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**(2014) 04 MAD CK 0224**

**In the Madras High Court**

**Case No : Tax Case (Appeal) No. 1352 of 2007**

Commissioner of Income Tax, Chennai

APPELLANT

Vs

M/s. Gimpex Ltd.

RESPONDENT

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**Date of Decision : 02-04-2014**

**Acts Referred:**

Income Tax Act, 1961 — Section 115JB, 143(2), 80A, 80AB, 80HHC

**Citation : (2014) 04 MAD CK 0224**

**Hon'ble Judges : T.S. Sivagnanam, J;Chitra Venkataraman, J**

**Bench : Division Bench**

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## **Judgement**

T.S. Sivagnanam, J.—This appeal by the Revenue is directed against the order dated 30.04.2007 passed by the Income Tax Appellate Tribunal [The Tribunal] in ITA No. 708/Mds/06 relevant to the assessment year 2002-03. The Tax Case (Appeal) has been admitted on the following substantial question of law:

Whether in the facts and in the circumstances of the case, the Tribunal was right in holding that the deduction u/s 80IB should be allowed without setting off the losses of other units?

2. The assessee is engaged in the business of process and sale of Barytes minerals by establishing 12 units located at different places. Two of such units are located in Balanagar, Mahboobnagar District, Andhra Pradesh State which has been notified u/s 80IB(5) of the Income Tax Act, 1961 [the Act] as industrially backward area Category "B" vide Notification S.O. 440E dated 15.06.1999. The assessee claimed deduction u/s 80IB of the Act. The assessee also claimed relief u/s 80HHC of the Act in respect of its export turnover. By virtue of such notification, the assessee filed the return of income u/s 80IB of the Act pertaining to "eligible business" declaring a total income at nil and book profit u/s 115JB of the Act at Rs. 1,69,33,642/-. The assessee's case was taken up for scrutiny and notice u/s 143(2) of the Act was issued. After scrutiny of the details furnished by the assessee and after discussion, the assessment was completed by order dated 29.03.2005. The Assessing Officer, held that the assessee had

segmented the accounts and furnished separate profit and loss account for each of the 12 units. The units at Chennai, BNR-I and BNR-II and Bhuj had shown profits whereas the units at eight other places have shown losses. The Assessing Officer held that the assessee had allocated common expenses disproportionately to arrive at more profit for the two units, which are eligible units" viz., BNR units, with a view to claim more relief u/s 80IB of the Act. Therefore, the Assessing Officer held that the assessee has considered only the profits in the "eligible units" and losses in the other eight units. After referring to Section 80IB of the Act and placing reliance on the decision of the Hon"ble Supreme Court in the case of IPCA Laboratory Ltd. Vs. Deputy Commissioner of Income Tax, Mumbai, , the Assessing Officer held that the quantum of qualifying amount for relief u/s 80IB of the Act will be restricted to the gross total income. In other words, the Assessing Officer held that deduction under Chapter VIA should be allowed only against such portion of the income, which forms part of the gross total income and if there are more than one "eligible unit", the balance income available should be divided among the units proportionate to the sales in each unit.

3. Aggrieved by the finding given by the Assessing Officer, the assessee preferred appeal before the Commissioner of Income Tax Appeals-III contending that in view of Sub Section 5 to Section 80IB and Sub Section 13 to Section 80IB, the first of the "eligible business" was eligible for deduction at 30% of the profits and gains derived as it had commenced its operation on 1.7.96 and the second unit was eligible at 100% of its profits and gains, derived. The assessee relied on the decision of the Hon"ble Apex Court in the case of Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, and contended that in view of the specific provisions of the Act under Sub Section (13) and (5) to Section 80IB neither the provisions of 80AB of the Act nor the decision of Hon"ble Supreme Court in the case of IPCA Laboratories Ltd., (cited supra) are applicable to the assessee's case. The First Appellate Authority after considering the contentions raised by the assessee and after hearing the Revenue held that it is not in dispute that out of the 12 industrial undertakings two were situated in notified backward district and therefore, the profits and gains derived from these undertakings are eligible for deduction u/s 80IB(5) of the Act. The issue which fell for consideration before the First Appellate Authority was whether the method adopted by the Assessing Officer for computation of eligible deduction u/s 80IB(5) of the Act is in accordance with the provision of the Act. After referring to the relevant provisions, the First Appellate Authority held that by virtue of Sub-Section (13) to Section 80IB of the Act, the provisions of Sub-Section (5) to Section 80IA of the Act is applicable to the provisions of Section 80IB of the Act. After holding so, the First Appellate Authority held that the Assessing Officer had not referred to any particular item of expenditure, which was disproportionately allocated and no material or evidence is brought on record by the Assessing Officer to support his conclusion. The First Appellate Authority recorded the concessions made on behalf of the

assessee that expenses, which were not allocated were Directors remuneration and those expenses are required to be allocated before arriving at profits and gains of the "eligible business" for the purposes of determination of the sum deductible under Sub Section 5 to Section 80IB of the Act. Therefore, the Assessing Officer was directed to re-determine the eligible deduction u/s 80IB(5) of the Act after apportioning the expenditure incurred under three heads which have been referred to in the order. The Tribunal by citing Section 80IB(5) and 80IB(13) of the Act held that these provisions provided that losses of other units are not to be adjusted in the assessee's claim to deduction under the said provision for the "eligible unit" and that the "eligible unit" for the purpose of deduction under the cited provisions has to be treated as the only source of income of the assessee. The Tribunal further held that the case law cited by the Revenue are in a different context and not applicable to the facts of the case. The Tribunal held that the decision of the Hon'ble Supreme Court in the case of Canara Workshops (supra) supports the assessee's claim. On the above finding, the Tribunal held that the order passed by the First Appellate Authority is a well reasoned order and accordingly the appeal filed by the Revenue was dismissed.

4. Challenging the same, the Revenue has preferred this appeal, which has been admitted on the substantial question of law referred to above.

5. Learned Standing Counsel appearing for the Revenue submitted that the Tribunal failed to appreciate the provisions of Section 80A and 80AB in a proper perspective and erroneously held that the deduction u/s 80IB of the Act should be allowed without setting off the losses of other units.

6. By referring to Sub Section (5) to Section 80IB of the Act, learned counsel for the assessee submitted that the deduction in the case of industrial undertakings located in industrially backward Districts are entitled to deduction in terms of Sub Section (13) to Section 80IB of the Act. In this regard, learned counsel referred to the findings/observations made by the First Appellate Authority as well as the Tribunal and sought to sustain the order passed by the Tribunal.

7. We have considered the submissions made on either side and perused the materials placed on record.

8. After perusing the facts placed before the Assessing Authority, First Appellate Authority as well as the Tribunal, it is to be pointed out that the question of eligibility to the assessee for deduction under Sub Section (13) to Section 80-IB r/w Sub-Section (5) of Section 80IB of the Act is not in dispute. The only question would be whether the assessee has disproportionately allocated the common expenses to arrive at more profits for the "eligible units" in order to claim more relief u/s 80IB of the Act. This being a factual issue the assessee was bound to place before the Assessing Officer necessary documents to establish that the common expenses have not been disproportionately allocated so as to claim more relief u/s 80IB of the Act. Admittedly, no other record was produced by the assessee before the Assessing Officer. When the matter was considered by

the First Appellate Authority, the First Appellate Authority had erroneously shifted the burden on the Assessing Officer stating that the Assessing Officer did not bring on record any material or evidence to support its conclusion that the expenditure was disproportionately allocated. It is to be noted that the onus is on the assessee to produce sufficient records to show that there was no disproportionate allocations and they were under an obligation to show as to how the profits were arrived at in respect of 12 units and particularly in respect of BNR-I and BNR-II for the purpose of claiming deduction u/s 80IB of the Act. The assessment order also does not state as to whether the common expenses were with reference to the 12 units or with reference to the two units alone, which was disproportionately distributed. As regards the grant of relief u/s 80IB of the Act in respect of the "eligible units" with reference to the income and in order to arrive at the appropriate relief to the assessee, we have no hesitation in setting aside the order of the Tribunal and remit the matter back to the Assessing Officer so as to work out the relief properly, particularly with reference to the expenses allocable to BNR-I and BNR-II units. In the circumstances, we direct the assessee to produce necessary materials before the Assessing Officer to substantiate their claim as regards the deduction u/s 80-IB of the Act. It is open to the assessee to place such records in support of its claim as regards the expenditure relatable to each of these units and explain as to how it arrived at the profits and gains for the purpose of claiming deduction u/s 80IB of the Act. With the above direction, this Tax Case (Appeal) is disposed of. No costs.