

**(1982) 03 MP CK 0026**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** Miscellaneous Civil Case No. 131 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Steel Tubes of India P. Ltd.

RESPONDENT

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**Date of Decision:** March 9, 1982

**Acts Referred:**

- Income Tax Act, 1961 - Section 154, 80J

**Citation:** (1982) 138 ITR 619

**Hon'ble Judges:** K.N. Shukla, J; G.G.Sohani, J

**Bench:** Division Bench

**Advocate:** R.C. Mukati, for the Appellant; G.M. Chaphekar, for the Respondent

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### **Judgement**

Sohani, J.

By this reference u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as " the Act "), the Income Tax Appellate Tribunal, Indore Bench, Indore, has referred the following questions of law to this court for its opinion :

" Qua the years 1967-68 and 1970-71 :

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in upholding the order of the AAC observing that the entire Section 80J deficiency in respect of the A.Y. 1967-68 should have been set off against the income of the A.Y. 1967-68 or, in the alternative, should have been given priority for set-off against the income of the A.Y. 1970-71 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal having generally accepted the legal position that the question of giving deduction u/s 80J arises only after arriving at the " gross total income " computed in the manner provided under the Act, it was justified in holding that it is a debatable issue not capable of rectification u/s 154 ?

(3) Whether the A.T. was justified in upholding the AAC's order cancelling the order u/s 154 passed by the ITO ?

Qua the year 1971-72 :

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in upholding the finding of the AAC that the ITO was not justified in disallowing the set-off of the deficiency u/s 80J to the extent of Rs. 24,112 and in directing the ITO to modify his order u/s 154 passed on May 24, 1975, and to allow the set-off of brought forward deficiency u/s 80J before adjusting the current and carried forward depreciation, development rebate and loss ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal having generally accepted the legal position that the question of giving deduction u/s 80J arises only after arriving at the " gross total income " computed in the manner provided under the Act, it was justified in holding that it is a debatable issue not capable of rectification u/s 154 ?

(3) Whether the Tribunal was justified in upholding the AAC's order cancelling the order u/s 154 passed by the ITO ? "

2. The material facts giving rise to this reference briefly are as follows :

The assessee is a private limited company incorporated in the year 1959, for carrying on business in woollen cloth. In the accounting year relevant to the assessment year 1963-64, the assessee established a new undertaking for manufacture of iron tubes. The plant for the new industrial undertaking was commissioned in the month of March, 1963. In the assessment years 1963-64 and 1964-65, the assessee suffered loss in this new venture. The entire loss in assessment year 1963-64 and a part of the loss in assessment year 1964-65 was set off against the income of the assessee in the assessment year 1965-66. The remaining loss in respect of the assessment year 1964-65 was set off against the income of the assessee for the assessment year 1966-67. For the assessment year 1967-68, the total income of the assessee was finally determined at Rs. 74,333, which was subject to depreciation, relief u/s 80J and development rebate amounting to Rs. 65,116, Rs. 33,329 and Rs. 1,048, respectively. After setting of depreciation of Rs. 65,116 and relief u/s 80J to the extent of Rs. 9,341, the income was reduced to nil. The deficiency u/s 80J to the extent of Rs. 23,988 and the unabsorbed development rebate to the extent of Rs. 1,048 were carried forward. For the assessment years 1968-69 and 1969-70, the assessments of the assessee resulted in loss of Rs. 2,49,194 and Rs. 91,048, respectively. The loss of Rs. 91,048 was arrived at after adjusting depreciation for that year to the extent of Rs. 62,700 but without adjusting development rebate of Rs. 7,616, which was admissible for the year 1969-70. For the assessment year 1970-71, the assessment of the assessee, after adjusting depreciation for the year to the extent of Rs. 1,31,879, was finally made at a loss of Rs. 12,556. The development rebate to the extent of Rs. 28,705 admissible for that

year could not be adjusted. For the assessment year 1971-72, the assessee's income, after set off of depreciation and development rebate for the year, was assessed at Rs. 1,87,779, against which the following unabsorbed losses of preceding years were set off:

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| (i) Rs.<br>23,988                             | (80J relief -- Rs. 33,329 for the assessment year 1967-68 Less : Rs. 9,341 set off for the assessment year 1967-68). |
| (ii)<br>Rs.<br>1,048                          | (Development rebate in respect of A.Y. 1967-68).   |
| (iii)<br>Rs.<br>1,62,743<br>year<br>1968-69). | (A part of the loss relevant to the assessment year 1968-69).  |

3. Thus, the total income of the assessee for the assessment year 1971-72 was reduced to nil. Subsequently, the ITO revised the assessment by an order passed u/s 154 of the Act, disallowing the set-off of Rs. 23,988, earlier allowed, on the ground that the deficiency relief u/s 80J in respect of 1967-68, could not be carried forward beyond the seventh assessment year commencing from the initial assessment year 1963-64. The ITO held that since the seventh year reckoned from 1963-64 ended with the assessment year 1970-71, the deficiency to the extent of Rs. 23,988 was wrongly set off. Aggrieved by the order passed by the ITO, the assessee preferred an appeal before the AAC. The AAC held that though the assessee had commissioned the steel tube manufacturing plant in March, 1963, yet it was only on trial basis in the assessment year 1963-64. The AAC further held that the issue as to whether the business of manufacture of steel tubes was started in the assessment year 1963-64 or in the subsequent assessment year, was debatable and in this view of the matter, the question as to whether the deficiency u/s 80J could or could not be carried forward in the assessment year 1971-72, could not be called a mistake apparent on the face of the record. The AAC further held that if the profits and gains derived from the new steel undertaking were less than the relief u/s 80J, the deficiency was to be carried forward and had to be accorded priority over depreciation and development rebate in the matter of set-off against profits in the subsequent year from the industrial undertaking. The AAC, therefore, held that the relief u/s 80J amounting to Rs. 33,329 in respect of the assessment year 1967-68 ought to have been deducted from the income of Rs. 74,333 before adjusting current year's depreciation against it or in the assessment year 1970-71, the brought forward deficiency of Rs. 24,112 should have been first adjusted against the

income of Rs. 1,19,333 and that thereafter set off of depreciation should have been considered. The AAC, therefore, held that the ITO was not justified in disallowing the set-off of the deficiency u/s 80J to the extent of Rs. 24,112 in exercise of powers u/s 154 of the Act. Aggrieved by the order passed by the AAC, the department preferred an appeal before the Tribunal. The Tribunal held that the assessee was entitled to carry forward u/s 80J the deficiency in the assessment year 1971-72. The Tribunal further held that the right of the assessee to carry forward the relief u/s 80J against the income of the assessment year 1971-72 and the question as to whether the assessee was entitled to the deduction of the relief u/s 80J after carrying forward the other set-off of losses such as depreciation, etc., were highly debatable and the provisions of Section 154 of the Act were, therefore, not attracted. In this view of the matter, the Tribunal dismissed the appeal. Aggrieved by the order passed by the Tribunal, the department sought a reference and it is at the instance of the department that the aforesaid questions of law have been referred to this court for its opinion.

4. During the course of hearing, learned counsel for the parties conceded that if our answers to questions Nos. 2 and 3 (qua assessment years 1967-68 and 1970-71) and questions Nos. 2 and 3 (qua assessment year 1971-72) were in favour of the assessee, it would not be necessary to answer the other questions referred to this court. We, therefore, propose to answer these questions first. Now, it is well settled that a mistake, which has to be discovered by a long drawn process of reasoning or examining arguments on points, where there may conceivably be two opinions, cannot be said to be a mistake or error apparent on the face of the record as to justify action u/s 154 of the Act.

5. Now, the exemption u/s 80J of the Act starts being available in the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles. In the instant case, the finding of the Tribunal is that the production in the assessment year 1963-64 by the new undertaking commenced by the assessee was on a trial basis and that it was in the assessment year 1964-65 that the production of steel tubes was undertaken on a regular basis. In view of this finding, the question as to whether the new industrial undertaking of the assessee can be said to begin manufacture or produce articles in the assessment year 1963-64 or in the assessment year 1964-65, is a debatable question. In these circumstances, the Tribunal was right in holding that the ITO had no jurisdiction to exercise powers u/s 154 of the Act. Our answer to questions Nos. 2 and 3 qua assessment years 1967-68 and 1970-71 and questions Nos. 2 and 3 qua assessment year 1971-72 referred to this court, is that the Tribunal was justified in holding that the issue was debatable, not capable of rectification u/s 154 of the Act and hence the Tribunal was justified in upholding the AAC's order cancelling the order u/s 154 of the Act passed by the ITO. Our answers to these questions are, therefore, in the affirmative and in favour of the assessee. In this view of the matter, we decline to answer question No. 1 qua assessment years 1967-68 and 1970-71 and question No.

1 qua assessment year 1971-72 referred to us.

6. Reference answered accordingly.

7. Parties shall bear their own costs of this reference.