IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH ' A', HYDERABAD

BEFORE SHRI G.C. GUPTA, VICE PRESIDENT AND
SHRI CHANDRA POOJARI ACCOUNTANT MEMBER

ITA No.352/Hyd/2005
Assessment Year 2002-03

M/s Hyderabad Chemicals Supplies Ltd., APIE, Balanagar Hyderabad-37. (PAN AABCH 1014K)	Vs.	The ACIT, Circle 1(4), Hyderabad
(Appellant)		(Respondent)

ITA No.1479/Hyd/2008
Assessment Year 2005-06

M/s Hyderabad Chemicals Products Ltd., APIE, Balanagar Hyderabad-37. (PAN AAACH 5507 Q)	Vs.	The Dy. CIT, Circle 2(2), Hyderabad.
(Appellant)		(Respondent)

ITA No.40 & 41/Hyd/2006
Assessment Year 2001-02 & 2002-03

M/s Hyderabad Chemicals Supplies Ltd., APIE, Balanagar Hyderabad-37. (PAN AABCH 1014K)	Vs.	The ACIT, Circle 1(4), Hyderabad
(Appellant)		(Respondent)

ITA No.42, 43 & 44/Hyd/2006
Assessment Year 2001-02, 2002-03 & 2003-04

M/s Hyderabad Chemicals Products Ltd., APIE, Balanagar Hyderabad-37. (PAN AAACH 5507 Q)	Vs.	The ACIT, Circle 1(4), Hyderabad.
(Appellant)		(Respondent)

Appellant by	:	Shri A.V. Raghuram
Respondent by	:	Shri K.V.N. Charya

O R D E R

Per Chandra Poojari, Accountant Member:

2. The first two appeals in ITA Nos.352/H/2005 & 1479/H/2008 preferred by the assessee are directed against different orders passed by the CIT(A)-II & III, Hyderabad u/s 250 read with 143(3) of the IT Act and pertains to the assessment years 2002-03 & 2005-06.

3. There are other five appeals out of this the first two appeals in ITA Nos.40 & 41 by one assessee & other 3 appeals in ITA No. 42 to 44/H/2006 are by another assessee which are directed against the different orders passed by the CIT-Hyderabad u/s 263 of the IT Act and pertains to the assessment years 2001-02, 2002-03 & 2003-04.

4. The assessees herein raised common ground in these appeals are that the CIT(A)/CIT erred in not accepting claim of the assessee that losses relating to the industrial undertaking which is already absorbed against other income need not be notionally brought forward against the profit of the current year while allowing the deduction u/s 80IA. The assessees also raised ground in ITA No.40 to 44/H/2006 that the CIT(A) erred in canceling the assessment when the original assessment was completed u/s 143(3) of the Act and all the relevant information at the point of Sec.80IA are furnished before the assessing officer. As such, the it is not open to the CIT(A) to invoke the provisions of sec. 263 of the IT Act.

5. The assessee herein is a company which is carrying on its business in the manufacture and trading of agro chemicals, generation, distribution and sale of power. In the assessment years 2002-03 and 2005-06, assessment was framed u/s 143(3) of the Act wherein the claim of the assessee u/s 80IA was denied on the reason that in view of the specific provisions of section 80IA(5) of the profit from the eligible business

for the purpose of determination of the quantum of deduction u/s 80IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years. For the assessment years 2001-02, 2002-03 & 2003-04, the original assessments have been completed u/s 143(3) of the IT Act while passing assessment order, the assessing officer not considered the provisions of section 80IA(5) and bringing forward the unabsorbed losses and unabsorbed depreciation relating to the eligible business that have not been fully set off/adjust against the income from the said undertaking for the earlier year(s) and setting them off against the income from such units in the subsequent year treating the undertaking as if they are only the business of the assessee for the purpose of quantification amount of the income that can be considered for deduction. It is also observed that the assessing officer has not verified the details relating to the expenditure relatable to the earnings of income of the undertaking and has not verified the correctness of the income of the undertaking. In view of this, the CIT invoked the provisions u/s 263 of the Act in these assessment years i.e. 2001-02, 2002-03 & 2003-04 and set aside the order of the assessing officer with a direction to the assessing officer to work out the correct amount of depreciation and business losses of the earlier years relating to the undertakings to which the provisions of section 80IA(7) apply and to carry forward the same and set off against the income of the undertaking in the current year treating the undertaking as if they are only business of the assessee for the purpose of computing the deduction u/s 80IA. Regarding the quantification of the expenses of the undertaking, it was directed to the assessing officer that he/she shall verify the correctness of the claim in this regard. In particular, he/she should allocate the expenses not particularly relatable to the existing alone in the rational manner to the

new undertaking for determination of income of the undertaking. Against this the assessee is in appeal before us.

6. According to learned authorized representative, the notionally brought forward unabsorbed business losses or depreciation of eligible business unit need not be set off against the income earned by the unit for the assessment years.

7. He submitted that the assessee company started the windmill unit located at Kadavakallu near Tadipatyri, Anantapur District on 31.3.1999. The assessee claimed deduction u/s 80IA on this unit at Rs.11,67,300/-. But the assessee company had losses for the assessment year 1999-2000 and 2000-01 on this unit. It has shown a turnover of Rs.12,85,783/- towards this windmill and claimed expenses at Rs.1,18,483/- and arrived the figure of Rs.11,67,300/-. The assessee set off the brought forward losses against the income of this windmill as per the provisions of section 80IA(5).

8. Further, he submitted that the real intention behind sub section 5 section 80IA is to ensure that the industrial undertaking which is eligible for deduction has to be treated as separate industrial undertaking for initial assessment year and subsequent assessment year to arrive at right quantum of profits that are eligible for deduction i.e., that there is no overlapping of any other income of the undertaking or other undertakings and even if there is any reorganization of that unit subsequent to the claim, the profits of the undertaking should be arrived treating it as a separate unit. Sec.80IA(5) has to be read with section 80IA(8)(9) and (10). The other provisions which give detailed instructions as to the manner of computation no where suggest any adjustment for past losses already absorbed.

9. He submitted that S.80IA(5) has to be read with section 80IA(9)(10) the other provision which give detail instructions as to manner of computation, no where suggests any adjustment with regard to past losses already absorbed.

10. He submitted that if loss is intended to be set off against the profits in a succeeding year, the law would have certainly provided for the same as explicitly as it had done under section 80J, now deleted. It is because of the department from normal rule that assessment for each year is distinct and separate is made by specific provisions either u/s 80J, earlier or section 70 to 80 dealing with set off losses in Chapter VI. There cannot be mixing up of the section in this chapter with Chapter VIA except where the concept of set off is specifically incorporated or a cross reference is made thereto.

11. According to the learned AR, Sec.80IA nowhere in explicit terms provides that past losses already absorbed needs to be notionally brought back while working out deduction u/s 80IA for the current year.

12. He relied on the judgement of Rajasthan High Court in the case of CIT Vs. Merwer Oil and General Mills Ltd. (271 ITR 33) and submitted that on similar facts the Hon'ble High Court did not uphold the set off of past losses already absorbed in the purported interpretation of analogous provisions. He submitted that in the case of M.Pallonji & Co. (P) Ltd. Vs. Jt.CIT (6 SOT 287) (MUM) notional adjustment is not called for and not contemplated in the claim of deduction provided in section 80IA and therefore the assessee's claim had to be allowed on the basis of profit of the windmill project, unfettered by any notional amount of unabsorbed depreciation pertaining to the preceding assessment year.

13. Further, he submitted that the amount allowed in earlier years for depreciation on wind mills and was set off against the business income u/s 70 of the Act. That section 80IA does not have that past losses have to be brought forward to curtail the benefit. According to the learned AR the deduction u/s 80IA being a beneficial provision intended for the encouragement of the industries has to be construed liberally and only income for the year has to be taken into account for computation of deduction u/s 80IA without setting off of any brought forward losses shall be when the earlier years losses already absorbed by the income from the other unit of the assessee company. Fiinally, he drew our attention to the following judgements:

1. CIT Vs. Merwer Oil & General Mills Ltd. (271 ITR 311) (Rajas.) wherein it was held:

That the question of rectification would have been germane only if there had been carry forward of unabsorbed depreciation and unabsorbed development rebate or any other unabsorbed losses of the previous year arising out of the priority industry and whether it was required to be set off against the income of the current year. In view of the finding that there was no carry forward of allowable deduction under the head depreciation or development rebate which needed to be absorbed against the income of the current assessment year 1984-85, re-computation of income for the purpose of computing permissible deduction u/s 80I for the new industrial undertaking was not required. There was no error apparent on the face of the record which could be rectified.

2. Mohan Breweries & Distilleries Ltd. (116 ITD 241) (Chennai) wherein held that:

Assessee having claimed deduction u/s 80IA for the first time in assessment year 2004-05, this will be the year in which the undertaking has to be treated as a separate sole source of income within the meaning of S.80IA (5) and, therefore, depreciation and loss of earlier years cannot be notionally carried forward to be set off against income of that year for computing deduction u/s 80IA.

3. Rangamma Steels & Malleables Vs. ACIT (132 TTJ 365) (Chennai) wherein it was held that:

The assessee has option to opt for initial year and the deduction u/s 80IA shall have relevance to that initial year only and conditionality u/s 80IA(5) shall be applicable from such initial year and therefore losses pertaining to year(s) prior to the year in which the assessee opted to claim deduction could not be adjusted against the eligible income.

4. Velayudhaswamy Spinning Mills (P) Ltd. Vs. ACIT (38 DTR 57) (Mds.) (HC) **wherein it was held that losses and depreciation of the years earlier to the initial assessment years which have already been absorbed against the profit of other business cannot be notionally brought forward and set off against the eligible business profit computing u/s 80IA.**

14. The learned departmental representative submitted that as per the provisions of section 80IA (5), the income of any eligible business unit shall be computed as if it is only source of income of the assessee during the previous year relevant to the initial assessment years and to very subsequent assessment years upto including assessment years for which the said benefit is to be computed**.** According to departmental representative the income of the unit eligible for deduction u/s 80IA only is to be computed before granting deduction u/s 80IA as if that it is only source of income. She relied the order of the Tribunal Special Bench in the case of ACIT Vs. Goldmine Shares & Finance (P) Ltd. (113 ITD 209) (Ahed. S.B) wherein it was held that:

"The second aspect of the matter is that the fiction is created for all the years eligible for the deduction i.e. the initial year (the first year of the deduction) and shall subsequent and succeeding years. It is not only for a particular year as evident from the language used in section 80IA(5), it is for initial assessment year and every subsequent assessment year upto and including the assessment year for which the determination is to be made. There was no merit in the contention of the assessee that the fiction was for that year alone or that the concept of initial year was dispensed with in the new provision in view of section 80IA(1) of the old provision and section 80IA(2) (iv)(b) sub section (5) (6)(7). Instead of defining the concepts separately by clause (b) to sub section (12) of the pre amended section 80IA, the sub section (2) itself has contained the provisions of the Explanation by providing the period of deduction and the year from which it is to start. Even otherwise the plain reading of the work

'initial year' means the year in which the manufacture or production or other activity begins."

15. We have heard both the parties and perused the materials available on record. In our opinion, the issue relating to computation of 80IA deduction that it has to be computed after deduction of the notional brought forward losses and depreciation of business even though they have been allowed set off against other income in earlier years has been dealt by the Special Bench in the case of ACIT Vs. Gold Mine Shares & Finance (P) Ltd. (113 ITD 209) (SB) (Ahemadabad) and decide the issue against the assessee. While delivering this order, the Special Bench considered all the arguments what the assessee has placed before us. The Tribunal also considered the judgement in the case of Mewar Oil & General Mills Ltd. (supra) and observed that this case has not noticed the non obstante provisions of section 80I(6)/80IA(5) and, therefore, there is no discussion on this point in that decision. It would similarly, therefore, be not of any help to us. The Tribunal also considered the decision cited by the assessee in the case of Mohan Breweries & Distilleries Ltd. (116 ITD 241) (Chennai) (supra) and observed that what it decided in that case is that the deduction is allowed u/s 80IA for 10 out of 15 years at the option of the assessee which means any ten years not necessarily the beginning of 10 years. Finally it was observed that this case has no relevance in deciding the issue in this case of the assessee because the assessee itself had claimed deduction in the return starting from 1st year. The same is applicable in the case of Rangamma Steels & Malleables Vs. ACIT (132 TTJ 365) (Chennai) and Velayudhaswamy Spinning Mills (P) Ltd. Vs. ACIT (38 DTR 57) (Mds.) (HC). Further, judgement of High Court though not of the jurisdictional High Court, prevails over an order of the Special Bench even though it is from the jurisdictional Bench of the Tribunal, however, where the judgement of the non jurisdictional High Court, though the only judgement on the point, has been rendered without

having been informed about certain statutory provisions that are directly relevant, it is not to be followed. In our opinion, judgement of Special Bench in the case of Gold Mine Shares & Finance (P) Ltd. (113 ITD 209) (SB) (Ahemadabad) squarely applicable to the facts of the present case and applying the ratio laid down by this order of the Special Bench of this Tribunal, we inclined to decide the issue against the assessee relating to allowability of deduction u/s 80IA that in terms of provisions of u/s 80IA(5) of the IT Act, the profit from the eligible business for the purpose of determination of the quantum of deduction u/s 80IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.

16. Regarding invoking of provision u/s 263, the argument of the assessee counsel is that the assessment for the assessment years 2001-02, 2002-03 and 2003-04 have been completed u/s 143(3) of the IT Act and the assesses have furnished all the information as required for the purpose of assessment and the CIT cannot invoke the provision u/s 263 for the purpose of making roving enquiry and the order of the assessing officer is not erroneous as he has followed one possible view on the issue. We have carefully gone through the argument of the assessee's counsel and also perused the material on record. In our opinion, prejudicial to the interest of revenue appearing section 263 is conjunction with the expression 'erroneous' and that every loss of revenue as a consequence of an order of the assessing officer cannot prejudice to the interest of Revenue. In case, where the assessing officer adopts one of the courses permissible in law where two views are plausible the CIT cannot exercise his power u/s 263 to defer with the assessing officer even if there has been a loss of revenue. On the other hand, when the assessing officer takes a view it is patently unsustainable, the CIT can exercise his powers where

the loss of revenue results as a consequence of the view taken by the assessing officer. It is also clear that while passing the order u/s 263, the CIT has to be examined not only the assessment order but also the entire facts on the record. Further, when a regular assessment is made it has to be presumed that it has been passed upon proper application of mind when he has made proper enquiry before passing assessment order. The ITO is not only the adjudicator but also an investigator. He cannot be remained passive in face of an order when it calls for further enquiry. He has to ascertain the truth of the facts stated by the assessee. It is incumbent on the part of the assessing officer to make further investigation of the facts stated by the assessee when circumstances would make such an enquiry is prudent. The word 'erroneous' in section 263 includes failure to make such an enquiry by the assessing officer. The assessment order becomes erroneous because such an enquiry is not made and not because there is anything wrong with the facts stated therein or assumed to be correct. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of being erroneous. An order passed by the assessing officer without application of his mind is said to be an erroneous order. In the facts of the present case, we find that the assessing officer has not applied his mind to the provisions of section 80IA(5). No additional facts were necessary before the assessing officer to come to the conclusion that deduction u/s 80IA is wrongly computed. The assessing officer not examined the facts before him. The order passed by the assessing officer is very cryptic. There is no discussion or methodology of computation of deduction u/s 80IA. It cannot be said that the assessing officer is aware of any of the Tribunal orders on the issues involved. The order of the assessing officer is erroneous for want of proper enquiry. He has not recorded reasons for accepting the return of the assessee as submitted by it on the impugned issue. The assessing officer without making any enquiry accepted the

claim of the assessee without recording any reasons at all. The assessment order is silent about the issue raised by the CIT. He has not examined the merit of the claim of the assessee. We cannot say that he has taken one of the permissible views in accordance with law. He has not taken any view, except accepting the view of the assessee on the issue. In this case, the failure of the assessing officer to make an enquiry with regard to the claim of the assessee and to record such a reason, why he is taking particular view, makes the assessment order erroneous and prejudicial to the interest of the revenue. As such, we are of the opinion that there is no merit in the arguments of the assessee's counsel against observation made by CIT in his order u/s 263..

17. In the result all the appeals of the assessees are dismissed.

Order pronounced in the open Court on: 21.1.2011

Sd/- sd/-

G.C. GUPTA **CHANDRA POOJARI**
VICE PRESIDENT **ACCOUNTANT MEMBER**

Dated the 21st January, 2011

Copy forwarded to:

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2. The DCIT, Circle 2(2), Hyderabad
   The ACIT, Circle 1(4), Hyderabad
3. The CIT(A) –II & II, Hyderabad
4. CIT, Hyderabad
5. The D.R., ITAT, Hyderabad.

Np