

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ‘ A ‘ Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri A. Mohan Alankamony, Accountant Member

ITA No.988/Hyd/2017		
Assessment Year: 2012-13		
NSL Renewable Power Private Limited, Hyderabad PAN:AABCN6009L	Vs.	Dy. Commissioner of Income Tax, Circle 16(1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri Aliasghar Rampurwala	
Revenue by:	Sri Rajendra Kumar, DR	
Date of hearing:	16/09/2020	
Date of pronouncement:	29/09/2020	

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2012-13 against the order of the CIT (A)-4, Hyderabad, dated 24.03.2017. The assessee has raised the following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) - IV ("Ld. CIT(A)" erred in upholding the rectification order passed u/s. 154 of the Income Tax Act, 1961 ("the Act") by Deputy Commissioner of Income Tax, Circle 16(1), Hyderabad (Ld. AO)" on the alleged ground that no debatable issue was rectified u/s. 154.

The Appellant therefore prays that the rectification order passed u/s. 154 of the Act by the AO, be held as bad in law and liable to be quashed.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of Ld. AO in restricting the claim of deduction u/s. 80IA of the Act only to the extent of income from business and profession on the alleged ground that deduction u/s. 80IA shall be

allowed to the extent of business income only and not from the gross total income.

The Appellant therefore prays that the Ld. AO be directed to allow the claim of deduction u/s. 80IA of the Act against the gross total income.

3· On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not adjudicating the ground of disallowance u/s. 14A r.w.r. 8D of the Act on the alleged ground that disallowance u/s 14A r.w.r. 8D was made in the order passed u/s. 143(3) of the Act and such order was not the subject matter of appeal.

The Appellant therefore prays that the action of the Ld. CIT(A) be quashed and disallowance u/s. 14A r.w.r. 8D of the Act be deleted.

4· On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not adjudicating the ground of taxability of dividend income as "income from other sources" on the alleged ground that ~ the dividend income was made taxable in the order passed u/s. 143(3) of the Act and such order was not the subject matter of appeal.

The Appellant therefore prays that the action of the Ld. CIT(A) be quashed and dividend income be held as exempt u/ s. 10(35) of the Act.

5· On the facts and circumstances of the case and in law, the Ld. Aa erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant therefore prays that the action of the Ld. AO in initiating penalty proceedings be quashed.

The above grounds of appeal are without prejudice to each other.

That the appellant reserves its right to add, alter, amend, delete or withdraw any ground of appeal either before or at the time of hearing of this appeal".

2. At the time of hearing, the learned Counsel for the assessee submitted that grounds of appeal Nos. 3, 4 and 5 are not pressed by the assessee. They are accordingly rejected as not pressed.

3. Brief facts relating to the other grounds i.e. 1 and 2 are as under:

4. The assessee company filed its return of income for the A.Y 2012-13 on 30.09.2012 admitting "Nil" income after claiming Rs.21,67,91,677/- as a deduction u/s 80IA of the Act and book profits of Rs.13,78,32,670/- u/s 115JB of the Act. The return was initially processed u/s 143(1) of the Act and subsequent thereto, the assessee company filed a revised return of income on 05.10.2012 admitting "Nil" income after claiming Rs.21,67,91,677/- as a deduction u/s 80IA of the Act. Thereafter, the assessee filed another revised return of income on 21.11.2012 admitting "Nil" income after claiming Rs.21,35,54,327/- as a deduction u/s 80IA of the Act. Therefore, the case was selected for scrutiny and the AO observed that the assessee company derived carbon credits of Rs.10,61,04,375/- which have been credited to the P&L A/c of the power divisions and has claimed deduction u/s 80IA on the carbon credits as well. He was of the opinion that carbon credit is not business income, but it is other income. Therefore, the AO recomputed the deduction u/s 80IA at Rs.16,55,99,026/- after reducing the carbon credits.

5. Subsequent thereto, the AO issued a notice u/s 154 of the Act on the ground that the deduction u/s 80IA was allowed to the assessee on the gross total income instead of restricting the same to the available business profit and therefore, there is a mistake apparent from record which needs rectification. In response to the said notice, the assessee submitted that the deduction u/s 80IA is available from the gross total income which has been correctly allowed during the assessment proceedings.

But the AO was not convinced and he recomputed the income by restricting the deduction u/s 80IA to the business income/loss only. Aggrieved, the assessee preferred an appeal before the CIT (A) who confirmed the order of the AO u/s 154. As regards the assessee's challenge to the applicability of section 154 to deduction u/s 80IA, the CIT (A) held that there is no debatable issue and hence can be rectified u/s 154 of the Act. Thus, he upheld the initiation of proceedings u/s 154 and also final order u/s 154 of the Act. Aggrieved, the assessee is in second appeal before us.

6. The learned Counsel for the assessee submitted that this issue had come up before the Tribunal in the assessee's own case for the earlier A.Y wherein the Tribunal has considered relevant provisions of the Act to hold that deduction u/s 80IA is allowable from the Gross Total Income of the assessee for the relevant A.Y. He has also drawn our attention to section 80IA and sub-section (1) and (2) thereof to demonstrate that deduction u/s 80IA shall be allowed from the gross total income of the assessee.

7. On the other hand, the learned DR supported the orders of the authorities below.

8. Having regard to the rival contentions and the material on record and also the decision of the Coordinate Bench of the Tribunal and the provisions of section 80IA and sub-section 1 and 2 thereof, we hold that deduction u/s 80IA is to be allowed from the gross total income and should not be restricted to the net business income of the assessee. For the sake of ready reference, the relevant paragraphs of the order of the Tribunal from the earlier A.Ys are reproduced hereunder:

"8. Having regard to the rival contentions and the material on record, we find that the assessee has claimed deduction u/s 80IA of the Act in the return of income filed along with Form 10CCB. The AO has accepted and allowed the claim u/s 80IA. It is only subsequent thereto, that he has issued notice u/s 154 on the ground that there is an excess claim of deduction u/s 80IA. The argument of the assessee that it is a debatable issue and therefore, it could not be rectified u/s 154 of the Act has to be examined first. It is not mere quantification but the method of quantification that has been considered u/s 154 of the Act. If there is mistake in the calculation of quantum to be allowed, it is a mistake which can be rectified u/s 154 of the Act. However, if the issue sought to be rectified, is the method of calculation, then we agree with the contention of the assessee that it is a debatable issue and cannot be rectified u/s 154 of the Act. The Hon'ble Supreme Court in the case of CIT vs. Hero Cycles (P) Ltd (Supra) has clearly held that "Rectification under section 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order and it becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which is not examined on fact or in law cannot be dealt with as mistake apparent on the record. The dispute in the instant case raised a mixed question of fact and law. Hence, the Tribunal was in error in upholding the Assessing Officer's order allowing the assessee's claim for weighted deduction by way of rectification order under section 154".

9. In the case of T.S. Balaram, ITO vs. Volkart Brothers (Supra), the Hon'ble Supreme Court has held as under:

"Section 17(1) of 1922 Act can apply to a 'person'. The expression 'person' is defined in section 2(9) of 1922 Act to include a HUF and a local authority. Unless a firm can be considered as a 'person', section 17(1) of the 1922 Act cannot govern the assessment of the assessee-firm. In the 1961 Act the expression 'person' is defined differently. It is a matter for consideration whether the definition contained in section 2(31) of the 1961 Act is an amendment of the law or is merely declaratory of the law that was in force earlier. To pronounce upon this question, it may be necessary to examine various provisions in the Act as well as its scheme. Thus, the question whether section 17(1) was applicable to the case of the assessee-firm was not free from doubt. Therefore, the ITO was not justified in thinking that on that question there could be no two opinions. It was not open to the ITO to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the 1961 Act. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions.

Thus, the ITO was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the assessee-firm.

The revenue's appeal was accordingly dismissed".

10. After considering the above decisions, the Hon'ble Delhi High Court in the case of CIT vs. Richa & Co (Supra) has held as under:

"The adjustment, which was sought to be made by the Assessing Officer, was not one of those prima facie adjustments, permissible while

exercising power under section 143(1)(a). Law is fairly well settled that section 154 has no application where debatable issues are involved. Where the error sought to be rectified is far from self-evident, it ceases to be an apparent error. An error which is apparent on the face of the record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law. The power exercisable under section 154 to correct 'any mistake apparent from the record' is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an 'error apparent on the face of the record'. That being the position, the Tribunal's conclusion that the matter could be taken up in a regular proceeding and not under section 154 was in order.

Accordingly, this appeal was not entertained.

11. From the above judgements, it is clear that only a mistake which is glaring and apparent can be rectified u/s 154 of the Act. In the case before us, the AO had set off the loss of the eligible units from the profits of the eligible units to calculate the deduction u/s 80IA of the Act. Whether the loss from the eligible units cannot be set off from the profits of other eligible units is a datable issue and therefore, it cannot be rectified u/s 154 of the Act. Therefore, we allow the ground of appeal of the assessee. Even otherwise, on merits of the issue which is raised in Ground No.2, we find that the issue is covered in favour of the assessee by various decisions which are relied upon by the Id Counsel for the assessee. Sub-section 5 of Section 80IA provides that the deduction should be calculated in respect of an eligible unit on a standalone basis i.e. as if it is the only source of income to the assessee. This is for the reason that an assessee is eligible for deduction u/s 80IA for a period of 10 years and the first of these ten years can be selected by the assessee.

12. In the case of CIT vs. Dewan Kraft Systems () Ltd (2008) 297 ITR 305, the hon'ble Delhi High Court has clearly brought out that loss of eligible unit cannot be set off against the profits of another eligible unit. Relevant paragraphs of the Hon'ble Delhi High Court decision are as under:

"13. Perusal of the above provision shows that it is a distinct and separate deeming provision which lays down the special method of computing the profits and gains entitled to deduction under section 80-IA of the Act. Moreover, this provision is of overriding nature providing specifically that during each of the assessment years in the tax holiday, period in which the assessee is entitled to deduction under section 80-IA of the Act, this provision will be applied as if the industrial unit is an independent unit and is the one and only source of income possessed by the assessee.

14. It is clear that while computing deduction under section 80-IA of the Income-tax Act, 1961, the profits and gains of Kalamb unit for the purpose of determining the quantum of deduction under section 80-IA(5) of the Act is to be computed if such eligible business of the said unit is the only source of income of the assessee. The Assessing Officer mixed the profits of the Kalamb unit with the profits of units at Delhi and NOIDA and, thus, he ITA No 2146 of 2017 NSL Renewable Power P Ltd Hyderabad erroneously restricted the deduction to the extent of business income and this was done by him in total disregard of the provisions of sub-section (7) of section 80-IA of the Act as mentioned above.

15. Thus, the Kalamb unit being the only unit of the assessee eligible for deduction under section 80-IA of the Act is to be treated as an independent unit and the same is to be treated as the only source of income for assessee for the purpose of computing deduction under section 80-IA of the Act. The deduction claimed by the assessee under section 80-IA of the Act, thus, is in accordance with the said provisions and as such we find that there is no infirmity in the impugned order passed by the Income-tax Appellate Tribunal".

13. In the case of Punit Construction Co (Supra), the Coordinate Bench of the Tribunal at Mumbai has considered various judicial precedents including the decision of the hon Apex Court in the case of Plastiblends India Ltd vs. Add. CIT which was relied upon by the learned DR, and has held as under:

"13. In this case, the assessee is into two segment of business i.e. construction business which is non eligible and power generation business which is eligible business u/s 80IA of the Act. Admittedly, the assessee has set up 5 wind mills out of which two wind mills are set up in the financial year relevant A.Ys. 2005- 06 and 2006-07 and remaining 3 wind mills have been set up during the financial year relevant to A.Y. 2011-12. All 5 wind mills are situated at different locations and commenced production at different point of time. All 5 wind mills are eligible units for deduction u/s 80IA of the Act. The assessee has derived profit from 2 wind mills and incurred losses from 3 wind mills. The assessee has claimed deduction u/s 80IA in respect of profit of 2 wind mills without set off of losses of 3 wind mills, considering each wind mill as a separate unit eligible for deduction u/s 80IA of the Act. Considering the facts and circumstances of this case, we are of the considered view that the assessee's claim of deduction u/s 80IA is in accordance with the provisions of section 80IA(5) of the Act and also in consonance with the decisions of ITAT, Ahmedabad special Bench and ITAT, Bangalore decision. Hence, we direct the AO to allow deduction claimed u/s 80IA of the Income Tax Act, 1961.

14. In the case of Jindal Aluminium Ltd (Supra), in similar circumstances it was held as under:

"13. Coming back to the facts of our case we observe that the gross total income of the assessee is at Rs. 8,03,26,598 lakhs after adjusting the losses suffered by it in the eligible as well as profits of the non-eligible units. There are no brought forward losses or unabsorbed depreciation. The claim of deduction under section 80-IA was in respect of eligible unit 4.14 MW wind energy division at Rs. 4,72,28,143 and the deduction u/s.80HHC of the Act was claimed in respect of other units at Rs.15,51,440. Even if both the deductions are added the sum total is obviously less than the gross total income. In our considered opinion the learned Commissioner of Income-tax (Appeals) has ITA No 2146 of 2017 NSL Renewable Power P Ltd Hyderabad erred in interpreting the relevant provision when he held that the losses suffered by the assessee in two eligible units be reduced from the income of the other eligible unit before granting the deduction under section 80-IA. Since the facts of the case in the case of Synco Industries Ltd. (supra) lie in an altogether different compartment, we hold that the ratio of that case cannot be considered for application to the assessee' s case. Accordingly, the

impugned order is overturned and the assessee is allowed deduction under section 80-IA on the profit derived by it from eligible unit 4.14 MW wind energy unit at Rs.4,72,28,143.

14. We find that the CIT(A) in the present case has disregarded the binding decision of the ITAT. The basis on which the CIT(A) refused to follow the order of the ITAT in assessee's own case for the assessment year 2006-07 cannot be sustained. In the case of Meera Cotton & Synthetic Mills (P) Ltd. (supra) the Bombay Bench of the ITAT after considering the decision of the Hon'ble Supreme Court in the case of Synco Industries Ltd. (supra) had clearly held that the stage at which set off has to be done is only after aggregation of income under all heads. The CIT(A) did not agree with this reasoning of the ITAT. The facts of the present case are clearly identical to the facts, as it prevailed in the case of Meera Cotton & Synthetic Mills (P) Ltd. (supra) The CIT(A) being an authority lower in the tier of authorities under the Act to that of the ITAT, is bound to follow the decision of the ITAT. In our view, the CIT(A) in the present case has for no valid reason refused to follow the decision of the Hon'ble ITAT".

15. Further, in the case of Meera Cotton & Synthetics Mills (P) Ltd (Supra), the Coordinate Bench of the Tribunal has held as under:

"9. Section 80A(1) provides that in computing total income of the assessee, there shall be allowed from the gross total income the deductions specified in sections 80-C to 80-U. Sub-section (2) further provides that the aggregate amount of deductions under this Chapter shall not in any case exceed the gross total income of the assessee. The gross total income has been defined under section 80B (5) to mean 'the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter.' It therefore follows that the primary step for considering the grant of deductions under Chapter VI-A is to determine the gross total income, which, in turn, is computed by aggregating the income from all the sources in this year after adjusting the losses of the current year under any head. The brought forward loss or unabsorbed depreciation etc., are also reduced. The resultant figure is determined as gross total income. To put it simply gross total income is the income available at the disposal of the assessee immediately before allowing deductions under Chapter VI-A. If the gross total income is say Rs. 100 and the assessee is entitled to deduction under section 80-IB at Rs. 150, then the amount of deduction under section 80-IB will be restricted to Rs. 100 as per the mandate of section 80A which provides that the deductions shall be allowed from the gross total income and the aggregate amount of all the deductions shall not in any case exceed the gross total income of the assessee.

If however the amount of eligible relief under section 80-IB is say Rs. 90, then full amount will be eligible for deduction because the amount of the eligible relief does not exceed the gross total income. Therefore it is mandatory to work out the eligible amount of deduction under various sections of Chapter VI-A individually and then such aggregate amount has to be restricted to the amount of gross total income as computed under section 80B(5), which means the income available after adjusting all the brought forward losses and unabsorbed depreciation etc.

16. In the case of Sriram Properties (P) Ltd (Supra), the Coordinate Bench at Chennai has held as under:

"19. We are reminded of the celebrated judgment rendered by the Hon'ble Supreme Court in the case of CIT v. Canara Workshop (P.) Ltd. [1986] 27 Taxman 262/161 ITR 320 in which the assessee was engaged in the manufacture of automobile spares. The products manufactured by it were covered by the list in the Fifth Schedule to the Income-tax Act. During the relevant period, the assessee commenced another activity, that is the manufacture of alloy steels, which was also an industry covered in the Fifth Schedule. The assessee sustained loss in the alloy steel industry but profit in the other industry. It claimed deduction in respect of the profit without reducing the loss from the alloy steel industry. The ITO held that the assessee will be entitled to deduction under section 80E on the profits from the manufacture of automobile parts only after setting off the loss in alloy steel manufacture. The High court decided the point in assessee's favour. The revenue assailed the judgment of the Hon'ble High Court before the Hon'ble Supreme Court. While affirming the view taken by the Hon'ble High Court, it was held that in computing the profits for the purpose of deduction under section 80E, the loss incurred by the assessee in the manufacture of alloy steels (a priority industry) could not be set off against the profits of the manufacture of automobile ancillaries (another priority industry) and hence the assessee was entitled to deduction at the specified rate on the entire profits of the automobile parts industry included in the total income without deducting there from the loss in the alloy steel manufacture. Facts involved in the instant appeal are mutatis mutandis similar.

20. The Hon'ble Andhra Pradesh High Court in the case of CIT v. Visakha Industries Ltd. [2001] 251 ITR 471/118 Taxman 777 has also taken the similar view by holding that the deductions contemplated under section 80HH and 80-I are to be allowed with reference to the profits of the particular industrial undertaking and not with reference to the total income of the assessee and therefore loss in an other unit cannot be set off against the profits of eligible unit.

21. In the instant case, we observe that gross total income of the assessee is Rs. 2,56,37,975/- after adjusting losses suffered by the assessee in the ITA No 2146 of 2017 NSL Renewable Power P Ltd Hyderabad other two 'projects viz. 'Shreyas' and 'Coimbatore'. There are no brought forward losses or unabsorbed depreciation. The claim of deduction u/s 80IB in respect of the two eligible units viz. 'Spandhana' and 'Samruddhi' of Rs. 2,23,22,237/- is obviously less than the gross total income. In our considered opinion, the Assessing Officer as well as the Id. CIT(A) erred in interpreting the relevant provisions when they held that the losses suffered by the assessee from two projects, viz. 'Shreyas' and 'Coimbatore' be reduced from the profits of the other two units viz. 'Spandhana' and 'Samruddhi' for granting deduction u/s 80IB. Accordingly, the impugned orders of the lower authorities are set aside. The Assessing Officer is directed to allow deduction u/s 80IB on the profits derived by the assessee from two projects viz. 'Spandhana' and 'Samruddhi' of Rs. 2,23,22,237/-. Thus, the grounds of appeal of the assessee are allowed".

17. Respectfully following the above decisions, we hold that the loss of the eligible units cannot be set off against the profits of other eligible units.

18. As regards the third ground of the appeal against the observations of the CIT (A) that it is only the business income of the eligible unit and not the gross total income eligible for deduction u/s 80IA of the Act, we find that the case law relied upon by the assessee and in support of ground No.2 are also applicable to this issue. Respectfully following the same, we delete the findings of the CIT (A)".

9. Thus, the assessee's grounds of appeal Nos. 1 & 2 are allowed, particularly because, such an issue cannot be decided in the proceedings u/s 154 of the I.T. Act as only such mistakes which are apparent from the record can be rectified and the law is clear that deduction u/s 80IA is to be allowed from the gross total income. Therefore, there is no mistake apparent from the record which needed rectification u/s 154 of the Act.

10. In the result, assessee's appeal is partly allowed.

Order pronounced in the Open Court on 29th September, 2020.

Sd/-	Sd/-
(A. MOHAN ALANKAMONY) ACCOUNTANT MEMBER	(P. MADHAVI DEVI) JUDICIAL MEMBER

Hyderabad, dated 29th September, 2020.

Vinodan/sps

Copy to:

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- 3 CIT (A)-4, Hyderabad
- 4 Pr. CIT -4 Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order