IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1160 OF 2016
WITH
INCOME TAX APPEAL NO.1149 OF 2016
WITH
INCOME TAX APPEAL NO.1150 OF 2016
WITH
INCOME TAX APPEAL NO.1139 OF 2016

The Pr. Commissioner of Income Tax … Appellant

V/s.

Hamilton Houseware P. Ltd. … Respondent

Mr.Tejveer Singh for the Appellant.
Mr.S.Sriram with Mr.B.V.Jhaveri with Mr.Mayank Thosar for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 16, 2019.

P.C.:-

1. These appeals involve the same assessee and raise similar questions. We may notice facts from Income Tax Appeal No.1160 of 2016. This appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal in case of the respondent-assessee for the assessment year 2005-06. Following questions are raised by the revenue:-

> "i. Whether on the facts and circumstances of the case and in Law, the Tribunal was justified in directing not to exclude the interest income of Rs.69,936/- from the profits eligible for deducting u/s 80IB, without considering the fact that the said income is not directly 'derived from' the manufacturing activity of the assessee?
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> ii. Whether on the facts and circumstances of the case and in Law, the Tribunal was justified in directing not to exclude the exchange rate difference of Rs.21,81,641/- from the profits eligible for deducting u/s 80IB?
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> iii. Whether on the facts and circumstances of the case and in Law, the Tribunal was justified in directing not to exclude the scrap income of Rs.13,25,620/- from the profits eligible for deduction u/s 80IB, even though the said income is not directly 'derived from' the manufacturing activity of the assessee?
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> iv. Whether on the facts and circumstances of the case and in Law, the Tribunal was justified in setting aside the settled issue to the file of the A.O. in respect of exclusion of export benefits such as DEPB & duty drawback etc from the profits eligible for deduction u/s 80IB in contravention of the ratio laid down by the Hon'ble Apex Court Liberty India Vs. CIT (2009) 317 ITR 6218 (SC)?"

2. The respondent-assessee is a manufacturer-exporter and claims deduction of income derived from such business in terms of Section 80IB of the Income Tax Act, 1961 ("the Act" for short). In this context, the revenue has raised objections which are subject matter of the present appeals.

3. Question No.1 noted above refers to the revenue's objection to the interest income earned by the assessee being eligible for deduction. The question as framed does not bring about the correct controversy. The assessee does not claim deduction of such interest income. The assessee however argued that disallowance of interest income for such deduction should be the net of the interest and not gross. The revenue argues to the contrary. The Tribunal by the impugned judgment accepted the assessee's contention holding that the disallowance from the deduction of interest can be only be of the net of the interest income.

4. Having heard learned counsel for the parties, we do not find any error in the view of the Tribunal . It is undisputedly that the interest income earned by the assessee cannot be said to have been derived from its export business. However, when the question of disallowance comes, the revenue cannot ignore the assessee's interest expenditure and disallow the entire interest earned by the assessee without netting if to off. Revenue cannot

give different treatment to interest income and interest expenditure.

5. Question No.2 pertains to revenue's objection to the income earned by the assessee on account of foreign exchange rate fluctuation. Counsel for the revenue submitted that income cannot be stated to have been derived from the assessee's export business. We however notice that the CIT Appeals while granting the relief to the assessee had recorded that the additional income earned by the assessee on account of the fluctuation of foreign exchange rate was out of its receipts for exported goods. This is not a case where the assessee after completing the exports and receipt of the sale consideration, realized the same in rupee turns after a gap of time and in the meantime, the foreign exchange rate having fluctuated favourably, the assessee earned additional income. We are therefore, of the opinion that the Tribunal correctly confirmed the view of the CIT appeals and granted the benefit to the assessee.

We are not oblivious to the decision of this Court in **Income Tax Appeal No. 2131 of 2008 dated 22nd April, 2010.**

In such case, however, the Court while holding that the additional income earned by the assessee on account of fluctuation of the foreign exchange rate would not qualify for deduction under Section 80HHC of the Act, noted that such exchange fluctuation was not on account of delayed realization of export proceeds. It was the case in which the interest rate fluctuation arose after completion of the export activities and the receipts which were kept in EEFC account. The facts of the present case are therefore, distinguishable.

6. The question No.3 arises out of the revenue's objection to the assessee's claim of deduction of income arising out of sale of scrap. The revenue argues that such income cannot be stated to have been derived from the assessee's export business. In this respect, we notice that the Commissioner appeals while granting the relief to the assessee had come to factual finding that the assessee was engaged in manufacturing activity. During the course of such manufacturing activity scrap was generated out of use of various raw materials till the finished goods are produced. Such scrap was sold which generated receipts which in turn

reduced the costs of manufacturing.

It can thus be seen that scrap was generated in the course of assessee's manufacturing activity and the income generated out of sale of such scrap was adjusted to the cost of manufacturing of the product itself. Such additional income thus was clearly derived out of the assessee's activity of manufacturing and export of such manufactured goods. In this context, we may refer to the decision of the division bench of Gujarat High Court in case of **Deputy Commissioner of Income-Tax Vs. Harjivandas Juthabhai Zaveri and anr.**[1] on which reliance was also placed by the CIT appeals and the Tribunal in the present case. It was the case in which the assessee had claim deduction under Section 80I of the Act in respect of the profits and gains from industrial undertaking. The assessee had earned income out of sale of empty barrels and used jute bags. The assessee reduced the costs of manufacturing to the extent it received income out of sale of such items. The Court accepted the assessee's contention and upheld the claim of deduction granted by the Tribunal. Learned counsel for the revenue however brought to our notice

1 (2002) 258 ITR 785 (Guj)

an order dated 3rd April, 2018 in Income Tax Appeal No.1086 of 2016 and connected appeal in which the Court has admitted a question as to whether in facts and circumstances of the case the Tribunal had erred in allowing the claim of the assessee under Section 80IB of the Act on income earned on sale of scrap "When it was not derived from the activities of the alleged business". Thus, the Court is examining a question in different context on the ground that such income out of sale of scrap was not derived from the assessee's eligible business. In the present case, as noted, the facts are different. This question is therefore not considered.

7. The fourth question arises out of the revenue's objection to the assessee's claim of deduction pertaining to benefits of DEPB and duty drawback. Here also the question as framed fails to bring to about the true controversy. Upon perusal of the impugned judgment of the Tribunal, we notice that the assessee had raised an alternative contention of disallowance of net of the benefits and not gross. The Tribunal while upholding revenue's objection to the assessee's principal claim of deduction accepted the

alternative contention and held that such disallowance would be restricted to the net of the benefit and not gross. Here also we do not find any error in view of the Tribunal. Even if the benefits of the DEPB and duty drawback were to be excluded from the purview of deduction for the assessee's export business, the costs incurred for receiving such benefits must be accounted for.

8. In Income Tax Appeal No.1139 of 2016 the revenue has suggested one more question which reads as under:

> "Whether on the facts and circumstances of the case and in Law, the Tribunal was justified in deleting the addition made by AO on account of setting off the loss amounting to Rs.1,10,79,284?"

9. This question rises out of the revenue's objection to the assessee's claim of deduction under Section 80IC of the Act in respect of its one of the units. The assessee had claim a deduction of 1.70 crores (rounded off) . The Assessing Officer noticed that the assessee had incurred loss of Rs.1.10 crores (rounded off) in relation to the said unit in the earlier assessment year which was absorbed against other incomes. The Assessing Officer was of the opinion that the assessee should have brought forwarded

the national loss to the current year which had to be set off against its claim of deduction for the present year. This view was also accepted by the CIT appeals. The Tribunal however reversed the decision relying on the decision of the Madras High Court in case of **Velayudhaswamy Spinning Mills Pvt. Ltd. and anr. Vs. ACIT**[1]**.**

10. Having heard learned counsel for the parties and having perused the documents on record, we notice that the division bench of this Court in case of **Commissioner of Income Tax-10 Vs. Hercules Hoists Ltd. Dated 14th June, 2017 (Income Tax Appeal No.707 of 2014)** had occasion to consider a similar issue. The Court referred to and relied upon the decision of the Madras High Court in case of **Velayudhaswamy Spinning Mills Pvt. Ltd.(supra)** and made following observations:

> "7. The learned standing Counsel appearing for the revenue submitted that the assessee is not entitled to claim deduction under Section 80-IA of the Act. Since the accumulated losses and unabsorbed depreciation were more than the profits of this year, the same had to be set off against the profits and therefore, the assessee is not entitled for any deduction as per Section 80-IA

1 (2012) 340 ITR 477

read with Section 80AB of the Act. Further, it is contended that the Special Bench of the Tribunal has correctly decided the issue and held that profits from the eligible business for the purpose of determination of the quantum of deduction under Section 80-IA have to be computed only after deduction of notionally brought forward losses and depreciation of the eligible business even though they have been set off against other income in earlier years. Therefore, the assessee is not entitled to the relief of claim under Section 80-IA of the Act. In addition to that, the learned Counsel appearing for the revenue also submitted that in respect of Tax Case No.918 of 2008, the Tribunal is not right in holding that the initial assessment year is 2004-05. He further submitted that before the Tribunal, the revenue filed a letter stating that the assessee had exercised the option of claiming the deduction under Section 80-IA during the assessment year ,1999-2000, which is the initial assessment year and not the assessment year 2004-05 as held by the Tribunal. Further, the Tribunal ought to have considered the letter given, after affording one more opportunity to the parties before deciding the matter. Without considering the same, the Tribunal simply rejecting the contention of the revenue in respect of Tax Case No. 918 of 2008 is not correct and this Court may remand the matter to the Tribunal to decide the issue afresh in respect of the initial assessment year.

8. Heard the counsel appearing for the parties and perused the materials available on record.

9. On a perusal of the order of the assessing officer, it is seen that the eligible income for deduction under Section 80-IA is worked out in all the cases as follows:

Tax Case No. 909 of 2009
Net income from Windmill Division 1 1,70,76,945 (2002-03)
Less: (a) Unabsorbed depreciation 8,26,84,110 allowance assessment year 2003-04
(b) Income from Windmill Division 1 71,16,270 (200203) assessment year 2004-05
Balance of unabsorbed depreciation 7,55,67,840 allowance
Unabsorbed depreciation allowance (-) 5,84,90,895 balance
Tax Case No. 940 of 2009
Net income from Windmill Division
2,82,67,370--
Less: Unabsorbed depreciation allowance (initial assessment year) ------------ Asst. yr. 2003-04 12,11,01,360

------------ Asst. yr. 2004-05 1,59,85,972 13,70,87,332
Balance (-) 10,88,19,962
Tax Case No. 918 of 2008
Total loss + depreciation of the units claiming depreciation
For all earlier years-V (-) 24,63,50,426
Less: Current years income from the unit 10,63,74,164
Balance income available for deduction (-) 13,99,76,362 under Section 80-IA.

Thus, the assessee has been setting off the loss against the income of the company for the earlier years. During the assessment year, the assessee exercised the option claim of deduction under Section 80-IA of the Act. But the assessing officer denied the exemption on the finding that loss or depreciation already allowed and set off against other sources of the income of the assessee has to be nationally carried forward and set off against the current years income from the units for which the assessee is claiming deduction under Section 80-IA. There is no dispute that during the year, there is a profit. Therefore, the assessee claimed deduction under Section 80-IA and the revenue has no authority to notionally bring forward the unabsorbed depreciation and loss of the earlier year which has been already set off as against the current year profit from the unit.

10. It is pertinent to note that the learned senior Counsel appearing for the assessee invited the attention of this Court to an unreported judgment of this Court dated 23-12-2009 in Tax Case (Appeal) No.298 of 2004 wherein, this Court considered the similar substantial question of law, which reads as follows:

Whether the Tribunal was right in holding that for the purpose of allowing deduction under Section 80I, the brought forward losses and unabsorbed depreciation etc., of the new industrial undertaking need not be taken into consideration, once they have been set off against other sources of income, especially in view of the clear provisions of Sub-section 6 of Section 80-I, the application of which is mandatory?

11. This question is therefore concluded against the revenue by virtue of the judgment of this Court in case of **Hercules Hoists Ltd.(supra)** and is therefore not required to be considered. In the result, all the tax appeals are dismissed.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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