

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 62 of 2020**

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-2

Versus

JAY CHEMICAL INDUSTRIES LTD.

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Appearance:

MRS MAUNA M BHATT(174) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA**Date : 17/02/2020****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

1. This Tax Appeal under Section 260A of the Income Tax Act, 1961 (for short 'the Act') is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'D', Ahmedabad, dated 26th March, 2019, in the ITA No.305/Ahd/2015 for the A.Y.2011-12.

2. The Revenue has proposed the following questions as substantial questions of law, for the consideration of this Court:

"(A) Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the addition made on account of disallowance u/s.40(a)(ia) of the Act for non deduction of tax on commission payable to foreign agents of Rs.2,47,85,500/-?"

(B) Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the addition made on account of disallowance u/s.40(a)(ia) of the Act for non deduction of tax on commission payable to foreign agents of Rs.2,47,85,500/-?

(C) Whether the Appellate Tribunal has erred in law and on facts in considering the steam as "power" for the purpose of deduction u/s.80IA(4) of the Act?

(D) Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the addition made on account of disallowance u/s.14A of the Act of Rs.19,09,800/-?"

3. It appears from the materials on record that the assessee is engaged in the business of liquefied dyes. The return of income was filed by the assessee on 30th September 2011, declaring the total income of Rs.9,12,75,000/-. The case was selected for scrutiny and the notice under Section 143(2) of the Act was issued on 3rd August, 2012.

4. So far as the first question as proposed by the Revenue is concerned, we take notice of the fact that the Assessing Officer had disallowed the commission paid to the foreign agents taking the view that the income arising on account of the commission payable to the foreign agents could be deemed to have accrued or arose in India and accordingly would be taxable under the provisions of Section 5(2)(b) read with Section 9(1)(i) of the Act. The Assessing Officer took the view that the assessee has failed to comply with the provisions of Section 195(2) of the Act. In

such circumstances, the Assessing Officer disallowed the amount of Rs.2,47,85,500/- for non-deduction of tax on the commission payable to the foreign agents.

5. We take notice of the fact that the CIT(A) deleted the addition, taking the view that similar issue has been decided in the case of the very same assessee for the Assessment Year 2010-11. In this regard, the finding recorded by the Tribunal, in paragraph No.11, reads thus:

"11. We have heard the rival contentions. With the assistance of Id. Representatives, we have gone through the material on record and it is noticed that identical issue on similar facts for the assessment year 2010-11 in the case of the assessee vide ITA No.2693/Ahd/2014 has been adjudicated in favour of the assessee as supra in this order. On careful consideration of the entire fact of the case, we consider that similar issue and identical facts has been involved in this ground of appeal, therefore, following the finding as supra for assessment year 2010-11 in this order, we do not find any infirmity in the deletion of Id.CIT(A), therefore, this ground of the revenue is dismissed."

6. It is brought to our notice by Ms.Bhatt, the learned standing counsel, that the Revenue had come before this Court challenging the aforementioned order by filing the Tax Appeal No.610 of 2019, which came to be dismissed vide judgment and order dated 24th September 2019. In such circumstances referred to above, the first question as proposed by the Revenue should fail.

7. We now look into the second question, as proposed by the Revenue. The second question is one relating to the deletion of the addition made on account of disallowance under Section 36(1)(iii) of the Act. The Assessing Officer took notice of the fact that there was an increase in the fixed assets as well as the capital work in progress. The assessee had debited interest expenses in the profit and loss account and claimed that the interest cost was to be capitalized in accordance with the provisions of Section 36(1)(iii) of the Act. The assessee had capitalized the interest cost of Rs.32,64,147/- on the borrowings used to acquire the capital assets. The Assessing Officer rejected the submission of the assessee and worked out the total interest to be capitalized at Rs.50,49,554/- and, after setting off the interest already capitalized by the assessee, further disallowed Rs.17,85,407/-. The CIT (A), while allowing the appeal, preferred by the assessee, held as under:

"On a careful consideration of entire facts of the case, it is noted that the appellant had given detailed working of interest capitalisation for the year. It had given details of the opening capital work in progress and the monthly accretion therein month-wise during the year. Further it has also given details of capitalisation, Cumulative expenses, Cumulative capitalization and percentage of C WIP to CAPEX. It is noted that the first instalment of loan was received by the appellant in the month of August 2010 and it has bifurcated the interest by taking into account the percentage of CWIP to CAPEX. For example the percentage of capital work in progress to CAPEX was 69% in the month of August, the interest

cost has been proportionately distributed in that ratio. It has been similarly done for other months as well. It is an accepted fact that the appellant has not borrowed money for specifically the assets and therefore, as per the guidelines issued by the ICAI, a copy of which has also been given by the appellant, the allocation of interest shall have to be made by taking into account by applying a capitalisation rate to the expenditure on that asset. The guidelines specifies that the capitalisation rate should be the weighted average of the borrowing cost applicable to the borrowing of the enterprise that is the outstanding during the period. The method of the AO by capitalising the total loan borrowed for CWIP as long as the Cumulative borrowings are less than the CWIP is not correct as there is no specific borrowing for a particular asset and the appellant has also invested its own money before purchase of assets which was subsequently financed. The method adopted by the appellant is as per the guidelines issued by the ICAI and has also been certified by the chartered accountant in the Audit Report. In view of these facts, I am inclined to accept the submission and calculation given by the appellant. The disallowance made by the AO is therefore, directed to be deleted."

8. The Tribunal, while dismissing the appeal of the Revenue, held as under;

"The assessee has given the working of interest capitalized to the amount of Rs.32,64,147/- after taking into consideration the capital expenditure incurred for capital asset and the quantum of work in progress for time to time. The assessing officer has disallowed the interest on all the term loans availed after August, 2010 without considering as to what part of the term loan was applied for the new asset which was already put to use. The assessing officer has not disproved the detailed working of the calculation of

capitalization of interest given by the assessee. The term loan was sanctioned in the middle of the year and by that time many purchases for machinearies were made by the assessee by utilizing its own funds. We observe that the presumption of the assessing officer that that the total term loan received was applied towards CWIP was not based on relevant supportive evidence. Considering the above facts and the detailed findings of the ld. CIT(A), we do not find any merit in the ground of the appeal of the revenue. Therefore, this ground of appeal of the Revenue is dismissed."

9. The concurrent finding of fact recorded by the two authorities is, that the assessee had furnished the working of interest capitalized to the tune of Rs.32,64.147/- after taking into consideration the capital expenditure incurred for the capital assets and the quantum of work in progress from time to time.

10. The Tribunal rightly observed that the presumption drawn by the Assessing Officer that the total term loan received was towards the CWIP could not be said to be based on any cogent material.

11. In view of the concurrent findings, we are of the view that the second question, as proposed by the Revenue cannot be termed as a substantial question of law.

12. We now proceed to look into the third question as proposed by the Revenue with regard to Section 80IA(4) of the Act.

13. It appears that during the year under consideration, the assessee had claimed deduction of Rs.32,51,080/- under Section 80IA(4) of the Act. This claim was on account of the operation of the Captive Power Plant. The assessee showed income from sale of Power to the tune of Rs.1,23,10,500/- and the sale of vapour of Rs.6,59,77,170/-. The Assessing Officer took the view that "Vapour" would not fall within the meaning of "Power". The case of the assessee is that "steam" is also a form of "power".

14. The case of the Revenue is that "steam" is only an intermediate raw material for the manufacturing process. In other words, the production of "steam" is only a byproduct, which is used by the assessee for its manufacturing activity.

15. In this regard, the CIT (A) recorded the following findings:

"2. The appellant has also claimed deduction under Section 80 I-A on account of sale of steam to the chemical plant. "The steam was generated by the power plant in the boiler and part of it was also utilised for the chemical process of the non-eligible unit. The AO has held that the appellant was not entitled to the deduction on account of sale of steam to the power plant. It has been held by her that steam does not fall within the meaning of "power". In this reference she has made reliance on the judgment of honourable ITAT Ahmedabad in the case of N R Agrawal Industries Ltd Vs DCIT dated 26/07/2013. The appellant on the other hand has submitted that the value of steam should be considered for arriving the profit as the scheme is being generated for generation of electricity and after utilising the same for electricity

generation the balance steam is used for the chemical process. Therefore, it is a byproduct and therefore, the deduction was admissible.

On a careful consideration of the facts related to the issue, it is noted that that appellant is generating steam at high-pressure and temperature and the steam is being fed into turbine and the steam which is coming out from turbine is utilised for the chemical process. The details on record to show that the turbine utilised by the appellant for generation of the power is a back pressure turbine. In back pressure turbine the intake is of high-pressure steam which is used for generation of power and the exhaust steam is also at certain pressure so that it can be utilised for some other purpose. The design of the turbine is done in such a manner so that all energy of the steam is not utilised by the turbine for generation of power but certain part of it is released in the exhaust steam also. Therefore, the design of the turbine used by the appellant is in such a manner that the exhaust steam is at a certain pressure so that it can be utilised for some other work. Accordingly, this steam cannot be considered as a by product but it is intentionally being produced or generated for a specific purpose. Further the intention of the legislature was to provide deduction for generation of electricity and not for generation of steam. The intention is clearly evident from the perusal of the speech of the honourable Finance Minister while introducing the provisions for deduction in the budget. The use of word 'power' is intended for 'electricity' as the other relevant sections clearly mentioned the word 'electricity'. The honourable Bench of ITAT Ahmedabad while deciding the issue in N.R.Agrawal Industries Private Limited has discussed these aspects in detail and accordingly relying on the judgment it is held that the appellant is not entitled for deduction under section 80 I-A on sale of such steam to its chemical plant. Accordingly, the decision of the AO in this regard is upheld.

3. For the purpose of calculation the quantum of deduction and allocation of expenditure incurred for production of steam the appellant had given certain information-related to the heat value of steam (Enthalpy). The details given by the appellant were also forwarded to the AO and she has also given her comments on the same. In order to arrive at a logical conclusion it would be useful to understand the process involved. The appellant has installed a

boiler which generates high-pressure steam at a very high temperature. The steam is first fed in the turbine where part of the heat energy of the steam is utilized in generating the electricity and the balance energy available in the steam coming out from the turbine is utilised in the chemical process. The appellant is incurring expenses such as coal consumption, boiler running, depreciation of boiler and other machinery and the building in which the whole generation plant is housed. The expenditure for the steam which is utilised in generation of power and the balance steam which is utilised by the chemical plant can be determined by distributing the same in proportion to the heat value (Enthalpy) of the inlet steam and the outlet steam of the turbine. As per the details available on record the heat value of the inlet steam at 65.5 KG/cm² is 793 kcal per KG whereas the heat value of the output steam at 3.5 KG/cm² is 653.7 kcal per KG. The quantity of input and output steam remains the same and only the calorific value of the heat value goes down as part of the energy is utilised for generation of power. Accordingly, the expenses can be apportioned in the ratio of enthalpy of the inlet and output steam. The same is worked out as under:-

Total enthalpy of the steam coming out of the boiler	793 kcal per KG	
The enthalpy of the steam coming out of the turbine	653 kcal per KG	
The enthalpy utilised by the turbine for generation of electricity	139 kcal per KG	
Percentage of energy utilised in the generation of electricity	17.66%	
Total expenses for	Boiler	1800000
Generation of steam to be allocated on a percentage basis	expenses	
	Boiler maint	1 728903
	Coal expenses	38733894
	Depreciation other than turbine	10522945
	Total expenses	52785832
Expenses for steam	17.66% of 52785832	

<i>utilised for</i>	
<i>Generation of electricity</i>	9321977

In addition to above expenses for generation of steam, the expenses of head office of the appellant company which looks after the management or the affairs of the Company and also the power plant are also to be disallowed on proportionate basis. It is also noted that the appellant has taken loan from financial institutions for installing the power plant. The appellant is also paying huge amount of interest on the loan. Proportionate allocation of the interest expenditure should also be done and added to the cost of generation of steam. Since the details related to the expenses of head office as well as interest expenditures are not available before me, the AO is directed to work out the proportionate allocation of the interest expenditure should also be done and added to the cost of generation of steam. Since the details related to the expenses of head office as well as interest expenditure are not available before me, the AO is directed to work out the proportionate allocation of these expenses by obtaining suitable details from the AO. The details of following expenses are readily available from record:-

<i>Expenses for generation of steam</i>	9321977
<i>Depreciation on turbine</i>	1289189
<i>Electricity duty</i>	787872

The AO is also directed to verify the above figures. Accordingly the AO is directed to rework the deduction under Section 80I-A claimed by the appellant as indicated in the preceding discussion."

16. The Tribunal, concurred with the aforesaid findings recorded by the CIT (A), by taking support of the decision of a Co-ordinate Bench of the ITAT, Mumbai, in the case of West Cost Paper Mills Pvt. Ltd. vs. CIT, (2014) 52 taxmann.com 268. As regards Section 80IA of the Act, strong reliance has been

placed on behalf of the Revenue on the decision of this Court in the case of **Commissioner of Income-tax Vs. Atul Ltd. [2016] 74 taxmann.com 255**. In **Commissioner of Income-tax Vs. Atul Ltd. (Supra)**, the assessee had established a new power plant by expending a sum of Rs.14.62 Crore and claimed deduction under Section 80IA. The Assessing Officer upon examination of such claim, arrived at the conclusion that the production of power would require boiler and also a turbine since the boiler would manufacture steam which would be a raw material for the production of power with the aid of turbine and such a plant would be a new industrial undertaking capable of generating electricity. The case of the assessee was that in the existing power plant the assessee had excess steam production capacity which was to be utilised by the turbine installed in the new plant. The Assessing Officer ultimately rejected the case of the assessee on the ground that the turbine should be treated as an independent power generating unit and thereby disallowed the claim of deduction under Section 80IA of the Act.

17. The assessee carried the matter in appeal. The CIT (A) held that no industrial undertaking would come into existence within the meaning of the provisions contained in Section 80IA of the Act by transferring the boiler or by installing new machinery for the purpose of generation of the power. The appeal came to be dismissed and the assessee carried the matter before the Tribunal. The Tribunal

dismissed the appeal.

18. It appears that the assessee preferred an application for rectification before the Tribunal contending that after the judgment was delivered by the Tribunal, the High Court, in the case of Gujarat Alkalines and Chemicals Ltd. Vs. CIT [2013] 350 ITR 94/[2012] 208 Taxman 31/20 taxmann.com 764 (Guj.) has delivered a judgment which would have a bearing on the issue decided by the Tribunal. The said application was opposed by the Revenue. However, the Tribunal allowed the application for rectification and recalled its earlier judgment. The Revenue came before this Court in appeal. This Court took the view while allowing the appeal of the Revenue that the claim of the assessee for deduction under Section 80IA of the Act was not tenable in law.

19. This Court took notice of the fact that the assessee had installed turbine for power generation which relied on the excess steam production capacity of the plant. This Court ultimately took the view that the installation of turbine for power generation could be said to setting up of a new industrial unit and therefore, the assessee would not be entitled for deduction of sum under Section 80IA of the Act.

20. In our view, the facts in the case of ***Commissioner of Income-tax Vs. Atul Ltd. (Supra)*** are quite different and the ratio, as propounded in the same, will have no applicability to the case on hand,

more particularly, the question No.3 with which we are dealing with.

21. It is difficult for us to take the view as suggested by the learned standing counsel appearing for the Revenue that "steam" would not amount to power. The word "Power" used in Section 80IA(4) has not been defined under the Income Tax Act.

22. The word "Power" should be understood in common parlance as "Energy". "Energy" can be in any form being mechanical, electricity, wind or thermal. In such circumstances, the "steam" produced by the assessee can be termed as power and would qualify for the benefits available under Section 80IA(4) of the Act.

23. The above takes us to the fourth question, as proposed by the Revenue. The fourth question is with regard to the disallowance under Section 14A of the Act of Rs.19,09,800/-.

24. It appears that in the course of the assessment proceedings, the Assessing Officer noticed that the assessee had made investment in the shares of its subsidiary companies. The Assessing Officer further noticed that the assessee had not earned any exempt income under Section 10 of the Act on the investment but, at the same time, was of the view that the possibility of earning such tax free income could not

be ruled out. Accordingly, the Assessing Officer computed the disallowance under Section 14A read with Rule 8D to the tune of Rs.19,09,880/- and added to the total income of the assessee.

25. The assessee being dissatisfied went in appeal before the CIT(A). The CIT(A) allowed the appeal following the deduction given by this Court in the case of **Corrtech Energy Pvt Ltd. 45 taxmann.com 116**. The deduction as allowed in **Corrtech Energy Pvt Ltd. (Supra)** is that no disallowance can be made if no exemption from the income has been claimed.

26. In our opinion, the fourth question, as proposed by the Revenue also cannot be termed as a substantial question of law.

27. In the overall view of the matter, more particularly, in view of the aforesaid discussion, we have reached to the conclusion that none of the questions of law as proposed by the Revenue could be termed as the substantial question of law.

28. In the result, this Appeal fails and is accordingly dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

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