

Court No. - 3

1. **Case :-** INCOME TAX APPEAL No. - 20 of 2014

Appellant :- M/S Shrikar Hotels Pvt. Ltd.6,Shahnajaf Road Lko.

Respondent :- Commissioner Of Income Tax-I Lucknow

Counsel for Appellant :- Mudit Agarwal

Counsel for Respondent :- G.S.Chaudhary,Manish Mishra

2. **Case :-** INCOME TAX APPEAL No. - 21 of 2014

Appellant :- M/S Shrikar Hotels Pvt. Ltd.6,Shahnajaf Road Lko.

Respondent :- Commissioner Of Income Tax-I Lucknow

Counsel for Appellant :- Mudit Agarwal

Counsel for Respondent :- G.S.Chaudhary,Manish Mishra

3. **Case :-** INCOME TAX APPEAL No. - 22 of 2014

Appellant :- M/S Shrikar Hotels Pvt. Ltd.6,Shahnajaf Road Lko.

Respondent :- Commissioner Of Income Tax-I Lucknow

Counsel for Appellant :- Mudit Agarwal

Counsel for Respondent :- G.S.Chaudhary,Manish Mishra

4. **Case :-** INCOME TAX APPEAL No. - 38 of 2015

Appellant :- M/S Shrikar Hotels Pvt.Ltd. Shahnajaf Road Lucknow

Respondent :- Commissioner Of Income Tax-I Lucknow

Counsel for Appellant :- Mudit Agarwal

Counsel for Respondent :- Manish Mishra

5. **Case :-** INCOME TAX APPEAL No. - 30 of 2014

Appellant :- Commissioner Of Income Tax- Ii Lucknow

Respondent :- M/S Shrikar Hotel Pvt. Ltd. 6 Shahnajaf Road Lucknow

Counsel for Appellant :- Manish Misra

Counsel for Respondent :- Mudit Agarwal,Ruhi Gill

6. **Case :-** INCOME TAX APPEAL No. - 31 of 2014

Appellant :- Commissioner Of Income Tax- Ii Lucknow

Respondent :- M/S Shrikar Hotel Pvt. Ltd. 6 Shahnajaf Road Lucknow

Counsel for Appellant :- Manish Misra

Counsel for Respondent :- Mudit Agarwal,Ruhi Gill

7. **Case :-** INCOME TAX APPEAL No. - 32 of 2014

Appellant :- Commissioner Of Income Tax-Ii Lucknow

Respondent :- M/S Shrikar Hotel Pvt.Ltd. 6 Shahnajaf Road Lucknow

Counsel for Appellant :- Manish Misra

Counsel for Respondent :- Mudit Agarwal,Ruhi Gill

Hon'ble Sudhir Agarwal,J.

Hon'ble Ravindra Nath Mishra-II,J.

1. Heard Sri J.N. Mathur, learned Senior Advocate assisted by Sri Mudit Agarwal, Advocate for Assessee and Sri Manish Mishra, Advocate for Revenue.

2. Appeals No. 20 of 2014, 21 of 2014, 22 of 2014, 30 of 2014, 31 of 2014 and 32 of 2014 have arisen from common judgment dated 16.05.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench "A", Lucknow (*hereinafter referred to as the "Tribunal"*) and relate to Assessment Years 2006-07, 2008-09 and 2009-10. Appeal No. 38 of 2015 has arisen from judgment dated 16.01.2015 passed by Tribunal and relates to Assessment Year 2007-08.

3. Assessee's appeal, i.e., Appeals No. 20 of 2014, 21 of 2014, 22 of 2014 and 38 of 2015 have been admitted on following substantial question of law:

"Whether the finding recorded by the Tribunal to the effect that after 13.12.2011 the appellant has done nothing to pursue the pending matter for approval before the Director General of Income Tax under Section 80-IB (7)(a) of the Act is perverse since before the Tribunal the application moved by the appellant dated 29.3.2014 was on record?"

4. Appeals No. 30 of 2014, 31 of 2014 and 32 of 2014 filed by Revenue have been admitted on following substantial questions of law:

"1) Whether the Income Tax Appellate Tribunal is justified under the facts and circumstances of the case in dismissing the department's appeal and confirming the order of CIT (A) when the assessee did not claim deduction under Section 80IB (7) (b) of the Income Tax Act, 1961 in its return or by filing a valid revised return

as held by the Hon'ble Supreme Court in Goetze India Ltd. vs. CIT (2006) 284 ITR 323.

2) Whether the Income Tax Appellate Tribunal was justified under the facts and circumstances of the case in confirming the order of CIT (A) by which a direction has been issued to the Assessing Officer to give the deduction under Section 80IB (7) (b) of the Income Tax Act, 1961 to the assessee, as it is beyond the statutory provisions.

3) Whether the Income Tax Appellate Tribunal was justified under the facts and circumstances of the case in confirming the order of CIT (A) who has travelled beyond the statutory provision of Chapter VIA under Section 80A (5) of the Income Tax Act, 1961 which clearly provides that if assessee fails to make a claim in his return of income for any deduction, no deduction shall be allowed to him thereunder."

5. Brief facts necessary to understand the dispute and adjudicate aforesaid questions are as under.

6. M/s Shrikar Hotels Pvt. Ltd. (*hereinafter referred to as the "Assessee"*) has set up a Hotel at 6, Shahnajaf Road, Lucknow after getting approval of project of Hotel from Department of Tourism, Government of India vide letter dated 12.02.1999. The Hotel unit of Assessee commenced operation on 03.07.2000. Government of India has also granted recognition to said Hotel as a three star hotel vide letter dated 08.11.2001. Under Section 80 IB of Income Tax Act, 1961 (*hereinafter referred to as the "Act, 1961"*) provision has been made for deduction in respect of profits and gains to certain industrial undertakings other than infrastructure development undertakings. Sub-section (7) thereof deals with the amount of deduction in case of hotels. There are two level of deduction. One is 50% which is within the ambit of Clause (a) of Section 80 IB(7) and second is 30% which is within the ambit of Clause (b) of Section 80 IB(7). However, Clause (c) of Section

80 IB(7) specifically provides that deduction under Clauses (a) and (b) shall be available only if conditions set out in sub-clauses (i), (ii) and (iii) of Clause (c) are satisfied. In the present case we are concerned with sub-clause (iii), which reads as under:

"(iii) the hotels is for the time being approved the prescribed authority:

Provided that any hotel approved by the prescribed authority before the 1st day of April, 1999 shall be deemed to have been approved under this sub-section."

7. Under Rule 18 BBC of Income Tax Rules, 1962 (*hereinafter referred to as the "Rules, 1962"*), Prescribed Authority is identified as Director General, Income Tax (Exemptions) and he has to grant approval on concurrence of Director General in the Directorate General of Tourism, Government of India in respect of hotels which qualified for 50% deduction under Section 80 IB(7)(a); and, hotels covered by Clause (b) on Section 80 IB(7), there, prescribed authority competent for granting approval is Director General in the Directorate General of Tourism, Government of India.

8. Assessee's hotel in Lucknow comes within the Buddhist Circuit which is a tourist place notified by Department of Tourism, Government of India vide notification dated 01.07.1997. Lucknow also falls in Buddhist Circuit as notified by State Government in its notification dated 31.03.1999. Assessee, therefore, in order to claim exemption under Section 80 IB(7)(a) of Act, 1961 submitted application on 28.08.2002 before Director General, Income Tax (Exemptions). Since no decision was communicated to Assessee, it continued to request Prescribed Authority to pass order on its application and first representation referred to in memo of appeal is dated 11.11.2014. In the meantime assessment order was passed on 24.12.2009 against Assessee by competent Assessing Authority. Matter went up to Tribunal

who vide order dated 13.12.2011 remanded matter to Assessing Authority. Claim for deduction under Section 80 IB(7)(a) was rejected by Assessing Authority on the ground that Assessee was not granted approval by Prescribed Authority and hence no deduction was admissible in view of Section 80 IB(7)(c) of Act, 1961.

9. In the appeal preferred by Assessee, Commissioner of Income Tax (Appeals)-II (*hereinafter referred to as the "CIT(A)"*), Assessing Authority's order rejecting claim for deduction under Section 80 IB(7) (a) has been upheld but CIT(A) has allowed exemption under Section 80 IB(7)(b).

10. Both parties felt aggrieved by order of CIT(A) and preferred appeal before Tribunal. Since no order was passed by Prescribed Authority on Assessee's application seeking approval, it filed an application before Tribunal on 27.11.2014 requesting to defer hearing of appeal. Said application was rejected by Tribunal and thereafter it has dismissed appeals of Assessee as well as Revenue both. Assessee's claim for exemption under Section 80 IB(7)(a) which has been denied on the ground of lack of approval by Competent Authority has been upheld. Deduction, however, granted under Section 80 IB(7)(b) has been upheld on the ground that there was an approval granted by Competent Authority.

11. With regard to deduction under Section 80 IB(7)(a), Tribunal has observed that Assessee did not pursue matter diligently before Competent Authority and, therefore, cannot get any advantage if it has not been able to obtain approval from Competent Authority. In our view, approach of Tribunal in this regard is neither justified nor sustainable in law.

12. Under the statute, i.e., Section 80 IB(7)(c) deduction under Clause (a) or (b), as the case may be, would be applicable only if hotel is for the time being approved by Prescribed Authority. Authority has

been prescribed under Rule 18 BBC. For attracting deduction under Clause (b) it is only one authority, namely, Director General in the Directorate of Tourism, Government of India but for attracting deduction under Clause (a), Competent Authority is Director General, Income Tax (Exemptions), who has to act upon with concurrence of Director General in the Directorate of Tourism, Government of India. The Director General in the Directorate of Tourism, Government of India, admittedly had granted approval and for that reason benefit of deduction under Clause (b) has been allowed by Revenue Authorities to Assessee. In order to attract Clause (a), no decision has been taken by Director General, Income Tax (Exemptions) though application has been filed by Assessee in this regard in 2002. Competent Authority for granting approval is an officer of Income Tax Department itself. Assessee has neither any administrative control nor otherwise can compel said authority to act within a particular time and in a particular manner. It is the authority of Revenue itself, who has to grant approval. For own lethargy or inaction on the part of an officer of Income Tax Department, a deduction which otherwise may be available to Assessee, cannot be denied since it is not a case where Assessee is disqualified being ineligible for such deduction but question of approval is pending before Competent Authority, who is a senior officer of Income Tax Department and has not been able to get enough time to take a decision on the application filed by Assessee on 28.08.2002. Observations of Tribunal that Assessee did not pursue matter are unwarranted for the reason that whatever could have been done by Assessee, it has done by submitting application and rest is the job of departmental authority, specified in Rule 18 BBC.

13. Even otherwise, where a power has been conferred upon a holder of public office, it has to exercise such power within a reasonable time and in accordance with relevant considerations of law. Such authority cannot sit over matter for time immemorial and the person who suffers

on account of inaction of authority cannot be denied a benefit which would have been admissible if approval is granted, by keeping matter pending for a long time and failing to take a decision. In our view, it is a fit case where Tribunal ought to have required Director General, Income Tax (Exemptions) to take a decision on Assessee's application within a particular time and thereafter it ought to have decided matter but that has not been done.

14. We, therefore, answer the substantial question of law involved in Assessee's appeals in its favour and hold that it was inappropriate and illegal on the part of Director General, Income Tax (Exemptions) not to take a decision on Assessee's application filed for seeking approval as required under Section 80 IB(7)(c). Tribunal in upholding denial of deduction to Assessee ignoring the fact that application seeking approval submitted by Assessee is still pending for consideration before Competent Authority, has committed manifest error.

15. Now coming to substantial questions of law formulated in Revenue's appeals, the basic argument is that no exemption could have been allowed unless claimed by Assessee and and for that purpose learned counsel appearing for Revenue relied on Section 80 A of Act, 1961. Reliance is placed on sub-section (5) of Section 80A, which reads as under:

"(5) Where the assessee fails to make a claim in his return of income for any deduction under Section 10A or Section 10AA or Section 10B or Section 10BA or under any provision of this Chapter under the heading "C.--Deductions in respect of certain incomes", no deduction shall be allowed to him thereunder."

16. We find that sub-section (5) of Section 80A was inserted by Finance Act (No. 2) of 2009 but given effect from 01.04.2003. It says, where Assessee fails to make claim in his return of income for deduction under any provision of Chapter VIA, under the heading "C.-Deductions

in respect of certain incomes", no deduction shall be allowed to him thereunder. It is contended that since Assessee has not claimed deduction under Section 80 IB(7)(b), hence same could not have been granted.

17. Record shows that Assessee had claimed actual deduction of Rs. 30,20,198/- under Section 80 IB(7)(a) but same was declined by Assessing Authority for want of approval by Prescribed Authority. Deduction under Section 80 IB(7) to a hotel is common and difference in Clauses (a) and (b) is with regard to percentage, which is 50% and 30% respectively. It is not a case where Assessee did not claim deduction under Section 80 IB(7). Whether his claim was justified for 50% deduction under Clause (a) or 30% under Clause (b) is a matter which relates to only quantum of deduction but it is not a case where deduction has not been claimed by Assessee specifically under Chapter VIA. Assessing Authority declined deduction by referring to Section 80A and a judgment of Supreme Court in **Goetze (India) Ltd. vs. Commissioner of Income Tax, 2006(284) ITR 323** but in our view the words mentioned in Section 80A have not been properly construed by Revenue inasmuch as Section 80A(5) says that if deduction under any provision of Chapter VIA is not claimed then it will not be allowed. Assessee has claimed specifically deduction under a provision of Chapter VIA. The mere fact that clause referred therein is different, is not a substantial reason to exclude the provision of deduction. Even otherwise Section 80 IB(7)(a) provides a deduction of higher amount and would cover deduction under Clause (b) as well if existing facts justify that Assessee would be entitled for same.

18. Learned counsel appearing for Revenue very heavily relied on the decision in **Goetze (India) Ltd. (supra)** but in our view same does not help Revenue so far as these appeals are concerned. That was a case where deduction under a particular provision was not at all claimed in

the return filed by Assessee. The question, whether deduction was admissible under one sub-clause or another, was not involved since deduction was not at all claimed in return. For Assessment Year 1995-96 return was filed on 30.11.1995 without claiming deduction. Thereafter Assessee claimed deduction by submitting letter to Assessing Authority. This was disallowed by Assessing Authority observing that there is no provision under the Act to make amendment in return by entertaining an application at assessment stage. The only option in such a case available to Assessee is to file a revised return. This view taken by Assessing Authority was held valid.

19. In the present case, Assessee claimed deduction under a provision in Chapter VIA and in the return also it claimed deduction with reference to Section 80 IB(7) but sub-clause mentioned was (a) and not (b). Sub-clause (a) talks of a larger degree of deduction and if that was not admissible a smaller degree of deduction, under same section but in another sub-clause could have been allowed. Here it cannot be said that Assessee had not claimed any deduction whatsoever in return, therefore, is not entitled in view of Section 80 A. We have no hesitation in holding that in the present case Section 80 A has no application.

20. We are not impressed that while declining exemption under Section 80 IB(7)(a) for want of approval by Competent Authority, Tribunal has erred in law in confirming order of CIT(A) in allowing deduction under Section 80 IB(7)(b) of Act, 1961. Therefore, the questions formulated in appeals filed by Revenue are answered against it.

21. In the result, appeals preferred by Assessee, i.e., **Appeals No. 20 of 2014, 21 of 2014, 22 of 2014 and 38 of 2015 are partly allowed.** Concerned authority under Section 80 IB(7)(c)(iii) of Act, 1961 read with Rule 18 BBC of Rules, 1962 is directed to take a final decision on Assessee's application for grant of approval within a period of two

months from the date of production of a certified copy of this order. In case approval is granted, Assessing Authority shall reconsider the matter in the light of aforesaid approval with regard to deduction under Section 80 IB(7)(a) and pass appropriate order in accordance with law. However, in case Competent Authority reject Assessee's application for approval, it will have no consequence and order of Assessing Authority already passed shall remain operative.

22. We however make it clear that this situation will not deny Assessee from availing such remedy as permissible in law against order of rejection of approval passed by Competent Authority under Section 80 IB(7)(c) of Act, 1961 read with Rule 18 BBC of Rules, 1962.

23. The appeals preferred by Revenue, i.e., **Appeals No. 30 of 2014, 31 of 2014 and 32 of 2014 are hereby dismissed.**

Order Date :- 02.02.2017

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