(2011) 08 DEL CK 0202

In the Delhi High Court

Case No : IT Appeal No. 531 of 2011

Commissioner of Income Tax APPELLANT

Vs

Tata Communications Internet Services Ltd. RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Citation : (2012) 251 CTR 290 : (2012) 204 TAXMAN 606

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Rashmi Chopra, for the Appellant; Prakash Kumar with Vikas Dhawan, for the Respondent

Judgement

M.L. Mehta, J.—Admit on the following substantial questions of law :

(a) Whether on the facts and in the circumstances of the case, the Tribunal erred in law and on merits in holding that the assessee was entitled to deduction under s. 80-IA of the IT Act, 1961 on income from internet services and internet telephony ?

(b) Whether the Tribunal erred in law and on merits in holding that deduction under s. 80-IA of the IT Act, 1961 cannot be denied after having been granted in the first year of claim ?

With the consent of the counsel of parties, we have heard the matter finally.

2. This is an appeal preferred by CIT against the order dt. 26th Feb., 2010 passed by learned income tax Appellate Tribunal ("the Tribunal" for short) whereby the Tribunal set aside the decision of CIT(A) and allowed the appeal of the assessee allowing deductions under s. 80-IA of the IT Act ("the Act" for short) for the asst. yr. 2006-07 holding inter alia that the Revenue cannot decline deduction for subsequent year for alleged violation of s. 80-IA(3) of the Act. Claiming of deduction under s. 80-IA of the Act can only be considered for the year of formulation of business. The Tribunal also held that the provisions of s.

80-IA(4)(i) to s. 80-IA(3) of the Act will not apply to the business of the assessee which was formulated and/or commenced prior to the asst. yr. 2004-05.

3. The assessee company which was incorporated under the name of C.G. Graphnet (P) Ltd. which was engaged in the business of providing telecommunication services and on 15th Nov., 1996, its name was changed to CG Fax Mail Ltd. and the company was converted into a public limited company on 23rd Sept., 1997. The company was acquired by Direct Internet Ltd. in August, 2000 and its name was changed to Primus Telecommunications Ltd. w.e.f. 27th Sept., 2000. The company was stated to be in the business of providing fax mail services. The Department of Telecommunication granted license to the assessee company on 5th Jan., 1999 for carrying of business activities for Internet Services and Internet Telephony Services from October, 2000. As per the license issued on 5th Jan., 1999, w.e.f. October, 2000, the company started two new services viz. Internet Services and Internet Telephony Services. Thereafter, this license was updated as the internet services and internet telephony services provider from 2002. The business of Fax and Email services which were being carried out earlier were discontinued and in the financial year 2003-04 the company was solely carrying on the business of internet service provider and internet telephony services. The assessee had claimed that since the first invoice was cut on 17th Oct., 2000 and it filed IT return regularly and as per the provisions of s. 80-IA(4) of the Act, it was entitled to deduction right from the asst. yr. 2001-02. It was claimed that as per the provisions of 80-IA(2), the assessee could claim deduction under s. 80-IA(4) for 10 years out of 15 years starting from the year in which the assessee started its business being asst. yr. 2001-02. Since the assessee had not claimed deduction under s. 80-IA(4) of the Act for the asst. yrs. 2001-02, 2002-03 and 2003-04 and the first year of claim under s. 80-IA(4) was 2004-05 and as It had been granted deduction under s. 80-IA(4) of the Act for the asst. yrs. 2004-05 and 2005-06, it was entitled to deduction for the relevant assessment year i.e. 2006-07.

4. The AO has rejected the claim of assessee for deduction of Rs. 11,12,41,929 under s. 80-IA of the Act. While rejecting the claim for deduction, the AO has reasoned as under :

7. The perusal of the record reveals that originally the license agreement was granted initially for a period of 15 years to M/s CG Fax-mail Ltd. Another license agreement was executed on 19th April, 2002 which was issued in the name of Primus Telecommunication India Ltd. which was already in existence. There was only change of name of company from M/s CG Fax-mail Ltd. to Telecommunication India Ltd. on 27th Sept., 2000 as per certificate of the RoC. It clearly establishes that a company was already in existence in 1999 also. Therefore, it is not a new business but has been formed by continuing the business--the old business with the old assets. According to s. 80-IA(3) such undertaking should not be formed by splitting up, or the reconstruction of business already in existence (ii) it should not be formed by a transfer to a new

business of machinery or plant previously used for any purposes. The balance sheet for the asst. yr. 2003-04 and the details furnished in respect of fixed assets, it is evident that old machinery has been used meaning thereby that all the old machinery which was used by the assessee previously has been carried forward. In view of these facts, the assessee has not fulfilled the conditions laid down in s. 80-IA(3), hence the claim of the assessee under s. 80-IA is denied.

8. The assessee also claims that the deduction under s. 80-IA was allowed in the earlier assessment years. So it should be allowed for the assessment year under consideration, is not tenable. I have perused the assessment record for the asst. yr. 2005-06. Nothing has been discussed in the said order about merit of the claim regarding deduction under s. 80-IA. Simply deduction under s. 80-IA has been allowed in computation of income. It appears that deduction under s. 80-IA was allowed without examining the factual aspects as well as the legal requirements stipulated in s. 80-IA. It is settled law that if an issue legal or factual is not examined and no quasi judicial adjudication is made thereon, it cannot be said that the same creates a precedent to be followed for all time to come on the fallacious ground of consistency. The law of consistency as elucidated by the apex Court in M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, clearly underlines that though each assessment year being a unit an what was decided in one year might not apply in the following year but ''where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year''.

9. What emerges from the above legal proposition is that to apply the rule of consistency, the issue must have been ''found as a fact one way or other''. But where no enquiry is conducted into the veracity of a contention, and an assessment order is framed without going into the various aspects--legal or factual--on the basis, it cannot be said the issue ''has been found as a fact'' so as to invoke the law of consistency. Thus, the contention of the assessee that the issue of deduction under s. 80-IA stands duly examined and allowed in earlier assessment years is not tenable. I reject the same accordingly.

9.1 Coming to the legal requirements, it may be appreciated that deduction under s. 80-IA is available only to an undertaking i.e. an undertaking which is not formed by splitting up or the reconstruction of a business already in existence.

Accordingly, it is held that the deduction under s. 80-IA claimed by the assessee is hit by the mischief of provisions of s. 80-IA(3)(II).

5. The assessee went in appeal before the CIT(A) which dismissed the appeal holding that the assessee had violated the restrictive condition as laid down under s. 80-IA(3) of the Act. The CIT(A) also rejected the contentions of the

assessee that since it was providing telecommunication services it was eligible for deduction under s. 80-IA; the provisions of s. 80-IA(3) are not applicable since the business of telecommunication services was commenced prior to 1st April, 2004; the change of ownership does not affect the claim of relief under s. 80-IA and the assessee was entitled to deduction on the principle of rule of consistency for having been allowed deduction for the asst. yrs. 2004-05 and 2005-06 under s. 143(3).

6. The matter was taken in appeal by the assessee to the Tribunal which allowed the appeal and allowed the deductions as claimed by the assessee. The Department is in appeal against the impugned order of the Tribunal.

7. It was submitted before us by the Learned Counsel for the assessee that s. 80-IA(3) was not applicable inasmuch as the case of the assessee falls within the ambit of s. 80-IA(4)(ii) of the Act. In this regard, it was submitted that the provisions of s. 80-IA(3) had been amended w.e.f. 1st April, 2005 by the Finance Act (I) of 2004 whereby cl. (ii) of sub s. (4) of the Act had been brought within the ambit of s. 80-IA. In other words, the claim was that till 1st April, 2005 the provisions of s. 80-IA(3) of the Act did not apply to the provisions of s. 80-IA(4)(ii) of the Act. In this regard reliance was also placed upon the Circular No. of 2005 dt. 15th July, 2005 of CBDT [(2005) 197 CTR (St) 1] wherein it was clearly mentioned that if an undertaking is formed by transfer of old plant and machinery or asking for reconstruction of existing business, but has started providing telecommunication services prior to 1st April, 2004, it would continue to get tax benefit under s. 80-IA of the Act and that the amendment takes effect from 1st April, 2005 as applied in relation to asst. yr. 2005-06 and subsequent assessment years. Referring to the agreement dt. 5th Jan., 1999 and dt. 19th April, 2002, the Learned Counsel for the assessee submitted that the agreement dt. 19th April, 2002 did not result into new business being started. He also drew our attention to the copy of the notice issued by the AO for asst. yr. 2005-06 dt. 25th Sept., 2007 for the purpose of assessment under s. 143(3) wherein in cl. 19 of the said notice, the assessee had been asked to substantiate with documentary evidence its claim of deduction under s. 80-IA and also reply of the assessee dt. 5th Dec, 2007 wherein this issue had been clarified. It was urged that the assessee had started its new business of fax and email right from the financial year 2003-04 and had incurred expenditure of Rs. 2.65 crores in relation to its business of internet services and internet telephony.

8. On the other hand, it was submitted by Learned Counsel for the Revenue that the company was incorporated in 1994 and the assessee had itself in the case of assessment for the year 2003-04 confirmed that the business of the assessee was started in 1997. He submitted that the assessee had been originally in the business of fax and email services and in October, 2000 it had ventured into the new business of internet services by entering into the agreement with DOT on 5th Jan., 1999. It was submitted that vide an agreement dt. 19th April, 2002, the assessee had started another business of internet telephony and accordingly

it had three lines of business being fax and email started in 1997, internet services started in 2000 and telephony services were started in 2002. Based on this, it was submitted that the internet and telephony services being a new business were formed on splitting up and reconstruction of business of fax and email already being done by the assessee and the plant and machinery of the whole business was used by it for the new business. Based on this premise, it was submitted that the provisions of s. 80-IA(3) of the Act were applicable and consequently the assessee was not entitled to the benefit of deduction under s. 80-IA. With regard to the plea of consistency based on the asst. yrs. 2004-05 and 2005-06 whereby all such deductions were allowed, it was submitted that the AO had not considered different incomes from the fax and email and from internet services and internet telephony for the asst. yrs. 2004-05 and 2005-06 and that cannot be utilized for all time deductions under s. 80-IA.

9. There is no dispute with regard to the fact that cl. (ii) of s. 80-IA(4) was inserted in s. 80-IA by the Finance Act II of 2004 w.e.f. 1st April, 2005 and that this was not with retrospective effect. It became applicable only after its insertion w.e.f. 1st April, 2005. The circular issued by CBDT explaining the provisions of Finance Act II of 2004 testifies the fact that this insertion took effect from 1st April, 2005 and is to apply in relation to the asst. yr. 2005-06 and subsequent years. The first claim of the assessee for deduction under s. 80-IA indisputably was for asst. yr. 2004-05. The Tribunal has rightly recorded that the business of fax and email has been started by the assessee in 1997 and the business of providing internet services during the year 2000 being from 17th Oct., 2000, the relevant asst. yr. 2001-02. The question for consideration would be as to whether there was any violation of provisions in the claim of deduction under s. 80-IA(4)(ii) of the Act for asst. yr. 2001-02 or at the maximum for the first year of deduction under s. 80-IA being the asst. yr. 2004-05. Admittedly, the assessee was granted deduction under s. 80-IA for the asst. yr. 2004-05. The Tribunal was right in holding that the Revenue could not pick up the assessment year granting claim holding that there was violation of provisions of s. 80-IA(3) on the ground that the business was formed by splitting up and reconstruction of business already in existence or that it was formed by transfer of plant and machinery to the new business. The bar as provided under s. 80-IA(3) is to be considered only for the first year of claim for deduction under s. 80-IA. Once the assessee is able to show that it has used new plant and machinery which has not been previously used for any purpose and the new undertaking is not formed by splitting up or reconstruction of business already in existence, it is entitled to the deduction under s. 80-IA for subsequent years. Since the assessee had been granted claim of deduction right from the asst. yr. 2004-05 under s. 80-IA, consequently it cannot be denied deduction for the subsequent years inasmuch as restrain of s. 80-IA(3) cannot be considered for every year of claim of deduction, but can be considered only in the year of formation of the business.

10. Be that as it may, cl. (ii) of s. 4 of s. 80-IA was inserted in sub-cl. 3 of s. 80-IA w.e.f. 1st April, 2005 and the business of the assessee had been formed and

started much prior to that. The restriction placed by s. 80-IA(3) to the provisions of 80-IA(4)(ii) would not bar the assessee for continuing its claim of deduction under s. 80-IA. Since the provisions of 80-IA(3) are not applicable to the present assessee, it having commenced its business much prior to 1st April, 2005, s. 80-IA(3) would not disentitle it from claiming deduction under s. 80-IA on its income from internet services and internet telephony services.

11. In our view, the Tribunal was right in holding that the assessee could not be said to have been formed by splitting up or reconstruction of the business already in existence as its business had commenced after 1st April, 1995 and before 31st March, 2005 and the assessee had started its business of fax and email services right from the financial years 2003 and 2005 and it continued to carry on the business of internet telephony.

12. Insofar as the objection of the Revenue that there had been change in the name of pattern of shareholding it does not make any difference as it is a well-settled rule of law that benefit under s. 80-IA of the Act is available to an undertaking and not to the assessee since the undertaking continues to carrying on its business without any reconstruction of business already in existence.

13. Even otherwise, on merits the conditions under s. 80-IA(3) of the Act are seen to be fully met by the assessee and on this ground also the assessee is entitled for deduction under s. 80-IA of the Act. The first contention is that s. 80-IA(3) of the Act provides that the eligible business is not formed by splitting up or reconstruction of the business already in existence. Based on the facts discussed above, it may be noticed that the assessee started its new business in the existing company and the said business could not be said to have been formed either by splitting up or reconstruction of the existing business. It is to be noted herein that the business of providing internet services was awarded by the Government to the assessee in the year 1999. The second contention of applicability of s. 80-IA(3) regarding use of old plants and machinery is also not relevant in the case of the present assessee as the business of assessee had not come into existence or formed by transfer of any old plants and machinery. The license was granted to the assessee on 5th Jan., 1999 and it purchased new plants and machinery worth Rs. 5.65 crores during the financial year 2000-01 for this telecommunication business.

14. Reliance is placed on the case of The Commissioner of Income Tax Vs. Mahaan Foods Ltd., of this Court wherein this Court observed as under :

10. The term ''splitting up of the business already in existence'' indicates a case where the integrity of a business earlier in existence is broken up and different sections of the activities previously conducted are carried on independently. Commissioner of Income Tax, Delhi Vs. Hindustan General Industries Ltd.,

11. As observed by Supreme Court in Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, , ''the term ''reconstruction'' implies that the identity of the business should not be lost, and

substantially the same business should be carried on by substantially the same person. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business''.

12. As per findings of fact recorded by the Tribunal, it has been stated that ''in the present case the old undertaking no longer existed and remained identifiable. It was completely submerged in the new industrial undertaking of the assessee. The provisions of s. 80-IA of the Act with reference to Expln. 2, do not require that new industrial undertaking should be raised on separate plot of land leaving the earlier undertaking totally untouched. We find that the processes for which the assessee entered into technological collaborations with M/s Rotacom Industries, B.V., Netherlands and M/s Seppo Ralli OY, Finland were the key processes of the assessee''s industrial undertaking and other processes such as storage of milk in stainless steel storage tanks, pre-warming, preheating, pasteurization were only of preparatory nature for the manufacturing of the product of the assessee. The assessee appears to have introduced almost entirely new manufacturing technology and processes.''

13. The reconstruction of a business or an industrial undertaking must necessarily involve the concept that the original business or undertaking is not to cease functioning, and its identity is not to be set to be lost or abandoned. The concept essentially rests on changes but the changes must be constructive and not destructive. There must be something positive about the whole matter as opposed to negative. The underlying idea of a reconstruction evidently must be--and this is brought out by the section itself--of a ''business already in existence''. There must be a continuation of the activities and business of the same industrial undertaking. The undertaking must continue to carry on the same business though in some altered or varied form. If the alteration and changes are substantial, there would be little scope for describing what emerges as a reconstruction of the business. [See Commissioner of Income Tax, Bombay City-I Vs. Gaekwar Foam and Rubber Co. Ltd.,].

14. From the perusal of s. 80-IA of the Act it is clear that the statute itself has envisaged and approved of a situation in which an old existing smaller industrial undertaking is absorbed by a new much bigger industrial undertaking.

In view of our above discussion, we answer both the questions in negative i.e. in favour of the assessee and against the Revenue. The appeal deserves no merit and is hereby dismissed.

