IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SMT KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA No.1303/Mum/2021
(**Assessment Year :2010-11**)

M/s. Ultratech Cement Ltd. (as the successor of Samruddhi Cement Ltd.) Ahura Centre 'B'Wing, 2nd Floor Mahakali Caves Road Andheri (E) Mumbai – 400 093	Vs.	ACIT, CC-1(4), Mumbai Central Circe-1(4) Mumbai (ACIT CC)
PAN/GIR No.AAACL6442L		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Nitesh Joshi
Revenue by	Ms. Richa Gulati
Date of Hearing	**16/12/2022**
Date of Pronouncement	**21/02/2023**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No. 1303/Mum/2021 for A.Y.2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-47, Mumbai in appeal No.CIT(A)-47/10004/2018-19 dated 12/05/2021 (ld. CIT(A) in short) against the order of assessment passed u/s.154 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 27/03/2018 by the ld. Jt. Commissioner of Income Tax (OSD), Central Circle-1(4), Mumbai (hereinafter referred to as ld. AO).

2. The assessee has raised the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] erred in confirming the order passed by the leamed Joint-Commissioner of Income-tax (OSD), Central Circle 1(4), Mumbai (JCIT) under section 154 of the Income-tax (IT Act).

2 On the facts and in the circumstances of the case and in law, the leamed CIT(A) erred in holding that order passed by the learned JCIT is not time barred as per the provisions of section 154(7) of the IT Act. He erred in computing the limitation period from the subsequent 154 order dated 10 June 2014 not the original assessment order dated 26 March 2013.

3.On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the rectification order and holding that denial of claim under section 801A for Thermal Power Plant (TPP) was not change of opinion despite the fact that the claims were examined during assessment proceedings and the claims were denied/reduced in the assessment.

4.Without prejudice to above and on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned JCIT in order passed under section 250 r.w.s. 154 of the IT Act in respect of tax holiday claim towards captive use of TPP. He erred in concurring with the view of the learned JCIT that such deduction is not allowable in view of provisions of section 801A(12A) of the IT Act.
5. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] has erred in not directing the learned JCIT to allow claim of TDS/ TCS credit on the basis of certificates produced by the appellant company.

The Appellant craves leave to add, alter, amend or delete the aforesaid grounds of appeal from time to time and upto the date of hearings."

3. The assessee is a public limited company and its shares are listed in stock exchange. Assessee is engaged in manufacturing and sale of cement and allied products. The appeal pertains to Samruddhi Cement Ltd (SCL) which was amalgamated with Ultratech Cement Ltd. w.e.f. 01/07/2010. In the instant case, we are concerned with the transactions for the last six months of the F.Y.2009-10 relevant to A.Y.2010-11. SCL

filed its return of income u/s.139(1) of the Act for A.Y.2010-11 on 30/09/2010 declaring total income of Rs.429,82,41,920/-. Subsequently SCL filed revised return of income on 16/03/2012 declaring total income of Rs.428,83,81,880/-. The original assessment was completed u/s.143(3) of the Act on 26/03/2013 determining total income of the assessee at Rs.461,41,39,653/-. The assessee filed a rectification application u/s.154 of the Act before the ld. AO to set right the short TDS credit granted by the ld.AO in the assessment framed u/s.143(3) of the Act on 26/03/2013. This rectification application was disposed of by the ld.AO vide order u/s.154 of the Act dated 10/03/2014 by granting further TDS credit.

3.1. The assessee company was incorporated on 04/09/2009 on account of demerger of cement business of M/s. Grasim Industries Ltd. Accordingly, the assessee being a resulting company, had claimed deduction of Rs.74,39,06,091/- u/s.80IA of the Act on 7 units (thermal plants) transferred after 01/10/2009 from Grasim Industries Ltd. (demerged company) and also on Rail systems, in accordance with the provisions of Section 80IA (12) of the Act. The claim of deduction u/s.80IA of the Act was granted by the ld. AO in the original assessment order u/s.143(3) of the Act dated 26/03/2013. This claim was not disturbed by the ld. AO in the rectification order passed u/s.154 of the Act on 10/03/2014.

3.2. SCL filed an appeal before the ld. CIT(A) against the disallowances made and certain other claims rejected by the ld. AO in the regular assessment. The ld. CIT(A) decided the said appeal vide order dated 21/04/2017 granting substantial relief to the assessee company. The ld. AO thereafter, issued notice u/s.154 of the Act dated 13/02/2018 proposing to disallow an amount of Rs.46,29,61,752/- being deduction

u/s.80IA of the Act in respect of thermal power plants by applying the provisions of Section 80IA (12A) of the Act. The assessee filed a detailed written submission vide letter dated 25/02/2018 contending that the proceedings initiated u/s.154 of the Act are time barred. In other words, the case of the assessee was that the original assessment was completed on 26/03/2013. Any proceedings seeking to rectify the order could be passed u/s.154 of the Act within four years from the end of the year in which scrutiny assessment was framed in terms of Section 154(7) of the Act. In the instant case since the scrutiny assessment was completed u/s.143(3) of the Act on 26/03/2013, the time limit to rectify any order could be made u/s.154 of the Act only upto 31/03/2017 and not thereafter. Apart from this legal ground, the assessee also submitted that there is no mistake apparent from record necessitating rectification of order passed u/s.143(3) of the Act in view of the fact that assessee, being the resulting company is entitled for deduction u/s.80IA of the Act in respect of thermal plants hived off from Grasim Industries Ltd pursuant to demerger, for the remaining period. The ld. AO however, did not accept the contentions of the assessee and proceeded to pass an order giving effect to CIT(A)'s order u/s.154 r.w.s.250 of the Act on 27/03/2018. In the said order giving effect to CIT(A) order, the ld. AO sought to rectify even the original order passed u/s.143(3) of the Act by disallowing the claim of deduction u/s.80IA of the Act for thermal power plants amounting to Rs.46,29,60,671/- by applying the provisions of Section 80IA(12A) of the Act. This action of the ld. AO was upheld by the ld. CIT(A).

4. We have heard rival submissions and perused the materials available on record. We find that the present appeal is concerned with

order dated 27.03.2018 passed by the ld.AO under section 154 of the Income-tax Act (the Act), withdrawing the assessee's claim for deduction under section 80-IA of the Act in respect of profits of the Thermal Power Plant by invoking the provisions of sub-section (12A) thereof. The Thermal Power Plants in respect of which the said deduction is claimed were originally set-up as a part of the Cement Undertakings by Grasim Industries Limited. As a part of the demerger scheme, the said Thermal Power Plants along with the Cement Undertakings were transferred to Samruddhi Cement Limited (being the assessee herein) w.e.f. 01/10/2009. The present appeal is being pursued by Ultratech Cement Ltd. as the amalgamated company of the assessee. According to the ld. AO, section 80-IA(12) of the Act enables the resulting company, being the assessee herein, to claim deduction under the said section in respect of the remaining period for which deduction is to be allowed.

4.1. According to ld. AO, Section 80IA(12) is an enabling provision. By virtue of insertion of Sub-section 12A of Section 80IA of the Act, the ld. AO was of the opinion that the enabling provision in sub-section 12 has been withdrawn by the Finance Act 2007 w.e.f. 01/04/2008 and accordingly, the assessee would not be entitled for deduction u/s.80IA of the Act.

4.2. The primary facts stated hereinabove remain undisputed and hence, the same are not reiterated for the sake of brevity. We find that the following issues arise for our consideration in the present appeal :-

a. Whether the order dated 27/03/2018 passed by the ld. AO under section 154 of the Act is barred by limitation as it has rectified assessment order dated 26.03.2013 passed under section 143(3) of the Act as per section 154(7) of the Act, the limitation would expire on 31/03/2017 being four years from the end of the financial year in which the said assessment order was passed?

b. Whether withdrawal of the deduction under section 80-IA of the Act in respect of profit and gains of the Thermal Power Plants raises a debatable issue and, hence, cannot be regarded as a mistake apparent from the record.

4.3. We find that the issue raised in point 'a' above would be crucial as it challenges the validity of assessment framed by the ld. AO per se u/s.154 of the Act. We find that with a view to secure consistent supply of power for its cement undertakings, Grasim Industries Limited had set-up Thermal Power Plants at Shambhupura and Kharia in the state of Rajasthan, Malkhed in the state of Karnataka, Reddipallayam in the State of Tamil Nadu and at Rawan in the State of Chhattisgarh. It is an admitted position that profits and gains of the said power plants are eligible for deduction under section 80-IA of the Act.

4.4. By a scheme of Demerger, Grasim Industries Limited transferred the aforesaid power plants along with the Cement Undertakings to the assessee, with the effective date being 01/10/2009. Pursuant thereto, the said power plants are owned, operated and maintained by the assessee. The profits arising in respect of the said plants have been reflected as

income in the assessee's books of account. The assessee accordingly in the return of income filed, claimed deduction u/s.80IA of the Act which was allowed by the ld. AO in the original scrutiny assessment proceedings framed u/s.143(3) of the Act on 26/03/2013 in the sum of Rs.46,29,61,752/- for thermal power plants after making some disallowance on account of reallocation of head office expenses and treatment of part of its income as ineligible for such deduction. Hence, for all practical purposes, the assessment got completed on 26/03/2013 for the impugned assessment year. Hence, any rectification order i.e. required to be passed either suo moto by the ld. AO or at the behest of the assessee, could be passed upto 31/03/2017 i.e. four years from the end of the financial year in which assessment was completed, in terms of provisions of Section 154(7) of the Act. In the instant case, the assessee was not granted TDS credit for the full amount and interest u/s.234C of the Act was not correctly charged in the assessment framed u/s.143(3) of the Act on 26/03/2013. Accordingly, the assessee had filed a rectification application u/s.154 of the Act seeking for TDS credit and for rectification of interest excessively charged u/s.234C of the Act. The ld.AO rectified the said mistakes by passing an order u/s.154 of the Act on 10/03/2014. The said order deals only with the quantum of TDS credit to be allowed to the assessee and consequently charging of interest u/s.234C of the Act. **There was absolutely no discussion in that order with respect to grant of deduction u/s.80IA of the Act either on quantum or on its eligibility (emphasis supplied).** We find that the ld. AO had passed an impugned assessment order u/s.250 r.w.s.154 of the Act dated 27/03/2018 wherein he had sought to apply the provisions of Section 80IA(12A) of the Act and had denied the claim of deduction u/s.80IA of the Act to the assessee company.

4.5. The ld. AR pointed out that this assessment framed on 27/03/2018 is barred by limitation as it is in violation of provisions of Section 154(7) of the Act. Per Contra, the ld. DR before us vehemently argued that the said order is passed well within the time as the same was passed within four years from the end of the last rectification order passed on 10/03/2014. We are unable to comprehend ourselves to accept to this proposition of the Revenue. The rectification order dated 10/03/2014, as stated supra, was only to grant further credit of TDS to the assessee and to rectify the excess interest charged u/s.234C of the Act. Once this order is passed, it only seeks to rectify the original assessment order passed on 26/03/2013. Hence, for all practical purposes, this rectification order relates back or goes back to the date of the original assessment i.e. 26/03/2013. In other words, these rectifications are to be construed as if it has been done only in the original assessment order framed on 26/03/2013. This rectification order dated 10/03/2014 does not stand on its own. Moreover, the claim of deduction u/s.80IA of the Act, be it on its eligibility or on its quantum, as stated supra, was never the subject matter of consideration in the rectification proceedings u/s.154 of the Act dated 10/03/2014 by the Revenue. Once an order of rectification is passed, the assessment originally framed itself is modified and what remains thereafter is not order of rectification but only the assessment as duly rectified. Hence, in our considered opinion, the rectification order passed u/s.154 of the Act dated 10/03/2014 cannot be considered to be an independent proceeding. Reliance in this regard was rightly placed by the ld. AR on the decision of the *Hon'ble Madras High Court in the case of S.Arthanari vs. First Income Tax Officer wherein the Hon'ble Madras High Court relied on the observations made by the Hon'ble Madras High Court in the case of*

Vedantham Raghaviah vs. Third Additional Income Tax Officer, Madras reported in 49 ITR 314 as under:-

> *"Once an order of rectification is passed the assessment itself is modified and what remains is not the order of rectification, but only the assessment as rectified."*

4.6. In any case, we find that eligibility of claim of deduction u/s.80IA of the Act was not an issue of dispute in rectification proceedings u/s.154 of the Act dated 10/03/2014. While this is so, how the time limit for making further rectification order u/s.154 of the Act wherein the deduction u/s.80IA of the Act was sought to be denied, could be reckoned from this first section 154 order dated 10/03/2014. In all fairness, the time limit should be reckoned only from the original assessment order dated 26/03/2013 as that was the order in which deduction u/s.80IA of the Act was granted to the assessee and the department is only trying to disturb that claim of deduction u/s.80IA of the Act in the impugned 154 proceedings dated 27/03/2018.

4.7. We further find that the ld. AR placed reliance on the decision of the *Hon'ble Apex Court in the case of CIT vs. Alagendran Finance Ltd reported in 293 ITR 1 (SC)*. That case was concerned with revision proceedings u/s.263 of the Act where after the passing of the original assessment order, the assessment proceedings were reopened and re-assessment order was passed. Against the said re-assessment order, the revision proceedings has been initiated for denial of that assessee's claim of deduction of lease equalisation fund, which issue was never farming part of re-assessment proceedings. The Hon'ble Apex Court held that for the purpose of ascertaining period of limitation u/s.263(2) of the Act, the date of original assessment order would be relevant and not the re-

assessment order, as if at all there was error in allowability of lease equalisation fund, the same would arise only in the original assessment order and not in the re-assessment order. Accordingly, the revision order passed by the ld. Commissioner of Income Tax in that case was quashed by the Hon'ble Apex Court.

4.8. We find that the ld. DR vehemently relied on the decision of the *Hon'ble Apex Court in the case of Hind Wires Ltd. vs. CIT reported in 212 ITR 639 (SC)* in order to support the proposition that the period of limitation in the present case had to be reckoned from 10/03/2014 i.e. the date of first rectification order u/s.154 of the Act. On perusal of the said decision of the Hon'ble Apex Court, we find that the said case was concerned with a fact situation where after the passing of original assessment order, rectification order has been passed dealing with depreciation relating to extra shift allowance. In that case, the date of original assessment order was 21/09/1979 and date of first rectification order u/s.154 of the Act dated 12/07/1982. Later assessee filed rectification application u/s.154 of the Act on 04/07/1986 claiming that depreciation on factory buildings was claimed at a rate lower than that allowed under the provisions of the Act and Rules. Since the subject matter of rectification in the first rectification order and also the subject matter of rectification in the second rectification proceedings, being the claim of depreciation, was the same, the Hon'ble Apex Court upheld the view of the Tribunal granting higher rate of depreciation on factory building to that assessee. Whereas in the instant appeal before us, as stated supra, the subject matter of first rectification proceedings was granting further credit of TDS and rectification of excess interest charged u/s.234C of the Act and the subject matter of impugned section 154

proceedings dated 27/03/2018 was denial of deduction u/s.80IA of the Act. Hence, the reliance placed by the ld. DR on the decision of the Hon'ble Apex Court in Hind Wires Ltd. referred to supra becomes factually distinguishable and does not come to the rescue of the Revenue. In fact in the factual matrix of the assessee's case before us, the decision rendered by the Hon'ble Apex Court in the case of CIT vs. Alagendran Finance Ltd reported in 293 ITR 1 and the decision of the Hon'ble Madras High Court referred to supra advances the case of the assessee.

4.9. Our aforesaid observation and view is further fortified by the decision of the Co-ordinate Bench of this Tribunal in the case of Ashu Engineers and Plastics Pvt. Ltd. vs. DCIT in ITA No.3453/Mum/2010 for A.Y.2001-02 dated 29/04/2011 wherein it is held as under:-

> *"9. In view of the above discussions, the hyper technical plea of the learned Departmental Representative is only fit to be rejected. Learned Departmental Representative as indeed the authorities below have also relied on in the case of Hind Wire Industries Ltd v. CIT,(supra) but then it is a case in which the subject matter of first rectification was the same as the subject matter of second rectification was sought.* ***In the present case, however, subject matter of two rectification proceedings is altogether different and, therefore, the ratio of Hon'ble Supreme Court's judgment in the case of Hind Wire Industries Ltd v. CIT(supra) does not come into play.*** *When this proposition was put to Learned D.R., he did not have much to say except placed his bland reliance of Hon'ble Supreme Court's judgment in the case of Hind Wire Industries Ltd v. CIT(supra) and also the stand taken by the authorities below. We are unable to see any merits in learned Departmental Representative's reliance on Hind Wire Industries (supra) either.* ***We are of the considered view that the ratio laid down in the case of Hind Wire Industries Ltd v. CIT(supra) remains confined to a case where subject matter of second rectification is the same as the first rectification and it was only in such a situation that the time limit of second rectification proceedings gets extended by the fact of first rectification proceedings. In a situation in which the subject matter of second rectification proceedings is wholly unrelated to the subject matter of first rectification proceedings as is the situation in the present case, the time limit for second rectification proceedings remains unaffected by the first rectification***

> ***proceedings.*** *In view of the these discussion, as also bearing in mind entirety of the case, we are of the considered view that the impugned rectification order, having been passed well after the end of four years from the end of financial year, in which, intimation under section 143(1)(a) passed, is time barred. In any event, by no stretch of logic, a rectification of mistake almost after eight years of processing an intimation under section 143(1)(a) can be said to have been made within a reasonable time limit. We, accordingly, quash the impugned rectification order."*
>
> (emphasis supplied by us)

4.10. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we have no hesitation to hold that the second rectification order passed u/s.154 of the Act dated 27/03/2018 wherein the claim of deduction u/s.80IA of the Act was denied to the assessee by applying the provisions of Section 80IA(12A) of the Act, is clearly barred by limitation. Accordingly, the issue framed hereinabove in question 'a' above is decided in favour of the assessee.

4.11. In any case, even on merits, the ld. AR placed on record the copy of decision of this Tribunal in the case of Ultratech Cement Ltd. vs. DCIT for A.Y.2011-12, 2012-13, 2013-14 and 2014-15 in ITA Nos.1412,1413,2461,2462,2871,2872,2873,3764/Mum/2018 and CO Nos. 129,130,118 & 155/Mum/2019 vide order dated 14/12/2021 wherein this Tribunal had passed an elaborate order after due consideration of provisions of Section 80IA(12A) of the Act and granted deduction u/s.80IA of the Act to the successor company. For the sake of brevity, the elaborate observations made by this Tribunal on merits is not reproduced hereunder. Hence, even on merits, the assessee is entitled for deduction u/s.80IA of the Act in the facts and circumstances of the instant case. Accordingly, the ground Nos. 1-4 raised by the assessee are allowed.

5. The ground No.5 raised by the assessee is seeking TDS credit. This issue requires factual verification by the ld. AO. Hence, the ld. AO is hereby directed to decide the issue in accordance with law. Accordingly, the ground No.5 raised by the assessee is allowed for statistical purposes.

6. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 21/ 02 /2023 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 21/ 02 /2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai