आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

श्री आर. के. पांडा, लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.2282/PN/2014
निर्धारण वर्ष / Assessment Year : 2010-11

ACIT, Circle-9, Pune	.... अपीलार्थी / Appellant
बनाम v/s	
Jayshree Polymers Pvt. Ltd., 21/4, D-1 Block, MIDC, Chinchwad, Pune – 411019 PAN No.AACJ4677K	.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Assessee by : Shri Nilesh Khandelwal
प्रत्यर्थी की ओर से / Revenue by : Shri Hitendra Ninawe

सुनवाई की तारीख / Date of Hearing :03.02.2016		घोषणा की तारीख / Date of Pronouncement: 10.02.2016

आदेश / ORDER

PER R.K. PANDA, AM :

This appeal filed by the Revenue is directed against the order dated 24-09-2014 of the CIT(A)-V, Pune relating to Assessment Year 2010-11.

2. Grounds raised by the Revenue are as under :

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was correct to interpret the operation of Section 80IA(5) only from the year of first claim of deduction u/s 80IA(1) even when the eligible business had commenced in earlier years?

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) and Hon'ble ITAT, Pune, on which the Ld.CIT(A) placed reliance was correct to treat the judgement of non-jurisdictional High Court as a binding precedent that must be followed in disregard to the principle laid down on this issue by the Division Bench of the Bombay

High Court in the case of CIT Vs. Thane Electricity Supply Ltd. reported in 206 ITR 727 ?

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in allowing deduction u/s.80IA(4) by considering the initial assessment year for the purpose of claiming deduction u/s.80IA(4) of the Act, is the first year in which the assessee claimed deduction u/s.80IA(iv)(4) for ignoring the operation of Sec. 80IA(5) of the I.T. Act, 1961 ?

4. The appellant craves leave to add, amend or alter any of the above grounds of appeal.

3. Facts of the case, in brief, are that the assessee is engaged in the business of manufacturing of rubber items as well as energy generation business. It filed its return of income on 06-10-2010 declaring total income of Rs.6,10,14,820/-.

4. During the course of assessment proceedings the A.O. observed that the assessee company owned four Windmills on which the assessee company has claimed deduction u/s. 80IA of the Income-tax Act for an amount of Rs. 38,88,733/-. The assessee company had opted to claim the deduction u/s 80IA for the first time in A.Y. 2009-10 which was the "initial year". The details of the profits from different windmills as computed by the assessee in this year for computing the deduction u/s 80IA are as under:

Name of Windmill	Relevant A.Y. from which Power Generation started	Amount of Profit during the year (Rs.)
Windmill 1	2001-02	12,60,699/-
Windmill 2	1999-2000	10,96,404/ -
Windmill 3	2000-01	15,31,630/ -
Windmill 4	2006-07	---

5. However, the AO observed that the above computation was incorrect as it was made without application of section 80IA(5).

According to the AO, as per provisions of section 80IA(5) the assessee has to compute profit of each undertaking separately as if it were the only business of the assessee. He noted that from its year of commencement, all the units had huge brought forward losses as on 01-04-2009. If profit and loss of each windmill is to be considered on stand-alone basis, no unit will have positive income entitled to deduction u/s. 80IA of the Income-tax Act, 1961, The position of profit and brought forward losses in respect of all the units in this method is as under:

Particulars	Windmill 1	Windmill 2	Windmill 3	Windmill 4
Date of installation	09/07/2001	30/12/2000	29/03/2002	19/06/2006
Brought Forward losses (Rs.)	1,31,42,486	1,17,49,745	1,15,37,123	3,42,22,434
Profit during the year (Rs.)	12,60,699	10,96,404	15,31,630	---
Set off of loss allowed	12,60,699	10,96,404	15,31,630	---
Losses of earlier years to be carried forward	1,18,81,787	1,06,53,341	1,00,05,493	3,22,66,511

6. The major portion of resultant loss of windmills of Rs. 7,06,51,788/- as on 01-04-2009 computed above adjusted with other income of the earlier years by the assessee, were notionally brought forward by A.O. u/s. 80IA(5). After adjustment of profits of windmills in this year, the AO noted that the assessee had total loss of Rs.(-) 6,48,07,132/ - in this year. He further noted that no unit has shown profitability if considered on stand-alone basis. Hence, the claim of deduction u/ s 80IA of the Income-tax Act, 1961 was not found to be admissible by the A.O.

7. The AO further noted that the assessee claimed deduction u/s 80IA(1) for the first time in A.Y. 2009-10 as per Form No. 10CCB

filed. It has also been claimed in this year on the same basis. According to the AO, section 80IA(5) creates a fiction, as per which while computing the deduction from initial year onwards, it has to be computed as if the eligible business is the only business of the assessee. As per AO the losses of the eligible business of even prior to the first year of claim of deduction has to be notionally brought forward, if not already set off, against the income of eligible business while computing the deduction. The A.O. further observed that after adjusting brought forward losses of Wind Mill Unit of earlier years, there was no profit left and therefore in this year the assessee is not entitled for deduction u/s 80IA(4) of the I.T. Act. Thus, as per see. 80IA(5) of the I.T. Act, for the purpose of computing the income of the eligible unit, it has to be treated as if such unit was the only source of income of the assessee. Rejecting the various decisions cited before him, the AO disallowed the deduction of Rs. 38,88,733/- claimed by the assessee company u/s 80IA of the Income-tax Act, 1961. The claim of the assessee that sec. 80IA(5) will operate from the 1st year of claim and not from the year of commencement of eligible business even when business commences prior to the year of 1st claim was also not accepted by the A.O.

8. Before CIT(A) it was submitted that it has the option to claim the deduction u/s 80IA of the LT. Act, for any 10 consecutive assessment years falling within the period of 15 years beginning from the year in which the activity of power generation has been commenced. It was submitted that in its case the eligible unit was set up in the previous year relevant to A.Y. 2001-02 (Windmill-1), 1999-2000 (Windmill-2), 2001-02 (Windmill-3) and 2006-07 (Windmill-4) and the assessee company had opted to claim the deduction u/s

80IA for the first time in A.Y. 2009-10 which was the "initial year" in its case. On these lines the assessee has chosen A.Y. 2009-10 to be its initial assessment year for claiming deduction. Hence, depreciation loss of the years earlier to A.Y. 2009-10, which have already been set off against the income, cannot be notionally carried forward to compute deduction u/s.80IA. The assessee further contended that the loss from eligible business in the years prior to initial year of claim absorbed against the profits of other business need not be notionally brought forward and has no effect on the deduction claimed. As per assessee, the fiction u/s.80IA(5) is applicable only from the initial year of claim of deduction and not prior to it. The assessee stated that as the windmills were installed from A.Y. 1999-2000 onwards, hence its case is covered by the amended provisions of See. 80IA(2), implying that assessee company had the option of choosing the 'initial assessment year'. The assessee company opted A.Y. 2009-10 as the initial assessment year, implying that any loss incurred in the windmill division prior to A.Y. 2009-10 need not be notionally carried forward and adjusted against current year's income. Relying on various decisions it was submitted that the claim made by the assessee should be allowed.

9. Based on the arguments advanced by the assessee, the Ld.CIT(A), following the decision of the Pune Bench of the Tribunal in the case of Serum International Ltd. vide ITA Nos. 290 to 292/PN/2010 order dated 28-09-2011 for A.Y. 2004-05 and the decision of Hon'ble Madras High Court in the case of Vellayudhaswamy Spinning Mills Pvt. Ltd. Vs. ACIT reported in 38 DTR 57 (Madras) allowed the claim of the assessee.

10. Aggrieved with such order of the CIT(A) the revenue is in appeal before us.

11. The Ld. Departmental Representative strongly opposed the order of the CIT(A). Referring to the statement of facts filed by the Revenue, the Ld. Departmental Representative drew the attention of the Bench to the following part of the statement of facts filed by the revenue as to why the order of the CIT(A) is not acceptable :

> "(i) The Ld.CIT(A) has ignored the decision of Special Bench of ITAT, Ahmedabad in the case of Goldmine Shares and Finance Pvt. Ltd. (Supra) wherein it is held that the profit from the eligible business, for the purpose of determination of quantum of deduction u/ s.801A, has to be computed after deduction of the notional brought forward loss and depreciation of eligible business even though it has been allowed set off against other income in the earlier years.
>
> (ii) The Department has not accepted the Hon'ble ITAT, Pune's decision given in the case of M/s. Serum International Ltd. for A.Y. 2008-09 on similar issue and appeal has been filed before the Hon'ble High Court, Bombay.
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> (iii) The Department has not accepted the decision given in the case of M/s Advik Hi-Tech Pvt. Ltd for A.Y. 2008-09 on similar issue and appeal has been filed before the Hon'ble ITAT.
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> (iv) The decision in the case of Poonawala Estate Stud Farm and Agro P. Ltd has not been accepted by the Department and further appeal has been filed before the Hon'ble High Court.
>
> (v) The Ld.CIT(A) and the ITAT both have erred in treating the judgement of Hon'ble Madras High Court given in the case of Velayudhaswamy Spinning Mills Pvt. Ltd. Vs. ACIT (2010) 38 DTR 57 as a binding precedent, to ignore the judgement of Ahmedabad Special Bench given in the case of DCIT Vs. Goldmine Shares and Finance Pvt. Ltd. 116 TTJ 705 and own judgement of IT AT, Pune given in favour of revenue in the case of Khinvasara Investment (P) Ltd. reported in 110 ITD 198 and many such judgements relied by the AO in the assessment orders, in total regard to the principle of binding precedent laid by the jurisdictional Bombay High Court in a Division Bench Judgement given in the case of CIT V s. Thane Electricity Supply Ltd (1994) 206 ITR 727. As per this judgement, the decision of non-jurisdictional High Court is not a binding precedent and such decision can only be taken as one of the view on such issue.
>
> The 'initial year' has to be considered as the year in which power generation commences and not the year in which it chooses to make claim for deduction for the first time. Reliance is also placed on the decision of Hon'ble Delhi High Court in the case of CIT vs. Nestor Pharmaceuticals Ltd. 322 ITR 631. Initial year is not defined in the Act. It

> may represent year of commencement of production or first claim but cannot change the interpretation of Section 80IA(5), which has been explained by the Hon'ble ITAT, Special bench, Ahmedabad, in Gold Mine judgement quoted supra and the Supreme Court Judgement of Liberty India Vs. CIT 317 ITR 218. Similar view was also found expressed by Bombay High Court in the case of Cipla Ltd reported in 2 SOT 617. Further the assessee company had started windmill electric production during the A.Y.1999- 2000, however not claimed deduction u/ s. 80IA(4) and the loss of windmill was adjusted with other income. After the adjustment of brought forward losses of windmill unit of earlier years, there was no profit left and thus, the assessee is not entitled for deduction u/s.80IA(4) of the Income-tax Act, 1961."

He accordingly submitted that the order of Ld.CIT(A) be reversed and that of the AO be restored.

12. The Ld. Counsel for the assessee on the other hand referring to the series of decisions filed in the paper book submitted that the issue stands decided in favour of the assessee after considering all the points raised by the Ld. Departmental Representative.

13. We have considered the rival submissions made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We find the issue of initial assessment year as per provisions of section 80IA(5) has been decided in favour of the assessee by the decision of the Hon'ble Madras High Court in the case of Vellayudhaswamy Spinning Mills Pvt. Ltd., (Supra). Following the above decision the Pune Bench of the Tribunal in the case of Serum International Ltd. Vs. ACIT vide ITA Nos. 290 to 292/PN/2010 order dated 20-09-2011 for A.Yrs. 2004-05 to 2006-07 has decided the issue in favour of the assessee and dismissed the appeal filed by the revenue by observing as under:

> "13. Having been considered the above submissions, we find that the issue raised in Ground No. 1 as to what would be the initial A.Y for the purposes of Section 80IA(5) of the Act has been decided in favour of the assessee by the Pune Bench of the Tribunal in the case of Poonawalla Stud and Agro Farm Pvt. Ltd. Vs. ACIT (Supra). In that case after discussing the issue in detail, the Tribunal has come to the conclusion that the initial 'A.Y' for the purpose of claiming deduction u/s. 80IA was

the first year in which the assessee claimed the deduction u/s. 80IA (1) after exercising his option as per the provisions of 80IA (2) of the Act. It was held that the Ld CIT(A) has erred in holding that the initial A.Y for the purposes of Section 80IA(2) r.w.s. 80IA (5) was the year in which the assessee started generating electricity from the wind mill activity. We also find that the issue raised in Ground No. 2 regarding the eligibility of the assessee to claim deduction u/s. 80IA undiminished by unabsorbed losses and depreciation also set off in earlier years against the other income, is fully covered by the decision of Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd Vs. ACIT (Supra) holding that as per Sub-section (5) of Section 80IA, profits are to be computed as if such eligible business is the only source of income of the assessee. When the assessee exercises the option, only the losses of the years beginning from the initial A.Y. are to be brought forward and not the losses of the earlier years which have been already set off against the income of the assessee. The Hon'ble Madras High Court has been further pleased to hold that revenue cannot notionally bring forward any loss of earlier years which had already been set off against the other income of assessee and set off against the correct income of the eligible business. Fiction created by Sub-section (5) of Section 80IA does not contemplate such notional set off, held the Hon'ble High Court. The Hon'ble Madras High Court in that decision has also referred the decision of Hon'ble Supreme Court in the case of Liberty India Vs. CIT (Supra) and the decision of Special Bench of the Tribunal in the case of Goldman Shares & Finance (P) Ltd. (Supra). There is no dispute that even a decision of non-jurisdictional High Court is a binding precedent for the Tribunal until a contrary decision is given by any other competent High Court. In this regard, we find strength from the recent decision of Hon'ble jurisdictional Bombay High Court in the case of Commissioner of Central Excise Vs. Valson Dyeing, Bleaching and Printing Works (Supra) wherein the Hon'ble Bombay High Court has been pleased to hold in a case of excise matter that Tribunal is bound by the decision of High Court , even of a different State, so long as there is no contrary decision of any other High Court. The Hon'ble Bombay High Court has been pleased to hold further that the Tribunal had no option but to follow the judgment of the Madras High Court. An authority like an Income Tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question. We thus respectfully following the ratio laid down by the Hon'ble jurisdictional High Court in the case of Commissioner of Central Excise Vs. Vakson Dyeing, Bleaching and Printing Works (Supra) hold that the Tribunal is bound by the decision of the Hon'ble Madras High Court on an identical issue in the case of Velayudhaswamy Spinning Mills (P) Ltd Vs. ACIT (Supra). We thus respectfully following the decision taken by the Hon'ble Madras High Court in that case on an identical issue under almost similar facts, hold that when the assessee exercising the option, only the losses of the year beginning from the initial A.Y. are to be brought forward and not the losses of earlier year which have been already set off against the other income of the assessee. The revenue cannot notionally bring forward any loss of earlier years which has already been set off against any other income of the assessee and set off the same against the current income of the eligible business. We thus set aside the orders of the authorities below and direct the A.O to allow the claimed deduction u/s. 80IA without bringing the notionally brought forward any loss or depreciation of earlier years which has already been set off against other income of the assessee. The decision of Pune Bench of the Tribunal in the case of Prima Paper Engineering P.Ltd. Vs. ITO (Supra) cited by the Ld. DR is also not helpful to the revenue since firstly the decision of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P) Ltd. Vs. ACIT (Supra) on the issue was not cited before the Bench and secondly the ld. AR fairly agreed that the issue raised was covered against the assessee by the decision of Special Bench in the case of ACIT Vs. Goldmine Shares & Finance (P) Ltd. (Supra) followed by the authorities below. The ld. AR therein thus contended that though the issue may be decided against the assessee in view of the Special Bench of the Tribunal in the case of ACIT Vs. Goldmine Shares & Financial (P) Ltd., but it should not be construed as acquiescence from the side of the assessee as the legal position on the subject is yet not settled. The Ground No. 2 is thus decided in favour of the assese."

14. Since the order of Ld.CIT(A) is in consonance with the decision of the Coordination Bench of the Tribunal, therefore, in absence of any material before us to take a contrary view than the view taken by the Tribunal, we find no infirmity in the order of the CIT(A) allowing the claim of the assessee. Accordingly, the same is upheld and the grounds raised by the revenue are dismissed.

15. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 10-02-2016.

Sd/-	Sd/-
(**VIKAS AWASTHY**)	(**R.K. PANDA**)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 10th February, 2016.

सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-V, Pune
4. The CIT-V Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**बी**" पुणे / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune