

GURBAX SINGH
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No. 289 of 2018

Date of decision: 14.01.2019

Principal Commissioner of Income Tax-1, Chandigarh.

.....Appellant

Vs.

**Vijay Kumar Batra, Proprietor, M/s Adley Formulations, SCO 915,
NAC, Manimajra, Chandigarh.**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL,
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Present: Ms. Urvashi Dhugga, Sr. Standing Counsel for the appellant(s).

**Mr. Saurav Verma, Advocate with Mr. Ahosh Soni, Advocate for
respondent in ITA No. 289 of 2018**

**Mr. Akash Garg, Advocate for respondent in ITA Nos. 402 &
478 of 2018.**

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos. 289, 402 and 478 of 2018 as learned counsel for the parties are agreed that the issue involved in all three appeals is identical. However, the facts are being extracted from ITA No. 289 of 2018.

2. ITA No. 289 of 2018 has been preferred by the appellant-revenue against the order dated 15.02.2018, Annexure A.4, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B' (in short, "the Tribunal") in ITA No.586/Chd/2017 dated 15.02.2018, for the assessment year 2013-14, claiming following substantial questions of law:-

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- “i) Whether on the facts and in the circumstances of the case, the Hon’ble ITAT has erred in deleting the addition of ₹ 2,10,51,286/- (made on account of restricting the claim of deduction under Section 80IC of Income Tax Act, 1951 @ 25%) without discussing the merits of the issue involved and by relying on the decision of Hon’ble Himachal Pradesh High Court in the case of *M/s Stovekraft India*, when this judgment has not been accepted by the department on merits?
- ii) Whether on the facts and in the circumstances of the case, the Hon’ble ITAT (by relying on the judgments discussed above) has erred in holding that those undertakings or enterprises which commenced production after 07/01/2003 can carry out multiple “substantial expansion” as long as provisions of Section 80IC(8)(ix) are met without appreciating that as per provision of Section 80IC of the Income Tax Act and as explained in CBDT Circular No. 7/2003, such enterprise or undertaking cannot carry out any “substantial expansion”?
- iii) Whether on the facts and in the circumstances of the case, the Hon’ble ITAT (by relying on the judgments discussed above) has erred in holding that those undertakings or enterprises which commenced production before 07/01/2003 can carry out multiple “substantial expansion” prior to 01/ 04/2012 and there will be initial year for each “substantial expansion” as long as provisions of Section 80IC(8)(ix) are met without appreciating that as per provision of Section 80IC of the Income Tax Act and as explained in CBDT Circular No. 7/2003, such enterprise or undertaking can carry “substantial expansion” only once?

3. In ITA Nos. 402 and 478 of 2018, the following substantial questions of law have been claimed:-

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- “i) Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT has erred in allowing appeal of the assessee without appreciating the facts of the case wherein the Hon’ble Himachal Pradesh High Court had set aside the case for examining the facts of substantial expansion?
- ii) Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT has erred in deleting the addition of ₹ 5,59,41,054/- (made on account of restricting the claim of deduction under Section 80IC of Income Tax Act, 1961 @ 30%) without discussing the merits of the issue involved and by relying on the decision of Hon’ble Himachal Pradesh High Court in the case of *M/s Stovekraft India* when this judgment has not been accepted by the department on merits?
- iii) Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT has erred in allowing the deduction under Section 80IC @ 100% to the assessee for 10 years without appreciating and ignoring the real intent and purpose of insertion of Section of 80IC and the CBDT circular No. 7 of 2003 dated 05.09.2003 and circular No. 49 of 2003 of Central Excise Department and the subsidy scheme issued by Ministry of Commerce and Industry, DIPP, GOI, which are binding in law on authorities and anything which is legally relevant, is to be considered for implementation as laid down by SC in 131 ITR 597 (SC)?
- iv) Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT has erred in allowing the deduction under Section 80IC @ 100% to the assessee for 6th year without appreciating and ignoring the fact that a perusal of the proviso would show that before the introduction of Section 80IC, the deduction to the backward states was available in terms of Section 80IB

(4), the third proviso makes clear that after 07.01.2003, this deduction will be available only under Section 80IC, and deduction would be @ 100% for the first five years and there after @ 30%?

- v) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in ignoring the explicit statutory provision of the Second proviso that clarifies that in the case of states of North-Eastern regions, the deduction would be @ 100% was allowable for 10 years whereas in the case of States of Himachal Pradesh, the deduction was allowable @ 100% for first five years and 30% for the next five years?
- vi) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT by relying on the judgments in the case of *M/s Stovekraft India* (supra), has erred in holding that those undertakings or enterprises which commenced production after 07.01.2003 can carry out multiple "substantial expansion" prior to 01.04.2012 and there will be initial year for each "substantial expansion" as long as provisions of Section 80IC(ix) are met without appreciating that as per provisions of Section 80IC(2)(ii) of the Income Tax Act and as explained in CBDT Circular No. 7/2003, read with circular No. 49/2003 issued by Central Excise Department that benefit of substantial expansion was available only to units that existed and were operational as on 07.01.2003 and substantial expansion could have been carried out only on or after 07.01.2003 by an undertaking that existed prior to 07.01.2003 whereas this undertaking was set up only in F.Y. 2006-07?
- vii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in allowing the deduction under Section 80IC @ 100% to the assessee for 10 years without appreciating and ignoring the fact that

the expression substantial expansion has been GURBAX SINGH
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Section 80IC(2)(a) and 80IC(2)(b) however 80IC(2)(a)(ii)
and 80IC(2)(b)(ii) is applicable to H.P. or Uttrakhand and
80IC(a)(iii) and 80IC(b)(iii) are applicable to the north
eastern states when compared with rate of deduction
provided under Section 80IC(3)(ii), the rate given is 100%
for five years, and 25% for next five years, whereas under
sub Section 3(i), the rate has been given @ 100% for NE
states and Sikkim for all 10 years and the meaning of
substantial expansion will be rendered redundant?

- viii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in holding that an undertaking which has carried out substantial expansion in any assessment year prior to 01.04.2012 can opt for that assessment year as initial assessment year for the purpose of claiming deduction under Section 80IC(3) of the Income Tax Act without appreciating the fact that an undertaking like this set up after 07.01.2003, i.e. in F.Y. 2006-07 is not entitled to benefit of "substantial expansion" in view of the provisions of Section 80IC(2)(a)(ii) and 80IC(2)(b)(ii) and as clarified in CBDT circular No.7 of 2003?
- ix) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in not allowing the AO to examine, whether substantial expansion has taken place, holding that they do not find any justification for allowing a second innings to AO to reexamine facts, even though this is a violation of natural justice and a perverse order, since Hon'ble ITAT is the final fact finding authority?
- x) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in failing to adjudicate the issue of depreciation on merits holding that in view of allowance of 80IC, the matter was academic?

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- xi) Whether on the facts and in the circumstances and in law, the Hon'ble ITAT has erred in failing to adjudicate the issue of depreciation which would have substantial ramification for taxable income of 80IC is restricted to 30% per scheme and deserves to be adjudicated, Hon'ble ITAT being final fact finding authority?
 - xii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in failing to adjudicate the admissible depreciation which had been correctly restricted by AO based on finding of facts that rates claimed were incorrect and appellant had not supported its claim with relevant bills of assets either before AO or before Ld. CIT(A)?"

4. A few facts relevant for the decision of the controversy involved as narrated in ITA No. 289 of 2018 may be noticed. The respondent-assessee is in the business of production of pharmaceutical products. It has unit located in Baddi. It has been claiming deduction under Section 80IC of the Act since the financial year 2005-06. For the first five years, it has claimed 100% deduction as per the provisions of the Act. However, in the financial year 2010-11 (6th year), the assessee undertook substantial expansion of business by making more than 50% investment over and above the book value of plant and machinery. Thus, the assessee was claiming 100% deduction in the 8th year (financial year 2012-13 relevant to assessment year 2013-14) as it undertook substantial expansion in the assessment year 2011-12. The return of income was filed on 28.09.2013 by the respondent-assessee declaring an income of ₹ 4,43,270/-. The assessment was completed under Section 143(3) of the Act on 30.12.2015 at an assessed income of ₹ 2,14,95,090/- after making addition on account of disallowance of deduction

under Section 80IC of the Act to the tune of ₹ 2,10,51,826/- CLUBBAX SINGH
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deduction claimed of ₹ 2,80,69,101/-). Vide order dated 30.12.2015, Annexure A.1, the Assessing Officer restricted the deduction to 25% by relying on the judgment of the Tribunal in the case of *M/s Hycron Electronics Vs. ITO* in ITA No. 798/Chd/2012 dated 27.05.2015. Aggrieved by the order, the respondent-assessee filed an appeal before the Commissioner of Income Tax (Appeals), [CIT(A)]. Vide order dated 17.01.2017, Annexure A.2, the CIT(A) confirmed the addition and dismissed the appeal. Still not satisfied, the assessee filed appeal before the Tribunal. Vide order dated 24.07.2017, Annexure A.3, the Tribunal dismissed the appeal on the ground that the respondent-assessee did not appear for any hearing. Thereafter, the assessee filed a miscellaneous application before the Tribunal which was accepted vide order dated 15.02.2018, in view of the decision of the Himachal Pradesh in the case of *M/s Stovekraft India Vs. Commissioner of Income Tax* in ITA No. 20 of 2018 deleting the addition. Hence the instant three appeals by the appellant-revenue before this Court.

5. We have heard learned counsel for the parties.

6. The issue that arises for consideration in these appeals is whether the assessee who had availed deduction at the rate of 100% for first 5 years could start claiming deduction at the rate of 100% again for the next five years as they had undertaken substantial expansion under Section 80IC of the Act. The matter is no longer res integra. The issue involved in the present appeals has already been decided in favour of the appellant-revenue, in a recent judgment of this Court dated 06.09.2018 in *M/s Admac Formulations Vs. Commissioner of Income Tax, Panchkula* in ITA No. 332 of 2015. In the said case, the statutory provision of Section 80IC of the Act

was discussed in detail. The decision rendered by the Himachal Pradesh High Court in ***M/s Stovekraft India's*** case (supra) was also considered. The issue therein was as to whether “undertaking or an enterprise” established after 7th January 2003 carrying out “substantial expansion” within the window period between 07.01.2003 to 01.04.2012 would be entitled to deduction on profits at the rate of 100% under Section 80IC of the Act and if so then for what period. The relevant paras of the judgment in ***M/s Admac Formulations'*** case (supra) read thus:-

“Section 80-IC was inserted by Finance Act, 2003 w.e.f. April 1, 2004. It makes special provisions in respect of certain undertakings or enterprises in certain special category States. According to this provision, certain undertakings or enterprises in certain special category States are allowed deduction from such profits and gains, as specified in sub-section (3) of Section 80-IC of the Act. The provisions of this Section provided deduction to manufacturing units situated in the States of Sikkim, Himachal Pradesh and Uttaranchal and North-Eastern States. The deduction was provided to new units established in the aforesaid States, and also to existing units in those States if substantial expansion was carried out. The deduction was available @ 100% for ten Assessment Years for the units located in North-Eastern and in the State of Sikkim, and for the units located in Himachal Pradesh, the deduction was available @ 100% for five years and @ 25% for next five years.

6. The Tribunal in view of the opinion expressed by it in its decision in the case of ***M/s. Hycron Electronics, Baddi, Solan*** in ITA No. 798/Chd/2012 dated 27.05.2015 for the assessment year 2009-10 adjudicated the issue against the assessee. Learned counsel for the assessee had placed strong reliance on the decision of the Himachal Pradesh High Court in ***Stovekraft India vs. Commissioner of Income Tax***, alongwith other appeals reported as (2018) 400 ITR 225, to contend that in the batch of appeals including the case of ***Hycron***

Electronics (supra), the order of the Tribunal was set aside and the issue was decided in favour of the assessee. GURBAX SINGH
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7. The issue before the Himachal Pradesh High Court in **Stovekraft India's** case (supra) was as to whether “undertaking or an enterprise” established after 7th January 2003 carrying out “substantial expansion” within the window period between 07.01.2003 to 01.04.2012 would be entitled to deduction on profits at the rate of 100% under Section 80IC of the Act and if so then for what period. The answer was given in the affirmative. It was held as under:

- “(a) Such of those undertakings or enterprises which were established, became operational and functional prior to 07.01.2003 and have undertaken substantial expansion between 07.01.2003 upto 01.04.2012, should be entitled to benefit of Section 80-IC of the Act, for the period for which they were not entitled to the benefit of deduction under Section 80-IB.
- (b) Such of those units which have commenced production after 07.01.2003 and carried out substantial expansion prior to 01.04.2012, would also be entitled to benefit of deduction at different rates of percentage stipulated under Section 80-IC.
- (c) Substantial expansion cannot be confined to one expansion. As long as requirement of Section 80-IC(8)(ix) is met, there can be number of multiple substantial expansions.
- (d) Correspondingly, there can be more than one initial Assessment Years.
- (e) Within the window period of 07.01.2003 to 01.04.2012, an undertaking or an enterprise can be entitled to deduction @ 100% for a period of more than five years.
- (f) All this, of course, is subject to a cap of ten years. [Section 80-IC(6)]
- (g) Units claiming deduction under Section 80-IC shall not be entitled to deduction under any other Section, contained in

Chapter VI-A or Section 10A or 10B of the Act [Section 80C
IB(5)].”

8. The view of the Himachal Pradesh High Court in ***Stovekraft India's*** case (supra) and other appeals was not approved by the Supreme Court. The Apex Court in ***Commissioner of Income Tax vs. M/s Classic Binding Industries***, Civil Appeal No(s) 7208 of 2018 decided on 20.8.2018, dealing with the issue whether the assessee who had availed deductions at the rate of 100% for first five years on the ground that they had set up a manufacturing unit as prescribed under sub section (2) of Section 80IC of the Act can start claiming deduction at the rate of 100% again for the next five years as they had undertaken substantial expansion during the period mentioned in sub section (2) thereof. The answer was given in the negative.”

In ***Commissioner of Income Tax Vs. M/s Classic Binding Industries*** (Civil Appeal No. 7208 of 2018 decided on 20.08.2018), the view taken by the Himachal Pradesh High Court in ***M/s Stovekraft India's*** case (supra) was not accepted by the Apex Court. The issue before the Apex Court in ***M/s Classic Binding Industries*** case (supra) was as to whether the assessee who had availed deductions at the rate of 100% for first 5 years on the ground that they had set up a manufacturing unit as prescribed under sub Section (2) of Section 80IC of the Act, could start claiming deduction at the rate of 100% again for the next five years as they had undertaken substantial expansion during the period mentioned in Sub section (2) thereto. The answer was given in the negative. It was inter alia held by Apex Court that a pragmatic and reasonable interpretation of Section 80IC of the Act would be to hold that once the initial assessment year commences and an assessee, by virtue of fulfilling the conditions laid down in Sub section (2) of Section 80IC of the Act, starts enjoying deduction, there cannot be another assessment year for the purposes of Section 80IC of the Act within the aforesaid period of ten

years, on the basis that it had carried substantial expansion in its unit. It was further recorded that Section 80IC of the Act makes special provisions in respect of certain undertakings or enterprises in certain special category States. The provisions of Section 80IC provided deduction to manufacturing units situated in the States of Sikkim, Himachal Pradesh, Arunachal Pradesh and North Eastern States. The deduction was provided to new units established in the aforesaid States, and also to existing units in those States if substantial expansion was carried out. The deduction was available at the rate of 100% for ten assessment years for the units located in North-Eastern and in the State of Sikkim and for the units located in Himachal Pradesh, the deduction was available at the rate of 100% for five years and at the rate of 25% for next five years. Consequently, relying upon the law laid down by the Apex Court in *M/s Stovekraft India's* case (supra), the issue was decided against the assessee and in favour of the revenue. The relevant observations read thus:-

“17. In this backdrop, the question is as to whether these assesseees, who had availed deductions @ 100% for first five years on the ground that they had set up a manufacturing unit as prescribed under sub-section (2) of Section 80IC of the Act, can start claiming deductions @ 100% again for next five years as they had undertaken “substantial expansion” during the period mentioned in sub-section (2) thereof? The answer has to be in the negative for the following reasons:

18. We are dealing with the deductions in respect of profits and gains under Section 80-IC of the Act. No other provision is involved. This section makes special provisions in respect of certain undertakings or enterprises in certain special category States. Section 80-IC was inserted by the Finance Act, 2003 w.e.f. April 1, 2004. As per this provision, certain undertakings or enterprises in certain special category States are allowed

deduction from such profits and gains, as specified in sub-section (3) of Section 80-IC. The provisions of Section 80-IC provided deduction to manufacturing units situated in the State of Sikkim, Himachal Pradesh and Uttaranchal and North-Eastern States. The deduction was provided to new units established in the aforesaid States, and also to existing units in those States if substantial expansion was carried out. The deduction was available @ 100% for ten Assessment Years for the units located in North-Eastern and in the State of Sikkim and for the units located in Himachal Pradesh, the deduction was available @ 100% for five years and @ 25% for next five years.

19. In the instant case, we are concerned with the assessee who had established their undertakings in the State of Himachal Pradesh. Sub-section (3), as noted above, mentions the period of 10 years commencing with the initial Assessment Year. Sub-section (6) puts a cap of 10 years, which is the maximum period for which the deduction can be allowed to any undertaking or enterprise under this section, starting from the initial Assessment Year. Another significant feature under sub-section (3) is that the deduction allowable is 100% of such profits and gains from an undertaking or an enterprise for five Assessment Years commencing with the initial Assessment Year and thereafter the deduction is allowable at 25% (or 30% where the assessee is a company) of the profits and gains. Cumulative reading of these provisions brings out the following aspects:
 - (a) Those undertakings or enterprises fulfilling the conditions mentioned in sub-section (2) of Section 80-IC become entitled to deduction under this provision.
 - (b) This deduction is allowable from the initial Assessment Year. "Initial Assessment Year" is defined in Section 80-IB(14)(c) of the Act.
 - (c) The deduction is @ 100% of such profits and gains for first 5 Assessment Years and thereafter a deduction is permissible @ 25% (or 30% where the assessee is a company).
 - (d) Total period of deduction is 10 years, which means 100% deduction for first 5 years from the initial Assessment Year and

25% (or 30% where the assessee is a company) for the next 10 years.

20. When we keep in mind the aforesaid scheme and spirit behind this provision, such a situation cannot be countenanced where an period of 10 years. If that is allowed it will amount to doing violence to the provisions of sub-section (3) read with sub-section (6) of Section 80-IC. A pragmatic and reasonable interpretation of Section 80-IC would be to hold that once the initial Assessment Year commences and an assessee, by virtue of fulfilling the conditions laid down in sub-section (2) of Section 80-IC, starts enjoying deduction, there cannot be another “Initial Assessment Year” for the purposes of Section 80-IC within the aforesaid period of 10 years, on the basis that it had carried substantial expansion in its unit.”

9. While the Apex Court adjudicated the issue in favour of the revenue, it specifically distinguished its earlier pronouncement in ***Mahabir Industries vs. Principal Commissioner of Income Tax*** (Civil Appeal Nos.4765-4766 of 2018 decided on May 18, 2018 in the following terms:-

“21. We are conscious of our recent judgment rendered by this very Bench in ***Mahabir Industries vs. Principal Commissioner of Income Tax*** (Civil Appeal Nos. 4765-4766 of 2018 decided on May 18, 2018). However, a fine distinction needs to be noted between the two sets of cases. In Mahabir Industries, the assessees had availed the initial deduction under a different provision, namely, Section 80-IA of the Act, i.e. by fulfilling the conditions mentioned in sub-section (4) of Section 80-IA. Those conditions are altogether different. Deduction in respect of profits and gains under the said provision is admissible when these profits and gains are from industrial undertakings or enterprises engaged in infrastructure development etc. Even this availment started at a time when Section 80-IC was not even on the statute book.

As mentioned above, Section 80-IC was inserted by the Finance Act, 2003 with effect from April 01, 2004. The assessee in those cases had started claiming and were allowed deductions from the Assessment Years 1998-99 and 1999-2000 under Section 80-IA and from the Assessment Year 2000-01 to Assessment Year 2005-06 under Section 80-IB of the Act. The deduction was, thus, claimed by the assessee in those appeals under the new provision i.e. Section 80-IC on fulfilling conditions contained in sub-section (2) of Section 80-IC for the first time for the Assessment Year 2006-07. Thus, insofar as those cases are concerned, the initial Assessment Year under Section 80-IC started only from the Assessment Year 2006-07.

In contrast, position here is altogether different. These assessee have availed deduction under Section 80-IC alone. Initially, they claimed the deduction on the ground that they had set up their units in the State of Himachal Pradesh and after availing the deduction @ 100% they want continuation of this rate of 100% for the next 5 years also under the same provision on the ground that they have made substantial expansion. As pointed out above, once the assessee had started claiming deduction under Section 80-IC and the initial Assessment Year has commenced within the aforesaid period of 10 years, there cannot be another initial Assessment Year thereby allowing 100% deduction for the next 5 years also when sub-section (3), in no uncertain terms, provides for deduction @ 25% only for the next 5 years. It may be asserted again that the assessee accept the legal position that they cannot claim deduction of more than 10 years in all under Section 80-IC.”

10. In view of the law laid down by the Apex Court in *M/s Classic Binding Industries's* case (supra), the substantial questions of law are answered against the assessee and in favour of the revenue.”

7. In view of the above, the substantial questions of law in all the three appeals are decided against the assessee and in favour of the revenue.

Consequently, all three appeals are allowed. The impugned orders passed by the Tribunal in all the three appeals are set aside.

(Ajay Kumar Mittal)
Judge

January 14, 2019
'gs'

(Manjari Nehru Kaul)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No