आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

(Through Virtual Court)

BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT
& SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 567/Ahd/2017

(**निर्धारण वर्ष /** Assessment Year : 2012-13)

The Deputy Commissioner of Income-tax Kheda Circle-3, Nadiad, Dist. Kheda - 387002	**बनाम**/ Vs.	**M/s. Chhotabhai Jethabhai Patel & Co.** Mota Pore, Nadiad, Dist. Kheda - 387001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFLP1222A		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Vidhyut Trivedi, Sr.D.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri S. N. Soparkar, Sr. Advocate

सुनवाई की तारीख / **Date of Hearing**	08/07/2020
घोषणा की तारीख /**Date of Pronouncement**	20/07/2020

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-2, Vadodara ('CIT(A)' in short), dated 27.12.2016 arising in the assessment order dated 27.03.2015 passed by the Assessing

Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2012-13.

2. The grounds of appeal raised by Revenue read hereunder:

> *"1. On the facts and circumstances of the case and in law, the Ld. C.I.T. (A) erred in holding that " The action of the Assessing Officer is not as per the provision of law and he is directed to allow the deduction u/s. 80IA(4) to the extent of income of eligible business i.e. Rs, 3,61,15,115/- in the year under consideration without adjusting the losses/depreciation of earlier years brought forward notionally since the appellant has chosen the year under consideration as the "initial assessment year" , "without appreciating that the A.O. had correctly disallowed assessee's claim of deduction u/s. 80IA of the Act, in accordance with the provision of section 80IA(5) of the Act.*
>
> *2. On the facts and circumstances of the case and in law, the Ld. C.I.T. (A) erred In holding that " The action of the Assessing Officer is not as per the provision of law and he is directed to allow the deduction u/s. 80IA(4) to the extent of income of eligible business i.e. Rs. 3,61,15,115/- in the year under consideration without adjusting the losses/depreciation of earlier years brought forward notionally since the appellant has chosen the year under consideration as the "initial assessment year" . "without appreciating that for the purpose of deduction u/s. 80IA of the Act, not only provision of section 80IA(2) & 80IA(4) of the Act have to be considered but the provision of section 80IA(5) of the Act has to be considered in its entirety."*

3. Briefly stated, the assessee is engaged in generation of electricity through wind mills installed in various parts of Maharashtra, Rajasthan etc. which is eligible business under s.80IA(4) of the Act for the purposes of claim of deduction under s.80IA(1) of the Act. For the AY 2012-13 under consideration, the assessee has claimed deduction of Rs.3,61,15,115/- without notionally adjusting the losses/depreciation of the earlier years arising from the eligible business which already stood set off in accordance with law from other stream of income. The AO denied the deduction of profits arising from eligible business by invoking embargo placed by sub-section (5) of Section 80IA of the Act and proceeded to make adjustment on account of notionally carry forward losses/depreciation of earlier years from actual commencement of eligible business. While doing so, the AO

essentially observed that the assessee is required to treat the 'eligible business' as the only source of income of eligible undertaking and set off provisions of Section 70, 71 & 72 is required to be ignored for the quantification of eligible profits for deduction. Resultantly, deduction under s.80IA(1) of the Act on profits amounting to Rs.3,61,15,115/- arising from generation of electricity through wind mills was denied by artificial set off of losses arising from 'eligible business' notionally carry forward for the purposes of determination of eligible profits.

4. Aggrieved by the denial of deduction claimed under s.80IA(1) of the Act, the assessee preferred appeal before the CIT(A). The CIT(A) took cognizance of various judicial precedents as well as the CBDT Circular No. 1 of 2016 dated 15.02.2016 issued subsequent to passing of assessment order and reversed the action of the AO in following terms:

> *"4. I have carefully considered the facts on records and submission of the Id. Authorized Representative. I have also gone through various decisions relied upon by the Ld. Authorized Representatives. As a matter of fact, the appellant company has claimed deduction u/s. 80IA(4), post amendment effected from 01.04.2000 by Finance Act, 1999. The deduction u/s. 80IA(4) has been claimed in respect of the income derived from Wind Mill business at Rs.3,61,15,115/-. There is no dispute regarding requisite conditions of section 80IA having been satisfied by the appellant except the applicability of section 80IA(5). The appellant has installed* ***Wind Mills at as many as 4 locations for generation of electricity****. The business of generation of electricity has started on different dates in different Wind Mills from 31.12.2005 to 27.02.2010. Undisputedly, the appellant has chosen the year under consideration as* ***"initial assessment year"*** *as per provisions of section 80IA(5) and claimed the deduction for the first time. Undoubtedly, the appellant had incurred losses including depreciation loss in the years prior to the year under consideration to the tune of Rs.19,14,93,281/- and the same had been adjusted against the income of Bidi manufacturing business.* ***Therefore, there was no brought forward business loss or unabsorbed depreciation available to be set off against the income of current year.*** *However, the Assessing Officer has held that since the Wind Mill business being eligible business, has to be treated as only source of income as per provisions of section 80IA(5), the losses and unabsorbed depreciation of earlier years should be notionally brought forward and set off against the income of eligible business before allowing any deduction u/s. 80IA(4). Accordingly, the Assessing Officer has disallowed the deduction claimed u/s. 80IA(4) at Rs.3,61,15,115/- since after set off of notional brought forward losses/unabsorbed depreciation, there remained no income derived from eligible business.*

4.1. The appellant has relied upon various decisions to support its claim, but the Assessing Officer has rejected the same on the ground that the issue had not attained finality as the revenue was in appeal before higher Authorities (High Court or Supreme Court). After going through the decisions relied upon by the Ld. Authorized Representative, I find that the issue on hand is squarely covered in the favour of appellant. The lead case on the issue under consideration is of Hon'ble Madras High Court which is as under:-

Velayudhaswamy Spinning Mills (P) Ltd. v/s ACIT [2012] 21 taxmann.corn 95 (Mad.)

Section 80-IA of the Income-tax Act, 1961 - Deductions -Profits and gains from infrastructure undertakings -Assessment years 2004-05 and 2005-06 Loss in year earlier to initial assessment year already absorbed against profit of other business cannot be notionally brought forward and set off against profits of eligible business as no such mandate is provided in section 80-IA(5) [Assessment years 2004-05 & 2005-06] [In favour of assesses]

Under section 80-IA(1), deduction is given to eligible business and the same is defined in sub-section (4). Sub-section (2) provides option to the assessee to choose 10 consecutive assessment years out of 15 years. Option has to be exercised and if it is not exercised, the assessee will not be getting the benefit. Fifteen years is outer limit and the same is beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure activity etc. Sub-section (5) deals with quantum of deduction for an eligible business. The words "initial assessment year" are used in sub-section (5) and the same is not defined under the provisions. It is to be noted that an "initial assessment year" employed in sub-section (5) is different from the words "beginning from the year" referred to in subsection (2).

When the assesses exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and not the losses of earlier years which were already set off against the income of the assessee. Looking forward to a period often years from the initial assessment is contemplated. It does not allow the revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the revenue cannot rework the set off amount and bring it notionally. Fiction created in sub-section does not contemplate to bring set off amount notionally. Fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.

Thus, loss in the year earlier to initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profits of the eligible business, as no such mandate is provided in section 80-IA(5).

*Following the above mentioned decision, the **Hon'ble jurisdictional ITAT** has also decided the matter under consideration in the favour of assessee in the following cases:-*

i) Jivraj Tea & Industries Ltd. v/s ACIT [2014] 42 taxmann.com 462 (Ahd – Trib.)

Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) - Whether when an assessee exercises option of choosing initial assessment year as culled out in sub-section (2) of Section 80-IA from which it chooses its 10 years of deduction out of 15 years, then only losses of years starting from initial assessment year alone are to be brought forward; loss prior to initial assessment year which has already been set-off cannot be brought forward and adjusted into period of ten years from initial assessment year - Held, yes- Whether where assessee had not suffered any loss in relevant years and brought forward loss or depreciation did not relate to initial years, same could not be reduced for determining amount for which deduction is to be allowed under section 80-IA - Held, yes [Para 28] [In favour of assessee]

- *In all the appeals under consideration the initial year chosen by the assessee for claiming deduction was after 1-4-2000 when the amended provision of section 80-IA was applicable. [Para 18]*

- *Section 80-IA, which has been substituted with effect from 1-4-2000, provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking from any eligible business referred to in sub-section 4, there shall, in accordance with and subject to the provisions of this section, be allowed in computing the deduction of an amount equal to 100 per cent of the profits and gains derived from such business for 10 consecutive years. Substituted sub-section (2) of section 80-IA, provides that an option is given to the assessee for claiming any 10 consecutive assessment year out of 15 years beginning from the year in which the undertaking or the enterprise develops and begin to operate. The 15 years is the outer limit within which the assessee can choose the period of claiming the deduction. Sub-section (5) is a non-obstante clause which deals with the quantum of deduction for an eligible business.[Para 19]*

- *From a plain reading of sub-section (5) of section 80-IA, it can be gathered that it is a non-obstante clause which overrides the other provisions of the Act and it is for the purpose of determining the quantum of deduction under section 80-IA, for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year to be computed as if the eligible business is the only source of income. Thus, the fiction created is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the initial assessment year. Prior to 1-4-2000, the initial assessment year was defined for various types of eligible assessees under section 80-IA (12). However, after the amendment brought in statute by the*

Finance Act, 1999, the definition of 'initial assessment year' has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in sub-section (2) of section 80-IA from which it chooses its 10 years of deduction out of 15 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in section 80-IA(5). The loss prior to the initial assessment year which has already been set-off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. It is only when the loss have been incurred from the initial assessment year, then the assesses has to adjust loss in the subsequent assessment years and it has to be computed as if eligible business is the only source of income and then only deduction under section 80-IA can be determined. This is the true import of section 80-IA(5).[Para 20]

- *In the present cases, there was no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised the option under section 80-IA(2). During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There was a positive profit during the year. [Para 22]*

- *Thus, it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under section 80-IA for the purpose of computing admissible deductions thereunder. [Para 24]*

- *Since assessee had not suffered any loss in the said years, no brought forward loss or depreciation could be reduced for determining the amount in which the deduction is to be allowed under section 80-IA. Hence, the orders of the lower authorities on this issue were set aside and ground of appeal of the assessee was allowed. [Para 28].*

ii) ***Sadbhav Engineering Ltd, v/s DCIT T20141 45 taxmann.com 333 (And -Trib.)***

Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of) - Assessment years 2005-06 to 2007-08 - Assessee had set up an undertaking in assessment year 2003-04 - Whether provision through which assessee could have chosen its initial assessment year was brought in statute w.e.f. 1-4-2000, by virtue of section 80-IA - Held, yes - Assessee started its undertaking in assessment year 2003-04 - In assessment year 2005-06, assessee earned profits from undertaking and accordingly claimed deduction under section 80-IA by treating said assessment year as initial assessment year - Assessing Officer while computing deduction for assessment year 2005-

06 invoked provisions of sub-section (5) of section 80-IA and reduced deduction by adjusting losses of previous assessment years 2003-04 and 2004-05 from eligible profit of undertaking - Whether in instant case, since loss pertained to year prior to initial assessment year which had been set off against profits of non-eligible units and beginning of initial assessment year as adopted by assessee is assessment year 2005-06 only, losses of assessment years 2003-04 & 2004-05 could not be notionally carried forward within meaning of section 80-IA(5) - Held, yes [Para 9] [In favour of assessee].

4.1.1. The decision of Hon'ble Madras High Court in the case of ***Velayudhaswamy Spinning Mills (P) Ltd. (Supra)*** *has been followed subsequently in various decisions, a few of them, are as under:-*

a) ACIT Vs. Patankar Wind Farms Pvt. Ltd. (2014) 36 ITR (Trib) 0510 (Pune)

b) CIT Vs. Anil H. Lad (2014) 102 DTR 241 (Kar-HC)

c) CIT Vs. Ramraj Handlooms (2015) 93 CCH 0133 (Mad-HC)

d) CIT Vs. Eastman Shipping Mills Pvt. Ltd. (2015) 372 ITR 88 (Mad)

e) CIT Vs. Meera Textiles Mills Pvt. Ltd. (2015) 93 CCH 57 (Mad-HC)

f) CIT Vs. Ucal Fuel Systems Ltd. (2016) 383 ITR 15 (Mad)

g) CIT Vs. Prem Textile International (2016) 96 CCH 28 (Mad-HC)

h) CIT Vs. P.V. Chandran (2016) 385 ITR 479 (Mad)

4.1.2. In order to settle the controversy and also to avoid litigation, CBDT has also issued a circular clarifying the meaning of term "Initial assessment year" vide ***Circular No. 1 of 2016*** *dated 15.02.2016 which is reproduced as under:-*

"Section 80-IA of the Income-tax Act, 1961 ('Act'), as substituted by the Finance Act, 1999 with effect from 1-4-2000, provides for deduction of an amount equal to 100 % of the profits and gains derived by an undertaking or enterprise from an eligible business (as referred to in sub-section (4) of that section) in accordance with the prescribed provisions. Sub-section (2) of section 80-IA further provides that the aforesaid deduction can be claimed by the assessee, at his option, for any ten consecutive assessment years out of fifteen years (twenty years in certain cases) beginning from the year in which the undertaking commences operation, begins development or starts providing services etc. as stipulated therein. Sub-section (5) of section 80-IA further provides as under—

"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".

In the above sub-section, which prescribes the manner of determining the quantum of deduction, a reference has been made to the term 'initial assessment year'. It has been represented that some Assessing Officers are interpreting the term 'initial assessment year' as the year in which the eligible business/ manufacturing activity had commenced and are considering such first year of commencement/operation etc. itself as the first year for granting deduction, ignoring the clear mandate provided under sub-section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.

The matter has been examined by the Board. It is abundantly clear from sub-section (2) that an assessee who is eligible to claim deduction u/s 80-IA has the option to choose the initial/ first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-section. It is hereby clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction u/s 80-IA for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. ***Hence, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction u/s 80-IA.*** *However, the total number of years for claiming deduction should not transgress the prescribed slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.*

The Assessing Officers are, therefore, directed to allow deduction u/s 80-IA in accordance with this clarification and after being satisfied that all the prescribed conditions applicable in a particular case are duly satisfied. Pending litigation on allowability of deduction u/s 80 IA shall also not be pursued to the extent it relates to interpreting 'initial assessment year' as mentioned in sub-section (5) of that section for which the Standing Counsels/D.R.s be suitably instructed.

The above be brought to the notice of all Assessing Officers concerned."

After considering the above mentioned circular, Hon'ble Madras High Court vide order dated 01.03.2016 in the case of ***CIT Vs. M/s. G.R.T. Jewellers (India) Pvt. Ltd. contained in TCA No. 176 of 2016*** *have held that losses/unabsorbed depreciation pertaining to Wind Mill, which were set off in the earlier year against other business income of the assessee, cannot be notionally brought forward and again set off against the income of eligible business of the year which was chosen as "initial assessment year" for claim of deduction u/s. 80IA. I also find that SLP filed by the Department against the decision of Hon'ble Madras High Court in the lead case of* ***Velayudhaswamy Spinning Mills (P) Ltd. (supra)*** *has also been dismissed and the same is reported as* ***ACIT Vs. Velayudhaswamy Spinning Mills (P) Ltd. (2016) 76 taxmann.com 176 (SC).***

4.1.3. Therefore, in view of the above discussion and legal position, it is crystal clear that losses/depreciation of the Wind Mill business for the years prior to the "initial assessment year" which had been already set off against

the income of other business, cannot be brought forward notionally and again set off against the income of eligible business which is Wind Mill business of generating electricity in the case of appellant. Accordingly, I hold that action of the Assessing Officer is not as per the provisions of law and hence he is directed to allow the deduction u/s. 80IA(4) to the extent of income of eligible business i.e. Rs.3,61,15,115/- in the year under consideration ***without adjusting the losses/depreciation of earlier years brought forward notionally since the appellant has chosen the year under consideration as the "initial assessment year".*** *Thus, appellant succeeds in respect of* ***Ground Nos. 1 to 4.****"*

5. Aggrieved by the relief granted by the CIT(A), the Revenue is in appeal before the Tribunal.

6. The learned DR for the Revenue relied upon the assessment order.

7. The leaned senior counsel for the assessee, on the other hand, relied upon the order of the CIT(A) as well as the CBDT circular giving clarification of expression 'initial assessment year' and set off of brought forward losses as provided in Section 80IA(5) of the Act. The learned senior counsel also pointed out that the identical issue has earlier cropped up in assessee's own case in ITA No. 1849/Ahd/2017, order dated 05.12.2019 concerning AY 2013-14 where the issue has been adjudicated in favour of the assessee. The learned senior counsel also referred to para 4.1 of the CIT(A) order and submitted that the issue has now attained finality by the decision of the Hon'ble Madras High Court in *Velayudhaswamy Spinning Mills (P.) Ltd. vs. ACIT [2012] 340 ITR 477 (Madras).* It was submitted that SLP by Revenue against the aforesaid decision has been dismissed as reported in *[2016] 76 taxmann.com 176(SC).*

8. We have carefully considered the rival submissions. The short issue that arises for consideration in the present case is whether the assessee is entitled in law for claim of deduction of income arising from eligible business during the year under s. 80IA(1) r.w.s.

80IA(4) of the Act without making adjustments towards losses arising in the earlier assessment years prior to exercise of option of 'initial assessment year' with reference to the eligible business. Hence, the central question for consideration is whether the losses arising in eligible business, if any, prior to exercise of option towards 'initial assessment year' is required to be artificially carried forward and notionally adjusted from the profits arising from eligible business in the 'initial assessment year' and subsequent assessment years for the purposes of Section 80IA(5) of the Act.

9. The manner of determination of quantum of deduction as provided under s.80IA(5) of the Act has since been clarified by the CBDT Circular No.1 of 2016 dated 15.02.2016 and is devoid of controversy any more. Having regard to the wide ranging controversies, the CBDT circular has given categorical interpretation on exercise of option of choosing 'initial assessment year' referred to sub-section (5) of Section 80IA of the Act in favour of the assessee. The CBDT has also clarified that embargo placed under s.80IA(5) of the Act for quantification of deduction of profits and gains of an eligible business would apply from the assessment years immediately succeeding 'initial assessment years' only. Having regard to express elucidation by CBDT, the CIT(A), in our view, has rightly decided the issue of manner of computation of quantum of deduction under s.80IA(5) of the Act in favour of the assessee. The assessee, thus, while determining the eligible profit, is not required to notionally reduce losses arising from eligible business in the earlier years already set off against other business of assessee in terms of Sections 70, 71 & 72 of the Act prior to exercise of option of 'initial assessment year'. The losses arising in 'eligible business', if any, subsequent to earmarking of 'initial

assessment year' shall however continue to be governed by embargo placed in Section 80IA(5) of the Act.

10. Hence, in the light of above discussion and in consonance with the decision of the co-ordinate bench in AY 2013-14 as well as CBDT Circular referred above, we see no merit in the grievance of the Revenue.

11. In the result, appeal of the Revenue is dismissed.

This Order pronounced on 20/07/2020

Sd/-	Sd/-
(JUSTICE P. P. BHATT)	(PRADIP KUMAR KEDIA)
PRESIDENT	ACCOUNTANT MEMBER

Ahmedabad: Dated 20/07/2020

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।