IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 707 OF 2014

Commissioner of Income Tax-10 .. Appellant

v/s.

Hercules Hoists Ltd. .. Respondent

Mr. Arvind Pinto for the appellant
Mr. J.D. Mistri, Senior Counsel a/w Mr. Atul K Jasani, Mr. Madhur Agarwal for the respondent

CORAM : S.V. GANGAPURWALA &
G.S. KULKARNI, J.J.

DATED : 14th JUNE, 2017

P.C.

1. This present appeal relates to Assessment Year 2009-10. The Revenue has filed the appeal against the order of the Tribunal thereby partly allowing the appeal filed by the assessee.

2. The Revenue has framed the following questions for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in holding that the respondent company was eligible for deduction u/s 80IA of the

I.T. Act, 1961.

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in its interpretation of Section 80IA(5) of the I.T. Act, 1961 that unabsorbed depreciation of the eligible units need not be necessarily set off from the profits of the same units, but could be set off from other non-eligible units as well.

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in its interpretation considering the fact that Section 80IA(5) of the I.T. Act, 1961 points out that the eligible unit be considered as a stand-alone unit, thereby mandating that unabsorbed depreciation or losses be set off before allowing profits as deduction.

3. Mr. Pinto, the learned Counsel for the appellant strenuously contends that the Tribunal has misconstrued the provision of Section 80IA(5) of the Income Tax Act. The said provision starts with a non-obstinate clause. The only way to read the provision would be in a manner that the deduction under Section 80IA(5) of the Act will be computed with reference to the eligible units and not from the other non-eligible units. So also, in case of loss suffered by the eligible units, such loss should not be set off against the profits of the other

units, other business, other income earned in the initial years of assessment in the subsequent years. It is the mandate of law that the losses of earlier years though already absorbed against the other sources, they are once again notionally brought forward and set off against the profits of the other units to compute eligible deduction.

4. In view of the same, the profit from the eligible business for the purpose of determination of the quantum of deduction under Section 80IA of the Act, has to be computed after deduction of the notionally brought forward losses and depreciation of eligible business, even though they have been allowed to be set off against other income in the earlier years. The learned Counsel submits that in the wake of such position, the Tribunal erred in passing the impugned order and allowing the deduction of the entire profits under Section 80IA(5) of the Act.

5. The learned Senior Counsel for the respondent supports the judgment and submits that the issue involved in the present matter is concluded by the decision of this Court in the present assessee's case in Income Tax Appeal No.2485 of 2013 under judgment dated

7th May, 2015. The said judgment of this Court is further confirmed by the Apex Court in Civil Appeal No.14703 of 2015, decided on 23rd September, 2016. The learned Senior Counsel further submits that the Madras High Court in a case of ***Velayudhaswamy Spinning Mills P. Ltd. and Sudan Spinning Mills (P) Ltd. Vs. Assistant Commissioner of Income Tax, (2012) 340 ITR 477*** has concluded the issue and held that only losses of the years beginning from the initial assessment year alone are to be brought forward and no losses of earlier years which were already set off against the income of assessee, can be looked into. The learned Senior Counsel further submits that the said judgment of the Madras High Court has been confirmed by the Apex Court in Special Leave Appeal No.33475 of 2012 under order dated 5th September, 2016. The learned Senior Counsel also relied on the provision of Section 80IA(5) of the Act, which reads thus : -

> *"(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 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."

6. With the assistance of the learned Counsel for the respective parties, we have considered the submissions and also have gone through the order of the Tribunal so also the judgments relied by the respective Counsel.

7. It is not disputed that the respondent assessee is entitled for deduction of the profits and gains as contemplated u/s 80IA. It is also not disputed that the assessee is entitled for deduction of the profits and gains for the period of 10 consecutive years beginning with initial assessment year. It is further not disputed that the initial assessment year of the assessee's unit is 2009-10, though it started functioning from the year 2005-06. The losses of the years 2005-06 to 2008-09 were absorbed during the relevant years and no losses were carried forward. The only question of debate before the Tribunal was whether the profit earned during the Assessment Year 2009-10 would be entitled for deduction under Section 80IA(5) of the Act without deducting the losses, which were absorbed in the

earlier years.

8. The said issue is now no longer *res-integra* in view of the judgment of the Madras High Court in a case of *Velayudhaswamy Spinning Mills P. Ltd. & Sudan Spinning Mills (P). Ltd.* (supra), the Court observed as under :-

> *"From a readying 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."

9. The said judgment of the Madras High Court has been confirmed by the Apex Court, as such has attained finality. Even in the assessee's own case for the previous year, the losses were set off in the relevant years. The Revenue had challenged the said action before this Court in Income Tax Appeal No.2485 of 2013 and it was held that the said action is legal and proper. The said judgment is also upheld by the Apex Court.

10. Considering the above, we do not find any error committed by the Tribunal in allowing the deduction of the profit u/s 80IB(5) of the Act without deducting the losses of the earlier years.

11. In the light of the above, the present appeal is bereft of any substantial question of law. As such, the appeal is dismissed. No costs.

(G.S. KULKARNI, J.) **(S.V. GANGAPURWALA, J.)**