IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.01.2015

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUDHAKAR**
and
THE HONOURABLE MR.JUSTICE **R.KARUPPIAH**

Tax Case (Appeal) Nos.274 to 276 of 2012, 530, 815, 816 of 2013, 1039 and 1060 of 2014

T.C.(A)No.274 of 2012:

Commissioner of Income Tax
2, V.P.Rathnasamy Road,
Madurai - 625 002. .. Appellant

versus

M/s.Pondicherry Chlorate Ltd.,
110, Main Road,
Kovilpatti
.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 as against the order dated 07.03.2012 made in I..T.A.No.1727/Mds/2011 on the file of the Income Tax Appellate Tribunal, Madras 'B' Bench for the assessment year 2001-2002.

For appellant in all the above T.Cs: Mr.M.Swaminathan
Standing Counsel for Income Tax

For respondent in T.C.(A)Nos.
274 to 276 of 2012, 530, 815,
816 of 2013, 1039 of 2014 :Mr.R.Sivaraman

For respondent in T.C.(A)No.1060 of 2014: Mr.S.Sridhar

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by **R.SUDHAKAR,J.)**

The above Tax Case (Appeals) are filed by the Revenue as against the order of the Income Tax Appellate Tribunal. In all the above Tax Case (Appeals), the issue raised by the Revenue is identical. Hence, all the above appeals are taken up together and common order is passed.

2. The core issue raised in all the above Tax Case (Appeals) is whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the respondent/assessee in each appeal is entitled to claim deduction under section 80-IA of the Income Tax Act.

3. Learned counsel appearing for the assessee submitted that the issue involved in these appeals have already been decided by this Court in the decision reported in ***(2012) 340 ITR 477 (Velayudhaswamy Spinning Mills V. Asst. CIT)*** and hence the same may be followed in these cases also.

4. It is stated by the learned Standing Counsel appearing for the Revenue that as against the decision rendered by this Court in the case of ***Velayudhaswamy Spinning Mills V. Asst. CIT reported in (2012) 340 ITR 477***, the Revenue preferred appeals before the Supreme Court and the same are pending.

5. Heard learned counsel appearing for the assessees and the learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

6. In the decision reported in ***(2012) 340 ITR 477 (Velayudhaswamy Spinning Mills V. Asst. CIT),*** this Court, while dealing with the benefit under Chapter VIA of the Income Tax Act, placed reliance on the decision reported in ***(2009) 317 ITR 218 (SC) (Liberty India V. CIT)***, wherein the Supreme Court considered the scope of Section 80I, 80IA and 80IB of the Income Tax Act and held that Chapter VI-A provides for incentives in the form of tax deductions essentially belong to the category of "profit-linked incentives". This Court also placed reliance on the decision reported in ***(2004) 271 ITR 311 (Raj) (CIT V. Mewar Oil and General Mills Ltd.)***, and came to the conclusion that once the losses and other deduction have set off

against the income of the previous year, it should not be reopened again for the purpose of computation of current year income under Section 80I or 80IA of the Income Tax Act and the assessee should not be denied the admissible deduction under Section 80IA of the Income Tax Act.

7. For better understanding of the decision, we extract the relevant portion of the decision of this Court as such:

> "From a reading of the above, it is clear that the benefit is given to the profits and gains derived from the business of the hotel or the business of repairs to ocean-going vessels or other powered craft. The deduction is allowed to the extent of 20 per cent. from the profits and gains of the assessee. Sub-section (5) gives deduction for the period of seven assessment years immediately succeeding the initial assessment year. Sub-section (6) deals with computing the deduction under sub-section (1) and it starts with non obstante clause and also it is a deeming provision. The fiction created by the undertaking was the only source of income during the previous year initially and subsequent assessment years. Sub-section (6) was the subject-matter before this court in the above-mentioned unreported judgment, wherein this court had held that while interpreting the above provision, for the purpose of allowing deduction under section 80-I brought forward losses and unabsorbed depreciation of the new industry need not be taken into consideration once they have been set off from other sources of income earlier. In the present case, we are concerned with the provision of section 80-IA. The said provision was introduced by the Finance Act, 1999, with effect from April 1, 2000. The provisions of sections 80-I and 80-IA are also more or less identically worded. Sections 80-I and 80-IA come in Chapter VI-A of the Income-tax Act. Chapter VI-A deals with deductions to be made in computing total income. There are two tax incentives contemplated in Chapter VI-A. One is investment incentive and the other one is profit-linked investment. Chapter VI-A was introduced by the Finance Act, 1965, with effect from April 1, 1965, and it consists of four headings. They are A, B, C and D. Heading "A" is general and it

also contains definition. It consists of sections 80A, 80AA, 80AB, 80AC and 80B. Section 80AB deals with "Deductions to be made with reference to the income included in the gross total income", which reads as follows :
"Where any deduction is required to be made or allowed under any section included in this Chapter under the heading 'C-Deductions in respect of certain incomes' in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."

A mere reading of the above provision makes it clear that any income of the nature specified in that section, which is included in the gross total income of the assessee for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provision of this Act shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in the gross total income. Section 80AB defines "gross total income" which means the total income has to be computed in accordance with the Act before making deduction under this Chapter. Heading "B" deals with "deductions in respect of certain payments" which consists of sections 80C to 80GGC. Heading "C" deals with "deductions in respect of certain incomes", which consists of sections 80H to 80TT. The last heading "D" deals with "other deductions" which consists of sections 80U to 80V. Heading "C" is relevant for considering the issue in these appeals. The relevant provisions that are to be considered are sections 80-I, 80-IA and 80-IB. In the case of Liberty India v. CIT [2009] 317 ITR 218 (SC) ; [2009] 225 CTR (SC) 233 ; [2009] 28 DTR (SC) 73, the apex court considered the scope of sections 80-I, 80-IA and also section 80-IB of the Act, wherein, it has been held that Chapter VI-A provides for incentives in the form of tax deductions essentially belong to the category of "profit-linked incentives". Therefore, 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. Further, it has been held that sections 80-IB/80-IA are the code by themselves as they contain both substantive as well as procedural provisions. The Supreme Court further observed in the said judgment that sub-section (5) of section 80-IA provides for manner of computation of profits of an eligible business. Accordingly such profits are to

be computed as if such eligible business is the only source of income of the assessee.

Section 80-IA reads as follows :

"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 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 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 park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution or power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines.

(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 which fulfils all the following conditions, namely :

(a) it is owned by a company registered in India or by a consortium of such companies (or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act) ;

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing, or (ii) operating and maintaining, or (iii)developing, operating and maintaining a new infrastructure facility ;

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st April, 1995.

(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 immediately succeeding the initial

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."

From a reading of sub-section (1), it is clear that it provides that 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 subsection (4), i.e., referred to as the eligible business, there shall, in accordance with and subject to the provisions of the section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100 per cent. of the profits and gains derived from such business for ten consecutive assessment years. 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, 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). The important factors are to be noted in sub-section (5) and they are as under :

"(1) It starts with a non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored ;

(2) It is for the purpose of determining the quantum of deduction ;

(3) For the assessment year immediately succeeding the initial assessment year ;

(4) It is a deeming provision ;

(5) Fiction created that the eligible business is the only source of income ; and

(6) During the previous year relevant to the initial assessment year and every subsequent assessment year."

From a reading of the above, it is clear that the eligible business were the only source of income, during the previous

year relevant to the initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no 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. A fiction created in sub-section does not contemplates to bring set off amount notionally. The fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.

In the present cases, there is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised the option under section 80-IA(2). In Tax Case Nos. 909 of 2009 as well as 940 of 2009, the assessment year was 2005-06 and in Tax Case No. 918 of 2008 the assessment year was 2004-05. During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the year. The unreported judgment of this court cited supra considered the scope of sub-section (6) of section 80-I, which is the corresponding provision of sub-section (5) of section 80-IA. Both are similarly worded and, therefore, we agree entirely with the Division Bench judgment of this court cited supra. In the case of CIT v. Mewar Oil and General Mills Ltd. (No. 1) [2004] 271 ITR 311 (Raj) ; [2004] 186 CTR (Raj) 141, the Rajasthan High Court also considered the scope of section 80-I and held as follows (page 314 of 271 ITR) :

"Having considered the rival contentions which follow on the line noticed above, we are of the opinion that on finding the fact that there was no carry forward losses of 1983-84, which could be set off against the income of the current assessment year 1984-85, the recomputation of income from the new industrial undertaking by setting off the carry forward of unabsorbed depreciation or depreciation allowance from previous year did not simply arise and on the finding of fact noticed by the Commissioner of Income-tax (Appeals), which has not been disturbed by the Tribunal and challenged before us, there was no error much less any error apparent on the face of the record

which could be rectified. That question would have been germane only if there would have been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out of the priority industry and whether it was required to be set off against the income of the current year. It is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under section 80-I for the purpose of computing admissible deductions thereunder.

In view thereof, we are of the opinion that the Tribunal has not erred in holding that there was no rectification possible under section 80-I in the present case, albeit, for reasons somewhat different from those which prevailed with the Tribunal. There being no carry forward of allowable deductions under the head depreciation or development rebate which needed to be absorbed against the income of the current year and, therefore, recomputation of income for the purpose of computing permissible deduction under section 80-I for the new industrial undertaking was not required in the present case.

Accordingly, this appeal fails and is hereby dismissed with no order as to costs."

From a reading of the above, the Rajasthan High Court held that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under section 80-I for the purpose of computing admissible deductions thereunder. We also agree with the same. We see no reason to take a different view.

The standing counsel appearing for the Revenue is unable to bring to our notice any relevant material or any compelling reason or any contra judgment of other courts to take a different view. He only relied heavily on the Memorandum explaining the provisions in the Finance (No. 2) Bill, 1980, [1980] 123 ITR (St.) 154 to support this case and the same reads as follows :

"Clause 30(iii). In computing the quantum of 'tax holiday' profits in all cases, taxable income derived from the new industrial units, etc., will be determined as if such units were an independent unit owned by a taxpayer who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, ship or approved hotel will be taken into account in determining the quantum of deduction admissible under the new section 80-I even though they may have been set off against the profits of the taxpayer from other sources."

> We are not agreeing with the counsel for the Revenue. We are, therefore, of the view that loss in the year earlier to the 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).
>
> Under these circumstances, we set aside the order of the Tribunal and answer all the questions in favour of the appellant/assessee and against the Revenue in Tax Case Nos. 909 and 940 of 2009 respectively. Accordingly, tax cases are allowed.

8. It is relevant to note that as against the above-said decision rendered by this Court, the Revenue has filed appeals before the Supreme Court, which are stated to be pending, in which, only notice was ordered and were not yet admitted by the Supreme Court.

9. The facts in the present batch of cases are also identical to the above-said decision of this Court that all the business undertakings are wind mills and they have claimed the benefit of deduction under Section 80IA of the Income Tax Act for the assessment years in question and for the subsequent years as well. Having exercised their option and their losses have been set off already against other income of the business enterprise, the assessee in each of the appeal falls within the parameters of Section 80IA of the Income Tax Act. In the decision reported in ***(2012) 340 ITR 477 (Velayudhaswamy Spinning Mills V. Asst. CIT),*** there appears to be no distinction on

facts.

10. Again in a batch of cases in T.C.(A)Nos.408 of 2012, by order dated 12.1.2015, this Court, following the decision reported in ***(2012) 340 ITR 477 (Velayudhaswamy Spinning Mills V. Asst. CIT)*** held in favour of the assessee and against the Revenue.

11. We, therefore, taking note of the decision rendered by this Court in the case of ***Velayudhasamy Spinning Mills (supra)*** and in a batch of cases in T.C.(A)Nos.408 of 2012, are inclined to dismiss all the above Tax Case (Appeals), thereby confirm the order passed by the Tribunal.

12. In view of the above, the questions of law raised and admitted by this Court are answered against the Revenue and in favour of the assessee.

Index: Yes / No (R.S.,J.) (R.K.,J.)
Internet: Yes / No 13.01.2015

sl

To
The Income Tax Appellate Tribunal, Madras 'B' Bench.

R.SUDHAKAR,J.
AND
R.KARUPPIAH,J.

sl

Tax Case (Appeal) Nos.274 to 276 of 2012,
530, 815, 816 of 2013, 1039 and 1060 of 2014

13.01.2015