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*IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 31st July, 2014

+ **ITA Nos. 991/2010, 1078/2010, 1077/2010 1079/2010 & 535/2011**

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Kamal Sawhney, Sr. Standing Counsel.

versus

M/S ORIENT ABRASSIVE LTD ..... Respondent
Through Mr. Mayank Nagi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

These appeals by the Revenue pertaining to assessments years 2002-03, 2004-05, 2005-06 2006-07 and 2007-08 raise an identical question and, therefore, are being disposed of by this common decision. By order dated 23rd November, 2011, the following substantial questions of law were framed for adjudication:-

> "(1) Whether the electricity unit is an undertaking for the purpose of Section 80-IA of the Income Tax Act, 1961?
>
> (2) Whether "profit and gain" from captive consumption of electricity supplied from the generator set and which cannot be sold to any third person will qualify for deduction under Section 80-IA of the Income Tax Act, 1961?"

2. For the sake of convenience, learned counsel for the parties state that ITA No. 991/2010 relating to assessment year 2004-05, may be treated as the lead case.

3. The respondent-assessee, a company, was engaged in the business of manufacturing of fused Aluminium Oxide Grains, Calcined products, Monolithics, Refractories, Bonded Abrasives, Ceramic Paper and trading of Monolithic and Refractories.

4. The respondent-assessee had an Abrasives Grains Division at Porbandar, Gujarat that manufactured fused Aluminium Oxide grains etc. The respondent-assessee had setup a power plant at Porbandar, Gujarat for captive supply to the Aluminium Oxide gains unit. Profit earned from the power plant unit, it was claimed, was eligible for deduction under Section 80 IA of the Income Tax Act, 1961 (Act, for short), as an undertaking engaged in generation of electricity. The respondent-assessee had, along with return of income, filed Form No.10CCB as mandated by Rule 18BBB of the Income Tax Rules, 1962 computing deduction under Section 80 IA. In the course of the assessment proceedings, respondent-assessee had filed a technical note explaining the features of the power plant established by them to generate electricity.

4. The Assessing Officer denied benefit of Section 80 IA in respect

of power plant unit for the following reasons:-

(i) The power plant unit was supplying captive power to the respondent assessee i.e., the Abrasives Grains Division at Porbandar, Gujarat. Third person or parties were not supplied power generated by the unit. The respondent-assessee could not have earned profit as one cannot undertake or do business with oneself.

(ii) The profits declared as earned from the power plant unit were exorbitant and attempt had been made to enhance/increase the profits to claim higher exemption under Section 80-IA.

6. The aforesaid two substantial questions of law relate to the first aspect i.e. whether the respondent-assessee could have claimed benefit under Section 80 IA in respect of the power plant unit at Porbandar, Gujarat, though the power generated was supplied for captive consumption and not sold to third parties. The secondary issue, which arises for consideration, is whether one could do business with oneself and notional profits earned would qualify for deduction under Section 80 IA of the Act.

7. Section 80 IA (1), (5), (8) and (10) of the Act read as under:-

> "**80-IA.** (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.

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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 up to and including the assessment year for which the determination is to be made.

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(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date:

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional

> difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit .
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> *Explanation.*—For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.
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> x x x x x xx
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> (10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."

8. Sub-section (1) states that benefit of Section 80 IA would be available when the gross total income of an assessee includes profits and gains derived by an undertaking or any enterprise from eligible business specified in sub-section (4). It is not disputed that generation of electricity was eligible business. The amount eligible for deduction under Section 80-IA, were profits and gains derived by an undertaking or any enterprise from the specified activity. Further, the profits so derived should form part of the total income of the assessee. Thus sub-section (1) draws a distinction between profits and gains of an eligible

undertaking, which was engaged in the business of generation or distribution and gross total income of the assessee in whose income such profits were included. This distinction between an assessee and eligible profits of an undertaking of an assessee, becomes clear when we examine sub-section (5). Said sub-section stipulated that the assessee shall prepare separate profit and loss accounts for the eligible undertaking. The accounts of the eligible undertaking as a separate entity had to be audited and prescribed report in Form No.10CCB was mandated to be furnished, for ascertaining the qualifying profits. Form No.10CCB prescribed by Rule 18BBB at serial No. 4 stipulates and required an assessee to give ownership status of the undertaking/enterprise in the following manner:-

> "4. Ownership status of the undertaking/enterprise:
> (a) Fully owned by assessee Yes No
> (b) Partly owned by assessee Yes No
> If yes, please specify the percentage of ownership"

Wording of the aforesaid serial number supports the position that there was a distinction between the profits declared by the eligible undertaking and the total income declared by the assessee, the proprietor/owner of the eligible undertaking.

9. The position becomes clear and obvious when we examine sub-sections (8) and (10). Sub-section (8) stipulates (i) where goods and services held for the purpose of eligible business were transferred to

any other business carried on by the assessee, or (ii) where any goods or services held for the purpose of any other business carried on by the assessee were transferred to the eligible business; the consideration, if any, for such transfer as recorded in the accounts of the eligible business should correspond to the market value of such goods or services as on the date of the transfer. Where the consideration so recorded, does not correspond to the market value, the profits and gains of such eligible shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date. Thus in such cases, value/consideration disclosed would not be accepted. The aforesaid sub-section accepts and endorses that the eligible undertaking could have transacted or had business transactions with other business or units of the same assessee in form of input/purchases or in the form of output/sales. In either case, the Assessing Officer was entitled to compute the profits of the eligible undertaking on the basis of the market value/price, and ignore and not accept the value mentioned/recorded in the account books. There was no need to prescribe and incorporate sub-section (8) in case the assessee could not have transacted and sold goods or services manufactured/produced by the eligible undertaking to another unit or business of the same assessee. The proviso stipulated that the Assessing Officer in order to compute such profits and gains shall

adopt reasonable basis as he may deem fit. Explanation states that the market value in relation to goods or services meant the price that such goods or services would ordinarily fetch in the open market.

10. Sub-section (10) postulates that where it appeared to the Assessing Officer that because of the close connection between the assessee carrying on the eligible business and any other person, or for any other reason the course of business between them was so arranged, that the business transactions between them produced to the assessee more than the ordinary profits expected to arise from such eligible business, the Assessing Officer shall compute the profits and gains of eligible business by taking into account profits reasonably deemed to have been derived therefrom. Though, sub-section (10) would not be directly applicable in the present case which relates to captive consumption, the provision postulates re-working of the profits in cases where more than expected profits stand declared by the eligible undertaking because of proximity and close connection between the eligible undertaking and the persons to whom goods and services were supplied.

11. A similar issue was raised before the Delhi High Court in ***CIT Vs. Orissa Cement Ltd.*** [2002] 254 ITR 412 (Delhi), where deduction under Section 80-I was claimed on profits derived from captive consumption of limestone excavated from mines and thereafter used

for manufacture of cement in the plant of the assessee. Revenue's submission that one cannot earn profit by indulging in the business with oneself, was rejected to negate the claim. Division Bench relying on ***Tata Iron and Steel Co. Ltd. & Ors. Vs. State of Bihar*** [1963] 48 ITR 123 (SC) and several decisions, rejected the similar submission of the revenue after quoting the following paragraph from the judgment in Tata Iron and Steel Co. Ltd. (*supra*):-

> "That even in cases where the profit resulting from an ultimate activity is brought to tax there could be an apportionment if there were an exemption in respect of the profits resulting from distinct activities at earlier stages is illustrated by the provisions of the Indian Income Tax Act itself. Thus, in the case of, say, a sugar mill, which grows its own cane, in the absence of any exemption for the income derived from agriculture, i.e., from the production of the cane, the entire profit of the mills from the sale of the sugar would have to be included in the taxable profits under Section 10 of the Income Tax Act. But Section 4(3)(vii) exempts agricultural income as defined in Section 2(1). The result, Therefore, is that there is a. disintegration or dichotomy of the 'incomes, profits or gains' of the business and of agricultural income, so that there has to be an apportionment between the two in order to determine the taxable income of an assessed. It is on account of this situation that Section 59(2) of the Income Tax Act provides for rules being made for prescribing the manner in which and the procedure by which incomes derived in part from agriculture and in part from business shall be arrived at."

It was observed that there could be erosion or deviation from the

principle that one cannot make profit by trading or doing business with oneself. It would be appropriate to also reproduce the following observations of the Supreme Court in Tata Iron and Steel Co. Ltd. (*supra*):-

> "It could not be disputed that factually the profit from the mining operation and the winning of the mineral is imbedded in the profit realised from the sale of the end product. A simple illustration would demonstrate this. Let us assume that the cost of winning the ore is Rs. 50/- a ton and the market price of similar ore which would have to be used in the absence of the ore mined is Rs. 60/- per ton. There could not be any doubt that this difference of Rs. 10/- per ton of ore would be reflected in the profit and loss resulting from the sale of the steel. It is needles to add that if in a given case the mined product costs more than the market price of the commodity, there would be loss on the mining operation notwithstanding that there is a profit realised from the sale of the end product - steel, but these are matters of calculation not relevant at the present stage, for we are endeavouring to ascertain whether there could in law be a profit when the mined ore is converted into steel in the mills of the mining-company. It thus factually the profit from the mine or from the mining operation is imbedded in the profit from the sale of the steel is there any principle of law which prevents effect being given to this factual position? The learned Attorney-General submitted that in such a situation the "profit" is not a real or an actual profit but is one which is merely notional, and that when the Act spoke of a "profit" it meant an actual, real and realised profit and not a merely notional "profit". We find ourselves unable to accept this submission. We start with the premise that by the sale of the end product a real "profit" has been realised. When analysed it is found that that profit is the aggregate or resultant of the profits from different lines of

activity. If arithmetically that total represents the resultant aggregation of different items of activity we fail to see how it could be said that the profit from each item which results in that total is a notional and not an actual or real profit. In the interests of clarity, we should add that the principle would be the same when the sale of the end product yields no profit, but results in a loss, only in such a case, the relevant component, viz, the disintegrated profit or loss resulting from the mining operation would diminish the loss if that were a profit, or add to the loss if that were also a loss. No doubt, there was a further contention urged that you cannot dissect that final profit in order to ascertain its components, but it is quite a different one from that now under consideration and we shall deal with it in its proper place. But what we are now concerned to point out is that if it is capable of dismemberment or disintegration into its components, it would not be correct use of language to designate the profit so apportioned and ascertained as attributable to each line of activity any the less real than the aggregate profit realised from all the ventures. In the way in which we have approached the problem there could be no question involved of any departure from the principle that a man cannot trade with himself. In fact, the principle of dichotomy is brought in by the learned Attorney-General by first disintegrating the business of the appellant into two - first as a mine-owner winning the ore and later by a Steel Manufacturing Co., consuming the won ore and then posing the question as to whether the transfer of the ore from the mining section to the manufacturing one could in law involve a sale of the product so as to yield a "profit". It would be apparent that if one proceeded on the basis of treating the businesses as a single and integrated one, as the learned Attorney-General desired us to do, as one unbroken chain from the start of the mining operation to the sale of the finished steel or steel products by the company - no question of a person trading with himself would arise, but the

> very different one as to whether there could be a disintegration of the profits of an integrated business, between the component constituents which go to make it up. Undoubtedly, in order to ascertain the profits from the mine there would have to be a disintegration of the gross profits which finally emerge from the sale of the finished steel or steel products. What we desire to point out is that this involves no disintegration of the business affording scope for the contention based upon the principle that a person cannot trade with himself, but the one far removed from it, viz., whether when a profit has been made as a conjoint result of different but integrated operations, the profits so derived could be broken up so as to permit the attribution of specific amounts of profit to each or any of the several operations or activities."

12. Thereafter, the Supreme Court in Tata Iron and Steel Co. Ltd. *(supra)* noticed and went into the question whether there was anything in law which prohibits/bars ascertainment of profit and loss attributable to each line of activity, where the sale of the final end product has resulted in profit or loss for the entire venture. Contra argument raised on behalf of the Revenue was rejected for the reasons given in the paragraph which has been quoted in the decision of the Delhi High Court in Orissa Cement Ltd. (*supra*). We have already noted the statutory provisions of Section 80 IA of the Act and observed that the statutory provisions in fact were to the contrary and stipulate computation of an eligible undertaking's profit or loss, even when the sales/transactions were made to a related party or to the same assessee, but in such cases, the profits have to be computed in the manner

stipulated in sub-sections (10) and (8) to Section 80-IA.

13. Madras High Court in ***Tamilnadu Petro Products Ltd. Vs. Assistant Commissioner of Income Tax***, [2011] 338 ITR 643, had an occasion to deal with Section 80 IA in a case where the assessee had a electricity generation unit, which was supplying electricity to the same assessee and not to third parties, observing that profits from captive consumption would be eligible, Division Bench in paragraph 4 referred to an earlier decision of the same Court dated 7th June, 2010 in Tax Case (Appeal) Nos.68 to 70 of 2010, ***CIT Vs. Jhiagarjar Mills Ltd.*** and quoted the relevant portion and observed:-

> "4. After considering the issue, the statutory requirement as prescribed under section 80-IA(1) has been stated in paras 8 and 9 of the abovesaid judgment which reads thus
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> "8. The contention that only whatever power generated from the sale to an outsider or the Electricity Board, and the profit or gain derived by such sale alone can be taken as profits or gains derived by the assessee as mentioned in section 80-IA(1) of the Income-tax Act, has been rejected by the Tribunal in the order impugned. In our considered view, the Tribunal was well justified in having rejected such a stand of the appellant. Having referred to section 80-IA(1) of the Income-tax Act, we are also convinced that what is all to be satisfied in order to be eligible for the deduction as provided under sub-section (1) of section 80-IA, the assessee should have set up an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub-section covered by sub-section (4) of section 80-IA of the

Income-tax Act, such profit or gain derived by the assessee can be deducted in its entirety for a

period of 10 years starting from the date of functioning of the set up. The contention that profit or gain can be claimed by the assessee only if such profit or gain is derived by the sale of its product or power generated to an outsider cannot be the manner in which the provisions contained in section 80-IA(1) can be interpreted. The expression 'derived' used in the said section 80-IA(1) in the beginning as well as in the last part of sub-section (4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of the outcome of any such undertaking or business enterprise as referred to in sub-section (4) of section 80-IA. The dictionary meaning of the expression 'derive' in the *New Oxford Dictionary of English* states 'obtaining something from a specified source'. In section 80-IA(1) also no restriction has been imposed as regards the deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for the benefits provided in the said section.

9. Therefore, there is no difficulty in holding that captive consumption of the power generated by the assessee from its own power plant would enable the respondent/assessee to derive profits and gains by working out the cost of such consumption of power inasmuch as the assessee is able to save to that extent which would certainly be covered by section 80-IA(1). When such will be the outcome out of own consumption of the power generated and gained by the assessee by setting up its own power plant, we do not find any lack of merit in the claim of the respondent/assessee when it claimed by relying upon section 80-IA(1) of the Income-tax Act by way of deduction of the value of such units of power consumed by its own plant by way of profits and gains for the relevant assessment

years."

14. At this stage, it would be appropriate to also notice judgment of the Delhi High Court in ***CIT Vs. DCM Sriram Consolidated Ltd.***, [2010] 322 ITR 486 (Delhi), wherein explanation clause (iv) to Section 115JA of the Act had come up for interpretation. The clause provided for exclusion of profits derived by an industrial undertaking from the business of generation or generation and distribution of power. Revenue had raised the contention one cannot earn profit by indulging in the business with oneself and thus captive consumption would not be covered by explanation clause (iv) to Section 115JA. Rejecting the contention and relying upon decision in the case of Tata Iron and Steel Co. Ltd. (*supra*), it was observed:-

> "Based on the ratio of the Supreme Court in Tata Iron and Steel Ltd it is clear that in arriving at an amount that is to be deducted from book profits ' which is really to the benefit of the assessee as it reduces the amount of tax which it is liable to pay under the provisions of Section 115JA of the Act, the principle of apportionment of profits resting on disintegration of ultimate profits realized by the assessee by sale of the final product by the assessee has to be applied. In applying that principle it is not necessary as was observed by the Supreme Court to depart from the principle no one could trade with himself ' even though it pointedly noticed that House of Lords in Sharkey v. Wernher has opined that there was neither a general proposition that no man could

> trade with himself and make in its true sense or meaning taxable profits by dealing with himself nor was it universally true, and that, there are situations in which a man could be said to make a profit out of the consumption of his own goods. Since the earlier decision of House of Lords had found favour with the Supreme Court in Kikabhai Premchand (supra), the Supreme Court in Tata Iron and Steel Ltd (supra) decided the case by applying the principle of disintegration of ultimate profits realized on sale of final product."

15. In view of the aforesaid discussion, it has to be held that the finding of the Tribunal that the profits derived by the respondent-assessee's power generation unit would be eligible for deduction as a separate undertaking under Section 80 IA, but has referred to the decision in ***West Coast Paper Mills Ltd. vs. Asstt. Commissioner of Income Tax*** [2006] 286 ITR (AT) 252 (Mum.) is correct. The substantial questions of law mentioned above are accordingly answered in favour of the respondent-assessee and against the appellant Revenue.

16. At this stage, learned counsel for the appellant Revenue has submitted that the Tribunal has passed an order of remand on the question of computation of profit and gain from business in terms of sub-section (8) to Section 80IA. Learned counsel for the respondent-assessee submits that the Assessing Officer is competent to decide the said question as per law and the hands and power of the Assessing

Officer have not been curtailed and the present order does not give any specific or clear finding/direction. We take the statement made by the learned counsel the respondent-assessee on the said aspect on record. Both parties will be entitled to raise their contentions on the computation of eligible profit/loss from the eligible business.

17. The appeals are disposed of. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

JULY 31, 2014
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