आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B'' BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT,
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 2127/AHD/2017**
निर्धारण वर्ष/Asstt. Year: 2014-2015

A.C.I.T., Circle-2(1)(2), Ahmedabad.	Vs.	Kalthia Engineering & Construction Ltd., 193, Kalthia House, Thaltej, Ahmedabad. **PAN: AAACK8944N**

(Applicant)		**(Respondent)**

Revenue by	:	Shri D.B Gohil, Sr. D.R
Assessee by	:	Shri Manish Shah, A.R

सुनवाई की तारीख/**Date of Hearing : 15/12/2021**
घोषणा की तारीख **/Date of Pronouncement: 23/12/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-2, Ahmedabad, dated 08/06/2016, arising in the matter of assessment order passed 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-2015.

2. The revenue has raised the following grounds of appeal:

1. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.99,89,119/- u/s.14A of the Act.

1.1 The Ld.CIT(A) has failed to appreciate that an admitted investment of Rs.22,49,51,500/- was made in shares during the year, dividend income from which is exempt from tax.

1.2 The Ld.CIT(A) has failed to appreciate that since the assessee is not maintaining any separate account from which such investments had been made, the provision of Rule 8D are clearly applicable.

1.3 The Ld.CIT(A) has failed to appreciate that the assessee apart from making a bald assertion that it had the interest free funds available for making such investments had not lead any evidence to prove that it had the necessary interest free cash flow during the time of making such investment.

1.4 The Ld.CIT(A) has failed to appreciate that as per Section 106 of Evidence Act, when any fact is especially within the knowledge of any person the burden of proving the fact is upon him.

1.5 The Ld.CIT(A) has erred in facts and in law while deleting the impugned disallowance on the ground no exempt income had been earned by the assessee from such investment.

2. He Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.2,00,910/- u/s.36(1)(iii) of the Act.

3. The Ld.CIT(A) has erred in law and on facts in allowing the deduction of Rs.76,33,610/- u/s.80IA(4) of the Act.

4. The Ld.CIT(A) has erred in law and on facts in allowing the depreciation of Rs.9,52,922/- amount paid to Synefra Engineering & Construction Ltd., which did not create any tangible or intangible assets on which depreciation could be allowed.

4.1 The Ld.CIT9A) has erred in law and on facts by no adjudicating as to how such payment would form part of the cost of plant and machinery, which alone was entitled to the depreciation @ 80% p.a.

4.2 The Ld.CIT(A) has erred in law and on facts by observing that such expenditure could also be treated as revenue, when this was not the issue before him and, therefore, this observation of the Ld.CIT(A) is to be erased as it was no relatable to the issue at hand.

5. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary.

3. The 1st issue raised by the Revenue is that learned CIT (A) erred in deleting the addition made by the AO for Rs. 99,89,119/- under the provisions of section 14A read with rule 8D of Income Tax Rule.

4. The AO during the assessment proceedings found that the assessee has made investment in the shares which are capable of generating the exempted income. Accordingly the AO invoked the provisions of section 14A read with rule 8D of Income Tax Rule and made the disallowance as under:

1.	Interest Expenses	Rs. 83,89,119/-
2.	Administrative Expenses	Rs. 16,57,590/-
3.	Total	Rs. 99,89,119/-

4.1 The aforesaid amount was added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who deleted the addition made by the AO by observing as under:

> *Having considered the facts and following the decision taken in appellant's own case in the preceding years i.e A.Ys 2013-15 & 2012-13, the disallowance u/s.14A made by the AO is found not fully correct as the appellant did not had any exempt income in the year under consideration. However, the appellant himself has voluntarily made the disallowance of Rs.1,10,000/- on estimated basis and the same is accepted and disallowance to this extent of voluntary disallowance of Rs.1,10,000/- is maintained and the disallowance made by the AO of Rs.98,79,1199/- is deleted.*

6. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

7. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there was no exempted dividend income received by the assessee and therefore there cannot be any disallowance under the provisions of section 14A read with rule 8D of Income Tax Rule. In holding so we draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Corrtech Energy Pvt. Ltd. reported 45 taxmann.com 116 wherein it was held as under:

Section 14A(1) provides that for the purpose of computing total income under chapter IV, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the instant case, the Tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the Tribunal held that disallowance under section 14A could not be made. In the process tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case of CIT v. Winsome Textile Industries Ltd. [2009] 319 ITR 204 in which also the Court had observed that where the assessee did not make any claim for exemption, section 14A could have no application.

8.1 In view of the above, we hold that there cannot be any disallowance under the provisions of section 14A read with rule 8D of Income Tax Rule. Accordingly, we do not find any infirmity in the order of learned CIT (A) and thus we uphold the same. Hence the ground of appeal of the Revenue is dismissed.

9. The 2nd issue raised by the revenue is that the learned CIT (A) erred in deleting the addition made by the AO for Rs. 2,00,910/- representing the amount of interest attributable on the amount diverted to non-commercial activities.

10. The AO during the assessment proceedings found that the assessee has diverted a sum of ₹ 1,16,35,975/- being capital advance towards the non-commercial activities. Thus the AO was of the view that the assessee on one hand has incurred interest expenses on the borrowed fund and on the other hand, it has advanced for capital assets without charging any interest thereon. Accordingly, the AO was of the view that the amount of interest attributable to such capital advance is not eligible for deduction. Thus the AO worked out the amount of interest at Rs. 2,00,910/- and added to the total income of the assessee.

11. Aggrieved assessee preferred an appeal to the learned CIT (A) who deleted the addition made by the AO by observing as under:

It has also been noticed that during the year the appellant had much more interest free funds in the form of share capital and reserves and surplus as compared to the capital advances granted. In view of the above facts of the case and considering the fact that identical issue on similar lines has been decided by this office in the preceding years, relying on the same and respectfully following the judicial pronouncements made above, the disallowance made by the AO is found not correct and justified, hence not sustainable in the eyes of law.

12. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

13. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

14. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the advance was given by the assessee in the earlier year. Before we touch the issue whether such advance was given for the purpose of the business or not, it is sufficient to note that the own fund being capital and reserve of the assessee at the beginning of the financial year in which amount was advanced stands at Rs. 71,82,47,291/- which is much more than the capital advance as discussed above and this fact is undisputed. Thus it can be safely be presumed that the amount has been advanced by the assessee out of its own fund without involving any borrowed fund. Accordingly, the question of making the disallowance of the proportionate amount of interest on such capital advance does not arise. Hence, we do not find any reason to interfere in the order of the learned CIT (A). Thus we uphold the same. Hence the ground of appeal of the revenue is dismissed.

15. The 3rd issue raised by the Revenue is that the learned CIT (A) erred in allowing the deduction claimed by the assessee for ₹ 76,33,610/- under the provisions of section 80IA of the Act.

16. The assessee in the year under consideration has claimed deduction of its eligible unit being windmill generating the power for ₹ 76,33,610/-. As per the assessee the commercial activities for generating the power using the windmill was commenced from the assessment year 2009-10. However, the assessee has chosen the initial assessment year 2012-13 for claiming the deduction under section 80IA(2) of the Act. Therefore, the assessee contended that any unabsorbed depreciation prior to the initial assessment year shall not be carried forward to the initial

assessment year for set off against the profit of eligible unit. As per the assessee the unabsorbed depreciation pertains to the period prior to the initial assessment year which will be set off against the profit of non-eligible undertaking.

16.1 However, the AO disregarded the contention of the assessee by observing that the initial assessment year is 2009-10 as the commercial activity started in this year. The impugned unabsorbed loss pertains to the assessment year 2009-10 onward. Accordingly, the AO was of the view that such loss has to be set off against the profit of the eligible undertaking prior to claiming the deduction under section 80IA of the Act. Accordingly, the AO disallowed the deduction claimed by the assessee under section 80IA of the Act and added to the total income.

17. Aggrieved assessee preferred an appeal to the learned CIT (A) who deleted the addition made by the AO by observing as under:

> *6.5. On a careful consideration of the entire facts of the case, it is noted that the issue whether the deduction under section 80IA of the Act is to be allowed without adjusting the notional brought forward losses and depreciation of earlier years is to be allowed or not, is almost legally settled now. It is noted from the perusal of various judicial pronouncements that the preponderant judicial opinion is in favour of the appellant. The leading judgment on the issue is that of* ***Honourable High Court of Madras in the case of Velayudhaswamy Spinning Mills Private Limited [340 ITR 477].*** *For ready reference the head notes of the decision of the Honourable High Court is reproduced as under:-*
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> *"Under section 8Q-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 chose 10 consecutive assessment years out of 15 years. Option has to be exercised and if it is not exercised, the assessee 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. Subsection (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 "initial assessment year" employed in sub-section (5) is different from the words "beginning from the year" referred to in sub-section (2).*
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> *When the assessee exercise 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 of ten 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 contemplates 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 80IA(5)."

6.6. The judgment has subsequently been followed by several other Courts and Tribunals. Even thereafter, the SLP filed by the revenue in the Honourable Supreme Court, has been dismissed by the ***Honourable Apex Court as reported in [2016] 76 Taxmann.com 176 (SC) dated 05/09/2016.*** *For ready reference the head notes of the judgment of Honourable Supreme Court is reproduced as under:-*

"Section 80IA of the Income - tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings - Assessment Years 2004-05 and 2005-06 -High Court by impugned order held that 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) - Whether Special Leave Petition fifed against impugned order was to be dismissed - Held, yes [Para 2] [In favour of assessee]."

6.7. The basic principle that has been laid down by various courts is that there should be no carry forward loss pertaining to the eligible unit, if the losses of eligible unit had earlier been adjusted with the losses of other units prior to the initial assessment year. There is no need to notionally set-off the losses of that unit for allowing the deduction. The losses and depreciation of the years earlier to the initial assessment year which have been already absorbed against the profits of other business cannot be notionally brought forward and set off against the profits of the eligible business for computing the deduction under section 80 IA of the Act. In the case of appellant, as it is clear from the details, that the losses have been adjusted in earlier years prior to the initial assessment year. The initial assessment year is the year in which the appellant make the claim for the first time and not the year in which the eligible unit commences production. As per the provisions of the Act, a clear option has been given to the appellant for choosing the initial year of assessment. In the case of appellant, the appellant has chosen the subsequent year later to the year in which the production of electricity commenced. In the present year, there is no unadjusted business loss and depreciation loss and accordingly, the claim has rightly been made by the appellant. Reliance is also placed on recent judgments of ***ITAT Ahmedabad in the case of Sadbhav Engineering Ltd, 45 taxmann.com 333 and in the case of Jivraj Tea & Industries Ltd. 42 taxmann.com 462.*** *The head note of the decision in the later case is reproduced hereunder:-*

"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) - Whether when an exporter exercises option of choosing initial assessment year as culled out in subsection (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 often 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]"

6.8. The judicial pronouncements relied by the AO such as Goldmine Shares & Finance (P) Ltd (supra) is respectfully distinguished as the judgment has been considered by honourable ITAT Ahmedabad and honourable High Court of Madras in the case of Velayudhaswamy

Spinning Mills Private Limited (supra). In view of the above discussion, the disallowance of claim under section 80IA made by the AO on this ground is directed to be ***deleted,*** *In other words, the appellant is found eligible for the deduction u/s. 80IA as claimed.*

18. Being aggrieved by the order of the learned CIT (A), the revenue is in appeal before us.

19. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

20. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that it is the option of the assessee to choose the initial assessment year under the provisions of section 80IA (2) of the Act beginning from the year in which commercial production begins.

20.1 In the case on hand, the commercial activity started from the assessment year 2009-10. However, the assessee has not chosen the assessment year 2009-10 as the initial assessment year. As such the assessee has chosen the initial assessment year 2012-13 which is within the provisions of law. The issue with respect to the selection of the initial assessment year has been resolved by the CBDT in its circular No. 1 of 2016 dated 15th February 2016. The relevant extract of the circular reads as under:

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 fulfilment 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.

20.2 From the above there remains no ambiguity that it is the option of the assessee to choose the initial assessment year. Admittedly, the assessee has chosen the assessment year as the initial assessment year 2012-13 for claiming the deduction under the provisions of section 80 IA of the Act. Now the controversy arises in the given facts and circumstances whether the unabsorbed depreciation pertaining to the period prior to the initial assessment year amounting to 3,86,48,499/- should be first set off against the against the profit of the eligible undertaking for the year under consideration. The provisions of subsection 5 of section 80IA of the Act provides that the deduction shall be computed treating the eligible undertaking as the only eligible source of business. Thus, the provision itself provides that the deduction shall be computed without setting off the unabsorbed depreciation of earlier year when undertaking was not eligible. Indeed, the unabsorbed depreciation pertains to the eligible undertaking for the period post commencement of the commercial activities but before the initial assessment year when the units becomes eligible for deduction. This controversy has been answered by the Hon'ble Madras High Court in case of Velayudhaswamy Spining Mills (P.) Ltd vs. ACIT reported in 340 ITR 477 by observing as under:

> *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 'initial assessment year' employed in sub-section (5) is different from the words "beginning from the year" referred to in sub-section (2).*
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> *When the assessee 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 of ten 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 contemplates 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).

20.3 In view of the above and after considering the facts in totality, we hold that the assessee is eligible for deduction under section 80IA of the Act without setting of/adjusting the unabsorbed depreciation of earlier years as alleged by the AO. Hence, we do not find any infirmity in the order of learned CIT (A) and thus we decline to interfere in his order. Thus the ground of appeal of the Revenue is dismissed.

21. The last issue raised by the revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO for Rs. 9,53,992/- on account of depreciation claimed on the cost incurred in relation to the land being non depreciable asset.

22. The AO during the assessment proceedings found that amount of depreciation claimed by the assessee on the windmill was inclusive of the depreciation on the cost incurred by the assessee for keeping the land open/ vacant near the area where the windmill was located. As per the AO, such cost of Rs. 19.85 Lacs was incurred by the assessee in connection with the land which is not a depreciable assets. Thus, the AO disallowed the same and added to the total income of the assessee.

23. Aggrieved assessee preferred an appeal to the learned CIT (A) who allowed the depreciation claimed by the assessee after relying on the order of his predecessor and by observing as under:

2.4. Having considered the facts and submission, it has been noticed that the appellant company has purchased the wind mill in the month of March and claimed the depreciation @ 40% thereupon and the same included the payment made to Synefra Engineering and Construction Ltd. of Rs.19,85,400/- for providing easy access and for keeping the land vacant surrounding the Wind Mill so that Wind Mill can work efficiently and generate maximum power of its capacity. Thus, it is apparent that the appellant has made the payment for obtaining the right to keep the land vacant surrounding the Wind Mill for efficient generation

of the power at its full capacity and it was not a purchase of land. Therefore, the question of treating the same as capital expenditure does not arise. This fact is also verified from the copy of the bill of the aforesaid party submitted. Since this expenditure was incurred in respect of the maximum utilisation of the Wind Mill for generation of the power and the use of the vacant land surrounding the Wind Mill was having direct nexus for such efficient use of the Wind Mill, therefore, the appellant in place of claiming the above expenditure as revenue u/s. 37 of the Act, rather claimed the depreciation thereupon along with the cost of the Wind Mill which is found in order and hence the depreciation is ***allowed.*** *Therefore, the appellant is eligible to get the depreciation on the payment made to the aforesaid party as claimed by the appellant and hence, disallowance of claim of depreciation made by the AO is found untenable and hence, the same is* ***deleted.***

24. Being aggrieved by the order of the learned CIT (A), the revenue is in appeal before us.

25. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

26. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that the cost/expense was incurred by the assessee to keep the surrounding land where the windmill was installed as open and vacant. It was incurred for the effective functioning and maximum output of the windmill. Admittedly, the cost was incurred by the assessee for the purpose of the business and this fact was not doubted by the authorities below. The assessee has treated such cost as part of the cost of the windmill and therefore, the assessee has claimed the depreciation thereon. To our understanding, the impugned expenses were not incurred by the assessee for the acquisition of the land rather cost was incurred for effective functioning of the windmills. Therefore, such cost was directly connected with the functioning of windmill. Thus there was commercial expediency to incur the expenses hence assessee was eligible to claim such expenses. However we find that the assessee instead of claiming such expenditure separately added the same to the cost of windmill and claiming depreciation on the same which was accepted in the earlier years. Therefore, keeping the principles of consistency, we do not find any prejudice

to the interest of Revenue, thus refrain ourselves to interfere in the order of learned CIT (A). Hence the ground of the Revenue is dismissed.

27. In the result, the appeal filed by the Revenue is **dismissed.**

Order pronounced in the Court on 23/12/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 23/12/2021
Manish