

**IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

**HEARD ON : 14.06.2022
DELIVERED ON : 14.06.2022**

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**ITAT NO. 150 OF 2014
IA NO:GA/2/2014[OLD NO:GA/2966/2014]**

**COMMISSIONER OF INCOME TAX, KOLKATA III
Vs.
M/s. ITC LIMITED**

Appearance:

Mr. Om Narain Rai, Advocate

...for the appellant

Mr. J.P. Khaitan, Sr. Advocate

Ms. Nilanjana Banerjee Pal, Advocate

...for the respondent

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

(T.S. SIVAGNANAM, J.) : - This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the act for brevity) is directed against the order dated 4th March, 2014 passed by the Income Tax Appellate Tribunal "C" Bench, Kolkata (Tribunal) in ITA/1054/Kol/2011 for the assessment year 2007-

08. The revenue has raised the following substantial questions of law for consideration :-

- i) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in allowing the claim of the assessee towards expenditure under Section 10(1) of the I.T. Act, 1961, amounting to Rs.3,91,57,316/- by disregarding that the assessee failed to prove the basis of agricultural operation being carried out in raising clonal plants, Sugarcane and coconuts in relation to assessment year 2007-08 ?
- ii) Whether on the facts and in the circumstances of the case the Ld. Tribunal has correctly interpreted Explanation to Section 2(1A) of the I.T. Act, 1961, in holding the same as retrospective in nature by disregarding that neither Finance Act, 2008 nor Explanatory Circular No. 1 of 2009 dated 27.3.2009 specifically express retrospectivity of the same ?
- iii) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in allowing claim of the assessee for deduction under Section 80IA of the I.T. Act, 1961, amounting to Rs.57,83,000/- in respect of its two captive power under takings at Bhadrachallam by disregarding that the assessee was not entitled to the aforesaid deduction since it had supplied power only to the paper undertakings belonging to the assessee itself and not to any outsider?

- iv) Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in allowing the claim of the assessee for deduction under Section 80IC of the I.T. Act, 1961, amounting to Rs.72,21,948/- by disregarding that the captive undertaking is not entitled to deduction under the said provision for the notional profit since the products have only been supplied to the Food Business Division (FBD) of the assessee and not to outsider ?
- v) Whether on the facts and the circumstances of the case the Ld. Tribunal has erred in law in allowing the claim of the assessee for deduction under Section 43B of the I.T. Act, 1961, being the amount of employees' contribution towards PF/ESI paid after the expiry of due date prescribed under the respective PF/ESI act even though the same was not claimed in the return of assessment year 2007-08?

We have heard Mr. Om Narayan Rai, learned standing counsel for the appellant/revenue and Mr. J.P. Khaitan, learned Senior Counsel, assisted by Ms. Nilanjana Banerjee Pal, learned Advocate for the assessee.

We need not labour much to answer the substantial question of law framed for consideration on account of certain earlier decisions in the assessee's own case. So far as substantial question of law Nos. 1 and 2 are concerned the issue stands squarely covered by the decision in Commissioner of Income Tax Vs. Soundarya Nursery [241 ITR 530] as well as the decision in Commissioner of Income Tax Vs. Green Gold Tree Farmers (P) Ltd [2008] 299 ITR 262. That apart

we note that in assessee's own case for the assessment years 2005-06 and 2006-07 these questions were answered in favour of the assessee.

Aggrieved by the same, the revenue had preferred appeal before this Court in ITA No. 173 of 2011 which was dismissed by judgment dated 22.12.2015. On reading of the said judgment it is not clear as to whether the said appeal relates to the assessment year 2005-06 or 2006-07 yet the legal issues having been settled, the order passed by the Tribunal cannot be faulted. That apart in CBDT Circular No. 1 of 2009 dated 27th March, 2009 the scope of the expression "agriculture income" was widened to hold that if the nursery is maintained independently without resorting to basis operations of law then the income from such nursery would not be agriculture income and would be liable to be included in total income. This circular will not have any effect on the assessee's case as on facts, the Commissioner Appeals has noted the submission of the assessee that in order to cultivate the seeds the assessee engages in the activities of preparing of land, levelling, preparation of beds, sowing of seeds, planting etc. and after a certain stage the best responsive plant is earmarked as the mother seed. Therefore, de hors the circular issued by CBDT, the conclusion arrived at by the Tribunal, affirming the view taken by the Commissioner of Income Tax (Appeal), cannot be faulted.

Accordingly, substantial questions of law 1 and 2 are answered against the revenue.

So far as the substantial question no. 3 is concerned, it is not in dispute that the said question is covered in favour of the assessee and against the

revenue in assessee's own case for the assessment year 2002-03 in the case of CIT Kolkata III V. ITC [2015] 64 taxmann.com 214 (Calcutta). The Hon'ble

Division Bench held in favour of the assessee in the following terms:-

"4. The aforesaid provision contemplates or does not militate against supply of electricity by the eligible unit to any other business of the assessee. Therefore the contention that the unit is not eligible because "the assessee has not sold power generated by the power undertaking to any outsider but has consumed 100% generated by its unit" does not appear to be logical. The premise for claiming the benefit according to Clause IV of Sub-section 4 of Section 80-IA is a setting up of an undertaking for the generation of power during the specified period. The fact that the unit was set up within the specified period is not in dispute.

5. the mere fact that the power generated by the undertaking was I its entirety consumed for power to that extent was reduced and the surplus to that extent could be supplied by the existing distribution undertaking to the public at large. The object of the legislature was to promote infrastructure for generating power, if the instant undertaking had not been set up the other business of the assessee would naturally have depended for its demand in its entirety upon the supply by the Andhra Pradesh State Electricity Board. Shortage of power throughout the country is a well-known phenomenon. The overall shortage of power to the extent of the power generated by the undertaking has, therefore, been reduced.

6. We are, as such, unable to hold that the benefit under Section 80IA is not available to the assessee because the power generated was consumed at home or by other business of the assessee. It is now well-settled that a statute granting incentives for promoting growth and development should be construed liberally so as to advance the objective of the provision and not to frustrate it."

Thus following the aforementioned decision substantial question of law no. 3 is answered against the revenue.

In so far as the substantial question of law No. 4 is concerned CITA reversed the order passed by the assessing officer having found that the assessee was an eligible undertaking and entitled to the benefit of Section 80IC which is a special provision in respect of certain undertakings or industries in certain special category states. It is not in dispute that the said eligible undertaking was not

manufacturing any of the goods as listed in 13th schedule to the Act. The principle which was laid down in the assessee's own case in the issue relating to Section 80IA as reported in [2015] 64 taxmann.com 214 (Calcutta) will equally apply to the claim of deduction under Section 80AC of the Act. The CITA rightly took note of the fact that Section 80AC (7) specifically provides that the provisions of sub-Section 5 and sub-Section 7 to 12 of Section 80IA will equally apply to Section 80IC, and therefore, the eligibility for claiming deduction under Section 80IA in respect of captive undertaking will, therefore, also apply to Section 80IC.

That apart we should take note of the fact that the provision is a special provision conferring certain benefits on undertakings in certain special category states. In the assessee's case as reported in [2015] 64 taxmann.com 214(Calcutta) the Hon'ble Division Bench while considering the scope of Section 80IA pointed out that Statute granting incentives for promoting growth and development should be considered liberally so as to advance the objective of the provision and not to frustrate it. Further we note the decision of the Hon'ble Supreme Court in Bajaj Tempo Ltd. V. CIT [1992] 196 ITR 188/62 Taxman 480 (SC) wherein the Hon'ble Supreme while considering the claim for exemption under Section 15C of the Act pointed out that the section, read as a whole, was a provision directing towards encouraging industrialisation by promoting an assessee setting up a new undertaking to claim of not paying tax to the extent of 6% in a year on the capital employed. Further it was pointed out that a provision intended for promoting economic growth has to be interpreted liberally,

the restriction on it, too, has to be construed so as to advance the objective of the Section and not to frustrate it. Therefore, the decision arrived at by the CITA was wholly justified. The Tribunal decided the correctness of the said finding and in paragraph 5.1 of the impugned order took note of the Section 80IA (8) and held that the said provision is applicable to Section 80IC and accordingly approved the finding recorded by the CITA.

In the light of the above, we find there is no error in the approach of the CITA or the Tribunal for us to interfere. Accordingly substantial question of law No. 4 is answered against the revenue.

This leaves us with only substantial question of law No. 5 which pertains to claim made by the assessee for deduction under Section 43B of the Act being amount of employees' contribution towards provident fund/employees' State insurance paid after the expiry of due date prescribed under the relevant statute even though the same was not claimed in the return for the assessment year 2007-08. We are conscious of the fact that certain appeals have been admitted by this Court on the very same issue. But, however, we note that the tax implication on the said issue is far lesser than the threshold limit fixed by CBDT for filing of the appeal. Since all four substantial question of law have been answered against the revenue the solitary question which remains is with regard to the claim for deduction under Section 43B. We have perused the assessment year and we find that the disallowance on the said head is Rs.4,06,052/-. This being below the threshold limit fixed by the CBDT for pursuing the appeal, the

appeal fixed by the revenue on this ground has to be dismissed on the ground of low tax effect. Consequently, the substantial question of law has to be left open.

In the result, the substantial questions of law No. 1 and 2 are answered against the revenue by following the decision in *Soundarya Nursery and Green Gold Tree Farmers Pvt. Ltd.* as well as the decision in ITA/173/2011 dated 22.15.2015 in assessee's own case. Substantial question of law No. 3 is answered against the revenue by following the decision in assessee's own case as reported in [2015] 64 taxmann.com 214(Calcutta).

Substantial question of law No. 4 is answered against the revenue for reasons assigned by us in preceding paragraph.

The substantial question of law No. 5 is left open as the quantum of disallowance under the said head is below the threshold limit fixed by the CBDT and, therefore, the revenue cannot pursue the said question on the ground of low tax effect.

The appeal and the applications are dismissed/disposed of accordingly.

There will be no order as to costs.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)