OD-3-5

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

HEARD ON : 15.09.2022
DELIVERED ON: 15.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA

ITA/159/2018

COMMISSIONER OF INCOME TAX (LARGE TAX PAYERS UNIT), KOLKATA
-Versus-
M/S. CENTYURY PLYBOARDS (I) LTD.

ITA/39/2021

COMMISSIONER OF INCOME TAX (LARGE TAX PAYERS UNIT), KOLKATA
-Versus-
CENTYURY PLYBOARDS (I) LTD.

ITA/65/2021

COMMISSIONER OF INCOME TAX (LARGE TAX PAYERS UNIT), KOLKATA
-Versus-
M/S. CENTYURY PLYBOARDS (I) LTD.

Appearance:
Ms. Smita Das De, Adv.
...for the appellant in ITA/159/2018 & ITA/39/2021.
Mr. Aryak Dutt, Adv.
...for the UoI in ITA/65/2021.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Siddhartha Das, Adv.
Ms. Swapna Das, Adv.
Mr. Sanjoy Bhowmick, Adv.
...for the respondent.

(Judgment of the Court was delivered by T.S. Sivagnanam, J.)

1. This appeal filed by the revenue under Section 260A of the Income Tax Ac, 1961 (the 'Act' for brevity) is directed against the order dated 13th July, 2016 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the 'Tribunal') in ITA No.2307/Kol/2013 for the assessment year 2008-09.

2. In all the three appeals the common substantial question of law in which the appeals were admitted is as follows:

> *"Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in allowing the benefit under Section 80IC of the Income Tax Act by not appreciating the facts and evidences on record that the assessee has not undertaken substantial expansion of business as is required under Section 80IC(2)(b)(iii) of the Act for claiming the benefit of exemption under Section 80IC of the Income Tax Act ?"*

3. There are two other substantial questions of law on which ITA/159/2018 and ITA/65/2021 were admitted which are as follows which we will deal in the later portion of this judgment.

> *"(i) Whether on the facts and in the circumstances of the case, the learned Tribunal failed to consider that in cases where no direct nexus between borrowings and investments could be established especially when investments and regular business are run out of*

distinctly separate bank accounts, rule 8(iii) of the Income Tax Rules, 1962 cannot be invoked ?

(ii) Whether on the facts and circumstances of the case, the learned Tribunal erred in law in deleting an amount of Rs.1,17,99,000/- /Rs.1,03,70,000/- added by the Assessing Officer under Section 14A of the Act read with Rule 80D(ii) of the Rules?"

4. The decision rendered by the learned Tribunal for the assessment year 2008-09 had been followed by the tribunal for two other assessment years namely, assessment year 2010-11, which was the subject-matter of ITA/65/2021 and assessment year 2011-12 which was the subject matter of ITA/159/2018. Therefore, ITA/39/2021 is the lead case and any decision taken in the said appeal would automatically be applicable to the two other appeals namely, ITA/159/2018 and ITA/65/2021.

5. We have heard Ms. Smita Das De, learned standing counsel appearing for the appellant/revenue in ITA/159/2018 and ITA/39/2021 and Mr. Aryak Dutt, learned counsel for the Union of India in ITA/65/2021; also Mr. J.P. Khaitan, leaned senior counsel assisted by Ms. Swapna Das, Mr. Siddhartha Das and Mr. Sanjoy Bhowmick, learned Advocates for the respondent in all the three appeals.

6. It is to be noted that all the three appeals were heard individually and we have heard the submissions of the learned standing counsels separately on the three appeals.

For the sake of convenience of the Court, a consolidated judgment is passed and the Ministry of Law & Justice shall construe this judgment and order to be individual judgment in each of the appeals.

7. The short issue which falls for consideration is whether the learned Tribunal was right in allowing the benefit to the respondent/assessee under Section 80IC of the Act. The revenue's contention is that the assessee having not undertaken any substantial expansion as required under Section 80IC(2)(b) of the Act, they cannot claim exemption under Section 80IC of the Act. To test the correctness of the contentions raised by the revenue before us, we have carefully examined the order passed by the Commissioner of Income Tax (Appeals),-XII, Kolkata [CIT(A)] dated 14th May, 2013. The assessing officer denied the claim of exemption on the sole ground that the assessee has not undertaken any substantial expansion on their unit located in the State of Meghalaya, one of the North-Eastern State and, therefore, the benefit of Section 80IC cannot be granted. Section 80IC was a new provision which was inserted with effect from 1st April, 2004 allowing ten years tax holiday in respect of certain undertakings in the State of Himachal Pradesh, Sikkim, Uttaranchal and North-Eastern States. The Union Cabinet announced a package of Fiscal

and Non-Fiscal concessions for the special category sates of Himachal Pradesh, Sikkim, Uttaranchal and North-Eastern States with a view to give boost to the economy in those States. By insertion of Section 80IC of the Act with effect from 1st April, 2004 deduction was allowed for ten years from the profits of new undertakings or enterprises or existing undertakings or enterprises on their substantial expansion in those States during the period beginning 24th December, 1997 and ending before 1st April, 2007 in any of the North-Eastern States.

8. The CIT(A) has pointed out that deduction has been allowed to the assessee under Section 80IB of the Act for the assessment years 2002-03 and 2003-04 and after Section 80IC was inserted deduction was allowed for the assessment years 2004-05 and 2005-06 with effect from 1st April, 2005. The other company got amalgamated with the assessee and the assessee was granted the benefit of deduction under Section 80IC of the Act for the assessment years 2006-07, 2007-08 and 2009-10. For the subject assessment years 2008-09, 2010-11 and 2011-12 which are the subject-matter in these three appeals the deduction was disallowed. The reasoning of the assessing officer in all these three years is that the assessee has not undertaken any expansion. As rightly noted by the CIT(A), a consistent approach is required to

be adopted by the department unless and until the department is able to establish a factual distinction in a particular assessment year to justify a different course of action. Admittedly, the assessing officer has not pointed out any such factual distinction. That apart, on a reading of Section 80IC(2)(b) of the Act, it is evidently clear that benefit is available to all existing undertakings and they are entitled to claim deduction under Section 80IC of the Act. Therefore, the CIT(A) while rightly interpreting the provision held that the assessing officer was not justified in denying the benefit to the assessee on the ground that they have not undertaken substantial expansion. The correctness of the order was tested by the learned Tribunal and it was pointed out that the assessing officer committed an error in denying the claim of deduction under Section 80IC only on the ground that the assessee has not undertaken substantial expansion and the learned Tribunal approved the order passed by the CIT(A) holding that it had rightly come to the conclusion that in respect of certain units which had claimed deduction earlier under Section 80IB of the Act, such unit will continue to get the benefit of the deduction under Section 80IC of the Act subject to the limitation of ten years period. For better standing we

extract the relevant portion of section 80IC(2)(b) of the Act:

"80-IC. Special provisions in respect of certain undertakings or enterprises in certain special category States.

*(1) * * * * * * * * *

(2) This section applies to any undertaking or enterprise,-

(a) . . . .

(b) which has begun or begins to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule, or which manufactures or produces any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule and undertakes substantial expansion during the period beginning-

(i) . . .

(ii) . . .

(iii) on the 24th day of December 1997, and ending before the 1st day of April, 2007, in any of the North-Eastern States."

9. The above provision is a special provision in respect of certain undertakings or enterprises in certain special category States. Sub-Section (1) of Section 80IC states where the gross total income of an assessee includes in profit and gains derived by an undertaking or an enterprise from any business referred to in sub-Section (2), there shall, in accordance with and subject to the provisions of Section 80IC, be allowed in computing the total income of the assessee, a deduction from such profits

and gains as specified in sub-Section (3) of Section 80IC. Sub-Section (2) of Section 80IC deals with the undertakings and enterprises to which Section 80IC would apply. Clause (b) of sub-Section (2) of Section 80IC would be relevant to the cases on hand. The said clause (b) of Section 80IC(2) applies to any undertaking or enterprise which has begun or begins to manufacture or produce any article or thing specified in the Fourteenth Schedule or commences any operation specified in that Schedule. The second category of undertakings are those which manufactures or produces any article or thing in the Fourth Schedule; and the third category being undertakings or enterprises which commenced operations specified in the Fourteenth Schedule and undertakes substantial expansion during the relevant period which is on 24th day of December, 1997 and ending before 1st day of April, 2007 in any North-Eastern States.

10. On a reading of the order passed by the assessing officer we find that the assessing officer has missed out one of the categories which have been mentioned in Clause (b) of Section 80IC(2). The assessee would squarely fall within the category of undertakings or enterprises which manufactures or produces any article or thing as specified in the Fourteenth Schedule as the assessee is a mineral

based industry which finds place in clause-16 of Part-A of the Fourteenth Schedule.

11. Thus, we are the of the view that the learned tribunal rightly affirmed the conclusion arrived at by the CIT(A). In the result, the appeal (ITA/39/2021) filed by the revenue is dismissed and substantial question of law which was common in all the three appeals is answered against the revenue.

12. On the two other substantial questions of law, we have elaborately heard the learned standing counsels for the appellants in each appeals and the learned senior advocate for the respondent/assessee.

13. On going through the order passed by the Tribunal, we find that the explanation submitted by the assessee while framing the assessment proceedings was rejected by the assessing officer without adducing any reasons nor any defect was pointed out by the assessing officer at the time of assessment and straightway the assessing officer applied the machinery provision under Rule 8D of the Income Tax Rules, 1962. Furthermore, on facts, the learned tribunal found that the assessee had sufficient funds and an inference can be drawn that the investment has been made out from the funds of the assessee. In the case of ***Kesoram***

Industries Ltd. vs. Principal Commissioner of Income Tax[1] the Court took into consideration the decision of the Hon'ble Supreme Court in ***Maxopp Investment Ltd. vs. CIT***[2] and held as follows:

> *"Two important issues have been pointed out in the aforementioned decision. Firstly that the provisions of section 14A has to be interpreted, particularly, the words that "in relation to the income" that does not form of total income. Therefore, it was held that the principle of apportionment of expenses comes into play as that is the principle which is incorporated in section 14A of the Act. With regard to as to how the power under section 14A(2) read with rule 8D of the Rules could be invoked it was pointed out that the Assessing Officer needs to record satisfaction that having regard to the kind of the assessee suo motu disallowance under section 14A was not correct and it will be in those cases where the assessee in his return has himself apportioned but the Assessing Officer was not accepting the said apportionment. In any event, the Assessing Officer will have to record its satisfaction to the said effect.*
>
> . . . .
>
> *We also take note of the decision of this Court in the case of CIT v. Ashish Jhunjhunwala reported in [2015] (12) TMI 905 (Cal), and the decision in Pr. CIT v. Britannia Industries Limited I.T.A.T./45/2017 dated July 19,2018. It was pointed out that the assessee has to make a claim (including a claim that no expenditure was incurred) with regard to the expenditure incurred for earning income which is not chargeable to tax. Such a*

[1] [2022] 441 ITR 648 (Cal)
[2] [2018] 402 ITR 640(SC)

claim has to be examined by the Assessing Officer and only if an objective satisfaction is arrived at by the Assessing Officer that the claim made by the assessee cannot be accepted, the Assessing Officer can then proceed to apply computation mode as provided in rule 8D(2) of the Rules."

14. The decision of the Hon'ble Supreme Court in ***South Indian Bank Ltd. vs. Commissioner of Income Tax***[3] is also in aid of the case of the assessee as the tribunal has recorded specific finding that own funds were available with the assessee. The relevant paragraphs are quoted hereunder:

> *"**27.** The aforesaid discussion and the cited judgments advise this Court to conclude that the proportionate disallowance of interest is not warranted, under section 14A of the Income-tax Act for investments made in tax-free bonds/securities which yield tax-free dividend and interest to the assessee-banks in those situations where, interest-free own funds available with the assessee, exceeded their investments. With this conclusion, we unhesitatingly agree with the view taken by the learned Income-tax Appellate Tribunal favouring the assessee.*
>
> ***28.** The above conclusion is reached because nexus has not been established between the expenditure disallowed and earning of exempt income. The respondents as earlier noted, have failed to substantiate their argument that the assessee was required to maintain separate accounts. Their reliance on Honda Siel (supra) to project such an obligation on the assessee, is already negated. The*

[3] [2021] 438 ITR 1(SC)

learned counsel for the Revenue has failed to refer to any statutory provision which obligate the assessee to maintain separate accounts which might justify proportionate disallowance."

15. In the light of the above legal settled position and the factual discussion done by the tribunal, the revenue has not made out any case for interference with the order passed by the tribunal on the said issue.

16. In the result, the appeals (ITA/159/2018 and ITA/65/2021) are dismissed and the substantial questions are answered against the revenue.

(T.S. SIVAGNANAM, J.)

I agree.

(SUPRATIM BHATTACHARYA, J.)

A/s./S.Das