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

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DECIDED ON: 19.12.2012

+ REVIEW PETITION 154/2012, CM APPL.4744/2012
& 4745/2012 IN ITA 1660/2006

COMMISSIONER OF INCOME TAX DELHI Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel.

versus

INDOVAX P.LTD. Respondent
Through: None.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

CM APPL.4745/2012 (Exemption)

Allowed, subject to all just exceptions.

CM APPL.4744/2012 (condonation of delay)

In the facts and circumstances of the case, the delay in filing Review Petition No.154/2012 is condoned.

CM APPL.4744/2012 is disposed of.

REVIEW PETITION 154/2012

After considering the submissions, the Court is of the opinion that matter deserves to be heard on merits. The Review Petition No.154/2012 is accordingly allowed.



ITA 1660/2006

1. The question of law urged by the Revenue in respect of its appeal against the order of the ITAT dated 31.3.2006 in ITA 1840/del/2002, is whether the amount of loss suffered in the Avitech Division was rightly set off by the AO against the profits from the eligible vaccine unit for the purpose of computing the deduction under Section-80IA, thereby reducing the deduction.
2. The brief facts are that the assessee company was engaged in the business of manufacturing poultry vaccines in collaboration with Vineland Laboratories, USA. It claimed that it had opened another unit, i.e., Animal Healthcare Products Division under the name of “Avitech”. Being a Section 80 (IA) undertaking, it reported losses in respect of “Avitech” Unit and profit from its vaccine centre/undertaking. The Assessing Officer adjusted the amount of loss so claimed towards the profits earned in the Poultry Vaccine Division and computed the deduction only on the balance of profits. The assessee carried the matter in appeal. The relevant part of the Appellate Commissioner’s order is as follows: -

“12. The 5th and the last ground of appeal is regarding the action of the AO in not enhancing the deduction admissible u/s 80IA by Rs.8,80,345/- and on account of loss of Rs.29,34,485/- of the company’s Avitech Division. The order of the ld. AO is silent on this point however, the ld. AR has contended that the company commenced manufacture of Poultry vaccine (in collaboration with Vineland Laboratories, USA) from its manufacturing facility located at Village Siswala, Kirian Road, District Hissar (Haryana) in June, 1991. The deduction u/s 115JA is admissible and has been allowed on profits of this vaccine division in the past years. It is argued that on account of growing severe competition in Poultry vaccines (itself a limited market) that the company from the current financial



year diversified into dealing in Animal health care products. This business was commenced as a separate division under name 'Avitech'. This is the first year of its operation and there was a net loss of Rs.29,34,485/-. In this division, it is submitted that during the financial year 1999-2000, the business of this division reached stability and earned a net profit of Rs.24,89,324/- and the deduction u/s 80IA has not been claimed on this profit. A copy of the Profit & Loss A/c of M/s Avitech Division has been enclosed. The deduction u/s 80IA has been allowed on the profit of the company after reducing the loss of Avitech from profit of Vaccine Division, and in this respect the copies of computation of total income for the assessment year 2000-01 and 2001-02 have been filed revealing that the company has not claimed deduction u/s 80 on the profits of this Division. In view of the same and keeping in view the provisions of section 90IA of the I.T. Act. The same is directed to be allowed as per the claim of the appellant. The above-said finding is supported by the division of the Hon'ble Supreme court in the case of CIT vs. Canara Workshop P. Ltd."

3. The Revenue unsuccessfully appealed to the ITAT which rejected its contention on the claim for disallowance of the adjustment. The relevant discussion by the ITAT is as follows: -

"10.1 We have heard both the parties. Under sec. 80IA, profits and gains derived by an undertaking or an enterprises from any business referred to in sub-section (4) shall be allowed as deduction. From the plain reading of the language used in sec.80-IA (1), it is clear that deduction under this section is available in respect of industrial activities of an undertaking and not in respect of gross total income of the assessee. Therefore, the loss suffered in another industrial undertaking cannot be set off against the income in respect of which deduction under sec.80-IA has been claimed. This view is supported by the decision of Hon'ble Supreme Court in the case of CIT vs. Canara Workshop (P) Ltd. (supra) wherein it



has been held that in computing the profits for the purpose of deduction under sec.80-E of Income-tax Act, 1961, the loss incurred by the assessee in the manufacture of Alloy Steels (a priority industry) could not be set off against the profit of the manufacture of Automobile Ancillaries (another priority industry). Accordingly, we do not find any infirmity in the order passed by learned CIT (Appeals).”

4. It is argued by Mr. N.P. Sahni, Sr. Standing Counsel for the Revenue that a fair and objective reading of the record would reveal that the assessee’s claim was inadmissible under Section-80IA because the second Unit was located within the same premises and could not, therefore, be characterised as a “separate undertaking”. Learned counsel especially relied upon paragraph-12 of the Commissioner (A)’s order and also emphasizes that in the question of law framed this aspect has been highlighted in the pleadings of the Revenue. Counsel urged that once the assessee decided to open the separate division in the same premises, he cannot claim the benefit of Section 80IA as far as that activity is concerned.

5. The relevant submissions in the appeal of the Revenue before this Court are as follows: -

- (i) *“The assessee is a company engaged in the business of manufacturing poultry vaccines in collaboration with Vineland Laboratories, USA. The above manufacturing is done by the assessee from its manufacturing facility in District Hissar (Haryana). The assessee had been claiming deduction under section 80IA on the profits of this division.*
- (ii) *It may be mentioned here that during the year under consideration, assessee had commenced separate division under the name of “Avitech” dealing in animal health care products. Assessee suffered loss of Rs.29,34,485/- in this division.”*



6. This Court observes in none of the orders, i.e., Assessing Officer, nor the CIT (A), in fact dealt with this issue as squarely or clearly as is being urged today. Furthermore, no such contention that the Avitech undertaking was located within the same premises as the other poultry vaccine division or undertaking was raised before the Tribunal. Certainly, the grounds recorded by the Tribunal do not reflect this. In the absence of these basic facts, this Court is left to surmise as to whether in fact the claim of the Revenue at this third appellate stage is created. Being a pure question of fact, this Court would be slow in interfering with the conclusions of the authorities below on this aspect and there is no specific fact finding on the aspect. As far as the legality of the conclusions are concerned, the Court notices that the Tribunal and the CIT (A) relied upon the ruling of the Supreme Court in *CIT v. Canara Workshops*, 161 ITR 320.

7. In view of the above discussion, the Court is satisfied that no substantial question of law arises for consideration.

8. The appeal is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

DECEMBER 19, 2012
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