आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गा राव,न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER&
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.No.225/Viz/2017**
(निर्धारण वर्ष**/Assessment Year:2012-13)**

The ACIT Circle-2(1) Guntur	Vs.	M/s Sree Jayalakshmi Power Corporation Limited. D.no.8-14-24, Tobacco Colony Mangalagiri Road Guntur **[PAN :AAFCS5063H]**
(अपीलार्थी/ Appellant)		**(प्रत्यर्थी/ Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri K.C.Das, DR
प्रत्यार्थी की ओर से/ Respondent by	:	None
सुनवाई की तारीख / Date of Hearing	:	19.07.2018
घोषणा की तारीख/Date of Pronouncement	:	31 .07.2018

आदेश /O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-1, Guntur vide I.T.A.No.7/15-16/CIT(A-1)/GNT dated 31.01.2017 for the assessment year 2012-13.

2. All the grounds of appeal are related to the set off of business losses claimed by the assessee pertaining to the earlier years. In this case, the assessee filed the return of income on 25.09.2012 admitting total income of Rs.81,24,780/- after setting off brought forward losses. The AO observed that, the assessee derived gross total income of Rs.1,88,27,273/- and claimed the set off of brought forward losses to the extent of Rs.1,07,02,498/- and arrived at the taxable income of Rs.81,24,780/-. The AO found that incorrect set off of losses were claimed by the assessee pertaining to the earlier assessment years as under :

2004-05 Rs.33,01,365/-

2003-04 Rs.74,01,133/-

The AO also observed that the assessee was having positive income in the assessment year 2005-06 onwards as per the details given below :

2005-06 Rs.1,35,72,656/-

2006-07 Rs.1,59,07,527/-

2007-08 Rs.2,58,92,798/-

The AO was of the view that having positive income from the assessment year 2005-06 to the assessment year 2011-12 the assessee ought to have claimed the set off losses in the immediately subsequent

assessment year and it is incorrect to claim the set off of losses after completion of tax holiday period.

3. The assessee is engaged in the business of power generation and eligible for deduction u/s 80IA for 10 consecutive assessment years (tax holiday period) out of 15 years beginning from the year in which the undertaking generates the power. The assessee started claiming the deduction from the assessment year 2000-01 and claimed the same for 10 consecutive assessment years and completed the tax holiday period in 2010-11. During the intervening period 2003-04 and 2004-05 the assessee had incurred the losses but did not set off the losses in the subsequent assessment years but allowed losses to be carried forwarded till 2011-12 (i.e till exhausting the tax holiday period of 10 years) and then claimed deduction in the impugned assessment year 2012-13. The AO was of the view that the assessee should have claimed set off of losses in the immediately subsequent Assessment years 2005-06 to 2006-07 instead of claiming the losses in the impugned assessment year and the same is against the provision of computation of income as per section 80AB of the act. Hence the AO was of the view that the assessee is disentitled for

claiming the set off of losses in the impugned assessment year 2012-13 accordingly disallowed the set off of losses claimed by the assessee and assessed the total income at Rs.1,88,81,260/-.

4. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A). The Ld.CIT(A) deleted the addition made by the AO holding that the assessee is eligible for deduction u/s 80IA for 100% of profits and section 80IA is a special provision and the normal provisions of setting off of carry forward losses is not applicable since the assessee was given an option for claiming the deduction u/s 80IA for10 consecutive assessment years out of 15 years period. The Ld.CIT(A) relied on the decision of Hon'ble ITAT 'A' Bench, in the case of M/s Hercules Hoists Limited, Mumbai Vs. ACIT, Range-10(3), accordingly allowed the appeal of the assessee.

5. Aggrieved by the order of the AO, the revenue has filed appeal before the Tribunal. During the appeal hearing, the Ld.DR submitted that the assessee had incurred the losses in the year 2003-04 and 2004-05 and in subsequent assessment years i.e. 2005-06 to 2010-11, there were profits

derived by the assessee from the business and the assessee should have claimed the set off of losses as provided u/s 72 of the Act in the subsequent assessment years i.e. from 2005-06 onwards till the losses were exhausted. Since he has not claimed the losses in the subsequent assessment years, the assessee is disentitled from claiming such losses, thus argued that the AO has rightly disallowed the losses and the order of the Ld.CIT(A) is to be set aside and restore the assessment order. The Ld.DR relied on the decision of Hon'ble Supreme Court in the case of IPCA Laboratory Ltd. Vs. DCIT [266 ITR 0521 (2004). None appeared representing the assessee.

6. We have heard the departmental representative and gone through the orders of the authorities below. In this case, the assessee had incurred the losses during the assessment year 2003-04 and 2004-05 and did not claim the set off of losses in the subsequent assessment years though there were profits from the business for the assessment years 2005-06 onwards and carried forwarded the losses till the completion of tax holiday period of 10 years and claimed the losses in the impugned assessment year i.e. after completion of 10 years. The assessee is eligible for deduction u/s 80IA of the Act for the 10 consecutive assessment years out of the 15 assessment

years commencing from the initial assessment year. The initial assessment year selected was 2000-01 in the instant case. As per section 80IA sub section 5 of the Act, the deduction is allowable to the assessee on the profits and gains derived from the eligible business as computed as if the unit is an separate and independent entity which means that the profits and gains as computed u/s 29 to 43D in the case of 80IA unit independently and allow the brought forward losses as provided in section 71, 72 and 80AB of the act and the balance would be available for deduction u/s 80IA of the act. For ready reference, we extract relevant part of sub section 5 of section 80IA which reads as under :

> *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.*

6.1. From the profits derived by the assessee from the 80IA unit earlier years brought forward unabsorbed losses required to be set off in the subsequent year and the resultant profit would be eligible for deduction u/s 80IA.. Manner and method of computation of deduction u/s 80IA is discussed elaborately by Hon'ble Special Bench of Ahmedabad in the case

of ACIT Vs. Goldmine Shares and Finance Pvt. Ltd. (2008) [113 ITD 209] as under :

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The provisions of section 80-IA were divided in two parts by the Finance Act, 1999 with effect from 1-4-2000 - one by the replaced section 80-IA and other, by the newly inserted section 80-IB. For material purposes and in order to resolve the controversy in these cases, the new provisions are almost identically worded to those of the aforesaid earlier provisions of sections 80-I and 80-IA. Under section 80-IA(1) the deduction is to eligible business, as defined in sub-section (4) thereof. [Para 21]

Apparently, section 80-IA(5) identically deems, for the purposes of determining the quantum of deduction, the eligible business as the only source of income of the assessee during the initial assessment year as well as the subsequent years and has an overriding effect on all other provisions of the Act. [Para 23]

Section 80-IA(1), (5) and other like section 80-IA(7)/80-IA(6) can be studied in following five broad sub-heads :—

1. *first, the deduction under section 80-IA(1) is of/from the profits and gains included in 'gross total income';*
2. *second, the computation of deduction is made under a* non obstante *section 80-IA(7)/80-IA(5);*
3. *third, the profits and gains are computed on a fiction created to the effect that the eligible business is the only source of income;*
4. *fourth, the fiction is created for the purposes of determining the quantum of deduction; and*
5. *fifth, the fiction is for all the years eligible for the deduction. [Para 24]*

As regards first sub-head it may be noticed that section 80-IA deduction is admissible in respect of profits and gains derived by eligible business which is included in the gross total income which is defined in sub-section (5) of section 80B to mean the total income computed in accordance with the provisions of the Act before making any deductions under Chapter VI-A. It follows, therefore, that deductions under Chapter VI-A can be given only if the gross total income is positive and not negative. If the 'gross total income' of the assessee is determined as 'Nil' *then there is no question of any deduction being allowed under Chapter VI-A in computing the total income. The Assessing Officer has to take into account the provisions of section 71 providing for set-off of loss from one head against income from another head and section 72 providing for carry forward and set-off of business losses. Section 32(2) makes provisions for carry forward and set-off of the unabsorbed depreciation of a particular year. The effect of the above mentioned provisions is that while computing the*

total income, the losses carried forward and depreciation have to be adjusted and, thereafter, the Assessing Officer has to work out the gross total income of the assessee. Section 80A(2) specifically enacts that the aggregate of deduction under Chapter VI-A should not exceed the gross total income of the assessee. If the gross total income is found to be a net loss on account of the adjustment of losses of the earlier years or nil, *no deduction under this Chapter can be allowed. Section 80B(5) defines the expression 'Gross total income' to mean the total income computed in accordance with the provisions of the Act without making any deductions under Chapter VI-A. The effect of section 80B(5), is that gross total income will be arrived at after making the computation as follows :—*

(i) *making deductions under the appropriate computation provisions;*

(ii) *including the incomes, if any, under sections 60 to 64 in the total income of the individual;*

(iii) *adjusting intra-head and/or inter-head losses; and*

(iv) *setting-off brought forward unabsorbed losses and unabsorbed depreciation, etc. [Para 25]*

The contention raised by the assessee that the deduction must first be allowed under section 80-I and then only the gross total income as computed under the provisions of the Act before allowing deductions under Chapter VI-A should be worked out, could not be accepted. It reiterated that section 80A provides that the deductions shall be allowed out of the gross total income whereas sub-section (2) restricts the deductions of the gross total income. It is, therefore, clear that gross total income of the assessee has got to be computed in accordance with the Act after adjusting losses, etc., and if the gross total income so determined is positive then the question of allowing deductions under Chapter VI-A arises, but not otherwise. [Para 26]

Referring to provisions of section 80-I(6), while computing quantum of deduction, the Assessing Officer no doubt has to treat the profit derived from an industrial undertaking as the only source of income in order to arrive at the deductions under Chapter VI-A. However, non obstante *clause appearing in section 80-I(6) is applicable only to the quantum of deduction, whereas, the gross total income under section 80B(5) which is also referred to in section 80-I(1) is required to be computed in the manner provided under the Act, which pre-supposes that the gross total income shall be arrived at after adjusting loss of other division against the profits derived from an industrial undertaking. [Para 27]*

The second sub-head is emanating from the provisions of section 80-IA(7)/80-IA(5) which starts with non obstante *clause reading as 'Notwithstanding anything contained in any provisions of the Act'. It means that it overrides all the provisions of the Act. Profits and gains of a business are determined, by allowing all deductions including under section 32 and set-off under the provisions of sections 70, 71 and 72; it is on the balance that the deduction is allowed under Chapter VI-A. By this overriding provision these sections, to the extent provided otherwise in section 80-IA(5), are not to be taken into consideration. Therefore, whatever is stated in the other provision is to be ignored. [Para 28]*

The third sub-head provides that the profits and gains are computed on a fiction created to the effect that the eligible business is the only source of income. It is a deeming provision which is intended to enlarge/curtail the meaning of a particular word which includes or excludes matters which otherwise may or may not fall within the provision; it should, therefore, be extended to the consequence and incidence which shall inevitably follow. [Para 29]

Section 80-IA(5) bids one to treat the eligible business as the only source of income of an undertaking as real, which is an imaginary state of affairs, as also real the consequences and incidents, which, if the putative state of affairs had, in fact, existed, must inevitably have flown from or accompanied it, i.e., *there was no other source of income of the assessee. The statute says that one must imagine a certain state of affairs (eligible business being the only source); it does not say that having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of the state of affairs, that there are other sources and that against those sources the unabsorbed depreciation or losses of eligible business have been set-off. [Para 30]*

It is implicit from the tenor and phraseology implied in section 80-IA(5) that in substance, a legal fiction is created by which the eligible business has been treated as the only source of income. In construing this legal fiction it will be proper and necessary to assume all those facts on which alone the fiction can operate; so, necessarily, all the provisions in the Act in respect of a source of income will apply. As a consequence, the other sources of income of an assessee/undertaking would have to be assumed as not existing and, consequently, any depreciation or loss cannot be set-off against any other source which is assumed to have not been in existence and, therefore, the depreciation or the loss of the illegible business which could not be set-off against the loss of the illegible business itself has to be carried forward or set-off of the profits of the very source of illegible business in the subsequent year. [Para 31]

The contention of the assessee that the object of this section, was not that sections 32(2), 70, 71 and 72 would not be applicable, had also no force. It amounts to permit imagination to boggle when it comes to the inevitable corollaries of the deemed state of affairs and also reading something which is prohibited by the fiction and is not there in the provisions. Because of the fiction, even if any set-off of eligible business loss was made against other sources of income, it has to be assumed as not so set-off. The fiction is to clarify the position that the deduction is to be granted only with respect of the profits of the eligible business, if the assessee was carrying out many activities and was having many sources of income. As if that was the only source of income means if there was no other source of income. If that be so, the depreciation and loss could not be absorbed and be set-off against any other source or head of income. It is because by virtue of deeming fiction one has to assume that there is no other source of income and, consequently, it has to be carried forward and set-off against the income of this very source only for which the deduction is being computed. The argument that if the loss incurred by the assessee was set-off and adjusted against profits of the earlier year, there was no mandate in the section to presume that it should be notional carry forward and set-off against the profits of the eligible business of the subsequent year had the effect of ignoring the fiction created in the provision and, therefore, had no force, hence, could not be accepted. [Para 32]

The words 'as if such eligible business was the only source of income of the assessee' compelled one to assume that the assessee was not having any other source of income except that which was eligible to deduction under section 80-IA, which in the instant case was the unit/undertaking, the unit of the mill generating electricity for the assessee. As per the wording of the sub-section (5) of section 80-IA, for the purposes of computation of the deduction, it has to be assumed that the only source of income of the assessee was the eligible business. The income or loss of this business alone was to be considered as if that was the only source. This means neither the income of the undertaking nor the loss thereof could be set-off or carried forward and set-off or adjusted against any other source of income or loss. As a corollary the income or the loss of the other business or source could not be considered or set-off for determining the quantum of the deduction of the eligible business. [Para 33]

Neither the income nor loss of a business other than the eligible business of any year can be taken into consideration; nor the earlier years' losses of the eligible business can be ignored in computing the profit and gains to determine the quantum of the deduction under this section. Losses of the eligible business are to be set-off only against the subsequent years' income of the eligible business, even though these might have been set-off against other income of the assessee in that earlier year. [Para 34]

6.2. The coordinate bench of ITAT, Ahmedabad in the case of Sadbhav Engineering Ltd. *v.* Deputy Commissioner of Income-tax, Circle-8, Ahmedabad, [2014] 45 taxmann.com 333 (Ahmedabad - Trib.) and in the case of Jivraj Tea & Industries Ltd.*v.*Assistant Commissioner of Income-tax, Central Circle -2,Surat, 2014] 42 taxmann.com 462 (Ahmedabad – Trib) has taken the similar views.

As held by the Hon'ble Special Bench in the case of Goldmine Shares and Finance Pvt. Ltd. (supra) Section 80IA which has been amended w.e.f. 1.4.2000 provides that where the gross total income of the assessee includes any profits and gains derived by an undertaking from any eligible

business referred to in sub section 4 shall in accordance with the provisions of the section be allowed in computing the deduction of an amount equal to 100% profits and gains derived from such business for the 10 consecutive years. The option is given to the assessee for claiming any 10 consecutive assessment years out of 15 years beginning from the year in which the undertaking or the enterprise develops and begins operating. 15 years is the outer limit within which the assessee can choose a period of 10 consecutive years for claiming the deduction. Sub section 5 of section 80IA is non- obstant clause which deals with the computation of business profits. Once the assessee exercises the option of choosing the initial assessment year as culled out in sub section 2 of Section 80IA , the time limit starts for the assessee to claim the deduction out of the profits derived from the eligible business. The losses incurred during the 10 years tax holiday period commencing from the initial assessment year required to be set off in the subsequent assessment years and claim the balance amount as deduction. There is no special provision in the Income Tax Act to allow the carry forward of losses incurred during the 10 years tax holiday period beyond the period of 10 years and set off against profits derived by the assessee in subsequent taxable profits, unless the brought forward losses

could not be absorbed during the period of 10 years. The income of the assessee is required to be computed each year independently after setting off of losses of earlier years in the subsequent assessment years. If the losses could not allowed to be set off the losses are allowed to be carried forward for the 7 consecutive assessment years from the end of the assessment year in which the loss was incurred. There is no special provisions to allow the carry forward of losses in the case of 80IA as held by the Ld.CIT(A). In the instant case, the assessee had incurred losses during the assessment year 2003-04 and 2004-05 aggregating to 1,07,02,448/- and the assessee had the profit of Rs.1,35,72,656/- in the assessment year 2005-06 and the assessee ought to have set off of the brought forward losses of Rs.1,07,02,498 in the assessment year 2005-06 and claim the balance income as deduction u/s 80IA. In the instant case, the assessee has carried forward the losses till exhausting the 10 years tax holiday period and claimed the loss in the impugned assessment year which is against the provisions of law. As held by Hon'ble Special Bench in the case of Goldmine Shares (supra), the losses incurred in 2003-04 and 2004-05 required to be set off against 2005-06 and in subsequent assessment years. Having not claimed the set off losses in the A.Y.2005-06,

the assessee is disentitled to claim the set off of such losses in the impugned assessment year. Hence, we hold that the CIT(A) erred in allowing the set off of losses in the impugned assessment year which is not correct in accordance with law and provisions of the Act. Therefore, we set aside the order of the Ld.CIT(A) and restore the order of the AO. The appeal of the revenue in this case is allowed.

7. In the result, appeal of the revenue is allowed.

The above order was pronounced in the open court on 31st July, 2018.

Sd/-	Sd/-
(वी.दुर्गा राव)	**(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखासदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam
दिनांक /Dated : 31.07.2018
L.Rama, SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee- M/s Sree Jayalakshmi Power Corporation Limited., D.no.8-14-24, Tobacco Colony, Mangalagiri Road, Guntur
2. राजस्व/ The Revenue –The ACIT, Circle-2(1), Guntur
3. The Pr.Commissioner of Income Tax, Guntur
4. The Commissioner of Income Tax(Appeals)-1, Guntur
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
6.गार्डफ़ाईल / Guard file

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Sr. Private Secretary
ITAT, VISAKHAPATNAM