

Mohan Breweries and Distilleries Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Chennai

Decided On : Oct-31-2007

Reported in : (2008)114TTJ(Chennai)532

Judge : N Vijayakumaran, C Poojari

Appellant : Mohan Breweries and Distilleries

Respondent : Assistant Commissioner of Income

Judgement :

1. This appeal by the assessee is directed against the order of the CIT(A) dt. 21st March, 2007. The assessee raised the ground that CIT(A) erred in confirming the withdrawal of deduction under Section 80-IA and confirming the setting off the notionally carried forward loss against profits generated by the industrial undertaking during the relevant assessment year.

2. The brief facts of the issue are that the assessee company has started three power projects. Two power projects in the previous year relevant to the asst. yr. 1996-97 and one in the previous year relevant to asst. yr. 1999-2000. As per findings of the CIT(A) which appeared in para 2 of appellate order, the assessee claimed deduction under Section 80-IA for the first time in the current assessment year viz. asst. yr.

2004-05. On going through the P&L a/c, it is seen that the assessee has been setting off loss from these three units against income of the company for the

earlier years. This is the first year of claim of deduction under Section 80-IA. According to the AO while computing the gross total income, the notional brought forward loss has to be taken into account first and after this, if any remaining profit is available then the deduction under Section 80-IA has to be given. Being aggrieved the assessee went in appeal before the CIT(A). The CIT(A) considered submission of assessee and observed that provisions of Section 80-IA are to be applied only in the year in which the deduction is claimed.

But when the claim is made, deduction has to 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 years and to every subsequent assessment year. Therefore, the only interpretation of this can be that the earlier years' losses are to be notionally brought forward and adjusted and arrive at what exactly is the actual profit and if the actual profit arrived in this way is negative, then the assessee is not eligible for any deduction. Thus he rejected the claim of the assessee. Aggrieved the assessee is in appeal before us.

3. The learned Counsel for the assessee submitted that deduction under Section 80-IA should have been allowed in respect of income of the assessee from the industrial undertaking without adjustment or set off of any notionally brought forward losses of earlier years pertaining to this industrial undertaking. He submitted that there is no concept under the IT Act of notionally carrying forward the losses. Further he submitted that the assessee has option to claim deduction under Section 80-IA(1) for any 10 consecutive years out of 15 years beginning from the year in which the undertaking begins to operate/generate power. He submitted that the assessee can claim this deduction for 10 consecutive years out of 15 years from the assessment year immediately succeeding the initial assessment year or subsequent assessment years.

Further he submitted that it is at the option of the assessee to claim deduction from first; second; third; fourth or fifth or any year. It is the option of the assessee. The Department cannot compel the assessee to claim the deduction from first year only. When the assessee exercises such option then deduction should be computed as if such eligible business were only the source of income of the

assessee during the previous year relevant to the initial assessment year and every subsequent assessment year upto and including the assessment year which the determination has to be made. Further he submitted that the case law in the cases of Prasad Productions (P) Ltd. v. Dy. CIT (2006) 102 TTJ (Chennai) 456 : (2006) 98 ITD 212 (Chennai) and Addl. CIT v. Ashok Alco Chem Ltd. (2005) 96 TTJ (Mumbai) 1000 : (2005) 96 ITD 160 (Mumbai) were not applicable to the facts of the case. These order were delivered before the amendment to Section 80-IA. By amendment by the Finance Act, 1999 w.e.f. 1st April, 2000, Section 80-IA(2) was introduced which has given the option to the assessee to opt the initial assessment year to claim deduction under Section 80-IA. (a) Without prejudice assuming but not accepting that the interpretation of the AO is adopted, still the provisions of Section 80-IA(5) cannot be applied in the case of the assessee in respect of the years prior to the year under appeal. Section 80-IA(5) refers only to assessment years; when Sub-section (1) of 80-IA is applicable, i.e. when the deduction in that section is claimed. If the deduction is not at all claimed, then provision of Sub-section (1) is not applicable and consequently provision of Sub-section (5) is also not applicable.

(b) Sub-section (2) of Section 80-IA gives an option to the assessee to claim deduction under Sub-section (1) of Section 80-IA for any 10 consecutive years within 15 years from the year of generation of electricity. Therefore, when the assessee does not opt for deduction under Section 80-IA in the initial years, the provision of Section 80-IA itself will not apply. So, for the period when this was not claimed, provision of Sub-section (1) is not at all applicable.

(c) Sub-section (5) becomes applicable from 'initial assessment year'. But the words 'initial assessment year' have not been defined in Section 80-IA or Section 80-IB in this year. However, a reading of Sub-section (5) would clearly show that the initial assessment year will commence and apply only to the previous year in which Sub-section (1) applies to an undertaking i.e. when the undertaking claims deduction for the first time under Section 80-IA. Therefore, the provisions of Sub-section (5) and treating each undertaking as a separate and sole source of income, undertaking cannot be applied to years prior to the year in which relief under Section 80-IA is claimed for the first time. Therefore for the years in which

relief under Section 80-IA was not claimed, depreciation and loss relating to an eligible unit, which has not been set off against the income of the other business of the assessee, cannot be notionally carried forward under Sub-section (5) of 80-IA--as it is not at all operative or applicable for those years. The decision of the Mumbai Tribunal in the case of Cipla Ltd. also supports this view.

(d) In the case of an enterprise carrying on the business of developing, operating and maintaining any infrastructure facilities, there was an option to claim deduction under Section 80-IA for a period of 10 consecutive assessment years, within a block of 12 assessment years from the year of commencement of the activity. In this context, the initial assessment year has been defined as the assessment year specified by the assessee at his option to be the initial year not falling beyond the 12th assessment year from the previous year in which the enterprise begins to operate the facility. Therefore, wherever the option for claiming the relief is given in the statute, the initial assessment year would mean the year from which the deduction is claimed by the assessee.

(e) In the circumstances and the facts of the present case, the initial assessment year is the current year in appeal and the assessee has claimed the relief for the first time. Therefore, the provisions of Section 80-IA(5) r/w Section 80-IA(1) will not be applicable for the earlier assessment years and there is no question of notionally carrying forward any loss or unabsorbed depreciation from these years. The decision of the Mumbai Tribunal in the case of Cipla Ltd. also supports this view. In that case, the assessee had claimed depreciation in the year when there was commercial production, but relief under Section 80-IA was claimed in the subsequent year of commercial production. Mumbai Tribunal held that the year in which the relief was claimed was the initial assessment year and therefore, there was no question of carrying forward unabsorbed depreciation from any year prior to the initial assessment year.

5. On the other hand, the Departmental Representative relied on the Tribunal decision in the case of Prasad Productions (P) Ltd. v. Dy. CIT (supra) wherein it is held: Because of non obstante clause contained in Section 80-1(6) the provisions will have overriding effect over other provisions of the Act. Section 80-1(6) does

enact a legal fiction providing that the profits and gains of new industrial undertaking shall be computed as if the new industrial undertaking were the only business of the assessee from the date of its establishment and the past years' depreciation and losses are to be set off against the income of assessee from the undertaking. Therefore, the new industrial undertaking is retrospectively quarantined or isolated from the other income-producing activity for determining the profits and gains for the purpose of eligibility under Section 80-1.

He further relied on the Tribunal decision in the case of Addl. CIT v. Ashok Alco Chem Ltd. (supra) wherein it is held: The language of Section 80-IA(7) is clear, according to which, taxable income of eligible business of the industrial undertaking is to be ascertained as if such undertaking were an independent unit owned by the assessee and the assessee had no other source of income. It is only consequential that the unabsorbed losses, unabsorbed depreciation, etc., relating to eligible business are to be taken into account in determining the quantum of deduction under Section 80-IA, even though these may have actually been set off against the profits of the assessee from other sources. In that view of the situation, the AO had rightly denied the deduction under Section 80-IA in respect of these two units, there being a loss in respect of the said units as computed within the meaning of Section 80-IA(7).

Section 80-IA, being beneficial provision, even though liberal interpretation has to be given to such a provision, the interpretation has to be as per the wordings of the section. The wordings of Section 80-IA(7) are clear and there is no ambiguity therein. Therefore, there was no scope for conferring the benefit sought by the assessee by ignoring or misinterpreting words in Section 80-1A(7).

The Departmental Representative also placed reliance on the Tribunal decision in the case of ITO v. Kanchan Oil Industries Ltd. (2005) 92 TTJ (Kol) 739 : (2005) 92 ITD 557 (Kol) wherein it is held as follows: Conversely, the unabsorbed losses, unabsorbed depreciation etc.

relating to the eligible business are to be taken into account in determining the quantum of deduction admissible under Section 80-IA even though these unabsorbed losses, unabsorbed depreciation etc.

relating to the eligible business may actually have been set off against the profits of the assessee from non-eligible business or other sources. Thus, the gross total income referred to in Sections 80A(1) and (2), 80AB and 80B(5), for the purpose of determining the quantum of deduction available under Section 80-IA for the relevant assessment year, would mean the total income computed in accordance with the provisions of the Act, before making any deduction under Chapter VI-A, with reference to the profits and gains of an eligible business only to which Section 80-IA apply as if such eligible business were the only source of income of the assessee during that assessment year. This is what which can be reasonably and harmoniously emerged from and derived out on conjoint reading of Sections 80-IA(5), 80A, 80AB and 80B(5) of the Act.

6. We have heard the rival submissions and perused the material on record. We have gone through the case law relied on by the Departmental Representative. These case law are relating to the assessment years prior to the amendment inserted by Finance Act, 1999. The new amended Section 80-IA came into force from 1st April, 2000. Hence the new amended Section 80-IA is applicable to the facts of the case. Now let us examine the case in view of the new amendment in Section 80-IA. 80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.-- (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in Sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in Sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in Clause (iii) of Sub-section (4) or generates power or commences

transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines: Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in Clause (a) or Clause (b) or Clause (c) of the Explanation to Clause (i) of Sub-section (4), the provisions of this Sub-section shall have effect as if for the words 'fifteen years', the words 'twenty years' had been substituted.

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of Sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that Sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination is to be made.

Section 80-IA as enacted by Finance Act, 1999 w.e.f. 1st April, 2000 as stated earlier gives an option to the assessee w.e.f. 1st April, 2000 to claim relief under this section for any 10 consecutive assessment years out of 15 years beginning from the year ending in which the undertaking or enterprise develops or begins to operate any infrastructure facility etc. It is left to the assessee at its will to claim this relief from the first assessment year, or from the second or from the third or so as it might think fit. Once the assessee has opted the first year of relief then it continues for further 9 consecutive years. To claim this relief the undertaking is to be set up during the period 1st April, 1993 to 31st March, 2006. This is as per Section 80-IA(4)(iv). Section 80-IA(2) clearly states that assessee can opt for year of deduction for any 10 consecutive years out of 15 years taken from the first year in which the undertaking or enterprise develops and begins to operate any infrastructure activity. It can be seen that Section 80-IA(2) does not mandate that first year of 10 consecutive assessment years should be always the first year of set up of enterprise. If the intention of the legislature is that the first year of set up is the initial assessment year to claim deduction under Section 80-IA, then there is

no meaning giving option to the assessee to claim deduction for 10 consecutive assessment years out of 15th years. The meaning of the Section 80-IA(2) is that the assessee can exercise the option in any 10 consecutive years starting from the first year in which the undertaking begins to operate any infrastructure facility. If the assessee opts to exercise the claim for first year, it should continue to claim the deduction for another 9th years. If it opted the second year to claim deduction, it should continue for another 9 years till the 11th year; similarly if it opted to claim relief from the 3rd year, it will end in the 12th year; if it opted to claim from the 4th year then it will end in the 13th year; if it opted to claim from the 5th year it will end in the 14th year and if it opted to claim from the 6th year it will end in the 15th year. Section 80-IA(2) has no provision for the assessee to claim deduction in any assessment year starting from the first assessment year. The provision of Section 80-IA(5) is applicable only when assessee chooses to claim deduction under Section 80-IA and if the assessee has not chosen to claim the deduction under Section 80-IA, Section 80-IA(5) cannot be made applicable. In the present case, there is a categorical finding by the AO and CIT(A) that the first year claimed is from the asst. yr.

2004-05. At the time of hearing the learned Departmental Representative filed a letter which reads as follows: Assessee's claim is that asst. yr. 2004-05 is the 'initial assessment year'. However, from a perusal of records the following facts are observed: Assessee claimed deduction of Rs. 2,15,59,112 under Section 80-IA of the IT Act. The AO rejected the claim under Section 143(3) r/w Section 263. Aggrieved by the order the assessee preferred an appeal before the CIT(A) agitating inter alia the claim for a deduction under Section 80-IA. The CIT(A) vide his order in ITA No. 39/2005-06/dt. 4th Aug., 2005 in para No. 12 directed the AO to allow the claim under Section 80-IA which was accordingly allowed.

In this assessment year also the assessee in the computation memo claimed deduction under Section 80-IA of an amount of Rs. 1,20,19,495 which was allowed in full by the AO in the regular assessment order under Section 143(3) dt. 28th March, 2003.

This being the position, the statement of the assessee that the claim under Section 80-IA claimed for the first time in the asst.

yr. 2004-05 is totally contrary to the facts as mentioned. This proves that asst. yr. 2004-05 is not the initial assessment year as claimed by the assessee.

The fact of the matter is that assessee exercised its option of claiming deduction under Section 80-IA in the asst. yr. 1999-2000 itself Therefore, asst. yr. 1999-2000 is initial assessment year.

But this letter is contrary to the findings of the lower authorities.

The lower authorities categorically observed that the first year in which deduction was claimed was 2004-05. We have already narrated in the facts of the case that if the facts stated by the AO or CIT(A) are wrong the Departmental Representative is required to adduce the evidence as per Rules 10 and 29 of ITAT Rules, 1963 which read as follows: Rule 10. Filing of affidavits.--Where a fact which cannot be borne out by, or is contrary to, the record is alleged, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

Rule 29. Production of additional evidence before the Tribunal--The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the IT authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

These facts are contrary to the facts recorded by the CIT(A) and AO. It cannot be considered. The above statement made by the AO is not in accordance with Rules 10 and 29. Hence we are decline to consider the same.

7. Adverting to the facts of the case the initial assessment year in this case starts from 2004-05. Since the assessee has opted to claim this deduction only in this

assessment year, the initial assessment year cannot be the year in which the undertaking commenced its operations and in this case the initial assessment year is the assessment year in which assessee has chosen to claim deduction under Section 80-IA. Hence the provisions of Section 80-IA(5) treating undertaking as a separate sole source of income cannot be applied to a year prior to the year in which assessee opted to claim relief under Section 80-IA for the first time. Depreciation and carry forward loss relief to the unit which claims deduction under Section 80-IA, cannot be notionally carried forward and set off against the income from the year in which the assessee started claiming deduction under Section 80-IA. At the cost of repetition, we make it clear that the case law relied on by the Departmental Representative are delivered before the amendment to section by Finance Act, 1999. Before the amendment the initial assessment year was defined in the Act but after the amendment there is no definition for initial assessment year in the Act and there is option to the assessee in selecting the year of claiming relief under Section 80-IA. In view of this, we are of the opinion that there is no question of setting off notionally carried forward unabsorbed depreciation or loss against the profits of the units and assessee is entitled to claim deduction under Section 80-IA on current assessment year on the current year profit. Accordingly we allow the claim of the assessee.

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