आयकरअपीलीयअधिकरण,राजकोटन्यायपीठ,राजकोट।

IN THE INCOME TAX APPELLATE TRIBUNAL RAJKOT BENCH, RAJKOT (THROUGH E-COURT)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

आयकरअपीलसं./I.T.A. No.68/Rjt/2009
(**निर्धारणवर्ष /** Assessment Year 2005-06)

Alpha Hi-Tech Fuel Limited, Station Road, Lakhtar, Dist. Surendranagar, Gujarat-382775	बनाम/ Vs.	D.C.I.T, Surendranagar
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AAACA4258P		
(अपीलार्थी/**Appellant**)		(प्रत्यर्थी / **Respondent**)

अपीलार्थीओरसे/ **Appellant by :**	Shri Kalpesh Doshi, A.R
प्रत्यर्थीकीओरसे/**Respondent by:**	Shri B.D Gupta, Sr. D.R.

सुनवाईकीतारीख/ **Date of Hearing**	08/06/2023
घोषणाकीतारीख /**Date of Pronouncement**	05/09/2023

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of Assessee against the order of the Learned Commissioner of Income Tax (Appeals), [Ld. CIT(A) in short], dated 08/12/2008 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") relevant to the Assessment Year (A.Y.) 2005-06.

2. The assessee has raised the following grounds of appeal:

1. The learned CIT(A), has erred in rejecting appellant's claim for deduction u/s.80IA(4); AND

2. Without prejudice to ground no.1, the learned CIT(A) has erred in upholding the AO's action of disallowance u/s.40(a)(ia) of advertisement expenses of Rs.5 lacs without appreciating the fact that the appellant has not even claimed deduction for the same.

The appellant craves leave to amend, modify, add or substitute the above grounds of appeal.

3. The 1st issue raised by the assessee in ground number 1 is that the learned CIT-A erred in denying the claim of deduction made by it under the provisions of section 80 IA(4) of the Act.

4. The necessary facts are that the assessee in the present case is a public limited company and claimed to be engaged in the activity of maintenance of infrastructure facility being solid waste management. As per the assessee, the profit from the impugned activity was eligible for deduction under section 80IA(4) of the Act effective from assessment year 2004-05 being maintenance of infrastructure facilities. The assessee company was established dated 20 January 1993 which has taken over the running business of partnership firm namely M/s Nemi Briquettes Industries from April 1993. The assessee right from the inception has been either claiming, in most of the assessment years, hundred percent depreciation or the benefit under section 80I or 80JJA of the Act in different assessment years subject to the availability of profit.

4.1 As per the assessee, it acquired plants and machinery in the earlier years but the same were under the process of upgradation. But finally, these plants and machinery were put to use effective from 1 January 2004 and thus the initial year is the financial year 2003-04, corresponding to the assessment year 2004-05. Accordingly, the assessee contended that it has started new infrastructure facilities by upgrading its business with new plants and machinery. Thus, the

assessee should be eligible for deduction under section 80 IA(4) of the Act. Accordingly, the assessee claimed deduction of Rs. 44,68,606.00 under the provisions of section 80-IA of the Act

5. However, the AO found that the assessee has been carried out its business activities from the assessment year 1994-95 as evident from the depreciation claimed by the assessee in different year as well as the deductions claimed under section 80I and 80JJA the of the Act in the earlier assessment years. Thus, the period of 10 years for claiming the benefit of deduction under section 80-IA(4) of the Act has already expired from the initial assessment year.

5.1 The AO also observed that the assessee is engaged in the business of manufacturing of energy-saving devices being briquettes which cannot be considered as infrastructure facilities.

5.2 It was also admitted by the AO that the benefit of deduction under section 80-IA(4) of the Act with respect to modernization and upgradation of plant and machinery was inserted in the statute effective from 1 April 2004 but it was limited to the industrial undertaking engaged in the business of generation and distribution of power whereas the assessee is engaged in the manufacturing activity of energy-saving devices being briquettes.

6. In view of the above, the AO denied the benefit to the assessee for the deduction claimed by it under section 80-IA(4) of the Act for Rs. 44,68,606.00 and added to the total income of the assessee.

7. Aggrieved assessee preferred an appeal to the learned CIT-A who has confirmed the order of the AO.

8. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

9. The learned AR before us filed a paper book running from pages 1 to 36 and the learned AR also filed written submissions dated 4-2-2023/ 27-2-2023 along with synopsis of arguments at the time of hearing. Among other contentions, the learned AR submitted that the assessee has claimed deduction under section 80-IA of the Act for first-time in the assessment year 2004-05 which was allowed in the assessment framed under section 143(3) r.w.s. 147 of the Act. Thus, as per the learned AR the validity of the deduction under section 80-IA(4) of the Act in the subsequent year cannot be disputed. In support of his contention, the learned AR has vehemently relied on the several judicial pronouncements which are part of record.

10. On the other hand, the learned AR has filed written submissions dated 27-02-2023, running from pages 1 to 12 wherein it was inter alia contended as under:

> *6. Row, before the Hon'ble ITAT the assessee has raised a totally new claim of i.e. setting up of a new industrial undertaking in the FY:2003-04 i.e. AY 2004-05. Though no claim for deduction U/s 80IA(4) was made in the relevant AY;2004-05, but from the subsequent AY i.e 2005-06. During the course of hearing on 21.02.2023 the Ld. AR of the f assessee claimed before the Hon'ble Tribunal that deduction U/s 801A(4) was allowed by, the department for AY:2004-05 is totally false and misplaced. The Ld AR had thus submitted that since its claim for deduction u/s 80IA was accepted and allowed for AY 2004-05, the claim for this year should also be allowed . Pursuant to the above claim the relevant record^ for AY 2004-05 were examined. A copy of the return of income along with the computation; is enclosed for your kind perusal (Annexures- B & c). On perusal of the return of income in Form No. 1 filed on 20.10.2004 it is seen that the assessee has not claimed any deduction under Chapter VIA and neither it had filed the required audit report in form No 10CCB [Para 3.1 of AO for 2004-05][Annex D] . This is also verifiable from the computation of income* ***(Annexures- C).*** *Therefore, the assessee's assertion that the claim of deduction u/s 80IA for AY 2004-05 was claimed and allowed by the Department is totally misplaced.*

11. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the orders passed by the authorities below have been challenged by the learned AR on various counts which was also rebutted by the learned DR appearing on behalf

of the revenue. Both the learned AR and the DR have filed before us, the written submissions on various dates which are available on record. The gist of the revenue for denying the benefit of tax holiday under section 80-IA of the Act is that no new industrial undertaking as per the provision of section 80IA(3) & (4) of the Act came into existence. As per the revenue the new plant in machinery having latest technology brought in by the assessee is only an expansion of existing business. On the other hand, one of the contentions of the learned AR of the assessee is that all these pre-conditions can only be verified in the initial year of claim of tax holiday. As such the pre-condition to avail the benefit of tax holidays cannot be examined and disturb in subsequent year of claim. Before we proceed to adjudicate the issue raised by the assessee, we find it pertinent to find out whether the assessment year in dispute in which the assessee has claimed deduction under section 80IA of the Act in the year under consideration is the 2nd assessment year.

11.1 It is the settled position of law that the conditions attached for claiming the deduction under section 80-IA of the Act has to be verified by the revenue in the 1st year itself i.e. in the initial assessment year. In other words, the revenue is debarred from denying the benefit of the deduction to the assessee claimed by it under section 80-IA of the Act after the initial assessment year on account of examination of preconditions. In holding so, we draw support and guidance from the judgement of Gujarat High Court in of Saurashtra Cement & Chemical Industries Ltd. Vs. CIT reported in 123 ITR 669 wherein it was held as under:

> ***7.*** *This takes us to the questions referred to us in the Income-tax Reference No. 239 of 1975 at the instance of the Revenue. We do not find any justifying reasons to interfere with the order of the Tribunal so far as both these questions are concerned. The Tribunal was perfectly justified in taking the view that if the relief of tax holiday was granted to the assessee-company for the assessment year 1968-69, the asseessee was, therefore, entitled to continuance of that relief for the subsequent four years and the ITO would not be justified in refusing to continue the allowance for the assessment year under reference, i.e., 1969-70 without disturbing the relief for the initial year. At this stage, it should be noted that for purposes of entitlement to the relief under section 80J which is corresponding to section 15(c) of the 1922 Act, an industrial unit claiming such relief must be new, in the sense, that new plants and machineries are erected for producing either the same commodities or some distinct commodities— Textile Machinery Corporation*

Ltd. v. CIT [1977] 107 ITR 195 and CIT v. Indian Aluminium Co. Ltd [1977] 108 ITR 367. It should be emphasised that it was common ground between the parties that the assessee-company has increased the capacity of its cement manufacturing plant from 600 tonnes per day to 1,600 tonnes per day by setting up new machinery and plant necessary for that purpose. In our opinion, the Tribunal was right when it expressed its view that the question involved was not a question whether there would be no bar to the view which the ITO has taken on principle of res judicata. The neat question to which the Tribunal addressed itself, and in our opinion rightly, was whether the ITO was justified in refusing to continue the relief of tax holiday granted to the assessee-company for the assessment year 1968-69 in the assessment year under reference, i.e., 1969-70 without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of section 80J similar to one which we find in case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under section 80J can be withheld or discontinued provided the relief granted in the initial year of the assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted.

11.2 We also find support and guidance from the order of coordinate bench of this tribunal in case of Janak Dehydration (P.) Ltd vs. ACIT reported in 44 SOT 93 wherein it was held as under:

***5.** We have heard the rival contentions and gone through facts and circumstances of the case. We have also perused the orders of the lower authorities and the material available on record. In the instant case it is observed that the Assessing Officer while framing the assessment had restricted the deduction under section 80-IB of the Act to the assessee after deducting from the eligible amount the deduction claimed and allowed to the assessee under section 80HHC of the Act. Aggrieved against this action, assessee preferred appeal before CIT(A) and CIT(A) enhanced the assessment of the assessee by withdrawing the deduction under section 80-IB of the Act allowed to the assessee by the Assessing Officer on the ground that the manufacture and sale of dehydrated onion flakers and potato chips is not manufacture or production of article or thing to be eligible to incentive deduction under section 80-IB of the Act. The assessee by filing chart narrating fact that all through assessment years 1993-94 to 2002-03 assessee had been allowed deduction under section 80-IB of the Act and therefore in the present year being assessment year 2003-04, the claim of the assessee is that it is eligible for deduction under section 80-IB of the Act and that the conditions to be eligible for deduction under section 80-IB have to be considered and decided in the first year of deduction and not in the subsequent years. We find that under the IT Act, each year is separate unit of assessment and taxable income as well as tax liability are to be determined keeping in view the facts prevailing in that year and the law as applicable. Further, res judicata is not applicable in an income-tax assessment is also an established position of law but the principle of consistency is to be followed. In section 80-IB of the Act, there are several conditions like the industrial units should not be formed by reconstruction or splitting up of an existing unit. These conditions are to be examined in the initial year of the claim and when found satisfied in the assessment of the initial year the Assessing Officer in the assessment of subsequent year cannot ignore that and take a different view.*

11.3 We also draw support and guidance from the judgment of Hon'ble Supreme court in case of DCIT vs. ACE Multi Axes System Ltd reported in 88 taxmann.com 69 where it was observed, the issue regarding allowances of deduction under section 80IB of Act to small scale industrial undertaking, that certain precondition to allow tax holiday under impugned section can be only examined in the initial assessment year only. The relevant observation of Hon'ble Supreme Court is extracted as under:

> ***12.*** *The scheme of the statute does not in any manner indicate that the incentive provided has to continue for 10 consecutive years irrespective of continuation of eligibility conditions. Applicability of incentive is directly related to the eligibility and not de hors the same. If an industrial undertaking does not remain small scale undertaking or if it does not earn profits, it cannot claim the incentive.* ***No doubt, certain qualifications are required only in the initial assessment year, e.g. requirements of initial constitution of the undertaking.*** *Clause 2 limits eligibility only to those undertakings as are not formed by splitting up of existing business, transfer to a new business of machinery or plant previously used. Certain other qualifications have to continue to exist for claiming the incentive such as employment of particular number of workers as per sub-clause 4(i) of Clause 2 in an assessment year. For industrial undertakings other than small scale industrial undertakings, not manufacturing or producing an article or things specified in 8th Schedule is a requirement of continuing nature.*

11.4 In the light of the above discussion, we proceed to verify whether the assessee has claimed deduction first-time under section 80IA of the Act in the assessment year 2004-05. In this regard, we note that the assessee has filed its return of income for the assessment year 2004-05 dated 20-10-2004 which was processed under section 143(1)(a) of the Act. Thereafter, the case of the assessee was selected under income escaping assessment under section 147 of the Act for calculating the tax liability under the provisions of section 115JB of the Act. However, the assessee during the assessment proceedings has also made submissions regarding the admissibility of his claim under the provisions of section 80IA of the Act. The relevant fact from the assessment order is extracted below:

> *The assessee has no submitted any reply on the point of assessment of income to be taxed u/s.115JB of the Act, it has submitted the reply on the points of admissibility of deduction u/s.80IA/80IB and u/s.80JJA of the Act. It means the assessee has accepted the tax ability of income proposed u/s.115JB of the Act. Therefore, income of the assesse assessable in the books profit of Rs.31,52,571/- is worked out from the accounts submitted along with the return of income.*

11.5 Besides the above we have perused the paper book filed by the learned AR and find that the assessee has furnished form 10 CCB, a report of the chartered accountant for claiming the deduction under section 80IA of the Act for the assessment year 2004-05 and the year the assessment year in dispute i.e. 2005-06 which are placed on pages 22 to 29 of the paper book.

11.6 We have also perused the statement of income filed by the assessee pertaining to the assessment year 2004-05 and note that the assessee has clearly made references to the sections 80IA/ 80JJA of the Act which can be verified from page 13 of the WS filed by the Revenue. At this juncture, it is also not out of the place to mention that there was no profit shown by the assessee under the normal computation of income to claim the benefit of deduction under section 80IA of the Act. In simple words, there was no occasion for the assessee to claim the deduction under section 80 IA of the Act being nil profit i.e. Profit of the assessment year 2004-05 was set off against the unabsorbed depreciation which is evident from the computation of income filed by the assessee which is available on page 13 of the WS filed by the Revenue. Thus, a question may arise if there was no positive income then what was the reason for the assessee to claim the deduction under section 80 IA of the Act. However, it is the choice of the assessee to select the initial assessment year and therefore the same cannot be questioned. Furthermore, there is a possibility that the AO during the assessment proceedings might disallow the expenses which may turn the loss of the assessee into positive income, then in that eventuality the assessee can claim the benefit of deduction under section 80 IA of the Act.

11.7 In the light of the above discussions and the documents available on record, we are inclined to hold that the deduction under section 80 IA of the Act was first-time claimed by the assessee in the immediately preceding assessment year. Therefore, the deduction under section 80IA claimed by the assessee in the subsequent year cannot be questioned until and unless the deduction claimed by

the assessee in the initial assessment year is disturbed. Thus, we are inclined to set aside the order of the learned CIT-A and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is hereby allowed.

12. The 2nd issue raised by the assessee is that the learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance of ₹5 lakhs on account of non-deduction of TDS under the provisions of section 40(a)(ia) of the Act.

13. The AO during the assessment proceedings based on the audit report found that the assessee has given an advance of ₹5 lakhs to the party namely Garima Communication towards the advertisement expenses without deducting the TDS. Therefore, the AO disallowed the same and added to the total income of the assessee.

14. On appeal the learned CIT (A) also confirmed the order of the AO.

15. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

16. The learned AR before us contended that the assessee has never claimed the sum of ₹5 lakhs as an expense and therefore the question of making the disallowance does not arise on account of non-deduction of TDS.

17. On the other hand, the learned DR vehemently supported the order of the authorities below.

18. We have heard the rival contentions of both the parties and perused the materials available on record. At the threshold, we note that the assessee has not claimed the deduction of ₹5 lakhs shown as an advance to the party namely

Garima Communication. Thus, in such a situation we are of the view that there is no question of making the disallowance of ₹5 lakhs by adding to the total income of the assessee. Accordingly, we set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee are allowed.

19. In the result the appeal filed by the assessee is allowed.

This Order pronounced in Open Court on	**05/09/2023**

Sd/-		**Sd/-**
(T. R. SENTHIL KUMAR)		**(WASEEM AHMED)**
JUDICIAL MEMBER		**ACCOUNTANT MEMBER**

TRUE COPY

Ahmedabad, Dated 05/09/2023

Manish