IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'C', MUMBAI

BEFORE SHRI B.R. MITTAL, JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO, ACCOUNTAT MEMBER

I.T.A. NO. 4226/M/2011
ASSESSMENT YEAR: 2005-2006

M/s. Prashant Caterers, C/o. Samrat Restaurant, Prem Court, J. Tata Road, Churchgate, Mumbai – 400 020. **PAN:AAJFP7855K**	Vs.	Income Tax Officer – 12(3)(3), Aayakar Bhavan, Churchgate, Mumbai – 400 020.
(Appellant)		(Respondent)

Appellant by	:	Shri Dr. K. Shivaram & Mr. Ajay R Singh
Respondent by	:	Shri Rajarshi Dwivedy, Sr.DR

Date of Hearing:9.1.2013 Date of order: 6.2.2013

O R D E R

Per D. KARUNAKARA RAO, AM:

This appeal filed by the assessee on 24.5.2011 is against the order of CIT (A)-23, Mumbai dated 4.2.2011 for the assessment year 2005-2006.

2. Before us, Dr. K. Shivaram, Ld Counsel for the assessee brought our attention to the **revised grounds** filed before the Tribunal and the same read as under:

"***Reopening of assessment bad in law***

1. *The Ld CIT (A) erred in upholding Assessing Officer reopening the assessment which was completed u/s 143(3) of the Act, dated 20.12.2007 by issue of **notice u/s 148** dated 30.3.2009 merely on **change of opinion** as learned AO had no reason to believe that any income chargeable to tax has escaped assessment, further the learned Assessing Officer failed to appreciate that assessment cannot be reopened on debatable point.*

On merits:

2. *The CIT (A) erred in upholding the order passed by the Assessing Officer in disallowing the deduction of Rs. 19,07,508/- claimed u/s 80-IA(4) of the Act by adjusting the notional unabsorbed losses of earlier years against income of the business eligible for deduction u/s 80-IA(4) of the Act which is contrary to the provison of law as*

assessee has option to claim deduction for any ten consecutive assessment years out of 15 years beginning from the year in which the undertaking begins to generate power.

3. *Alternately, the learned AO has erred in including capital subsidy of Rs. 13,87,500/- on account of setting up wind mill for generation of power in taxable income when deduction u/s 80-IA of the Act has been disallowed then capital subsidy received on wind mill cannot be included in taxable income as capital subsidy is a capital receipt not taxable."*

3. In this regard, Ld Counsel mentioned that the revised ground no.1 relates to the validity of reopening and pray for adjudication of the same in case the assessee is unlikely to succeed on ground no.2 of the Appeal. Similarly, ground no.3 becomes relevant only case, the issue raised in ground no.2 is not decided in his side. Referring to ground no.2 on merits, Ld Counsel mentioned that the issue is now covered in favour of the assessee by a series of decisions described which is as under:

"***Brief Proposition:***

1. *Assessee company is eligible for deduction u/s 80-IA in respect of Windmill installed by it and the unabsorbed depreciation of the earlier years could not be reduced from profits for computing deduction u/s 80-IA.*
   - *(a) Velayudhaswamy Spinning Mills Pvt. Ltd. vs. ACIT [2012] 340 ITR 477 (Mad) (High Court) (After considering Special Bench decision).*
   - *(b) CIT vs. Emrald Jewel Industry P. Ltd. [2011] 53 DTR 263 (Mad) (High Court) (After considering the above decision)*
   - *(c) ACIT vs. Eveready Spinning Mills Ltd. [2012] 14 ITR 491 (Chennai) (Tri)*
2. *Binding Effect: Non jurisdictional High Court decision after considering the Special Bench decision is binding on Tribunal:*
   Anil H. Lad vs. DCIT [2012] 13 ITR 581 (Bang.)(Trib.)
   (Considered the above decisions)."

3.1. Referring to the above citations and the ratios of the same, Ld Counsel mentioned that the Assessee is eligible for deduction u/s 80-IA of the Act in respect of the profits out of the generation of electricity out of Windmill activity and the unabsorbed depreciation of the earlier years, since already set off with the ineligible profits of the assessee, could not be reduced from profits of eligible business for computing deduction u/s 80-IA of the Act.

4. Further, Ld Counsel mentioned that the decisions of Hon'ble Madras High Court were decided after considering the Special Bench decision, which is heavily relied upon by the Ld CIT (A) while dismissing the appeal of the assessee on the issue relating to claim u/s 80-IA(4) of the Act. Further, Dr. K. Shivaram, Ld Counsel mentioned that this is the case where brought forward losses already adjusted against the other ineligible income of the assessee in the earlier year. Attempt of AO to adjust the same against the eligible income of the assessee notionally in the current years, will amount to denial of deduction as per the provisions of the Act. When there is enquiry about this fact of adjustment of losses of ineligible income of the assessee in the earlier years such as the profit from hotel business etc, Ld Counsel mentioned that for this limited purpose the matter can be set aside to the files of CIT (A) for verification and deciding the issue afresh strictly in the light of the Hon'ble Madras High Court judgment in the above cited cases.

5. From the above, it is a settled proposition that assessee-company is eligible for deduction u/s 80-IA in respect of the income from Windmill installed by it and the unabsorbed depreciation set off in earlier years cannot be reduced from the profits for computing the deduction u/s 80-IA of the Act. This is the conclusion in the decision of Hon'ble Madras High Court in the case of CIT vs. Emerald Jewel Industry P. Ltd (supra). Similar views are expressed by the same High Court in the case reported in 231 CTR 368 and another decision reported in 116 TTJ 705. It was argued by the assessee counsel, in principle, the ground no.2 has to be decided in favour of the assessee subject to the finding that the claim of the assessee that the losses were already adjusted against the ineligible profits of the assessee in earlier years. On the other hand, Ld DR does not have any objection in this regard.

6. Considering the above concurrence of both the parties that the issue of setting aside to the files of the CIT (A) for adjudicating the issue afresh in accordance with the judgments of Hon'ble Madras High Court as well as the other

decisions decided by the Coordinate Bench of this Tribunal, we are of the opinion that we remit the matter back to the files of CIT (A) for adjudicating the issue afresh. Accordingly, ground no.2 raised by the assessee is allowed for statistical purposes.

7. Regarding the legal issue raised in ground 1 and the ground 3 raised without prejudice, considering the binding judgments, we are of the opinion that the adjudication of these grounds only serve the academic interests. Therefore, grounds 1 and 3 are dismissed as academic.

8. In the result, appeal of the assessee is **allowed** partly for statistical purposes.

Order pronounced in the open court on this 6th day of February, 2013.

Sd/-	**Sd/-**
(B.R. MITTAL)	**(D. KARUNAKARA RAO)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Date : 6.2.2013
At :Mumbai
Okk

Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR "C", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai