

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 2485 OF 2013

The Commissioner of Income Tax-10 ... Appellant
Vs
Hercules Hoists Limited ... Respondent

WITH
INCOME TAX APPEAL NO. 2492 OF 2013
WITH
INCOME TAX APPEAL NO. 2498 OF 2013
WITH
INCOME TAX APPEAL NO. 2510 OF 2013

Mr. Tejveer Singh for the Appellants in all the appeals.

Mr. J.D. Mistri, senior counsel with Mr. P.C. Tripathi i/b Mr. Atul K. Jasani for the Respondents in all the appeals.

**CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.**

THURSDAY, 07TH MAY, 2015

P.C. :

1. This appeal by the Revenue challenges the order passed by the Income Tax Appellate Tribunal dated 13th February, 2013, in Income Tax Appeal Nos.7944/Mum/2011, 7946/Mum/2011, 2255/Mum/2011 and 7943/Mum/2011 pertaining to assessment years 2005-06 to 2008-09. They are decided by the common order. The appeals before the

Tribunal arise from the order passed by the Commissioner of Income Tax (Appeals) dated 7th September, 2010, 21st December, 2010 and 13th September, 2011 for four consecutive years. The Commissioner partly allowed the assessee's appeals against the assessment under section 143(3) of the Income Tax Act, 1961 for relevant years but the assessee was not satisfied with such relief. It, therefore, carried the matter to the Tribunal in further appeal.

2. The Revenue proposes the following question as a substantial question of law :

“Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in holding that loss incurred in business of power generation which is entitled to deduction under section 80 IA can be set off against business income from manufacturing unit ignoring the provision of section 80-IA(5)?”

3. In relation to that Mr. Tejveer Singh submitted that the Tribunal's conclusions would have a far reaching impact and effect. He relied upon the Tribunal's conclusions whereunder ground No.1 of the assessee's appeal was referred and the preceding paragraphs prior

to such conclusion dealt with that ground. That ground was in respect of determination of business income for the relevant years without allowing the assessee set off of depreciation / loss of its two units viz. Windmill 1 and 2, income from which was otherwise eligible for deduction under section 80-IA.

4. Though Mr. Tejveer Singh would submit that the above framed question is a substantial question of law, we invited his attention to the statement of facts. The statement of facts is that the respondent-assessee is engaged in the business of manufacture of material handling equipment and generation of power. It has installed windmills and that is a unit eligible for deduction under section 80-IA of the Income Tax Act. The other unit of the assessee is not entitled for any such deduction. The assessee claimed loss on account of the 80-IA unit for all these assessment years viz. 2005-06 to 2008-09. These losses incurred in the eligible unit have been adjusted against profits of ineligible unit viz. the manufacturing unit in the respective years. After adjusting these losses, positive income has been determined and tax has been paid. For these years where the 80-IA

unit incurred losses, there was no claim for deduction under section 80-IA by the assessee. The grievance is that the assessee by filing revised claim have also claimed these losses in section 80-IA unit as carried forward losses and eligible for adjustment against income for subsequent years in eligible unit as share profits under section 80-IA of the Income Tax Act. This is mentioned in the assessment order for the assessment year 2007-08. The argument is that the Assessing Officer had disallowed this claim of set off of loss of eligible units against the income of ineligible units in the same year. The losses were, therefore, added in the income of the assessee. The Assessing Officer relied upon the decision of the special bench of the Tribunal at Ahmedabad in the case of Gold Mine Shares and Finance Pvt. Ltd. However, the Commissioner (Appeals) in the appeal by the assessee partly granted relief. That partial relief and the Tribunal's order, according to Mr. Tejveer Singh, would raise substantial questions of law.

5. We find that the ground No.1 in the assessee's appeal before the Tribunal and referred in detail by us herein above and which has been

dealt with by the Tribunal from paragraphs 3.2.2 onwards and eventually the conclusions recorded by the Tribunal would denote that the above question of law and reproduced by us does not arise from the same. We have not found anything in the Tribunal's order and dealing with the grievance of the assessee being made subject matter of the present appeals. Thus, this is not an appeal projecting a grievance that the special bench decision has been misapplied and/or not applied or incorrectly applied. This is not a case where the losses incurred by the section 80-IA unit having been set off against the income from the non section 80-IA unit that course was impermissible. The Tribunal's conclusion in paragraph 5 at running pages 4.0 and 4.1 is thus not made subject matter of challenge in this appeal by the Revenue. The Revenue question projects the applicability of section 80-IA(5). Section 80-IA, to the extent relevant, reads as under :

“80-IA (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 hereafter 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 the 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 part 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.

.....
(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.”

6. We do not see any reason in our referring to the legislative background and these provisions in further details or considering and interpreting them for the present appeals. Once the statement of facts about which there can be no dispute show that there was no deduction claimed under section 80-IA for the assessment years in question, then, there was no occasion for the Tribunal and equally us to have

gone into these questions. In any event, merely because the Tribunal has gone into and considered them, we are not obliged to go into the same given the above admitted factual background. Therefore, by clarifying that as and when this question arises and in relation to the same assessee in future, if the deduction is claimed under section 80-IA for eligible unit, then, it would be open for the Revenue to project all questions and propose them as substantial questions of law. In that event, they can raise all contentions and equally pertaining to the setting off of the said losses and in relation to the eligible section 80-IA unit from the income of the non section 80-IA ineligible unit.

7. Keeping that course open and equally the contentions of both sides, we dispose of these appeals. They do not raise any substantial questions of law. No costs.

A.K. MENON, J.

S.C. DHARMADHIKARI, J.