**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO. 21 OF 2020**

Pr. Commissioner of Income Tax-2 .. Appellant

**Versus**

The Tata Power Company Ltd. .. Respondent

***Adv. Abhishek R. Mishra****, for the Appellant/Revenue.*

***Adv. Srihari Iyer****, for the Respondent.*

**CORAM: B. P. COLABAWALLA &**
**FIRDOSH P. POONIWALLA, JJ.**
**DATE: JULY 23, 2026**

**P. C.**

**1.** The above appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short "**IT Act**") challenging the order dated 21.05.2019 passed by the Income Tax Appellate Tribunal, Mumbai (for short "**ITAT**") in I.T.A. No. 3080/Mum/2009 relating to Assessment Year 2003-04. According to the Revenue, the impugned order of the ITAT gives rise to the following substantial questions of law.

> *i. On the facts and in the circumstances of the case and in law, whether Hon'ble ITAT was right in holding that pre-installation period broadband income of Rs. 9,81,38,257/- and income from sale of scrap of Rs. 1,27,67,139/- is capital in nature*

*instead of revenue in nature when the whole of income has been earned on account of setting up the business and the income is primarily in the nature of business income earned from running the business?*

*ii. On the facts and in the circumstances of the case and in law, whether Hon'ble ITAT was right in holding that pre-installation period broadband income and income from sale of scrap is capital in nature by relying upon the decision of Hon'ble SC in the case of CIT Vs. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC), since instant case is distinguishable with that of Bokaro Steel Plant wherein the issue was of interest and rent income generated from setting up the plant?*

*iii. Whether, on the facts and in the circumstances of the case and in law, the Tribunal erred in interpreting the import of Sec. 80 IA(5) in calculation of deduction available u/s. 80IA?*

**2.** As far as questions (i) and (ii) are concerned, the Assessee is in the line of business of generation and distribution of power. During the relevant Assessment Year, the Assessee earned income from trial runs of its broadband project and sale of scrap generated prior to the installation of the project and treated the income as capital work in progress and claimed depreciation. The Assessee did not offer the said income to tax. The Assessing Officer treated these receipts as revenue receipts and brought them to tax. On appeal, the Commissioner of Income Tax (Appeals) [for short "**CIT(A)**"] upheld the order of the Assessing Officer. Aggrieved by the order of the CIT(A), the Assessee preferred an Appeal before the ITAT.

**3.** Upon appreciation of the material on record, the ITAT recorded a finding of fact that the Assessee's broadband unit was under trial runs and had not yet been installed when the income of Rs. 9,81,38,257/- arose from the said project. Similarly, scrap was generated prior to the installation of the broadband project and the sale thereof generated income of Rs. 1,27,67,139/-. Hence, the ITAT concluded that both these incomes were inextricably linked with the broadband project, which was in the installation phase, and that the Assessee had rightly treated the income as capital work-in-progress. Consequently, the same could not be brought to tax, was the conclusion. In arriving at this conclusion, the ITAT placed reliance upon the decision of the Supreme Court in the case of ***CIT Vs. Bokaro Steel reported in 236 ITR 315***.

**4.** The learned Counsel appearing on behalf of the Appellant Revenue, sought to distinguish the decision of the Supreme Court in *Bokaro Steel* by contending that it dealt only with the capitalisation of interest and not with the capitalisation of income received by the Assessee.

**5.** We have carefully considered the decision of the Supreme Court in the case of *Bokaro Steel*. The issue before the Hon'ble Supreme Court was that the Assessee Company was in the process of constructing its own factory and installing its plant, and its business had not yet commenced. During the relevant assessment years, the Assessee received the following amounts prior to the commencement of its business:

(a) Rent received from contractors for quarters provided to their employees;

(b) Hire charges received for plant and machinery supplied to contractors;

(c) Interest received on advances made to contractors to facilitate construction work;

(d) Royalty received for excavation and use of stones from the Assessee's land in construction;

**6.** With regard to the first three receipts, the Supreme Court held that the arrangements which were made between the Assessee and the contractors pertaining to these three receipts, were arrangements which are intrinsically connected with the construction of its plant. The receipts have been adjusted against the charges payable to the contractors and have gone to reduce the cost of construction. Therefore, they have been rightly held to be capital receipts and not income of the Assessee. The Hon'ble Supreme Court further held that the same reasoning would apply to the fourth category of income, namely, the royalty received by the Assessee. To the extent of such royalty received, the cost of the plant to the Assessee stands reduced. Therefore, the royalty is required to be treated as a capital receipt.

**7.** The ratio of the aforesaid decision is that any income generated before the commencement of the business, which is inextricably connected with the setting up of a capital asset, is capital in nature and serves to reduce the cost of construction and the same cannot constitute taxable income. Therefore, the ITAT has recorded a categorical finding of fact and concluded that the income from the broadband project during the trial runs, and sale of scrap before the commencement of business, is a capital receipt and not liable to be taxed. Hence, no substantial question of law arises in so far as questions (i) and (ii) are concerned.

**8.** As far as question (iii) is concerned, the Assessee has undertaken a 67.5 MW power generation project at Jojobera, which is eligible for 100% deduction under Section 80-IA of the IT Act. As per Section 80-IA of the IT Act, an Assessee is entitled to claim deduction for ten consecutive years out of fifteen years beginning from the year in which the undertaking commences operation. The Assessee commenced operation in the A.Y. 1997-98 and opted to treat Assessment Year 2002-03 as the initial assessment year for the purpose of claiming deduction under Section 80-IA of the IT Act.

**9.** The Assessing Officer observed that the Assessee had brought forward unabsorbed depreciation pertaining to the said unit. However, the Assessee had not set off such unabsorbed depreciation against the income derived from the said unit. According to the Assessing Officer, the deduction under Section 80-IA of the IT Act could be allowed only on the income of the eligible undertaking as computed after setting off the brought forward unabsorbed depreciation relating to the said unit. Accordingly, the Assessing Officer set off the brought forward unabsorbed depreciation against the income of the said unit. As a result of this, the Assessee's eligible income became nil. On appeal, the CIT(A) upheld the assessment order.

**10.** Aggrieved by the order of the CIT(A), the Assessee preferred an appeal before the ITAT. The ITAT relied on the Assessee's own case pertaining to A.Y. 2002-03 and decided the issue in the Assessee's favour. In its order for Assessment Year 2002-03, the ITAT had placed reliance upon CBDT Circular No. 1 of 2016 dated 15.02.2016. The relevant portion of the Circular reads as under:

> *In the above sub-section, which prescribes the manner of determining the quantum of deduction, a reference has been made to the term 'initial assessment year'. It has been represented that some Assessing Officers are interpreting the term 'initial assessment year' as the year in which the*

*eligible business/ manufacturing activity had commenced and are considering such first year of commencement/operation etc. itself as the first year for granting deduction, ignoring the clear mandate provided under sub-section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.*

*The matter has been examined by the Board. It is abundantly clear from sub-section (2) that an assessee who is eligible to claim deduction u/s 80IA has the option to choose the initial/ first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-section. It is hereby clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction u/s 80IA for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. Hence, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction u/s 80IA. However, the total number of years for claiming deduction should not transgress the prescribed slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.*

*The Assessing Officers are, therefore, directed to allow deduction u/s 80IA in accordance with this clarification and after being satisfied that all the prescribed conditions applicable in a particular case are duly satisfied. Pending litigation on allowability of deduction u/s 80IA shall also not be pursued to the extent it relates to interpreting 'initial assessment year' as mentioned in sub-section (5) of that section for which the Standing Counsels/D.R.s be suitably instructed.*

**11.** The ITAT also placed reliance upon the decision of the Madras High Court in ***CIT Vs. G.R.T. Jewellers (India) in TCA No. 176 of***

***2016***. In the said decision, the High Court relied upon the aforesaid circular as well as its earlier decision in ***Velayudhaswamy Spinning Mills P.Ltd. Vs. ACIT reported in 340 ITR 477*** and decided the issue in favour of the Assessee.

**12.** This Court has also taken a similar view in ***CIT v. Hercules Hoists Ltd., reported in 2017 (6) TMI 1125 (Bom)***, and ***CIT v. B.G. Chitale, reported in 2018 (2) TMI 112 (Bom)***, and has decided the issue in favour of the Assessee. Further, the SLP against Velayudhaswamy Spinning Mills Pvt. Ltd. case has been dismissed by the Supreme Court.

**13.** Having regard to the aforesaid CBDT Circular and the decisions referred to hereinabove, we are of the considered opinion that the ITAT rightly allowed the deduction from the initial assessment year as opted for by the Assessee. Consequently, even as far as question (iii) is concerned, no substantial question of law arises for consideration.

**14.** We find that in the facts and circumstances of the present case, the impugned order of the ITAT does not give rise to any substantial question of law. The appeal is accordingly dismissed. However, there shall be no order as to costs.

**15.** This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

**[FIRDOSH P. POONIWALLA, J.]** **[B. P. COLABAWALLA, J.]**