Chapter 2 : Systemic issues

2.1 Introduction

We have come across 229 cases where unintended benefits were given to the assessees engaged in infrastructure development due to certain provisions of the Act being deficient, unclear and ambiguous which further lead to avoidable litigation. The present chapter deals with systemic issues relating to allowance of deduction to the assessee companies under section 80IA of the Act.

Systemic issues noticed in audit are briefly shown in Table 2.1 below:

Para No.	Table 2.1 : Nature of Mistakes	Cases	Tax effect (₹ in crore)
2.2	Deduction allowed to ineligible assessees	33	205.84
2.3	Deduction allowed to the business not specified in the Act	16	174.35
2.4	Incorrect computation of Minimum Alternative Tax (MAT)	10	14.12
2.5	Valuation of transient goods	15	0
2.6	Aggregation of income/loss of business vs undertaking	9	27.15
2.7	Inconsistency in setting off brought forward losses and unabsorbed depreciation relating to eligible units	110	119.20
2.8	Treatment of receipts from sale of carbon credits	19	34.77
2.9	Allowance of deduction on additions made during scrutiny assessment	9	74.66
2.10	Deduction on Infrastructure facility developed for captive/private use	8	2066.70
	Total	**229**	**2716.79**

2.2 Deduction allowed to ineligible assessees

Section 80IA(4) of the Income Tax Act provided that

- the enterprises should be owned by Indian company or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act to be eligible for the deductions.
- the enterprise has to enter into an agreement with a government entity (viz. Central Government, State Government or local authority or any other statutory body). In cases where the infrastructure facility is transferred by an enterprise which developed such infrastructure

facility to another enterprise for the purpose of operating and maintaining an infrastructure facility on its behalf in accordance with the agreement with the Government or Statutory Body then the transferee enterprise would also be entitled to deduction for the unexpired period of the contract.

- In the case of Telecommunication services, any undertaking which started providing telecommunication services on or after 1 April 1995 but before 1st April 2005 shall be eligible for deduction under section 80IA.
- In the case of Industrial Park/Special Economic Zone, the compliance with conditions prescribed in the notification issued by the Ministry under the Industrial Park scheme is a mandatory requirement.

The Government, for the purpose of deduction, excluded[2] the business in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise as the case may be. It has been judicially held[3] that the explanation must be read into the main provision with effect from the time that the main provision came into force.

We found that in 33 cases across 13 states[4], the ITD allowed deduction to assessees in respect of infrastructure developed by joint venture formed by collaboration with foreign companies, undertakings owned by AOPs, assessees who did not enter into agreement with the Government, non-compliant Industrial park and excluded works contractors, which resulted in underassessment of income involving tax effect of ₹ 205.84crore **(Appendix 3).**

Box 2.1: Illustrative cases where deduction allowed to ineligible assessees

a. Charge : Pr. CIT-14, Mumbai
Assessee : M/s. Maharashtra State Electricity Transmission Co. Ltd.
Assessment Year : 2010-11 to 2012-13
PAN: AAECM2936N

The AO allowed deduction of ₹ 27.12 crore, ₹ 42.52 crore and ₹ 65.85 crore to the assessee for electricity transmission business for above assessment years respectively. We observed that the assessee company claimed deduction on the income arrived notionally at 14 *per cent* on the basis of "return of equity" on the new additions to fixed

2 Inserted explanation with retrospective effect from 1 April 2000 by amendments made through the Finance Act of 2007 and 2009

3 (Sedco Forex International Drill. Inc. & Others *vs* CIT, Dehradun & Anr dated 17 November 2005-SC, Appeal (Civil) 351-355 of 2005)

4 Andhra Pradesh(3), Bihar (1), Chandigarh(1), Delhi(5), Gujarat(2), Jharkhand(1), Karnataka(2), Kerala(1), Madhya Pradesh(2), Maharashtra(7), Rajasthan (1), Tamil Nadu(4) and West Bengal(3)

assets cumulatively, which was not in order as there being no provision in the Act to claim deduction on such notionally computed income. Incorrect allowance of deduction of income of ₹ 135.49 crore by the AO has had the tax effect of ₹ 44.71 crore. Reply from ITD was awaited.

b. **Charge : Pr. CIT(Central-1), Kolkata**
Assessee : M/s. Jain Infra Projects Limited
Assessment Year : 2008-09 to 2011-12
PAN : AACCB9831F

The AO allowed deduction of ₹ 102.83 crore to the assessee company. We noticed that the assessee executed the works as per agreement with (i) Central Public Works Department (CPWD) for road work, (ii) National Building Construction Corporation Limited (NBCC) for construction of quarters (including water supply/sanitation works) at DVC, Mejia, (iii) Westinghouse Saxby Farmer Limited (WSFL) for road work (iv) Executive Engineer, RCD, Bihar for improvement of road in the district of Motihari and (v) IRCON International Limited (IRCON) for improvement/upgradation of existing roads of state Highways in Samastipur district, Bihar etc. These agreements being in the nature of contractual agreements for merely execution of work, the assessee company could not be termed as a developer for availing the deduction**.** AO's irregular allowance of deduction of income of ₹ 102.83 crore has resulted into under charge of tax of ₹ 34.75 crore. Reply from ITD was awaited (April 2016).

c. **Charge: CIT II, Delhi**
Assessee: M/s. Celebi Delhi Cargo Terminal Management India Pvt. Ltd.
Assessment Year : 2011-12 and 2012-13
PAN : AADCC6885B

The AO allowed deduction of ₹ 83.15 crore and ₹ 15.49 crore to the assessee company for AYs 2011-12 and 2012-13 respectively. Delhi International Airport Private Limited (DIAL) entered into an agreement(April 2006) with M/s. Airport Authority of India to operate, maintain, develop, design, construct, upgrade, modernise, finance and manage the IGI Airport, New Delhi. Later DIAL granted the right for up-gradation, financing, operation, maintenance and management of cargo terminal at the airport for a term of 25 years to the assessee company in August 2009. The assessee company not having been entered into an agreement directly with the Government was not eligible for deduction. AO's omission to disallow the deduction resulted in underassessment of income of ₹ 98.64 crore involving potential tax effect of ₹ 32.65 crore for both the assessment years.

The department replied that the company was executing the work under the concession agreement with DIAL which was a joint venture company of AAI and GMR Airports Ltd. and the cargo terminal was an integral part of the airport infrastructure. The reply was not acceptable as the assessee company did not enter into an agreement directly with the Central Government/state government/local authority/statutory body for development of infrastructure facility to be eligible for the deduction under Section 80 IA of the Income Tax Act.

d. Charge : CIT-V, Hyderabad
Assessee : M/s. United Port Services Pvt. Ltd., Hyderabad
Assessment Year : 2010-11, 2011-12 and 2012-13
PAN: AABCJ0188Q

The AO allowed deduction of ₹ 87.65 crore to the assessee company engaged in build, operation & maintenance of infrastructural facility, allotted in certain part of notified port land in Kakinada Deep Water Port for operation & maintenance of three existing berths and development, operation & maintenance of 4th berth and claimed deduction for all four berths. We noticed that the agreement was entered into by M/s. Kakinada Seaports Ltd. (KSPL) with the Government of Andhra Pradesh and the port area was sublet to the assessee company. Since the assessee did not enter into agreement with the Government, it was not eligible for deduction under section 80-IA. Omission to disallow the deductionresulted in under assessment of income of ₹ 87.65 crore involving tax effect of ₹ 29.09 crore. The ITD did not accept the observation on the ground that M/s. KSPL had subleased the activity of supply of water to vessels and assesse further obtained approval from Government of Andhra Pradesh for land Lease with M/s. KSPL. It is confirmed that Infrastructural facilities developed for bunkering, pipeline and other facilities is eligible for deduction. The reply is not tenable as there was no direct agreement of the assessee with Central/State government. Director of Income Tax (Intelligence), Hyderabad also concluded (November 2013) that the assessee was not eligible for deduction u/s 80 IA.

e. Charge: Pr. CIT (Central), Nagpur
Assessee: M/s. SMS Infrastructure Limited
Assessment Year : 2010-11 and 2011-12
PAN : AACCS9854P

The AO allowed deduction of ₹ 11.30 crore and ₹ 13.99 crore to the assessee for development and maintenance of roads for AYs 2010-11 and 2011-12. We noticed that the assessee company formed a joint venture with M/s. International Road Dynamics Inc (A company incorporated under the laws of Canada) and undertook the operation and maintenance of a toll road and collection of toll at Vidyasagar Setu Toll Plaza of HRBC, Kolkata of the Government of West Bengal. As M/s. International Road Dynamics Inc being a Canadian company, the joint venture formed with an Indian Company was not a consortium of Indian companies, the assessee was not eligible for deduction under section 80IA.AO's failure to disallow the deduction resulted in incorrect allowance of deduction of income of ₹ 25.29 crore involving tax effect of ₹ 8.49 crore. Reply from ITD was awaited (December 2015).

f. Charge : Pr. CIT 3, Mumbai
Assessee : M/s. Reliance Industrial Infrastructure Limited
Assessment Year : 2010-11, 2011-12 and 2012-13
PAN:AAACR7637P

The AO allowed deduction of ₹ 7.26 crore and ₹ 7.32 crore for AYs 2010-11 and 2012-13 during scrutiny assessment and of ₹ 7.06 crore for AY 2011-12 in summary assessment. The assessee was engaged in the business of raw water supply through pipeline from river Tapi to petrochemical complex of Reliance Industries Ltd. (RIL), Hazira, against a tripartite agreement executed by RIL with Surat Municipal Corporation, Hazira Area Industries

Association and Participating Industries for Singanpur Weir project. Further, RIL paid ₹ 8.07 crore to the assessee company for raw water supply after deducting TDS under section 194C of the Act. Thus, the assessee company being a contractor of RIL was not eligible for deduction. Irregular allowance of deduction of ₹ 21.64 crore resulted in under assessment to that extent involving tax effect of ₹ 7.19 crore.

The ITD did not accept the observation stating that explanation to Section 80IA includes water supply project as infrastructure facility (November 2015). The reply is not acceptable, as the assessee was only a contractor and hence was not eligible for deduction under Section 80 IA at all.

g. Charge : CIT II Vadodara
Assessee: M/s. Netafim Irrigation India Pvt. Ltd.
Assessment Year: 2011-12
PAN: AAACE4738J

The AO allowed deduction of ₹ 9.21 crore to the assessee company engaged in the business of manufacturing and trading of drip irrigation system. We noticed that the required agreement was signed between M/s. Netafim ACS and India Ltd. and the Government of Andhra Pradesh and not between assessee company and the State Government. The assessee company was a wholly owned subsidiary of Netafim Ltd. Israel (formally known Netafim ACS Israel) and did not enter into any agreement with the Centre or the State Government and hence it was not eligible for deduction. AO's failure to disallow the deduction resulted in under assessment of income of ₹ 9.22 core involving short levy of tax of ₹ 4.53 crore. Reply from ITD was awaited (December 2015).

h. Charge : CIT Thiruvananthapuram
Assessee: M/s. Indian Medical Association Goes Eco Friendly (IMAGE)
Assessment Year: 2010-11, 2011-12 and 2012-13
PAN: AAAAI1681A

The AO allowed deduction of ₹ 6.41 crore to the assessee for AYs 2010-11 to 2012-13 for providing facility of disposal of bio-medical waste generated in hospitals. The status of the assessee being "Association of Persons" was not one of the entities specified in section 80IA (4)(i) and as such the assessee was not eligible for deduction. AO's omission to disallow the deduction resulted in under assessment of income of ₹ 6.41 crore involving tax effect of ₹ 2.60 crore. **ITD took remedial action under section 263 (February 2015) for assessment year 2010-11**.

i. Charge : CIT II Coimbatore
Assessee : M/s. RPP Infra Projects Ltd.
Assessment Year : 2010-11 and 2011-12
PAN: AAACR9307E

The AO allowed deduction of ₹ 2.30 crore and ₹ 5.71 crore for AYs 2010-11 and 2011-12 respectively. We noticed that the assessee company entered into works contract for construction of properties belonging to the Government/Statutory Bodies and parted with them after the payment of contract amount. The AO, while completing the scrutiny assessment for the AY 2012-13, also held that the assessee was engaged in execution of works contract and accordingly disallowed the deduction. As the status of the assessee was same for the AYs 2010-11 and 2011-12, deduction claimed should have been disallowed for AYs 2010-11 and 2011-12 also. AO has therefore failed to disallow the deduction which has resulted in underassessment of income of ₹ 8.01 crore involving tax effect of ₹ 2.10 crore for the AYs 2010-11 and 2011-12. ITD agreed to examine the audit observation (March 2014).

It is, thus, observed from above that the AOs were not able to appreciate the pre-qualifications prescribed for availing the benefits and irregularly allowed the deduction to the assessees who were not eligible for deduction either due to not having entered into agreement directly with the government, or being works contractors, or infrastructure having been developed by joint venture formed by collaboration with foreign companies etc. The email response dated 27th June 2016 of CBDT did not contain any response either on the specific cases raised or on the systemic issue pointed out. No reply/comment was given even during the Exit Conference.

2.3 Deduction allowed to the business not specified in the Act

Business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility, providing telecommunication services, development, or development and operation or maintenance and operation of an industrial park or special economic zone notified by the Central Government, generation or generation and distribution of power including substantial renovation and modernisation of the existing network of transmission or distribution lines are the infrastructure facilities which are eligible for deduction under section 80IA.

Explanation to Section 80IA(4) covers infrastructure facility[5] but does not mention other ancillary/support services and facilities like fuel facility, parking facilities etc., required for smooth functioning of airports. As such these auxiliary services could not be termed as eligible infrastructure facility for the purpose of deduction under section 80IA.

We found in 16 cases in eight states[6] that the ITD allowed deduction from the income of the assessee companies under section 80IA where the businesses such as sale of plots, projects not covered under infrastructural

---

[5] (i) a road including toll road, a bridge or a rail system (ii) highway project, (iii)water supply project, water treatment system, irrigation projects, sanitation and sewerage system or solid waste management system, (iv) port, airport, inland waterways (inland Port or Navigational Channel in the Sea). The Finance Act 2001 applicable w.e.f. 1 April 2002 deleted the term 'other public facilities of similar nature as may be notified by the Board' form the list of eligible business.

[6] Andhra Pradesh(1),Bihar(1), Delhi(4), Gujarat(2), Karnataka(1), Madhya Pradesh(1), Maharashtra(2) and West Bengal(4)

facilities, conversion charges, development/maintenance of park etc, were not eligible for the deduction.

ITD's failure to disallow the deductions resulted in underassessment of income involving tax effect of ₹ 174.35 crore (**Appendix 4).**

Box 2.2: Illustrative cases where deduction allowed to ineligible business

a. Charge: CIT III, Delhi
Assessee: M/s. Delhi State Industrial and Infrastructure Development Corporation Ltd.
Assessment Year : 2011-12 and 2012-13
PAN :AAACD 1257F

The AO allowed deduction of ₹ 239.60 crore to the assessee company for developing, operating and maintaining the infrastructure facility. In course of audit, we observed that deduction was allowed on income from sale of plots, EWS projects, conversion charges and interest income etc which were not the income eligible for deduction. Incorrect allowance of deduction resulted in under-assessment of income of ₹ 239.60 crore involving tax effect of ₹ 86.76 crore. Reply from ITD was awaited

b. Charge: CIT-I, Hyderabad
Assessee : M/s. AP Power Generation Corporation Ltd.
Assessment Year: 2011-12 and 2012-13
PAN: AACCA2734J

The AO allowed deduction of ₹ 127.04 crore for AYs 2011-12 and 2012-13 to the assessee on the activities such as providing O&M services to AMRP lift irrigation scheme of Govt. of Andhra Pradesh, consultancy services to various power projects, etc. which were not accruing out of the assessees' eligible business i.e. generation of power. As the aforesaid business activities were not eligible business, the deduction should have been disallowed. AO's failure to disallow the deduction resulted in irregular allowance of deduction under section 80IA involving tax effect of ₹ 41.80 crore. Reply from ITD was awaited.

c. Charge : PCIT 5, Mumbai
Assessee : M/s. ABG Kolkata Container Terminal Private Limited
Assessment Year : 2010-11 to 2012-13
PAN:AACCC1919K

The AO allowed deduction of ₹ 7.04 crore and ₹ 8.67 crore for AYs 2010-11 and 2012-13 to the assessee company respectively after scrutiny and of ₹ 8.89 crore for AY 2011-12 in summary assessment on the income arising from hiring charges for supplying cranes/ equipment to Kolkata Port Trust. The supply of cranes for smooth functioning of the Port activity could not be construed as developing, operating and maintaining infrastructure facility namely, "Port". Therefore, the assessee was not entitled for deduction under section 80IA. AO's failure to disallow the deduction resulted in irregular allowance of deduction of ₹ 24.62 crore involving tax effect of ₹ 8.16 crore for all the three assessment years.

The department replied that the cranes installed at the port were used for loading and unloading of containers; therefore this activity squarely falls with the extended parameters of definition of "port". The reply was not tenable as the assessee company was merely a service provider of cranes at Port and the activity was not covered in the definition of Infrastructure facility by the Act.

It is therefore observed from above that the AOs failed to adhere to the prescribed businesses and irregularly allowed deduction against the income arising from consultancy services to various power projects, income from supply of cranes etc., which were not eligible for deduction under the section 80 IA. The email response dated 27th June 2016 of CBDT did not contain any response to either the specific cases raised or the systemic issue pointed out. No reply/comment was given even during the Exit Conference.

2.4 Incorrect computation of Minimum Alternative Tax (MAT)

Section 115JB provides that where the income tax payable on the total income as computed under normal provisions is less than prescribed percent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income tax at the rate/percentage prescribed from time to time. The Report under section 115JB (4) is required to be given in Form No.29B as per Rule 40B of the Act which requires certification by the accountant. In computation of MAT, the amount carried to any reserve is to be added back to arrive at the book profit.

It was judicially held[7] that forfeiture of shares amounts to transfer with reference to section 2(47) r.w.s. 45 of the Act and is a Capital Gain. Further, it is also judicially held[8] that if Profit and Loss account is drawn up without considering the capital gain then it cannot be said to be in accordance with the provisions of Part II and Part III of the Companies Act and the assessee is required to take into account, income by way of capital gain under section 45 of the Act and while computing the book profits under the Companies Act, the assessee has to include capital gain for the purpose of section 115JB.

Under section 115JAA of the Act, the difference of the tax paid and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of the Act shall be allowed as tax credit.

[7] DCIT vs, BPL (Sanyo) Finance Ltd. (2009) 312 ITR 63 (Kar)
[8] Jaroda Plantations Pvt.. Ltd. ITA No. 4420/Del/2011 ITAT Bench 'D', Delhi

Exemption under section 10(23G) on dividend income (other than dividend referred in section 115O), interest or LTCG of an infrastructure capital fund or and infrastructure capital company from investments in shares from 01 June 1998 for long term finance in any undertaking engaged in an approved eligible business is omitted w.e.f. 01 April 2007. Therefore, income from existing as well as future investment in any eligible business will be taxable.

We noticed in 10 cases in four states[9] that the ITD incorrectly computed MAT by (i) not adding back reserves, provisions (ii) capital gains credited to profit and loss account, (iii) allowing excess carry forward of MAT credit etc. resulting in underassessment of income involving tax effect of ₹ 14.12 crore (**Appendix 5).**

Box 2.3 Illustrative cases on incorrect computation of Minimum Alternative Tax (MAT)

a. **Charge : CIT-IV, Hyderabad**
Assessee : M/s. Lanco Kondapalli Power (Pvt.) Ltd.
Assessment Year : 2010-11
PAN : AAACK5423A

AO allowed deduction of ₹ 270.52 crore under normal provisions. We noticed that while computing book profit, the invoices raised on AP Transco towards reimbursement of taxes of ₹ 39.40 crore, not routed through profit and loss account were decided to add back during the scrutiny assessment but not added to the deemed income. Similarly, disallowance of ₹ 10 crore towards capital expenditure was also not added to book profit. Omission to disallow the deduction resulted in underassessment of income of ₹ 49.40 crore involving tax effect of ₹ 8.40 crore. The ITD did not accept the observation (December 2015) stating that said item of income was not deemed to be treated as income. The reply is not tenable on the ground that this was a recurring issue and for each assessment year the department was adding it to the book profit except for AY 2012-13.

b. **Charge : CIT-I, Guntur**
Assessee : M/s. Transstroy (India) Limited Guntur
Assessment Year : 2011-12
PAN : AABCT4226B

The AO while passing consequential order allowing relief of ₹ 104.63 crore to the assessee company allowed the relief on the income of ₹ 3.34 crore from other source, not eligible for deduction. Thus, there was excess allowance of deduction of ₹ 3.34 crore involving tax effect of ₹ 1.11 crore. As tax was paid under special provision, MAT credit should have been reduced to the extent of ₹ 1.11 crore. Reply from ITD was awaited.

It is therefore observed from above that the adjustments required under special provisions of the Act were not inter alia carried out even after clear cut decision of the assessing officer in the assessment order. The email

[9] Andhra Pradesh(4), Delhi(1), Maharashtra(2) and Rajasthan(3)

response dated 27th June 2016 of CBDT did not contain any response either on the specific cases raised or on the systemic issue pointed out. In the exit conference also, the representatives of the ITD did not comment on the issue.

2.5 Valuation of transient goods

As per Sec 80IA(8), if there is transfer of goods and services between eligible and other business of the assessee, the value of such goods shall correspond to the market value of the goods. If the consideration for such transfer recorded in the accounts of the eligible business does not correspond to market value of the goods on the date of the transfer, the assessing officer shall re-compute the profits or gains of the eligible business adopting the market value for such transferred goods.

Sugar, cement and paper industries typically embed combined heat and power plants (cogeneration plants) to utilise the excess heat/steam produced in their core business and produce electricity for captive consumption. In this type of power generation, intermediate products are transferred from core business to the eligible business. Steam is a transient product without shelf life and is used in the generation of electricity.

We observed that assessees treated steam[10] as input and/or as output for the power generation unit. Besides, assessees instead of adopting market price, used different methods of valuation of steam/waste heat i.e. either cost basis or notional basis (**Appendix 6).**

Box 2.4: Illustrative cases on valuation of transient goods and services

a. **Charge : CIT-1 Chennai**
Assessee : M/s. Coromandel Sugars Ltd.
Assessment Year : 2011-12 and 2012-13
PAN : AAACC 4628 F

AO allowed net deduction of ₹ 10.84 crore and ₹ 13.47 crore for AYs 2011-12 and 2012-13 respectively in respect of power generation business. We noticed that the assessee company which was engaged in the manufacture of sugar, generated steam based power (electricity) by additionally installing a turbine. The assessee treated the steam as an input for generation of electricity. The expenditure on steam used as input was determined on cost basis instead of market rate as envisaged in section 80 IA(8) which led to inflation of profit of the eligible unit and the amount of deduction allowed as well. Reply from ITD was awaited.

[10] Steam is used as input for generation of electricity which is an output of the core business

b. Charge : CIT-2 Chennai
Assessee : M/s. India Cements Ltd.
Assessment Year : 2011-12 and 2012-13
PAN:AAACT 1728 P

AO allowed deduction of ₹ 12.89 crore and ₹ 23.94 crore for AYs 2011-12 and 2012-13 respectively, for the profit arising out of the electricity generated from the waste heat emanated from cement manufacturing units. While computing the eligible profit, the assessee adopted a notional price for the waste heat at 10 paise per unit of electricity for working out the profit of the unit eligible for the deduction. In doing so, profit was inflated leading to excess allowance of deduction. Reply from ITD was awaited.

Steam or waste heat is not a saleable commodity and hence their market value is indeterminable. While, the Act stipulated adoption of market price for transient product like steam/waste heat, the department accepted the price (whether cost price or notional price) as claimed by the assessee without determining the market price or checking the authenticity of the method adopted by the assessee. It is felt that the ITD should have evolved an appropriate mechanism/formula and /or issued guidelines to the AOs for adoption of market price for transient product like steam/waste heat The CBDT stated (June 2016) that based on the definition of the term "Market Value" under Explanation to the sub-section (8) of the Section 80IA, the AOs should make necessary enquiries keeping in view the local market conditions so as to ascertain appropriate market value. In the Exit Conference again, the matter was highlighted by the audit that since there is no market for transient products like steam, appropriate guidelines should be issued to the AOs keeping in view the cost of production of steam by the PSUs like NTPC or State electricity boards.

2.6 Aggregation of income/loss of business vs undertaking

Section 80IA(1) provides that the income of an assessee from an undertaking or an enterprise includes profits and gains of the eligible business which is allowed as deduction.

The income/loss from both the eligible and ineligible units, under the same head is to be aggregated in accordance with the provisions of section 70 of the Act. Thereafter, the income from one head is aggregated with the income/loss of any other head in accordance with the provisions of section 71 of the Act. If after giving effect to the provisions of sections 70 and 71 of the Act, there is any income (where there is no brought forward loss to be set off in accordance with the provisions of section 72 of the Act), the same is eligible for deduction in accordance with the provisions of Chapter VI-A.

CBDT clarification[11] on computation of income or loss of eligible business for the purpose of Sections10A, 10AA, 10B is quiet relevant which need to be taken into cognizance by the ITD for the purpose of deduction under section 80IA though no such provision is available under the section in the Act.

We observed in nine cases[12] in four states that AO irregularly allowed deduction under section 80 IA to the extent of ₹ 80.18 crore to the assessees engaged in the generation of power using windmill, treating each windmill as separate undertaking. The assessees did not aggregate income or loss of all the windmills but selectively opted to claim deduction only for the profit making windmills, leaving losses of other windmills and other ineligible business.

The losses of other windmills were either set off against profit of non eligible business or carried forward for future years. Thus, AOs failed to disallow deductions which resulted in excess allowance of deduction involving tax effect of ₹ 27.15 crore **(Appendix 7).**

Box 2.5: Illustrative cases on lacuna in the definition of the term 'undertaking'

a. Charge : CIT-IV, Hyderabad
Assessee: M/s. NSL Renewable Power Pvt. Ltd.
Assessment Year: 2010-11, 2011-12 and 2012-13
PAN : AABCN6009L

AO allowed deduction of ₹ 37.26 crore selectively claimed by the assessee in respect of 4 profit making units out of total 9 units under power division. The assessee was engaged in generation of power through windmill together with another ineligible business relating to seeds, real-estate, IT infrastructure and others. By not considering the profit and losses of all the Windmill units as part of one business, there was an excess allowance of deduction of ₹ 37.26 crore involving tax effect of ₹ 12.48 crore. Reply of the department was awaited (November 2015).

b. Charge : CIT-Trivandrum
Assessee : M/s. Muthoot Fincorp
Assessment Year : 2010-11, 2011-12 and 2012-13
PAN: AACCM1453E

AO allowed deduction of ₹ 3.10 crore selectively claimed by the assessee in respect of two profit making windmills out of 14 units for assessment year 2010-11, three profit making windmills out of 20 units for assessment year 2011-12 and five profit making units out of total 20 units for assessment year 2012-13 of windmills generating power. The aggregate income from all the windmills worked out to loss of ₹ 6.35 crore. As there was net loss from

[11] Circular NO.7/DV/2013 dated 16 July 2013
[12] Andhra Pradesh (1), Kerala (2), Maharashtra (2) and Tamil Nadu (4)

power generation, the assessee was not eligible for any deduction under section 80IA. Thus, irregular allowance of deduction of ₹ 3.10 crore by the AO has had the tax effect of ₹ 1.02 crore. ITD did not accept the observation giving reference to ITAT decision[13] that each windmill could be treated as separate undertaking and accordingly the assessee's claim of deduction was allowed. ITD's reply is not tenable in view of CBDT's clarification[14].

c. Charge : PCIT LTU/Mumbai
Assessee : M/s. Nuclear Power Corporation of India Limited
Assessment Year : 2010-11
PAN: AAACN3154F

AO allowed deduction of ₹ 31.94 crore in respect of profit making Unit 2 of the assessee at Kakrapur whereas the assessee did not claim deduction in respect of Unit 1 at Kakrapur itself (combined Form No. 10CCB for Unit 1 and 2) which incurred loss of ₹ 31.37 crore. The department allowed the deduction without adjusting the current year losses against profit of other unit. AO has therefore failed to disallow the deduction which has resulted in irregular allowance of deduction of ₹ 31.37 crore involving tax effect of ₹ 10.66 crore.

ITD did not accept the observation stating that the assessee had correctly done the set off as each unit had to be treated as if it were the only business of the assessee. Reply of the department was not tenable in view of the Board circular of July 2013.

The electricity generated by the cogeneration units is primarily meant for captive consumption only by the respective individual undertakings. There is no provision in the law to treat the cogeneration units as a separate undertaking and no methodology has been prescribed to determine the profits derived from the cogeneration units for the purpose of deduction under section 80IA.

The word 'undertaking' mentioned in the section does not indicate whether it meant for a particular unit of the business of the assessee or all the eligible units of the business of the assessee taking together. Treatment of each unit of the business of same nature as separate undertaking led to undue benefit to the assessees. Further, CBDT's clarification on computation of income or loss of eligible business for the purpose of sections 10A, 10AA, 10B was not taken cognisance by the ITD authorities for the purpose of said deduction. The CBDT admitted (June 2016) that the observations in the above paragraph actually pertain to wrong deduction u/s 80 IA in those standalone cases and hence stated that it did not seem necessary to define the term "Undertaking" with a view to avoid such instances. In the Exit Conference, Audit held that it may be necessary for the Board to issue a suitable guidelines to field formation taking into account the local conditions based on due diligence and need for treating cluster of windmills owned by an assessee as an

[13] M/s Super Spinning Mills-ITA No.1672/Mds/08-ITAT Chennai-21 April 2011
[14] Circular NO.7/DV/2013 dated 16 July 2013.

undertaking instead of treating each windmill as an independent undertaking. The meaning of the word 'undertaking' is used to indicate individual windmill by some assessees and a cluster of windmills by some other assessees. This leads to claiming exemption u/s 80IA selectively on profit making windmills and the loss of the other windmills were set off against profit from other business. Hence, lack of such clarification may lead to unintended benefit of exemption and possible misuse of the Act.

2.7 Inconsistency in setting off brought forward losses and unabsorbed depreciation relating to eligible units

As per the provisions of section 80IA(1) and (2), deduction of an amount equal to 100 *per cent* of profits and gains derived from the eligible business may, at the option of the assessee, be claimed for any 10 consecutive years out of 15 years beginning from the year in which the undertaking or the enterprise begins to operate any infrastructure facility.

Section 80IA(5) stipulates that notwithstanding anything contained in any other provisions of the Act, the profits and gains of eligible business, shall, for the purpose of determining the quantum of deduction, for the assessment year immediately succeeding the initial 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 initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

CBDT has recently clarified[15] that initial assessment year would mean the first year opted for by the assessee for claiming deduction under section 80 IA and as such once such initial assessment year is opted for by the assessee, he shall be entitled to claim deduction for ten consecutive years beginning from the year in respect of which he has exercised such option subject to fulfillment of conditions prescribed in the section.

We noticed that AOs were not taking uniform stand in allowance of brought forward loss (es) pertaining to years prior to initial assessment year in respect of eligible business. In 19 cases in Tamil Nadu, the AOs disallowed the claim of deduction after setting off brought forward losses pertaining to years prior to initial assessment year but tax collections of ₹ 29.02 crore were kept in abeyance (**Appendix 8A)** whereas in 50 cases in Tamil Nadu itself, the ITD allowed deduction claimed without setting off of brought forward loss (es)

[15] CBDT Circular No.1/2016 dated 15 February 2016 issued from F. No.200/31/2015-ITA-I.

pertaining to years prior to initial assessment year which involved tax effect of ₹ 35.06 crore (**Appendix 8B**).

In 41 cases in different states, ITD allowed deduction without adjusting the notionally brought forward losses pertaining to initial assessment year and subsequent assessment years resulting in excess allowance of deduction involving tax effect of ₹ 55.12 crore (**Appendix 8C**).

Box 2.6: Illustrative cases on inconsistency in setting off brought forward losses and unabsorbed depreciation relating to eligible units

a. Charge: CIT I Baroda
Assessee: M/s. Gujarat Fluro chemicals Limited
Assessment Year: 2010-11/2011-12
PAN: AAACG6725H

The AO allowed deduction of ₹ 37.11 crore and ₹ 30.49 crore for AY 2010-11 and 2011-12 without setting off brought forward business loss/unabsorbed depreciation of ₹ 163.22 crore relating to AYs 2007-08 to 2009-10. After set off of notional brought forward loss against the profit of initial AY 2010-11, there was no profit left for claiming deduction under section 80-IA of the Act. Thus, there was irregular deduction of ₹ 37.11 crore and ₹ 30.50 crore involving the tax effect aggregating to ₹ 22.75 crore.

ITD, quoting various judicial decisions in favour of assessee[16], did not accept the observation (October 2015) stating that while computing deduction under section 80-IA, the brought forward losses of the eligible unit were not required to be set-off against the profit of the same unit, if they had already been set off against other income. The reply was not tenable as section 80-IA(5) stipulates that the quantum of deduction was to be computed treating the eligible undertaking as the only source of income. Karnataka High court, after taking into consideration the judgement of Madras High Court cited by the ITD, had given a decision[17] in favour of revenue stating that "the non obstante clause in sub-section (5) of section 80-IA overrides all the provisions of the Act."

[16] (i) CIT v Anil H Lad(2014) 225 Taxman 170(Mag.)(karn.)(HC)
(ii) Hercules Hoists ltd v ACIT(2013)22 ITR 527(URO)(Mum.)(Trib.)
(iii)Velayudhasamy Spinning Mills P. Ltd v ACIT (2012) 340 ITR 477(Mad.) (HC).

[17] Microlabs Ltd. versus ACIT, Banglore (Appeal No. 194 of 2011-Karnataka HC)

b. Charge : CIT VII, Delhi
Assessee : M/s. Powerlinks Transmission Ltd.
Assessment Year : 2012-13
PAN : AABCT7775M

AO allowed deduction of ₹ 89.35 crore to the assessee company for distribution of power after setting off unabsorbed deprecation of ₹ 28.76 crore pertaining to AY 2008-09 prior to initial assessment year 2012-13. We noticed that out of total unabsorbed depreciation of ₹ 28.76 crore, ₹ 16.16 crore was set off against other income consisting of interest income and non operating income and the remaining amount of ₹ 12.60 crore was set off from eligible business. In doing so there was excess allowance of deduction of ₹ 16.16 crore involving tax effect of ₹ 5.24 crore. The ITD did not accept the observation (November 2015) stating that unabsorbed depreciation could be adjusted against all income. The reply is not tenable in view of the Karnataka High court judgment that non obstante clause in sub-section (5) of section 80-IA overrides all the provisions of the Act.

c. Charge: CIT II Chennai
Assessee: M/s. India Cements Ltd.
Assessment Year: 2010-11/2011-12/2012-13
PAN:AAACT 1728 P

The assessee claimed deduction of ₹ 3.48 crore, ₹ 5.03 crore and ₹ 4.26 crore for the AYs 2010-11 to 2012-13 in respect of power generation through windmill located at Kayathar, Tirunelveli District. The assessee had unabsorbed depreciation/business loss of ₹ 25.95 crore for AY 2008-09 and 2009-10 prior to initial assessment year 2010-11, which was not adjusted by the ITD against the claim of deduction of the assessee. Thus, there was excess allowance of deduction of ₹ 12.77 crore involving tax effect of ₹ 4.24 crore. Reply from ITD was awaited.

It was therefore observed that AOs were not taking uniform stand in allowance of brought forward loss(es) pertaining to years prior to initial assessment year in respect of eligible business. The CBDT agreed (June 2016) to examine the feasibility of issue of a clarification under the existing law.

2.8 Treatment of receipts from sale of carbon credits

The taxability of the income arising from sale of carbon credits[18] has been a matter of litigation as to whether the consideration received by an entity for sale of carbon credits generated by it, is of capital nature or revenue nature or such amount is taxable or not or such income is eligible for deduction

[18] Under the Clean Development Mechanism (CDM), a developed country takes up a Green Houses Gases (GHG) reduction project activity in a developing/least developed country where the cost of GHG reduction is usually much lower. In consideration for undertaking the activity the developed country are given carbon credits for meeting its emission reduction targets. Alternatively, entities in developing/least developed countries set up a GHG reduction project, in their respective countries, get it approved by UNFCCC and earn carbon credits. Such carbon credits generated, by the entities in the developing/least developed country are bought for a consideration by the entities of the developed countries responsible for emission reduction targets. Under the CDM, carbon credits are measured in terms of Certified Emission Reduction (CER) where one CER is equal to 1 metric tonne of carbon dioxide equivalent, and for which a certificate is issued which is saleable.

under chapter VIA. There are different judicial decisions on the treatment of receipts from sale of carbon credits as below:

- ITAT Benches at Hyderabad, Jaipur and the Chennai have taken the view that sale proceeds of carbon credit being capital receipts, are not taxable.
- ITAT Bench at Cochin is of the view[19] that the sale proceeds of carbon credits are taxable as a benefit arising out of business. However, there being no direct source of income from industrial undertaking, the receipts from sale of carbon credits could not be treated as income 'derived from' the business which were not eligible for deduction under section 80-IA.
- Apex Court has held[20] that the word 'derived from' cannot have a wide import so as to include any income which can in some manner be attributed to the business, and therefore the income from sale of carbon credit is not eligible for deduction u/s 80IA.

We noticed in 19 cases in eight states[21] that the ITD allowed the deduction in respect of income earned through sale of carbon credit which involved tax effect of ₹ 34.77 crore **(Appendix 9).**

Box 2.7: Illustrative cases on treatment of receipts from sale of carbon credits

a. **Charge : CIT IV Chennai**
Assessee : Lanco Tanjore Power Co. Ltd.
Assessment Year : 2011-12
PAN : AACCA 4297N

The AO allowed deduction of ₹ 65.90 crore to the assessee company while processing the return in summary manner. The assessee received ₹ 21.92 crore towards carbon credit (sale of emission reduction). The earning towards carbon credit did not represent income derived from the eligible business. Hence allowance of deduction of ₹ 21.92 crore was not in order. AO has thus failed to disallow the excess claim which has resulted in underassessment of income to that extent involving tax effect of ₹ 7.28 crore. Reply from ITD was awaited.

---

19 Appolo Tyres Ltd Vs ACIT 47 taxmann 416 (Cochin-2014)
20 Cambay Electrical Supply Co. Ltd 113 ITR 84(SC)
21 Andhra Pradesh(1), Chattisgarh(2), Delhi(2),Gujarat(1), Karnataka(2), Maharashtra(5), Rajasthan(2) and Tamil Nadu(4)

b. Charge : Pr. CIT 10, Mumbai
Assessee : M/s. Hanjer Biotech Energy Private Limited
Assessment Year : 2011-12
PAN : AABCH3870H

The AO allowed deduction of ₹ 66.28 crore to the assessee company against the income which included ₹ 16.86 crore generated from verified emission reductions (VERs), not eligible for deduction. AO's omission to disallow the deduction resulted in underassessment of income of ₹ 16.86 crore involving tax effect of ₹ 5.60 crore. Reply from ITD was awaited.

c. Charge : CIT Hubli
Assessee : M/s. VRL Logistics Ltd.
Assessment Year : 2012-13
PAN : AABCV3609C

The AO allowed deduction of ₹ 11.66 crore to the assessee company against the income which included ₹ 9.35 crore from sale of carbon credit, not eligible for deduction. AO's omission to disallow the deduction has resulted in underassessment of income of ₹ 9.35 crore involving tax effect of ₹ 3.03 crore. Reply from ITD was awaited.

d. Charge : CIT charge V, Delhi
Assessee : M/s. Jindal Saw Ltd.
Assessment Year : 2011-12
PAN : AABCS 7280C

We observed that the deduction of ₹ 36.07 crore allowed to assessee included income from sale of carbon credits of ₹ 5.99 crore which should have been disallowed. Incorrect allowance of deduction by the AO has resulted in underassessment of income of ₹ 5.99 crore involving tax effect of ₹ 1.99 crore. Reply from the ITD was awaited (November 2015)

e. Charge: CIT Gandhinagar
Assessee: Kalpataru Power Transmission Ltd.
Assessment Year: 2010-11 and 2011-12
PAN: AABCS7280C

AO allowed deduction of ₹ 4.43 crore and ₹ 4.27 crore for AY 2010-11 and 2011-12 respectively towards profit on sale of carbon credit as revenue income. The sale proceeds of such carbon credits being taxable as a benefit arising out of business, could not be treated as income 'derived from' the eligible business and hence was not eligible for deduction. AO's failure to disallow the deduction has resulted in excess allowance of deduction of ₹ 5.45 crore involving tax effect of ₹ 1.85 crore. Reply from ITD was awaited (August 2015).

The CBDT stated (June 2016) that the ITD has consistently maintained that sale of carbon credits is a benefit arising out of carrying out of business and therefore taxable under section 28 (iv) of the Act. They further stated that they would examine whether any legislative amendment was required to consider sale proceeds of the carbon credit as income from other sources under the Act during the course of upcoming budget exercise 2017.

2.9 Deduction on additions made during scrutiny assessment

As per first proviso to section 92C(4), no deduction under section 10A, 10AA, 10B or under chapter VI-A shall be allowed in respect of amount of income enhanced after compution of income under Section 92CA. However, such deductions are allowed in respect of additions made u/s 40A(3) 14A, 40(a) etc. in the assessments completed after scrutiny without involving section 92C.

We noticed in nine cases in five states[22] that additions made on account of treatment of expenditure as revenue, sale of fixed assets, disallowance made u/s 40A(3) 14A, 40(a) etc., were considered for deduction under section 80IA. Consequently, the allowances were more than the amount claimed by the assessee. Further, in doing so, additions made by the AOs are neutralised due to allowance of deduction under section 80IA of the Act. Incorrect allowance of deduction resulted in consequential tax effect of ₹ 74.66 crore **(Appendix 10).**

Box 2.8: Illustrative cases on deduction on additions made during scrutiny assessment

a. Charge : PCIT-Central, Hyderabad
Assessee : M/s. Krishnapatnam Port Company Ltd.
Assessment Year : 2012-13
PAN : AAACK8657J

The AO allowed deduction of ₹ 22.85 crore to the assessee on additions made on account of sale of fixed assets and provision for doubtful debts over and above ₹ 1.37 crore as claimed. We observed that the sale of fixed assets and provision for doubtful debts could not be classified as income derived from eligible business for deduction under section 80-IA. Allowing deduction on such disallowances resulted in excess allowance of deduction of ₹ 21.48 crore involving potential tax effect of ₹ 6.97 crore. Reply from ITD was awaited (November 2015).

b. Charge: Pr CIT (Central) Mumbai
Assessee: M/s. JSW Energy Ltd.
Assessment Year: 2010-11 and 2011-12
PAN: AAACJ8109N

The AO allowed deduction of ₹ 726.94 crore and ₹ 886.50 crore after disallowance of expenditure of ₹ 6.93 crore and ₹ 76.67 crore under section 14Afor AYs2010-11 and 2011-12 respectively. Since expenditure disallowed under section 14A was not attributable to the eligible business, allowance of deduction under section 80IA there against was not in order. Irregular allowance of deduction by the AO has resulted in excess allowance of deduction of ₹ 83.60 crore involving potential tax effect of ₹ 27.82 crore. Reply from ITD was awaited.

[22] Andhra Pradesh(4), Chhattisgarh(1), Delhi(1), Karnataka(1) and Maharashtra(2)

Deduction allowed on additions/disallowances made during assessment for non-conforming to provisions of the Act defeated the very purpose of making such additions/disallowances. The amount of deduction allowed was more than the amount claimed by the assessees. The CBDT agreed (June 2016) to examine whether any legislative amendment was required under the Act during the course of upcoming budget exercise 2017.

2.10 Deduction on Infrastructure facility developed for captive/private use

Section 80IA deduction is basically a profit linked incentive and is not allowed on private and captive facilities unless specifically allowed such as captive power plants by CBDT. For development of infrastructure, the concept of public utility is always embedded therein and as such, development of a big road, dam etc. by an entity for its own use cannot be termed as development of infrastructure. Further, the word "or any other public utility notified by the Board" have been removed from the definition of infrastructure facility as given in Explanation below sub section (4) of section 80IA[23], which restricted the scope of infrastructure facilities/public utilities for the purpose of deduction under section 80 IA. .

We noticed in eight cases in two states[24] that ITD allowed deduction in respect of profits derived from 'Railway Sidings/Jetties' constructed and operated by the assesses for their private purposes, which did not qualify to be treated as infrastructure facilities in terms of Explanation to section 80 IA(4). Irregular allowance of deduction in these cases had attracted tax effect of ₹ 2066.70 crore **(Appendix 11).**

[23] CBDT circular No.7 of 2002 dated 26 August 2002
[24] Maharashtra(7) and West Bengal(1)

Box 2.9: Illustrative cases on deduction on Infrastructure facility developed for captive/private use

a. Charge: Pr. CIT 3, Mumbai
Assessee : M/s. Reliance Ports & Terminals Limited
Assessment Year : 2006-07 to 2011-12
PAN: AABCR3873B

The AO allowed aggregate deduction of ₹ 5245.38 crore as claimed, without examining the eligibility criteria for allowance of the deduction in the assessment orders. Gujarat Maritime Board (GMB) entered into an agreement with the assessee (28 July 1999) for construction of the four Captive Jetties[25] at Port Sikka near its Refinery Complex in the State of Gujarat, interalia, with a condition that captive jetties were meant for landing and shipping of captive industrial raw materials by RPL and RIL for manufacturing of their finished products with payment of 20 *per cent* of actual landing and shipping fee (wharfage charges) for a period of 25 years only and thereafter the assessee could use the Jetty for captive purpose of RPL & RIL subject to payment of full wharfage charges, so long as the project of the Licensee for which the permission is granted exists or continues to exist, i.e. continues to function. Since jetties were captively used by the assessee company and not for public purposes, the deduction allowed was not in order. The irregular allowance of deduction by the AO has resulted in underassessment of income of ₹ 5245.38 crore involving tax effect of ₹ 1766.74 crore.

The ITD did not accept the observation stating that the Act did not distinguish "Public facility" and "Private facility" for claiming the deduction under section 80IA. Further it was stated that GMB had incorporated in clause 18 of the agreement that it reserved the right to use the facilities when they were not in use by RPL/RIL. ITD also stated that comparison could be drawn to assessee's captive jetties to the captive power plant, which were considered eligible for deduction. The reply was not tenable as concept of public utilities was always embedded in the construction/development of any infrastructure (Road, Bridge etc). The assessee company constructed the jetties for their captive use only even after the completion of 25 years of license period. In clause 18 of the agreement, the assessee also emphasized that Jetties, when NOT in use by Reliance group of company (RPL/RIL), could be open to use by the Board for itself which indicated that jetties were constructed to meet the demand of RPL/RIL only without opening the same for others as meant for the public facilities. As regards ITD's comparison of captive power plant with captive jetties, CBDT had specifically clarified[26] that deduction to Captive Power Plants would be subject to certain conditions[27]. No such specific clarification was issued in respect of other captive / private facilities by CBDT till date. Further, with a view to substantiate their stand ITD had not submitted any list of other assessees owning ships who had used jetties when they were not in use by RPL/RIL.

[25] **Captive Jetty means** a "Jetty constructed for landing and shipping of captive industrial raw materials by RPL and RIL for manufacturing or their finished products that are manufactured by the said port based industry, namely RPL and RIL

[26] CBDT clarification to the Secretary General, Indian Merchants Chamber, Mumbai from File no. 178/28/2001-ITA I dated 3 October 2001

[27] (i)The CPP set up by an undertaking is distinct and separate and there is an element of commercial profits or gains by the power generating undertaking from the industrial user; (ii) The assessing officer through examination shall ensure that the transactions between CPP and its undertaking is at arm's length;(iii) The grant of deduction shall not be taken to legitimise something not permissible under the provisions of Electricity Supply Act and related laws and (iv) • The user undertaking shall not debit the expenses incurred by the CPP in its own profit and loss account.

b. **Charge : PCIT (Central) 1, Mumbai**
Assessee : M/s. Essel Mining & Industries Limited
Assessment Year :2010-11 to 2012-13
PAN : AAACE6607L

The AO allowed deduction of ₹ 78.44 crore, ₹ 130.65 crore and ₹ 11.76 crore for the above AYs respectively to the assessee company. The assessee company developed 'Railway Siding' to run its own business and the siding was not used by the members of the public. Hence, the deduction should have been disallowed. AO's failure to disallow the deduction has resulted in irregular allowance of deduction aggregating ₹ 220.85 crore involving tax effect of ₹ 73.88 crore. Reply from ITD was awaited.

c. **Charge : PCIT (Central)-1 Kolkata**
Assessee : M/s. Reshmi Metaliks
Assessment Year :2009-10 to 2012-13
PAN : AACCR7183E

The AO allowed a total deduction of ₹ 80.61 crore for AYs 2009-10 to 2012-13 to the assessee. The assessee developed and was maintaining and operating the 'Railway Siding' for its own benefit and the infrastructure facility was not extended for use of general public. As such, allowance of deduction of ₹ 80.61 crore for the AYs 2009-10 to 2012-13 was therefore irregular. AO's omission to disallow the deduction resulted in underassessment of income with identical amount involving tax effect of ₹ 38.91 crore. Reply from ITD was awaited.

The CBDT in its email response dated 27th June 2016 did not give any observation either on the specific cases raised or on the systemic issue pointed out. In the exit conference, Member, (A&J) desired to know whether the audit has received the response from their field formations viz Pr. CCITs etc. Deputy Comptroller and Auditor General (CRA) stated that while we have received reply at field level, CBDT has not replied to this observation. She explained at length how it is imperative that audit gets the reply so that a consensus on the audit observation is arrived at before finalizing the issue.

Recommendations

(i) The CBDT may evolve a suitable mechanism to determine the value of transient products during currency of business where the market price of such products is indeterminable.

The CBDT stated (June 2016) that explanation to sub section (8) of section 80IA defines the term "Market Value". Based on this, the AO may make necessary enquiries keeping in view the local market conditions, so as to ascertain appropriate market value. *However, during exit conference the*

CBDT agreed (June 2016) to re-examine the issue relating to the due diligence required for determination of the value of the transient products.

(ii) Taking into account the nature of business in various sectors like power generation through windmill, power generation by cogeneration plants, the CBDT may consider defining the term undertaking appropriately within the section.

The CBDT stated (June 2016) that the observations of CAG in para 2.6 actually pertain to wrong allowance of deduction u/s 80IA in some stand alone cases. It does not seems necessary to define the term "undertaking" with a view to avoid such kind of instances.

Audit is of the view that the CBDT may look into the issue of treating cluster of windmills owned by an assessee as one undertaking instead of treating each windmill as an independent undertaking. The word 'undertaking' is used to indicate individual windmill by some assessees and a cluster of windmills by some other assessees. This leads to claiming exemption u/s 80IA selectively on profit making windmills and the loss of the other windmills were set off against profit from other business. With a view to avoiding unintended benefit of exemption and possible misuse of the Act, necessary clarification may be issued by the CBDT.

(iii) The CBDT may modify the provisions of section 80IA(5) so that a uniform stand is taken by all AOs on the treatment of setting off brought forward loss (es) pertaining to the period prior to initial assessment year.

The CBDT stated (June 2016) that the feasibility of issue of a clarification under the existing law will be examined.

(iv) The CBDT may consider taxing the income from the sale proceeds of carbon credit as income from other sources.

The CBDT stated (June 2016) that the issue whether any legislative amendment is required to consider sale proceeds of carbon credit as income from other sources under the Act will be examined during the course of upcoming budget exercise 2017.

(v) CBDT may consider incorporating provisions similar to first proviso to section 92C(4) stipulating that no deduction under section 10A, 10AA, 10B or under chapter VI-A to be allowed in respect of amount of income enhanced on the additions made by the AO during assessments.

The CBDT stated (June 2016) that the issue whether any legislative amendment is required under the Act will be examined during the course of upcoming budget exercise 2017.