IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

T.C.A.No.338 of 2018

Commissioner of Income Tax,
No.63, Race Course Road,
Coimbatore. .. Appellant/Respondent

Vs.

M/s.G.V.G. Paper Mills Pvt Ltd.,
No.168/2, Sikkandar Batcha Street,
Gandhi Nagar, Udumalpet - 642 128. .. Respondent/Appellant

Prayer: Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, 'D' Bench, Chennai, dated 28.03.2014 in I.T.A.No.116/Mds/2014 preferred against the order dated 30.10.2013 made in AABCG1438N by the Commissioner of Income Tax (appeals)II Coimbatore against the order of the Assistant Commissioner of Income Tax Salary Circle I, Coimbatore dated 30.12.2011 made in AABCG1438N.

For Appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel
for Income Tax.

J U D G E M E N T

(Judgement of this Court was made by S.MANIKUMAR, J.)

Challenge in this Tax Appeal, is to an order passed by the Income Tax Appellate Tribunal in ITA No.116/Mds/2014, dated 28.03.2014, by which, the Tribunal dismissed the appeal preferred by the Revenue, against the order of the Commissioner of Income-Tax (Appeals) dated 30.10.2013, for the Assessment Year 2006-07.

2. Revenue has come up with the above appeal, raising the following substantial question of law:-

> "Whether the Appellate Tribunal right in law in holding that assessee is entitled to deduction under Section 80IA without setting off the losses/unabsorbed depreciation pertaining to the windmill,

which were set off in the earlier year against other business income of the assessee, following the decision of the Jurisdiction High Court in the case of M/s.Velayudhasamy Spinning Mills (340 ITR 477) when the same is pending appeal before the Hon'ble Supreme Court in SLP Civil 1136 of 2011?"

3. As regards substantial question of law, is concerned, it is the fair representation of the learned Senior Standing Counsel for Income Tax Department that this Court has been consistently following the decision in M/s.Velayudhaswamy Spinning Mills (P) Ltd., v. Assistant Commissioner of Income-Tax reported in 340 ITR 477. He also submitted that challenge to the same, is pending before the Hon'ble Apex Court in SLP No.1136 of 2011.

4. Similar to the facts and circumstances of the case, while adverting to the substantial questions of law raised and after considering the judgment of the Hon'ble Apex Court in Liberty India vs. CIT reported in (2009) 225 CTR (SC) 233 : (2009) 28 DTR (SC) 73 : (2009) 317 ITR 218 (SC) and the judgment of the Rajasthan High Court in CIT vs. Mewar Oil & General Mills Ltd. reported in (2004) 186 CTR (Raj) 141 : (2004) 271 ITR 311 (Raj), a Hon'ble Division Bench of this Court in Velayudhaswamy Spinning Mills Pvt. Ltd.,'s case (stated supra), held that once the losses and other deductions are set off against the income of the assessee in the previous year, it should not be re-opened again, for the purpose of computation of current year income, under Section 80-I and 80-IA of the Act.

5. Velayudhaswamy Spinning Mills Pvt. Ltd.,'s case (stated supra), has been followed in CIT v. R.Yuvaraj reported in [2015] 57 TAXMANN.COM 252 (Madras), wherein, it is held that though it is contended that SLP filed against the above reported judgment, is pending on the file of the Hon'ble Supreme Court, the effect of the same, would not amount to reversal or erase the dictum.

6. Material on record discloses that while confirming the order of the Commissioner of Income-Tax (Appeal), the Income-Tax Appellate Tribunal, at paragraph Nos.6 and 7 held as follows:

"6. Aggrieved, the assessee preferred an appeal. In the grounds raised before the CIT(A), he pleaded three folded averments i.e. reopening was not sustainable, it is entitled for deduction under Section 80IA and the issue was covered by the order of the 'Tribunal' in assessment years 2004-05 and 2005-2006. We find that the CIT(A) has agreed to assessee's latter arguments by observing as follows:

> "6.0. I have considered the submissions of the assessee and the material available on record. The assessee has raised an objection regarding the validity of the reopening of the assessment on the ground that the reopening has been made after the lapse of 4 years and that there is no failure on the part of the assessee to disclose any material facts. On going through the case records of the assessee it is seen that the assessment was competed originally u/s143(3) on 10.06.2008 and subsequently reopened u/s 148on 30.3.2011. Therefore, the reopening has been done within the 4 year limit and the assessee's objections are factually incorrect. Therefore, this ground is dismissed and the reopening is held to be in order.
>
> 6.1. Coming to the merits of the case, it is seen that the assessee has several windmill divisions and in this year while claiming deduction u/s 80IA it has not set off of the losses from Wind Mill Farm Division IV. The Assessing Officer's argument is that the deductions should be claimed after the set off of the loss from the other wind mill division, whereas the assessee's claim is that the each wind mill divisions is a separate entity by itself and the option of claiming deduction u/s 80IA lies with the assessee. The assessee has also quoted the case of Sri Velayudhasamy Spinning Mills Pvt. Ltd (231 CTR 368) (Madras) rendered by the jurisdictional High Court. On perusal of the facts of the case it is seen that the assessee is entitled to exercise its option on claiming

80IA deduction in respect of different wind mill divisions. There is no compulsion in the Act to treat the activity as an aggregate and common unit. Further, the decision in the case of Sri Velayudhasamy Spinning Mills Pvt Ltd will apply in respect of the claim for the set off of losses. Therefore the assessee's appeal is allowed."

This leaves the Revenue aggrieved.

7. We have heard the Revenue and gone through the case file. Admittedly, while granting relief to assessee on merits, the CIT(A) accepted its argument that each wind mill division is a separate entity is itself and option of claiming deduction under Section 80IA rests with the assessee. From the statement of facts filed by the Revenue, it is noticed that its mere argument is that against the decision of the Hon'ble Jurisdictional High Court, Special Leave Petition before the Apex Court is pending. In our view, merely because the Revenue's Special Leave Petition is pending does not form a valid ground to adopt a different approach in the impugned assessment year in absence of any distinction on facts being pointed out. In assessment year 2004-05 (supra) the issue has travelled upto the 'Tribunal' and stands decided in assessee's favour. Thus, in the impugned assessment year, we adopt consistency and affirm the findings of the CIT(A) holding the assessee eligible for deduction under Section 80IA of the Act.

The ITA No.116/Mds/2014 is dismissed."

7. Going through the material on record, we are of the view that there are no valid grounds to reverse the above said order, stated supra. Question of law raised is answered against the Revenue and in favour of the assessee.

8. In the result, the Tax Case Appeal is dismissed at the stage of admission itself. No costs.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
   'D' Bench, Chennai.

2. The Commissioner of Income Tax(Appeals)II Coimbatore.

3. The Assistant Commissioner of Income Tax, Salary Circle I
   Coimbatore.

+1 CC to Mr.T.R. Senthil Kumar, Advocate sr 42996.

T.C.A.No.338 of 2018

SSV(CO)
SP(18/07/2018)