

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**ITA No. 36 of 2008 a/w ITAs No.
37 and 38 of 2008**

Reserved on: 31.7.2012

Date of decision: 28.8.2012

1. ITA No. 36 of 2008

Commissioner of Income tax, ShimlaAppellant

Versus

M/s Him Teknoforge Ltd. Sai Road, Baddi, Distt. Solan
through its Managing Director.Respondent

2. ITA No. 37 of 2008

Commissioner of Income tax, ShimlaAppellant

Versus

M/s Him Teknoforge Ltd. Sai Road, Baddi, Distt. Solan
through its Managing Director.Respondent

3. ITA No. 38 of 2008

Commissioner of Income tax, ShimlaAppellant

Versus

M/s Him Teknoforge Ltd. Sai Road, Baddi, Distt. Solan
through its Managing Director.Respondent

Appeals u/s 260-A of the Income Tax Act, 1961.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, J.
The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting? Yes

For the appellant(s): Mr. Vinay Kuthiala, Senior Advocate with Ms.
Vandana Kuthiala, Advocate.

For the respondent(s): Mr. K.D. Sood, Senior Advocate with Mr.
Sanjeev Sood, Advocate.

Per Deepak Gupta, J

1. These three appeals are being decided by one judgment since the following common question of law arises in these appeals:-

“Whether deductions under Section 80HH/80IA of the Income Tax were allowable on the profits of each unit separately?”

2. It is not necessary to give the facts of each case. Briefly, stated dispute is that all the assesses herein are having separate units. Some of the units were entitled to tax benefits in terms of Sections 80-HH and 80IA of the Income Tax Act. For the sake of convenience, the units entitled to these benefits are being referred to as priority units. These units were either export orientated or set up in backward industrial area. The assessee at the same time was also running some non-priority units i.e. units which had no connection with the benefits granted under Sections 80HH and 80IA. In all cases the non-priority units were running in losses and the submission made on behalf of the Revenue is that the losses of the non-priority units have also to be taken into consideration while working out the income of the priority units and then the tax benefits under Sections 80HH and 80IA have to be calculated. The Assessing Authority in all these cases held that the income whether positive (profit) or negative (loss) of all the units i.e. priority and non-priority were to be clubbed together for working out the gross total income for purposes of grant of tax incentives/benefits. The Commissioner Income Tax held that the deduction is referable only to the profits and gains derived from the

industrial undertaking to which Sections 80HH and 80IA is applicable and is not referable to the gross total income of the assessee but only to the gross income from that particular industrial undertaking alone. The Income Tax Appellate Tribunal dismissed the appeal of the Revenue and held as follows:-

***“From the ratio laid down by the Hon’ble Andhra Pradesh High Court in the aforesaid referred to case, it would be clear that the deduction was to be given only in respect of profits and gains of an industrial undertaking included in the gross total income of the assessee and not from the gross total income of the assessee. In other words, deduction was to be given only in respect of profits derived from an industrial undertaking computed in accordance with the provisions of Income Tax Act and the condition was that the eligible profits must be included in the gross total income of the assessee and it is immaterial whether after the inclusion of those profits net result of clubbing of income was a gross loss or gross profit. In the present case since the assess claimed deduction u/s 80 HH/80 IA in respect of eligible profits of the units therefore claim of the assessee was in accordance with law and the LD CIT(A) rightly directed the Assessing Officer to allow claim of the assessee. We don not see any infirmity in the order of Ld. CIT(A).*”**

3. Mr. Vinay Kuthiala learned Senior Advocate appearing for the Revenue has strenuously contended that entire total income of the assessee from all sources has to be taken into consideration and even the losses incurred from non-priority units will have to be adjusted against the profits earned in the priority units while working out the deductions/incentives/benefits.

4. Before dealing with the issue it would be pertinent to make reference to certain provisions of the Income Tax Act. First of all reference may be made to Sections 80A(1) and 80A(2), 80AB, 80B(5) of the Income Tax Act (hereinafter referred to as the Act), which read as follows:-

“80A(1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in section 80C to 80U.

80A(2) The aggregate amount of the deductions under this Chapter shall not, in any case, exceed the gross total income of the assessee.

80AB. 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.

80B(5) “gross total income” means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter.”

5. Section 80HH of the Act deals with deduction in respect of profits and gains from newly established industrial undertaking or hotel business in industrial area. Section 80IA of the Act deals with deduction in respect of profits and gains from industrial undertakings or enterprises engaged in

infrastructure development. Section 801A(5) of the Act reads as follows:-

“801A(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 purpose 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.”

The provisions of Section 80IB of the Act are by and large similar to the provisions of Section 80IA of the Act.

6. Mr. Vinay Kutiala, learned Senior counsel urges that in terms of Section 80A(2) while calculating the aggregate amount of deductions the same cannot exceed the gross total income of the assessee. He submits that the gross total income in terms of Section 80B means the total income computed in accordance with the provisions of this Act which will include income from all units irrespective of the fact whether they are priority units or not. He, therefore, submits that while calculating the deductions/incentives which have to be granted, the gross total income will have to be calculated and this gross total income shall include the losses which may have been suffered by a non-priority Unit of the assessee. Mr. Vinay Kuthiala also submits that if the finding of the Tribunal is accepted then even where the gross total income of an assessee from all his units is nil he would

be entitled to deduction and according to him this is not the intention of the Revenue.

7. On the other hand, Mr. K.D. Sood, learned Senior counsel for the assesses, submits that Chapter VIA is a code in itself and the deductions under Section 80AB of the Act have to be made from the income of the nature contemplated in the Chapter and only the income or losses of the priority units which fall within the chapter can be taken into consideration. He submits that the term “gross total income” when applied to the proceeding under Chapter VIA will relate to income i.e. profits and losses of priority units falling under this Chapter and not to income/losses of non-priority units. It is also submitted on behalf of the assesses that benefits of non-priority units cannot be added to the gross total income of the assessee while calculating deductions and therefore, the losses of such units should also not be taken into consideration.

8. A large number of judgments have been cited before us. In Commissioner of *Income Tax, (Central) Madras vs. Canara Workshops P. Ltd. (1986) 161 ITR 320*, the Apex Court held as follows:

“The assessee in this case carries on two industries, both of which find places in the list in the Fifth Schedule and can, therefore, be described as priority industries. It is urged by the learned Additional Solicitor General, appearing for the Revenue, that on a true application of section 80E, the profit in the industry of automobile ancillaries must be reduced by the loss suffered in the manufacture of alloy steel, and reference has been made to a number of cases to which we shall presently refer. After giving the matter careful

consideration, we do not find it possible to accept the contention. It seems to us that the object in enacting section 80E is properly served only by confining the application of the provisions of that section to the profits and gains of a single industry. The deduction of eight percent is intended to be an index of recognition that a priority industry has been set up and is functioning efficiently. It was never intended that the merit earned by such industry should be lost or diminished because of a loss suffered by some other industry. It makes no difference that the other industry is also a priority industry. The co-existence of two industries in common ownership was not intended by Parliament to result in the misfortune of one being visited on the other. The legislative intention was to give to the meritorious its full reward. To construe section 80E to mean that you must determine the net result of all the priority industries and then apply the benefit of the deduction to the figure so obtained will be, in our opinion, to undermine the object of the section. An example will illustrate this. An industry entitled to the benefit of section 80E could have its profits wholly wiped out on adjustment against a heavy loss suffered by another industry, and, thus, be totally denied the relief which should have been its due by virtue of its profits. In our opinion, each industry must be considered on its own working only when adjudging its title to the deduction under section 80E. It cannot be allowed to suffer because it keeps company with some other industry in the hands of the assessee. To determine the benefit under section 80E on the basis of the net result of all the industries owned by the assessee would be, moreover, to shift the focus from the industry to the assessee. We hold that in the application of section 80E, the profits and gains earned by an industry mentioned in that section cannot be reduced by the loss suffered by any other industry or industries owned by the assessee."

9. In *H. H. Sir Rama Varma v. Commissioner of Income Tax*, (1994) 205 ITR, 433 the question before the Apex Court was whether long term capital losses brought forward from earlier assessment years have to be first set off against the

long-term capital gains of the current assessment year before the deduction contemplated by Section 80T of the Act could be allowed. The Apex Court held that the earlier long-term losses had to be adjusted against the capital gains for the purpose of deduction under Section 80T. The only relevant observation for this case is that Section 80AB was enacted to declare the law as it always stood in relation to deductions.

10. The Madras High Court in ***Commissioner of Income-Tax v. Macmillan Co. of India Ltd.***, (2000) 243 ITR 403 was dealing with a case where the assessee had made profits in the business of Printing and Publishing but had suffered a loss in its business of trading. It was held that the loss incurred in the latter business was required to be set off against the profits earned in the business of Printing and Publishing before arriving at the gross total income of the assessee under the head “Business”. The Madras High Court followed the judgment in *H. H. Sir Rama Varma’s* case (supra). Similar view was taken in ***Commissioner of Income-Tax vs. E.I. Forge Ltd.*** (2001) 247 ITR 488 by the Madras High Court.

11. The Andhra Pradesh High Court in ***Commissioner of Income-Tax v. Visakha Industries Ltd.*** (2001) 251 ITR 471, however, followed the view in *CIT v Canara Workshops P. Ltd* (supra) and distinguished *H. H. Sir Rama Varma’s* case. The Andhra Pradesh High Court took note of Sections 80AB and 80B(5) and held that Section 80B refers to profits in respect of which deductions are available under various provisions of Chapter VI-A of the Act and not to other income. This is the judgment which has been followed by the Tribunal.

12. The Apex Court dealt with a similar issue in ***IPCA Laboratory Ltd. v. Deputy Commissioner of Income-Tax, (2004) 266 ITR 521***. The Apex Court held that profits in sub sections (1) and (3)(a) and (b) of Section 80HHC means a positive profit. In other words, if there is loss then no deduction would be available under sub-section (1) or sub-section (3)(a) or sub-section (3)(b). In the case before the Apex Court the appellant was an export house and it had two units one was a Unit whereby self-manufactured goods were being exported and the second Unit dealt in trading of goods. From the facts, it is apparent that both the units fell in the definition of priority industry under Section 80HHC which deals with deductions in respect of profits earned from export business. The Apex Court considering the import of Sections 80AB, 80B(5) and held that Section 80AB has been given an overriding effect over all other provisions of Chapter VI-A of the Act. The Apex Court held as follows:-

“We are unable to accept the submission of Mr. Dastur. Undoubtedly section 80HHC has been incorporated with a view to providing incentive to export houses. Even though a liberal interpretation has to be given to such a provision the interpretation has to be as per the wording of this section. If the wordings of the section are clear then benefits, which are not available under the section, cannot be conferred by ignoring or misinterpreting words in the section.....

Section 80AB is also in Chapter VI-A. It starts with the words “where any deduction is required to be made or allowed under any section of this Chapter”. This would include section 80HHC. Section 80AB further provides that “notwithstanding anything contained in that section”. Thus section 80AB has been given an overriding effect over all other sections in Chapter VI-A. Section 80HHC does

not provide that its provisions are to prevail over section 80AB or over any other provision of the Act. Section 80HHC would thus be governed by section 80AB.....”

13. At this stage, it would be pertinent to mention that the Apex Court was dealing with Sections 80HHC, 3(a), 3(b) and 3(c) which deal with cases of export from self-manufactured goods, export in trading of goods and lastly, with exports of both self-manufactured goods as well as trading goods. All the industries are in the priority industry and it is in these circumstances the Apex court held that even if there is loss in one industry that must be taken into consideration while working out the profit of the other industry. The question whether the losses of a non-priority unit are taken into consideration while working out the profits of other priority units was not decided by the Apex Court.

14. In *Income Tax Officer, Bangalore v. Induflex Products (P) Ltd. (2005) 1 SCC 458*, the Apex Court dealt with Section 80HHC and held as follows:-

“5. The aforementioned provision was brought in the statute book for the purpose of providing incentive to export houses but the same would not mean that even if the assessee incurs a loss instead of profit, he would be entitled to the benefit thereof.

6. From a perusal of the aforementioned provision, it is evident that the profits derived from the export of goods which would be the subject matter of exemption thereunder must be the profits out of the business carried on by the assessee. The expressing “profits” used in the aforementioned provision connotes positive profit. It is a profit earned from the said business alone which can be the subject matter of exemption. A fortiori if a profit is not earned, the question of claiming exemption would not arise.

8. IPCA Laboratory is an authority for the proposition that adjusted profit of business would be a profit as reduced by the profit derived from the business of exports out of India of trading goods. It is no doubt true that the term “profit” implies positive profit which has to be arrived at after taking into consideration the profit earned from export of both self-manufactured goods and the trading goods and the profits and losses in both the trades have, thus, to be taken into consideration. In the event, if it is found that a loss has occurred, sub-section (3) of Section 80-HHC will have no application.”

15. The Apex Court in **Commissioner of Income-Tax v. Shirke Construction Equipment Ltd, (2007) 291 ITR 380(SC)** following the judgment in *IPCA Laboratory’s* case held that Section 80AB is not subject to Section 80HHC but in fact is the overriding Section. In **A.M. Moosa v. Commissioner of Income-Tax, (2007) 294 ITR 1(SC)**, the Apex Court was again dealing with the word “profit” in Section 80HHC and held that a plain reading of the Section showed that “*profit from such export*” has to be profits from exports of self-manufactured goods plus profits from exports of trading goods. It was held that if profits from exports of self-manufactured goods and profits from exports of trading goods have to be calculated by counting both the exports. Deduction under Section 80HHC can be granted if there is positive profit in the export of both self-manufactured goods as well as trading goods. If there is a loss in either of the two then the loss has to be taken into account for the purpose of computing the profits. Again we may point out that in this case also both the units were priority units.

16. In *Synco Industries Ltd. v. Assessing Officer (Income-Tax)*

and another, (2008) 299 ITR 444 (SC) the Apex Court dealt with a case where the assessee had two units one a Oil Division in Sirohi and the second a Chemical Division in Jodhpur. In the assessment year 1990-91 and 1991-92 it had earned profits on both the units but in the earlier year the assessee had suffered losses in the Oil Division, the assessee claimed that each Unit should be treated separately and the losses suffered in the earlier year by the Oil Division were not adjustable against the profits of Chemical Division. The Apex Court approved the orders of the Revenue and the High Court and held that the losses from the Oil Division were required to be adjusted against the gross total income and as the gross total income was nil, the assessee was not entitled to claim deduction under Chapter VI-A which included Sections 80HH and 80IA. The Apex Court held as follows:-

“8.....Clause (5) of section 80B defines the expression “gross total income” to mean the total income computed in accordance with the provisions of the Act before making any deductions under Chapter VI-A of the Act. It follows, therefore, that deductions under Chapter VI-A can be given only if the gross total income is positive and not negative.

9. If the gross total income of the assessee is determined as “nil” then there is no question of any deduction being allowed under Chapter VI-A in computing the total income. The Assessing Officer has to take into account the provisions of section 71 providing for set off of loss from one head against income from another and section 72 providing for carry forward and set off of business losses. Section 32(2) makes provisions for carry forward and set off of the unabsorbed depreciation of a particular year. The effect of the abovementioned provisions is that while computing the total income, the losses carried

forward and depreciation have to be adjusted and thereafter the Assessing Officer has to work out the gross total income of the assessee. Sub-section (2) of section 80A specifically enacts that the aggregate of deductions under Chapter VI-A should not exceed the gross total income of the assessee. If the gross total income is found to be a new loss on account of the adjustment of losses of the either years or "nil", no deduction under this Chapter can be allowed. As noticed earlier clause(5) of section 80B defines the expression "gross total income" to mean the total income computed in accordance with the provisions of the Act without making any deductions under Chapter VI-A. The effect of clause (5) of section 80B of the Act is that "gross total income" will be arrived at after making the computation as follows:

- (i) making deductions under the appropriate computation provisions;*
- (ii) including the incomes, if any, under sections 60 to 64 in the total income of the individual;*
- (iii) adjusting intra-head and/or inter-head losses; and*
- (iv) setting off brought forward unabsorbed losses and unabsorbed depreciation, etc."*

17. Relying upon these observations Mr. Vinay Kuthiala, learned senior counsel contends that if the gross total income from all units is negative, the industrial units cannot claim deduction on the basis of the income of the priority units.

18. The Apex Court in Synco Industries case further went on to hold as follows:-

"12. The above discussion makes it very evident that predominant majority of the High Courts have taken the view that while working out the gross total income of the assessee the losses suffered have to be adjusted and if the gross total income of the assessee is "nil" the assessee will not be entitled to deduction under Chapter VI-A of the Act. It is well settled that where the predominant majority of the

High Courts have take a certain view on the interpretation of certain provisions, the Supreme Court would lean in favour of the predominant view. Therefore, this Court is of the opinion that the High Court was justified in holding that the gross total income must be determined, by setting off against the income, the business losses of earlier years, before allowing deduction under Chapter VI-A and if the resultant income is "nil", then the assessee cannot claim deduction under Chapter VI-A .

13. The contention that under section 80-I(6) the profits derived from one industrial undertaking cannot be set off against loss suffered from another and the profit is required to be computed as if profit making industrial undertaking was the only source of income, has no merit. Section 80-I(1) lays down that where the gross total income of the assessee includes any profits derived from the priority undertaking/unit/division, then in computing the total income of the assessee, a deduction from such profits of an amount equal to 20 per cent has to be made. Section 80-I(1) lays down the broad parameters indicating circumstances under which an assessee would be entitled to claim deduction. On the other hand, section 80-I(6) deals with determination of the quantum of deduction. Section 80-I(6) lays down the manner in which the quantum of deduction has to be worked out. After such computation of the quantum of deduction, one has to go back to section 80-I(1) which categorically states that where the gross total income includes any profits and gains derived from an industrial undertaking to which section 80-I applies then there shall be a deduction from such profits and gains of an amount equal to 20 per cent. The words "includes any profits" used by the Legislature in section 80-I(1) are very important which indicate that the gross total income of an assessee shall include profits from a priority undertaking....."

19. In *Liberty India v. Commissioner of Income-Tax* 317 ITR 218, the Apex Court held that while calculating the profits of industrial undertaking in terms of Section 80-IB only profits

derived from the industry and having direct nexus with the industry could be taken into consideration and duty drawback could not be taken into consideration while computing the profits of the industry. Relying upon these observations, it is urged by Mr. K.D. Sood, learned Senior Advocate, that if profits which are not linked to Chapter VI-A are not to be added and taken into consideration why should the losses of a non-priority Unit be taken into consideration while calculating the gross total income of the assessee.

20. The Delhi High Court in ***Commissioner of Income-tax v. Sona Koyo Steering Systems Ltd. (2010 321 ITR 463 (Delhi)*** was dealing with a case where the assessee had two units, namely, a steering unit and an axle unit. The assessee claimed deduction under Section 80-I of the Act for the profit making unit. The Assessing Officer, while computing the deduction set off the losses of one unit against the profits of other unit. The Delhi High Court held that each industrial undertaking has to be treated separately and independently and it was only those industrial undertakings which have profits or gains which would be considered for computing the deductions. The loss making industrial undertaking would not come into the picture at all. The loss of one such industrial undertaking could not be set off against the profit of another such industrial undertaking. The Delhi High Court distinguished the judgment of the Apex Court in *Synco Industries Ltd* (supra) by observing that the Supreme Court was primarily concerned with the question as to whether any

deduction could be allowed under Chapter VI-A if the gross total income was nil. The Delhi High Court held as follows:- ◇

“15. From the above extract, it is apparent that the Supreme Court did not at all hold that while computing the deduction under Section 80-I(6), the loss of one eligible industrial undertaking is to be set off against the profit of another eligible industrial undertaking. All that the Supreme Court said was that in computing the gross total income of the assessee, the same has to be determined after adjusting the losses and that, if the gross total income of the assessee so determined turns out to be “nil”, then the assessee would not be entitled to deduction under Chapter VI-A of the said Act.

16. We agree with the submissions made by the learned counsel for the assessee that there is nothing in the decision in the case of Synco Industries Ltd (2008) 2999 ITR 444 (SC) which would enable us to detract from the position indicated by this court in Dewan Kraft Systems (2008) 297 ITR 305 and, as indicated by us above. In fact, the Supreme Court clearly held that while computing the quantum of deduction under Section 80-I(6), the Assessing Officer, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income of the assessee in order to arrive at a deduction under Chapter VI-A. The Supreme Court also held that under Section 80-I(6), for the purposes of calculating the deduction, the loss sustained in one of the units is not to be taken into account because sub-section (6) contemplates that only the profits shall be taken into account as if it was the only source of income.”

21. In *Commissioner of Income-Tax and another v. Modi Xerox Ltd.(No.2)*, (2012) 344 ITR 411 (All), the Allahabad High Court was dealing with a case where the assessee was engaged

both in the business of manufacturing of photo-copier, toners, etc. and also in the sale of such machines. Question

No.9 framed by the High Court is as follows:-

“9. Whether, on the facts and in the circumstances of the case, the learned Income-tax Appellate Tribunal was legally justified in confirming the Commissioner of Income-tax (Appeals)’s order allowing the claim of the company that it could claim deduction under sections 80HH and 80-I on two profit making units M/s Xerographic undertaking and M/s Toner, Developer, and Photo Receptor Unit, ignoring the third unit M/s Service Trading and other which though had suffered losses yet constituted a unit for the business of the assessee as a whole, in totality and without appreciating the provisions of sections 80AB and 80B(5) of the Income-tax Act?”

The Allahabad High held as follows:-

“37 We have considered the facts and circumstances of the present case and the law laid down by the Apex Court and the decision of the Delhi High Court referred herein above. It is not the case of the assessing authority that the gross income of the Company was nil. From perusal of the income disclosed to all the three units it appears that the gross income was not nil and, therefore, the assessee was eligible to claim the deduction under Sections 80-HH and 80-I of the Act. After becoming eligible to claim the deduction, the question for consideration is that whether deduction is eligible to the income derived to each industrial undertaking independently or on a consideration of the losses suffered by the service unit. Sections 80-HH and 80-I of the Act contemplate the deduction from the income derived by the undertaking. The CIT (Appeal) has rightly held that income of the undertaking shall be calculated on a consideration of an absorbed business losses, etc. in respect of each individual unit and thereafter on the profit derived by the unit the deduction is to be allowed. This view of the CIT (Appeal) confirmed by the Tribunal is in accordance to provisions of the Act as well as inconsonance with the law laid down by the Apex Court and Delhi High Court. The Apex Court in the case of Synco Industries Ltd. v. Assessing

Officer (Income-tax) and another (Supra) has held that non obstante clause appearing in Section 80-I (6) of the Act is applicable only to the quantum of deduction, whereas, the gross total income under Section 80B (5) which is also referred to in section 80-I (1) of the Act is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking. The Apex Court further held that under Section 80-I (6) of the Act for the purposes of calculating the deduction, the loss sustained in one of the units, cannot be taken into account because sub-section (6) of the Act contemplates that only the profits shall be taken into account as if it was the only source of income. Therefore from the decision of the Apex Court, two principle of laws emerges- one for the purposes of computation of gross total income the losses of other units are to be taken into account but for the purposes of calculating the deduction of industrial undertaking, the loss sustained in another unit cannot be taken into account and only the profit shall be taken into account as if it was the only source of income of that unit. In this view of the matter, we are of the view that there is no error in the order of the Tribunal.”

22. On perusal of the bare provisions of the Act and the law cited hereinabove, it is clear that while calculating deductions under Chapter VI-A only the profits derived from priority units are to be taken into consideration. Section 80A(2) specifically provides that the amount of deduction shall not in any case exceed the gross total income of the assessee. There can be no manner of doubt that Section 80AB has overriding effect and will govern the other provisions of Chapter VI-A. This also clearly indicates that only the income derived from a priority undertaking is to be taken into consideration while making deduction. Section

80B(5) indicates that gross total income means the total income computed in accordance with the provisions of this Act. Therefore, we are of the considered view that the phrase “gross total income” will include profits and losses from other units whether they be priority units or non-priority units.

23. In Canara Workshop’s case (supra) the Apex Court clearly held that even if two units were priority units, the losses of one unit could not be set off against the profits of other units. The reasoning given by the Apex Court was that each industry must be considered on its own and the benefits which were available to one industry should not be denied to it because of the losses suffered by the other industry. With due respect we are of the opinion that this proposition of law stands diluted by the later judgments of the Apex Court in IPCA Laboratory Ltd, Induflex Products P. Ltd and Synco Industries Ltd.

24. The question, however, which remains to be answered is whether the losses incurred in a non-priority unit should be taken into account while calculating the income of the priority undertaking or not. We are of the considered view that none of the authorities relied upon by Mr. Vinay Kuthila, Sr. Advocate, especially, the judgment rendered by the Apex Court in IPCA Laboratory Ltd case lays down the law that the profits of the non-priority units should be first set off while calculating the income of the priority unit. In Synco Industries Ltd. case the question before the Apex Court was whether an assessee could get benefit of deduction when the gross total income was nil. In view of

the provisions of Section 80A(2) which provides that the deduction under Chapter VI-A shall not in any way exceed the gross total income of the assessee, it is more than obvious that if the income is nil then the assessee is not entitled to any benefit of the deductions.

25. However, this does not mean that while calculating the total income of the assessee derived from the priority unit the losses of the non-priority unit have to be first adjusted. This does not appear to be the intention of the Legislature. In fact in Synco Industries Ltd case itself the Supreme Court held that for the purposes of calculating deduction under Section 80I(6) the loss sustained in one of the units is not be taken into account because sub section (6) contemplates that only profits shall be taken into account as if they were the only source of income. Therefore, we are of the considered view that while calculating the deductions under Section 80HH of 80IA of the Act, the profits of each unit will have to be calculated separately. However, in case if both of the units are priority units then in view of law laid down in IPCA Laboratory and Induflex Products P. Ltd the loss of the non-priority unit will have to be taken into account while calculating the deductions. However, this principle will not apply to losses, if any of a non-priority unit.

26. It is obvious that the Legislature by using the phrases “total income” and “gross total income” has tried to differentiate between the two. Gross total income has been defined to mean the total income computed in accordance with the provisions of this Act. Therefore, it will include the

profits and losses of all units of the assessee whether they be priority units or non-priority units. However, while computing the deductions specified under Section 80C to 80U only the income derived from the priority units has to be taken into consideration. The deductions shall be calculated only in respect of the income whether profit or loss of the priority unit(s).

27. Having calculated the deductions, the next question that would arise is what benefit has to be given to the assessee on account of such deductions. If the gross total income is nil, then as laid down in Synco Industry case the assessee cannot get any benefit of such deductions. Section 80A(2) leaves no manner of doubt that the amount of deductions cannot exceed the gross total income of the assessee. To give an example if the gross total income of the assessee after taking into account profits and losses of all its units whether priority or non priority is Rs.10 lacs and the deductions calculated are 15 lacs, the assessee can only get benefit of Rs.10 lacs. To give another example, supposing the income of the assessee from the priority unit is Rs.20 lacs and he is entitled to deduction of Rs.10 lacs but his gross total income after taking into consideration the losses of non priority unit is only Rs.5 lacs he would only be entitled to the benefit of deductions of Rs.5 lacs. This, however, does not mean that while calculating the deductions the profits of non-priority units have to be taken into consideration.

28. In view of the above discussion, we answer the question of law raised in these appeals in the following terms:-

1 That while calculating the deduction under Chapter VI-A only the losses and profits derived from the priority units can be taken into consideration

2. While calculating the gross total income of the assessee even the income whether profit or loss of the non-priority units has to be taken into consideration.

3. That the deductions cannot exceed the gross total income and obviously if the gross total income is nil then the assessee would not be entitled to the benefit of deductions.

29. The appeals are disposed of in the aforesaid terms. No order as to costs.

(Deepak Gupta)
Judge

August 28, 2012

(vt)

(Rajiv Sharma)
Judge