

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE ACTING CHIEF JUSTICE MR.ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 16TH DAY OF NOVEMBER 2017/25TH KARTHIKA, 1939

ITA.No. 48 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN ITA 157/COCH/2014 of
I.T.A.TRIBUNAL,COCHIN BENCH DATED 19-09-2014

APPELLANT(S)/APPELLANT:

KANAN DEVAN HILLS PLANTATIONS COMPANY PVT LTD.,
KDHP HOUSE, MUNNAR - 685 612, KERALA, PAN : AACCK5399 M.

BY ADVS.SRI.JOSEPH MARKOSE (SR.)
SRI.V.ABRAHAM MARKOS
SRI.BINU MATHEW
SRI.TOM THOMAS (KAKKUZHIYIL)
SRI.ABRAHAM JOSEPH MARKOS
SRI.ISAAC THOMAS
SRI.NOBY THOMAS CYRIAC

RESPONDENT(S)/RESPONDENT:

THE ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE - 1(2), ERNAKULAM, KOCHI - 682 018.

R1 BY ADV. SRI.P.K.R.MENON,SR.COUNSEL, GOI (TAXES)
R1 BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
06-11-2017, THE COURT ON 16.11.2017 DELIVERED THE
FOLLOWING:

: 2 :

APPENDIX

PETITIONER'S ANNEXURES:

- ANNEXURE A : TRUE COPY OF ASSESSMENT ORDER DATED 28.12.2010 PASSED BY THE ASSESSING OFFICER.
- ANNEXURE B : TRUE COPY OF ORDER DATED 15.01.2014 OF THE COMMISSIONER OF INCOME TAX (APPEALS)-II, KOCHI IN ITA 70/R-1/E/CIT(A)-II/2010-11.
- ANNEXURE C : TRUE COPY OF APPEAL ITA NO.157/2014 DATED 07.04.2014 FILED BY THE APPELLANT BEFORE THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH.
- ANNEXURE D : CERTIFIED COPY OF THE IMPUGNED ORDER DATED 19.09.2014 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN IN ITA NO. 157/COCH/2014 FOR ASSESSMENT YEAR 2008-2009

RESPONDENTS' ANNEXURES: NIL

//TRUE COPY//

P.A. TO JUDGE.

ANTONY DOMINIC, Ag. CJ &
DAMA SESHADRI NAIDU, J.

I. T. Appeal No.48 of 2015

Dated this the 16th day of November, 2017

JUDGMENT

Dama Seshadri Naidu, J

The appellant-assessee is a private limited company, engaged in the business of “growing, manufacturing, and selling tea and other produce.” It is also engaged in the business of distributing electricity taken from the State-owned Kerala State Electricity Board.

2. The assessee’s predecessor, Tata Tea Limited, had not only owned the plantation business but also generated hydel power from the pre-independence days. Post-independence, when the State took over the power generation, the company was allowed to buy electric power from the Government in bulk, use it for its own purpose, and distribute the balance power to the residents of Munnar hill-station. So the predecessor company had an elaborate network of transmission lines.

3. Formed in March, 2005, the assessee company took over the power distribution network as well as the tea plantations.

4. For the assessment year 2008-09, the assessee filed its return of income declaring a total income of Rs.2,45,83,170/-. Later, it filed a revised return declaring an income of Rs.1,49,74,810/-. But the assessing officer selected the assessee company for scrutiny and determined the total income at Rs.6,09,20,556/-, through Annexure A proceedings, after making certain disallowances.

5. Aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) II, Kochi, who allowed the appeal in part through Annexure B order. Further aggrieved, the assessee approached the Income Tax Appellate Tribunal, Cochin bench ("the Tribunal"). Rest of the issues either held in assessee's favour or not pressed by assessee itself, only one issue remained for the Tribunal to decide: Is the Assessing Officer's disallowing the deduction under Section 80-IA justified?

Submissions:

Assessee's:

6. Sri Joseph Markos, the learned Senior Counsel for the assessee, has submitted that the assessee has fulfilled all the eligibility criteria prescribed under Section 80-IA of the Act. To elaborate, he has submitted that the assessee substantially improved and increased the distribution network spending huge amounts. According to him the increase was beyond 50% of the then existing establishment's value.

7. Sri Markos has drawn our attention to a clarificatory circular issued by CBDT and also the legislative purpose of Section 80-IA as spelt out in the Finance Act, 2004. He contends that the statutory provision enables an assessee to claim certain deductions if the investment has led to renovation and modernisation of the transmission and distribution network.

8. To sum up, the learned Senior Counsel has contended that one company taking over the entire undertaking of another company hardly makes any difference to the undertaking itself. According to him, the tax benefits are undertaking-specific, and they do not run with the undertaking's owner. So he urges us to answer the questions of law

in assessee's favour and restore the deductions under Section 80-IA of the Act.

Revenue's:

9. Sri P. K. Ravindranatha Menon, the learned Senior Counsel for the Revenue, has contended that the assessee's business is not a new industrial undertaking. According to him, the assessee has also miserably failed to establish that it has spent more than 50% of the plant's book value on any renovation or modernisation.

10. The learned Senior Counsel has strenuously contended that the plant and machinery used by the assessee had been used by its predecessor. So whatever the assessee has is only used machinery or plant, and that cannot entail the assessee to any tax concessions. According to Sri Menon, the plant and machinery acquired by the assessee company had been installed and continuously used by the previous owner.

11. The conditions imposed under section 80-IA(3) of the Act are cumulative, contends Sri Menon.

Substantial Question of Law:

12. Has the Appellate Tribunal any material or evidence on record to justify its finding that the assessee has not substantially renovated and modernised the transmission and distribution lines within the meaning of Section 80-IA?

Discussion:

13. Indeed, the facts are not in dispute. The assessee took over a going concern: a tea estate with all its incidental businesses, too. A power distribution system with a network of transmission lines is part of that acquisition. The assessee maintained that in 2007-08 it renovated and modernised the transmission lines by investing huge amounts. So for the assessment year 2008-09, it claimed tax benefits under section 80-IA of the Act. Among other items, the Assessing Officer disallowed the deduction. The Appellate Authority and the Appellate Tribunal concurrently upheld the Assessing Officer's findings on the disallowance.

14. As on 01/04/2004, the assessee's plant and machinery were valued at Rs.88,39,340/-. In the financial year 2007-08, the assessee invested Rs.50,30,952/-. Because of this investment, the assessee asserts

that the transmission network has been renovated and modernised. Accordingly, it also justifies its claim for tax deductions under section 80-IA of the Act.

15. The Revenue frontally attacks the assessee's claim for deduction on two grounds: (1) the machinery on the plant existing before the alleged renovation or modernisation was used by the assessee's predecessor; (2) the conditions under Section 80-IA are cumulative, but the assessee has failed to prove that it has fulfilled all those conditions.

The Statutory Scheme:

16. To be specific, the assessee's claim for deduction hangs on the scope and ambit of Section 80-IA of the Act. It is, then, apposite for us to examine the long-winded provision only to the extent relevant for our purpose:

“Section 80 IA: 80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.—[(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to

hundred per cent of profits and gains derived from such business for ten consecutive assessment years.]

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park [[or develops a special economic zone] referred to in clause (iii) of sub-section(4)] or generates power or commences transmission or distribution of power [or undertakes substantial renovation and modernisation of the existing transmission or distribution lines [or lays and begins to operate a cross-country natural gas distribution network]]:

[Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words “fifteen years”, the words “twenty years” had been substituted;]

* * *

(3) This section applies to [an [* * *] undertaking referred to in [clause (ii) or] [clause (iv) or clause (vi)] of sub-section (4)] which fulfils all the following conditions, namely:—

- (i) it is not formed by splitting up, or the reconstruction, of a business already in existence:

Provided that this condition shall not apply in respect of an [* * *] undertaking which is formed as a result of the re-establishment, re-construction or revival by the assessee of the business of any such [* * *] undertaking as is referred to in Section 33-B, in the circumstances and within the period specified in that section;

- (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:

[Provided that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in

clause (7) of Section 2 of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.]

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:—

- (a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;
- (b) such machinery or plant is imported into India from any country outside India; and
- (c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or plant by the assessee.

Explanation 2.—Where in the case of an [* * *] undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

(4) This section applies to—

* * *

- (iv) an [* * *] undertaking which, —
 - (a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on [the 31st day of March, 2010];
 - (b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period

beginning on the 1st day of April, 1999 and ending on [the 31st day of March, 2010]:

Provided that the deduction under this section to an [* * *] undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution.

[(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on [the 31st day of March, 2010].

Explanation.—For the purposes of this sub-clause, “substantial renovation and modernisation” means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004.]

(italics supplied)

The Provision in Plain English:

(a) A linguistic Aside:

17. The Income Tax Act is one enactment that can shatter anybody’s linguistic confidence or competence. Each provision—inevitably, though—runs into pages, superordinate, subordinate, and sub-subordinate clauses piling up in syntactic curlicues. With annual addition, the provisions lose coherence and defy comprehension. Neither a lawyer nor a Judge can claim with comfort, if not with confidence, that he could comprehend the provision at least on a re-reading; the taxpayer is surely lost in in a maze of meandering phrases.

It is therefore time for the Revenue to host on their website a plain English version of the enactment—only a suggestion, however.

18. Even the native speakers of the language—notably the USA and the UK—have re-drafted, and have been re-drafting, the bulk of their legislation in plain language. In the USA, the Federal and the State Governments apart, the Uniform Law Commission, “a non-profit organisation of volunteers promoting uniformity of laws throughout the United States”, has drafted in legal-linguistic experts like Bryan A Garner and Joseph Kimble for this purpose.

(b) Paraphrased Provision:

Section 80-IA: (1) An assessee can deduct his entire profits for ten consecutive assessment years if his profits are from a business referred to in sub-section (4) of this section. But the deduction is subject to the limitations in this provision.

(2) The assessee can deduct the profits in any ten consecutive years out of fifteen years. The fifteen-year period begins when the assessee's establishment involves in any of these activities: (a) develop and operate any infrastructure facility, (b) start telecommunication service, (c) develop an industrial park, (d) develop a special economic zone [referred to in clause (iii) of sub-section(4)], (e) generate, transmit, or distribute power, (f) substantially renovate or modernise the existing transmission or distribution lines, or (g) lay and operate a cross-country natural gas distribution network.

But the fifteen-year period will be extended by five more years if the assessee develops; or operates and maintains; or develops, operates, and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4).

(3) This section applies to an undertakings referred to in clause (ii) or clause (iv) or clause (vi) of sub-section (4)] fulfilling all these conditions:—

- (i) the undertaking is not formed by splitting up or by reconstructing an existing business:

But this condition will not apply to an undertaking if the assessee re-establishes, re-constructs, revives the business as referred to in Section 33-B and in the circumstances and within the period specified in that section;

- (ii) it is not formed by transferring to a new business any machinery or plant used earlier for any purpose:

But this sub-section will not affect transfer, either in whole or in part, of machinery or plant used by a State Electricity Board referred to in clause (7) of Section 2 of the Electricity Act, 2003 (36 of 2003). Even if the transfer is by splitting up or by reconstructing, or by reorganizing the Board under Part XIII of that Act.

Explanation 1.—the restriction under clause (ii) will not apply to the machinery or plant used abroad by any other person than the assessee, if these conditions are fulfilled:—

- (a) the machinery or plant was not used in India before its installation by the assessee;
- (b) the machinery or plant is imported into India; and
- (c) no depreciation is allowed or allowable under this Act on the machinery or plant in computing the total income of any person for any period before the assessee installed the machinery or plant.

Explanation 2.—the restriction under clause (ii) will not apply if the used machinery transferred to the assessee's new business does

not exceed twenty per cent of the total value of the machinery or plant used in the new business.

(4) This section applies to—

- (i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating, and maintaining any infrastructure facility fulfilling these conditions:
 - (a) it is owned by a company registered in India, by a consortium of such companies, by an authority, a board, a corporation, or any other body established under any Central or State Act;
 - (b) it has contracted with the Central Government, or a State Government, or a local authority, or any other statutory body for (i) developing; (ii) operating and maintaining; or (iii) developing, operating, and maintaining a new infrastructure facility;
 - (c) it operates and maintains the infrastructure facility from any day after the 1st day of April 1995:

...

- (iv) if an undertaking in India —
 - (a) generates or generates and distributes power at any time between 1st April 1993 and 31st March 2010;
 - (b) transmits and distributes by laying a network of new transmission or distribution lines between 1st April 1999 and 31st March 2010:

But the assessee can deduct the profits under sub-clause (b) only if they are derived from the network of new transmission or distribution lines.

- (c) substantially renovates or modernizes the existing network of transmission or distribution lines between 1st April 2004 and 31st March 2010.

Explanation.—For sub-clause (c), the renovation or modernization must have increased at least by fifty per cent the book value of the plant and machinery as it stood on 1st April 2004.

Analysis:

Are the Conditions Cumulative?

19. Section 80-IA of the Act, to begin with, is the beneficial provision, carving out an exception from the rigors of tax payment. An assessee can deduct his total profits for ten consecutive assessment years if it earns those profits from any of those businesses enumerated under sub-Section (4) of the provision. Indeed, the deduction is subject to certain limitations. Undoubtedly, the assessee's business is covered by sub-Section (4) of Section 80-IA. As seen from sub-Section (2) of Section 80-IA, the assessee can deduct the profits in any consecutive years out of the initial 15 years when he started his business or when he first met the conditions imposed in the provision.

20. We may first deal with a pertinent issue: An enterprise may (i) develop, or (ii) operate and maintain, or (iii) develop, operate, and maintain any infrastructural facility. It brooks no contradiction if we hold that all these three activities are disjoint. Now, we will see clause (iv) of sub-section (4). It mandates that an undertaking in India may (a) generate or generate and distribute power at any time between 1.4.1993 and 31.3.2010; (b) transmit and distribute by laying a network of new

transmission or distribution lines between the above-mentioned period; or (c) substantially renovate or modernize the existing network of transmission or distribution lines between the same period.

21. The Revenue, indeed, has contended that these three contingencies are cumulative. We are afraid they are not. The clauses (a), (b), and (c) are disjointed and, in fact, unconnected. Clauses (b) and (c), especially, cannot go together. Under clause (b) a network of new transmission or distribution lines must be laid, whereas under clause (c), they must be renovated or modernized. Laying down a new network of transmission lines under clause (b) and simultaneously renovating them under clause (c) exposes a temporal impossibility and linguistic incongruity.

22. First, temporally, we can only renovate what has already been in use; second, linguistically, we cannot renovate what is new. So legislative intent is unmistakable, and the conditions are disjoint and independent. The assessee's fulfilling any one of them will suffice. And the assessee here did fulfil clause (c).

23. Now, we may, as well examine whether the conditions under sub-Section (4)(i) are cumulative. Clause (a) mandates that the company

must have been registered in India under any Central or State Act. It should contract with the Central Government, or State Government, or any other statutory authority to develop, or operate and maintain or, develop, operate and maintain a new infrastructure facility. Under clause (c), the operating and maintaining infrastructure facility must have commenced after the 1st April, 1995. It is not disputed that all these three activities are cumulative and the assessee fulfils them all.

Has the Machinery Been Used?

24. Indeed, the learned Senior Counsel for the Revenue has emphasized that much of the machinery in the assessee's establishment has already been used by another establishment.

25. Section 80IA, evidently, applies to an “undertaking” referred to in clause (ii) or clause (iv) or clause (vi) of sub-section (4) if it fulfils the enumerated conditions. We have already held that the assessee’s undertaking falls in clause (iv) of sub-section (4).

26. As per the conditions stipulated, the assessee ought not to have formed the undertaking by splitting up or reconstructing an existing business. Here there is neither splitting up nor reconstructing; nor is it the Revenue’s case, either. Equally mandatory is the other

condition that the assessee has not formed the undertaking (ii) by transferring to a new business any machinery or plant used earlier for any purpose. The Revenue, true, latches on to it. We will see whether it can sustain this plea: the assessee formed the undertaking by transferring used machinery or plant to a new business.

27. Of course, the restriction under clause (ii) will not apply to the machinery or plant used abroad by any other person than the assessee, as stated in the Explanation I. But it does not apply to this case; nor does the Explanation 2, which permits an assessee's new business to use less than 20% of the used machinery.

The Statutory Purpose:

28. It is well to remember that deduction under Section 80-IA was introduced only through Finance (No.2) Act, 2004; the Act spells out that it is to encourage investment in existing undertakings. CBDT Circular No. 5 of 2005, dated 15th July, 2005, clarifies the legislative intention:

"[R]ecognising the need to encourage investment in renovation and modernization of the transmission and distribution network, the benefit under the section has been extended to undertakings which undertake substantial renovation and modernization of the existing network of transmission or distribution lines during

the period beginning on 01-04-2004 and ending on 31-3-2006. 'Substantial renovation and modernisation' means 50 per cent increase in the book value of plant and machinery in the network of transmission or distribution lines, as on 01-04-2004".
(Italics supplied)

29. From the above extract, we can gather that Section 80-IA has a salutatory purpose of encouraging investment in renovation and modernization of the transmission and distribution network.

Whose Benefit Does the Provision Exist For?

30. We must acknowledge that the deduction under section 80-IA is a profit-linked incentive, for the very Chapter VI-A provides for the incentives of tax deductions. The 1961 Act broadly provides for two types of tax incentives: (a) investment linked incentives; (b) profit linked incentives. So, according to the Supreme Court in *Liberty India v. CIT*,¹ when Section 80-IA/80-IB refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives. What merits the incentives under Section 80-IA/80-IB is the generation of profits (operational profits).

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31. Further, if we look at the scheme of Section 80-IA(2), it does not speak about the business of assessee but of "undertaking" or "enterprise". Then, an undertaking or an enterprise alone matters for the Revenue to decide the eligibility. Significantly, section 80-IA (2), the charging provision, does not refer to "business" as such.

Analogous Provision and Its Interpretation:

32. Section 84—since repealed—is in pari materia.² Interpreting this provision, CBDT issued a clarificatory note, dt. 13/12/1963: The Board agree that the benefit of section 84 of the IT Act, 1961, attaches to the undertaking and not to the owner thereof. The successor may have the benefit for the unexpired period of five years provided the undertaking is taken over as a running concern.

Has the Assessee's Undertaking Fulfilled the Eligibility Criteria?

2(1)[] Section 84. Income of newly established industrial undertakings or hotels. – (1) Save as otherwise hereinafter provided, income tax shall not be payable by an assessee on so much of the profits and gains derived from any industrial undertaking or business of a hotel or from any ship, to which this section applies, as does not exceed six per cent. per annum on the capital employed in such undertaking or business or ship, computed in the prescribed manner.

(2) This section applies to any industrial undertaking which fulfils all the following conditions namely:

- (i) it is not formed by the splitting up, or the reconstruction, of a business already in existence;
- (ii) it is not formed by the transfer to a new business of a building, machinery or plant previously used for any purpose; ...

33. Repetitive it may be, the assessee acquired in March, 2005 certain tea estates at Munnar, as a going concern. This acquisition included the erstwhile “Devikulam Estate” from Tata Tea Limited. The plant and machinery thus acquired included the electric power distribution network—the transmission lines.

34. The assessee produced an audited certificate that the written down value of the plant and machinery as on 01/04/2004 was Rs. 88,39,340/-. It has claimed that it spent for the assessment year 2008-09 Rs.50.31 Lakh to renovate and modernize its transmission network. So, the amount spent is over 50% of the then existing establishment's book value. Indeed, the undertaking squarely falls under Section 80-1A(4)(iv) (c) of the Act. The renovation or modernization, admittedly, took place between 01.04.2004 and 31.03.2011.

35. To be specific, the assessee claims that the undertaking's renovation or modernization has brought about “substantial improvement in the 'line loss.' Substantial renovation and modernization has been done by replacement of High Tension distribution lines and installation of new CT/PT units.”

Conclusion:

36. In the above circumstances, the Assessing Officer's disallowing Rs.58,91,000/- under section 80-IA of the Act, as affirmed by the Appellate Authority and the Tribunal, cannot be sustained.

So, we answer the question of law in the assessee's favour. As a corollary, we set aside the Tribunal's impugned order, dated 19.09.2014, and allow the Appeal.

No order on costs.

ANTONY DOMINIC,
ACTING CHIEF JUSTICE.

DAMA SESHADRI NAIDU,
JUDGE.