction The ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-section. It is hereby clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction under Section 80IA for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. Hence, the term “initial assessment year” would mean the first year opted for by the assessee for claiming deduction under Section 80IA. However, the total number of years for claiming deduction should not transgress the prescribed

slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.

The Assessing Officers are, therefore, directed to allow deduction under Section 80IA in accordance with this clarification and after being satisfied that all the prescribed conditions applicable in a particular case are duly satisfied. Pending litigation on allowability of deduction under Section 80IA shall also not be pursued to the extent it relates to interpreting initial assessment year as mentioned in sub-section (5) of that Section for which the Standing Counsel/DRs be suitably instructed.

The above be brought to the notice of all Assessing Officers concerned.”

15. In the light of the above Circular, all the substantial questions of law deserve to be answered against the Revenue and the appeal deserves to be dismissed. Accordingly, it is dismissed. The miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

T.RAJANI, J.

11th September, 2017.
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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
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I.T.T.A. No.521 of 2017
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