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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 05.10.2023*

\+ **ITA 223/2023 & CM No. 18744/2023**

PR. COMMISSIONER OF INCOME TAX-7, DELHI ..... Appellant

Through: Mr Puneet Rai, Sr Standing Counsel.

versus

SIL INVESTMENTS LTD. (FORMERLY KNOWN AS SUTLEJ INDUSTRIES LTD.) ..... Respondent

Through: Mr Rohit Jain and Mr Saksham Singhal, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No. 18744/2023 ***[Application filed on behalf of the appellant seeking condonation of delay of 310 days in re-filing the appeal]***

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of three hundred and ten (310) days.

2. Mr Rohit Jain, counsel who appears on behalf of the respondent/assessee, says that he does not oppose the prayer made in the application.

3. Accordingly, the delay in re-filing the appeal is condoned.

4 The application is, accordingly, disposed of.

ITA 223/2023

5. This appeal concerns Assessment Year (AY) 2003-04.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order

dated 16.07.2021 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. According to the appellant/revenue, two issues emanate for consideration by this court.

7.1 First, whether the deletion of disallowance by the Tribunal under Section 80IA/80IB of the Income-tax Act, 1961 [in short, "Act"], amounting to Rs. 4,32,65,725/-, was in order.

7.2 Second, whether the deletion of disallowance of the claim made by the respondent/assessee under Section 80M of the Act, amounting to Rs. 3,97,34,475/-, was sustainable in law.

8. The broad facts that are required to be noticed to adjudicate the present appeal are as follows:

8.1 The respondent/assessee filed its Return of Income (ROI) for AY 2003-04 on 27.11.2003, whereby, it declared income amounting to Rs. 1,14,29,476/-. However, the respondent/assessee paid tax as per Section 115JB on the book profit amounting to Rs. 10,63,49,082/-. The ROI was processed under section 143(1) of the Act.

8.2 The respondent"s/assessee"s case was, thereafter, picked up for scrutiny, and an assessment order under Section 143(3) of the Act was framed on 29.03.2006. The order pegged the income of the respondent/assessee at Rs. 1,14,29,476 [the same income disclosed by the respondent/assessee in its ROI]. However, book profit, this time, was increased to Rs. 13,53,28,238/-.

8.3 The record shows that on 10.03.2010, the respondent/assessee was issued a notice under Section 148 of the Act. The respondent/assessee filed a response to the same *via*

communication dated 12.04.2010. *Inter alia*, in the said response, the respondent/assessee took the stand that the ROI filed originally should be treated as return filed in compliance with the notice issued under Section 148 of the Act.

8.4 The record also discloses that the AO proceeded to pass an assessment order under Section 147/143(3) of the Act. This assessment order was passed on 01.11.2010 and, accordingly, the respondent‟s/assessee‟s income was assessed at Rs. 5,11,63,951/-.

8.5 *Via* the assessment order passed on 01.11.2010, as noticed hereinabove, the AO computed the total income of the respondent/assessee at Rs. 5,11,63,951/-, as against the income amounting to Rs. 1,14,29,476/- declared in the ROI.

8.6 The assessed income factored in included two disallowances: i) disallowance of deduction claimed by the respondent/assessee under Section 80IA/80IB, amounting to Rs. 4,32,65,725/- on the ground that profits of two (2) eligible units were not adjusted against unabsorbed losses of the other (3) eligible units and brought forward losses of earlier years; and ii) disallowance under section 80M amounting to Rs. 3,97,34,475/-. The said disallowance was ordered as dividend received by the respondent/assessee had not been distributed to its shareholders.

8.7 The aforesaid disallowances resulted in a new demand amounting to Rs. 1,97,15,642/-.

9. The respondent/assessee, being aggrieved by the order passed by the AO, carried the matter, in appeal to the Commissioner of Income Tax

(Appeals) [in short, "CIT(A)"]. The CIT(A), *via* order dated 08.04.2011, deleted both the disallowances made by the AO.

10. The CIT(A), while deleting the disallowance made by the AO under Section 80IA/80IB, noted that during the relevant period, profits were derived from only two (2) units, and that computation was made as per Section 80IA(5) for these two (2) units. As regards the issue that profits of concerned said two (2) eligible units would be required to be adjusted against losses of the other three (3) eligible units, the CIT(A) concluded that section 80IA(5) does not permit such a computation.

11. Insofar as the disallowance of the claim made by the respondent/assessee under Section 80M of the Act was concerned, the CIT(A) noticed that the total amount received by the respondent/assessee in the form of dividend was Rs. 5,09,19,998/-, out of which Rs. 3,97,34,475/- was distributed to its shareholders. Therefore, the disallowance was uncalled for.

    11.1 A finding of fact was also returned by the CIT(A) that, although this aspect was brought to the notice of the AO, it was not discussed by her while dealing with the claim made by the respondent/assessee. Resultantly, the CIT(A) deleted the disallowance of the claim made by the respondent/assessee, both under Sections 80IA/80IB and 80M of the Act.

12. Both these findings of fact and law were confirmed by the Tribunal in the appeal preferred by the appellant/revenue.

13. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of the appellant/revenue, in support of the appeal filed by the appellant/revenue, seeks to rely on the assessment order dated 01.11.2010.

14. Mr Rai submits that the respondent/assessee was required to adjust losses suffered by the other three (3) eligible units and, therefore, the deletion of the claim made under Section 80IA/80IB of the Act by the AO was the correct view in law. In support of his plea, Mr Rai seeks to rely on the judgment rendered by the Karnataka High Court in ***Microlabs Ltd. v. Assistant Commissioner of Income Tax, Bangalore*** (2015) 56 taxmann.com 160 (Karnataka).

15. As regards the other aspect i.e., the disallowance of the claim made by the respondent/assessee under Section 80M, Mr Rai has asserted that since dividend was not distributed by the respondent/assessee, it could not claim the benefit of section 80M.

16. Mr Rohit Jain, counsel who appears on behalf of the respondent/assessee, in rebuttal, relies on the order passed by the CIT(A) and the Tribunal. He states that, firstly, the CIT(A) and the Tribunal have returned concurrent findings of fact that the assessee had computed the quantum of deduction after setting off the notional and actual losses of the „eligible" units as per the provisions of section 80IA(5) of the Act. Secondly, Mr Jain contends that in the AY in issue, the assessee distributed dividend amounting to Rs. 3,97,34,475/- to its shareholders.

17. Having heard learned counsel for the parties, we are of the view that the decision of CIT(A), sustained by the Tribunal, does not require any interference. The reason that we have come to this conclusion is as follows. 17.1 Firstly, the view taken by the CIT(A) that, while calculating deductions under Section 80IA/80IB, only profits of the eligible businesses had to be considered is the correct view. For convenience, Sections 80IA(1) [as substituted by the Finance Act,

2001, with effect from 01.04.2002], and 80IA(5) [as substituted by Finance Act, 1999, with effect from 01.04.2000], are extracted below:

"*[(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**. xxx xxx xxx*
*(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**."

[Emphasis is ours]

18. Section 80IA(5) provides that to quantify the deduction under Section 80IA(1) of an assessee for an AY [post the initial AY in which such deduction is claimed], the profits and gains of the „eligible" business should be computed as if it is the only source of income of the assessee. It does not mandate that losses that have been adjusted against the profits of „other" non-eligible businesses have to be, once again, adjusted against the profits of the „eligible" business, or that absorbed losses against the „eligible" businesses of the time before the second AY in which deduction is claimed must be notionally carried forward and adjusted.

18.1 This aspect stands clarified by a decision of this court rendered in ***Pr. Commissioner of Income Tax-7 v. Sterling Agro Industries Ltd.*** 2023:DHC:2330-DB. The relevant observations made in that behalf is set forth hereafter:

"*11. We may note that before the Tribunal, two issues were raised. Firstly, which AY would qualify as "the initial AY". Secondly, as to whether unabsorbed losses/depreciation could be notionally carried forward for the purposes of determining profit for the eligible business under Section 80IA of the Act.*

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11.4 Likewise, insofar as the second issue was concerned, the Tribunal ruled in favour of the respondent/assessee.

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13. We have examined in detail the facts of this case as noted above, and also the ratio of the three judgments cited before us.

13.1 As noted right in the beginning, there are two judgments of the Madras High Court, which are relevant for the purposes of determining the issue at hand, i.e., the Velayudhaswamy Spinning Mills (P.) Ltd. case and the Prabhu Spinning Mills (P.) Ltd. case.

13.2 We may note that insofar as the issue proposed by the revenue is concerned, the Division Bench of the Madras High Court in the Prabhu Spinning Mills (P.) Ltd. case has followed its own decision in the Velayudhaswamy Spinning Mills (P.) Ltd. case. The Division Bench has noted that they have followed the said decision in a number of cases. The large part of the discussion in the Prabhu Spinning Mills (P.) Ltd. case veered around what would be the initial AY of the eligible business. The court, after noting the CBDT"s circular no.1/2016 dated 15.02.2016, concluded that the assessee had an option of choosing its initial AY and, in this regard, adverted to a plain language of sub-section (2) of Section 80IA of the Act. Although this issue is not proposed before us, the reasoning of the Division Bench of the Madras High Court in the Prabhu Spinning Mills (P.) Ltd. case is unimpeachable.

13.3 Insofar as the proposed issue is concerned, the following observations made by the Division Bench of the Madras High Court in the Velayudhaswamy Spinning Mills (P.) Ltd. case, being relevant, are extracted hereafter:

> *"16. From a reading of sub-section (1), it is clear that it provides that 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 subsection (4), i.e., referred to as the eligible business, there shall, in accordance with and subject to the provisions of the section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100 per cent, of the profits and gains derived from such business for ten consecutive assessment years. Deduction is given to eligible business and the same is defined in sub-section (4). Sub-section (2) provides option to the assessee to choose 10 consecutive assessment years out of 15 years. Option has to be exercised, if it is not exercised, the assessee will not be getting the benefit. Fifteen years is outer limit and the same is beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure activity, etc. Sub-section (5) deals with quantum of deduction for an eligible business. The words "initial assessment year" are used in subsection (5)*

and the same is not defined under the provisions. It is to be noted that "initial assessment year" employed in sub-section (5) is different from the words "beginning from the year" referred to in sub-section (2). The important factors are to be noted in sub-section (5) and they are as under:

> *"(1) It starts with a non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored;*
>
> *(2) It is for the purpose of determining the quantum of deduction;*
>
> *(3) For the assessment year immediately succeeding the initial assessment year;*
>
> *(4) It is a deeming provision;*
>
> *(5) Fiction created that the eligible business is the only source of income; and*
>
> *(6) During the previous year relevant to the initial assessment year and every subsequent assessment year.*

17. From a reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to the initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. A fiction created in sub-section does not contemplates to bring set off amount notionally. The fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created.

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19. From a reading of the above, the Rajasthan High Court held that it is not at all required that losses or other deductions which have already been set off against the income of the previous year should be reopened again for computation of current income under section 80-I for the purpose of computing admissible deductions thereunder. We also agree with the same. We see no reason to take a different view.

20. The standing counsel appearing for the Revenue is unable to bring to our notice any relevant material or any compelling reason or any contra judgment of other courts to take a different view. He only relied heavily on the Memorandum explaining the provisions in the Finance (No. 2) Bill, 1980, [1980] 123 ITR (St.) 154 to support this case and the same reads as follows:

> *"Clause 30(iii). In computing the quantum of „tax holiday" profits in all cases, taxable income derived from the new industrial units, etc., will be determined as if such units were an independent unit owned by a taxpayer who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, ship or approved hotel will be taken into account in determining the quantum of deduction admissible under the new section 80-1 even though they may have been set off against the profits of the taxpayer from other sources."*

21. We are not agreeing with the counsel for the Revenue. We are, therefore, of the view that loss in the year earlier to the initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profits of the eligible business as no such mandate is provided in section 80-IA(5)."

14. As would be evident, the Division Bench of the Madras High Court in the Velayudhaswamy Spinning Mills (P.) Ltd. case has broken down subsection (5) of Section 80IA of the Act and analysed as to what would be the important indices of the said provision. This is evident upon a reading of paragraph 16 of the said judgement.

14.1 According to us, the indices noted in paragraph 16 of the said judgement clearly and distinctly emerge even on a plain reading of the said provision.

14.2 The argument advanced before us on behalf of the appellant/revenue, which was also the submission put forth before the Madras High Court, proceeded on the following lines: Because sub-section (5) of Section 80IA opens with a nonobstante clause, therefore, loss or unabsorbed depreciation which has already been set off prior to the initial year against the other business [i.e. business apart from the eligible business], should be notionally carried forward and adjusted against the profits of the eligible business in order to determine the deduction that an assessee can avail under Section 80IA of the Act.

*14.3 According to us, **there is nothing to suggest in Sub-clause (5) of Section 80IA of the Act that the profits derived by an assessee from the eligible business can be adjusted against "notional losses which stand absorbed against profits of other business." The deeming fiction created by sub-section (5) of Section 80IA does not envisage such an adjustment. The fiction which has been created is simply this: the eligible business will be the only source of income. There is no fiction created, that losses which have already been absorbed, will be notionally carried forward and adjusted against the profits derived from the eligible business to quantify the deduction that the assessee could claim under Section 80IA of the Act.***"

[Emphasis is ours]

18.2 In sum, there is no requirement under section 80IA(5) of the Act to adjust profits derived from the eligible units against the losses that stand absorbed against profits of the „other" non-eligible businesses or losses that

have already been adjusted against the profits of the eligible businesses in the years before the previous year in relation the first assessment year in which the deduction was claimed. Therefore, in this case, the respondent/assessee was not required to set off losses of other units against its profitable units.

18.3 In so far as the decision of the Karnataka High Court in ***Microlabs*** is concerned, the coordinate bench in ***Sterling Agro*** respectfully disagreed with the view held in ***Microlabs***. The court held:

"*14.4 **A perusal of the judgment rendered in the Microlabs Ltd. case would show that the Karnataka High Court gave weight to the fact that sub-section (5) of Section 80IA commenced with a non-obstante clause. It was based on this singular fact that the Karnataka High Court chose to veer away from the view expressed by the Madras High Court in the Velayudhaswamy Spinning Mills (P.) Ltd. case.** This aspect emerges on an appraisal of paragraph 6 of the judgement of the Karnataka High Court rendered in Microlabs Ltd. case.*

14.5 We have read the aforementioned portion of the judgement along with Mr Rai. For the sake of convenience, the same is extracted hereafter:

> *6. It is stated that the non-obstante clause in sub-section (5) means it overrides all the provisions of the Act and other provisions are to be ignored. In the absence of non obstante clause, what the judgment of the Madras Court states is the legal position, because of the non obstante clause, the set off amount against other income of the assessee has to be ignored and because of the fiction created in the sub-section notionally, the set losses is to be treated as "losses being carried forward and after deducting the said losses, the profit prior to business is to be calculated," i.e., precisely what the Special Bench has stated and the relevant portion of the judgment reads as under:*
>
> > *"From the reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of the assessee. Looking forward to a period often years from the initial assessment is contemplated. It does not allow the Revenue to look backward and find out if there is any loss of earlier years and bring forward notionally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. Fiction created in subsection does not contemplates to bring set off amount notionally. Fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created."*

*15. **We are unable to persuade ourselves to agree with the view taken by the Karnataka High Court in the Microlabs Ltd. case. We respectfully agree with the view taken by the Madras High Court in the Velayudhaswamy Spinning Mills***

(P.) Ltd. case, which has been followed in the Prabhu Spinning Mills (P.) Ltd. case as well."

16. We have given our own reasons as to how sub-section (5) of Section 80IA should operate.

[Emphasis is ours]

19. Insofar as the second aspect is concerned i.e., disallowance of the claim made by the respondent/assessee under Section 80M of the Act, we may note that Section 80M [as inserted by the Finance Act, 2002, with effect from 1.4.2003] read as follows:

Deduction in respect of certain inter-corporate dividends.
80M. *(1) **Where the gross total income of a domestic company**, in any previous year, **includes any income by way of dividends from another domestic company**, there shall, in accordance with and subject to the provisions of this section, **be allowed, in computing the total income of such domestic company, a deduction of an amount equal to so much of the amount of income by way of dividends from another domestic company as does not exceed the amount of dividend distributed by the first-mentioned domestic company on or before the due date**.*
(2) Where any deduction, in respect of the amount of dividend distributed by the domestic company, has been allowed under sub-section (1) in any previous year, no deduction shall be allowed in respect of such amount in any other previous year.
Explanation—For the purposes of this section, the expression "due date" means the date for furnishing the return of income under sub-section (1) of section 139."
[Emphasis is ours]

20. Therefore, the respondent/assessee can only claim a deduction to the extent of the dividend it distributed to its shareholders. Although Mr Rai sought to place reliance on the assessment order to submit that the dividend was not distributed by the respondent/assessee, it appears to be based on an erroneous factual foundation.

21. The CIT(A) has returned the finding of fact, which was sustained by the Tribunal, that the respondent/assessee had placed the relevant material

before the AO which showed that dividend to the extent of Rs. 3,97,34,475/- had been distributed by it to its shareholders. In this regard, the CIT(A) notes:

> "*Examined the rival submissions.* ***During the relevant period Rs. 5,09,19,998/- was received by way of dividend out of which Rs.3,97,34,475/- was distributed to its share holder.*** *Further all these facts were brought to the notice of the Ld AO by the appellant during 147 proceeding, so much so a certificate was also filed along with the return for the relevant period. Here also the Ld AO has not diicussed anything in her order but not allowed the claim u/s 80M. It was stated before me that the appellant thought it was a mistake on part of the Ld AO and an 154 petition dated 25/12/10 was filed on 05/01/11 but to no avail. The appellant stated before me that neither the facts were confronted to the appellant nor the matter was discussed in her order. I find full justification in such submission of the Ld AO of the appellant and hence disallowance u/s 80M is not sustainable.*"
>
> [Emphasis is ours]

21.1 This is a finding of fact that remains undisturbed and, therefore, in our view, the deletion of disallowance ordered by the CIT(A) and the Tribunal under Section 80M was correct.

22. Thus, for the aforesaid reasons, in our view, no substantial question of law arises for our consideration.

23. The appeal is, accordingly, closed.

24. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

OCTOBER 5, 2023/aj