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

Decided on: 18.02.2019

\+ **ITA 785/2017**

PRINCIPAL COMMISSIONER OF INCOME TAX-9..... Appellant
Through : Sh. Zoheb Hossain, Sr. Standing Counsel.

versus

M/S. VODAFONE ESSAR GUJARAT LIMITED ..... Respondent
Through : Sh. Sachit Jolly and Sh. Siddharth Joshi, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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Admit.

1. The Revenue claims to be aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) under Section 260-A of the Income Tax Act, 1961 [hereafter "the Act"] and contends that it is not in consonance with the order of this Court in *CIT v. Shri Ram Honda Power Equipments* 2007 (289) ITR 475 (Del).

2. The facts necessary for this order is that the respondent/assessee, a telecommunications company had claimed benefit of Section 80-IA of the Act. Apparently, it also reported a loan transaction to its group company – M/s. Hutchison Essar South Ltd. The facts relating to this aspect are that the assessee had borrowed sums towards its business undertaking; they were in turn loaned to the said group company. The amounts were borrowed from the bank carrying an interest rate of 7%. The interest received by the

assessee from its sister concern was 9%. The assessee had, in the course of proceedings, claimed that this income was derived from the tax deductable activity covered by Section 80-IA of the Act. The Assessing Officer (AO) held the deduction claim to be unjustified and rejected it. The assessee's further claims with respect to interest claim, netting etc. were disregarded. Ultimately, the assessee approached the ITAT which by the earlier order dated 09.01.2009 (in ITA No.1369 & 2000/Ahd/2008) held as follows:

> *"26. Before us, the Ld. Counsel for the assessee argued that the assessee earned certain interest income which has been treated by the assessee as well as by the AO as income chargeable to tax under the head "Business". It being the income derived from the business by the telecom undertaking, the assessee claimed deduction u/s 80IA in respect of such interest income as well. The AO has disallowed the claim for such deduction relying upon the decision of the Supreme Court in the case of Pandian Chemicals Ltd. (supra) to hold that interest income is not eligible for the tax holiday. The Ld. Counsel for the assessees stated that the decision of the Supreme Court in the case of Pandian Chemicals (supra) was rendered in the context of provisions of Sec. 80HH whereas the present case is concerned with provisions of Sec. 80IA. He stated that under Sec. 80HH: (1) the tax holiday is available where the gross total income of an assessee includes any profits and gains "derived from an industrial undertaking. As against the foregoing deduction under Sec 80IA is available when the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business refered to sub-section (4). Having regard to the clear shift in language of the provision the intention of the legislature is clear that all income derived from the business of the undertaking should be eligible for deduction. The AO himself has taxed interest income as income under the head "business" and not under the head "other sources". It was argued that the decision of the Supreme Court in Pandian Chemicals Ltd. (supra), which relates to Sec tion 80HH, cannot be applied to the provision of*

Sec. 80IA which is differently worded. The AO has also relied upon the decision of the Supreme Court in CIT v. Sterling Foods 1999 237 ITR 579 for disallowing interest. It is submitted that this decision was not concerning interest income but was pertaining to sale of import entitlements. Secondly, this decision was also rendered in the context of Sec 80HH and not Sec 80IA. As observed in the foregoing paragraph, the relevant language of Sec 80HH and 80IA is materially different. While the former requires a direct nexus between the income of the undertaking itself, the later requires the nexus between the income and the business and, therefore, having regard to the fact that interest income is taxed by the AO himself as business income, the application of the foregoing decision by the AO has been misplaced. Having regard to the above, the Ld. Counsel for the assessee argued that interest income be held as income derived from the business by the telecom undertaking and hence eligible for deduction u/s 80IA. The Ld. Counsel for the assessee alternatively argued that if at all the action of the AO is confirmed then in that case, the interest income ought to be adjusted against interest expense, as also the expenses incurred for earning such interest income, and the disallowance be restricted to net interest income only, if any. The Ld. Counsel for the assessee as regards the interest on refund received from Department of Telecommunication stated that the assessee made payments to the Government of India Ministry of Communications, Department of Telecommunications (DOT) in the earlier years as per the demand raised from time to time towards license fee. Subsequently, DOT revised its calculation as a result of which the assessee is entitled to refund as well as interest on refund if there is any delay in making payment of refund to the assessee. The assessee has received refund from DOT as well as interest theron. The said refund is received on excess demand recovered by DOT and, therefore, it has direct nexus with rendering telecommunication services. Therefore, such interest would qualify for deduction u/s 80IA of the Act. Similar arguments were made by the Ld. Counsel for the assessee as regards to FDR interest as well as interest on refund received from the Department of Telecommunication.

Similar alternative claimed was also made as regards to netting of interest. On the other hand the Ld. DR relied on the orders of the lower authorities as well as the case law of Hon'ble Supreme Court in the case of Pandian Chemicals Ltd. (supra).

27. We have heard the rival contentions and gone through the case records. It is seen that the issues of interest on FDRs, loan given to Hutchison Essar South Ltd. and interest on refund of DOT are covered by the decision of Hon'ble Supreme Court in the case of Pandian Chemicals Ltd. (supra). However, we are of the view that the assessee's alternative contention as regards to netting of interest has not been examined by the lower authorities. None of the authorities below have examined the nexus between the interest income earned on the above deposits on loans vis-a-vis the income earned from industrial undertaking. Accordingly, we set aside these issues to the file of the Assessing Officer to verify the facts, whether there is any nexus between the interest income and income from industrial undertaking and allow netting of interest in terms of the decision of the Hon'ble Delhi High Court in the case of CIT v. Shri Ram Honda Power Equip (2007) 289 ITR 475 (Del) and of Tribunal's decision of Delhi Special Bench in the case of Lalsons Enterprises v. DCIT (2004) 82 TTJ 1048 (Del)(SB) wherein it is stated that if there is direct nexus between the interest income and income of business, the netting is to be allowed. Accordingly, we uphold the order of CIT(A) as far the claim of deduction u/s 80IA of the Act on interest income but set aside the issues to the file of the Assessing Officer to find out the nexus and allow netting in view of the above decisions cited. In the result, these issues are partly allowed."

3. The AO, in the second round, after remission, disallowed the claim altogether holding that the amount received was not *business income* but *income from other sources*. The CIT(A) deleted the addition made. The ITAT affirmed that order, stating as follows:

> *"Heard both parties reiterating their respective stand. There is no dispute that instant proceedings are consequential ones confined to nexus aspect only qua impugned interest expenses and interest income in question. It has already come on record that assessee availed loan @7% followed by the same being advanced to its subsidiary @9%. This crucial fact goes unrebutted in the course of hearing. Hon'ble jurisdictional high court in case of Nirma Ltd. (2014) 367 ITR 12 reiterates the very netting principle. We accordingly see no reason to interfere in the lower appellate findings under challenge. This first substantive ground is thus declined."*

4. It is urged on behalf of the Revenue that the principle of netting could be permitted, if at all, if the interest were received in the course of business or in relation to business transaction. In the present case, it was contended, therefore, that having regard to the principles settled by this Court in *Shri Ram Honda (supra)*, netting could not be permitted at all.

5. A plain reading of paras 26 and 27 extracted previously of the earlier order of ITAT makes it clear that the AO had denied deduction under Section 80I-A but not altogether declined that the income received was by way of business. Were it not so, the question of considering the alternate submission of assessee, i.e. for the benefit of netting would not have been remitted by the ITAT in its first order. It was open to the Revenue to have questioned the remand in the first instance. Having not done so, it cannot now question the findings of the lower appellate authority with respect to the working out of the netting principle in the facts of this case.

6. Consequently, no substantial question of law arises in this regard.

7. The second question urged is with respect to the miscellaneous income reported from sale of scrap, including cheque bouncing charges, late payment charges etc. and whether it could be treated as *business income*

having regard to the fact that the assessee is a telecommunications company. At the outset, it is not disputed that this question has been decided against the Revenue in *Principal Commissioner of Income Tax-09 v. M/s. Vodafone Mobile Services Ltd.* [ITA 782 & 784/2017, decided on 03.12.2018] by a Division Bench of this Court.

8. In these circumstances, this question of law too does not arise. For the above reasons, the appeal has to fail; it is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

FEBRUARY 18, 2019