IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER

ITA No.570/Bang/2017
Assessment Year :2012-13

The Assistant Commissioner of Income Tax, Circle – 1(1), Hubballi.	Vs.	Hubli Electricity Supply Co. Ltd., Navanagar, Hubballi – 580 025. **PAN : AABCH3176 J**
APPELLANT		**RESPONDENT**

Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru
Assessee by	:	Smt. Prathibha, Advocate

Date of hearing	:	24.06.2021
Date of Pronouncement	:	30.06.2021

O R D E R

Per N. V. Vasudevan, Vice President

This is an appeal by the Revenue against the final order dated 11.11.2016 of CIT, Hubli, relating to Assessment Year 2012-13. The grounds of appeal raised by the Revenue reads as follows:

1. *The order of CIT(A) is opposed to law and facts of the case.*

2. *whether the Ld. CIT(A) was correct in law in holding that 'additional subsidy' received from the State Government by the assessee is allowed to be included as profit derived from the industrial undertaking and eligible for deduction u/s 80IA of the Income Tax Act 1961, when it has been clearly held by the Hon'ble Supreme Court in its decision in the case* ***Cambay Electrical Supply Company Limited Vs. CIT 1978 CTR (SC) 50*** *that the words 'derived from' referred to in the section 80IA has narrow meaning than 'attributable to' and the additional subsidy cannot be treated as profits 'derived' from industrial undertaking though it may be 'attributable' to industrial undertaking.*

3. *Whether the Ld. CIT(A) was correct in law in holding that 'additional subsidy' received from the State Government by the assessee is allowed to be included as profit derived from the industrial undertaking and eligible for deduction u/s8OIA of the Income Tax Act 1961, oblivious to the decision rendered by the Hon'ble Supreme Court in the case* ***CIT Vs. Sterling Foods 237 ITR 53 (SC) & Liberty India Ltd Vs. CIT 183 Taxman 349 (SC)***

4. *Any other ground that may be taken during the appeal.*

5. *The appellant craves leave to add, alter, amend and delete any of the grounds of leave.*

2. The assessee is a company which is engaged in the business of distribution of electricity in 7 districts of Karnataka. The assessee claimed deduction under section 80IA(4)(iv)(c) of the Income Tax Act, 1961 (hereinafter called 'the Act'). The AO in para 12 of the Assessment Order has accepted that the assessee is entitled to claim deduction under the aforesaid provisions. The AO, however, noticed that the aforesaid deduction also included a sum of Rs.412.67 Crores received as additional subsidy by the assessee pursuant to the order of the Karnataka Electricity Regulatory Commission (KERC). The AO did not dispute the fact that the aforesaid additional subsidy which was offered as income by the assessee and on which the deduction was claimed by the assessee had accrued to the assessee during the previous year relevant to Assessment Year 2012-13. The only dispute which the AO raised was that the additional subsidy cannot be considered as "profits derived from the eligible business". In this regard, the AO has made a reference to the provisions of section 80IA of the Act which reads as follows:

> *"[(1) where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in computing the total income of the assessee, a deduction of an amount equal to hundred percent of* ***the profits and gains derived from such business for ten consecutive assessment years.]"***

3. The AO thereafter made reference to several judicial pronouncements wherein the word "derived from" has been interpreted by the courts. The principal reliance placed by the AO was on the decision of the Hon'ble Supreme Court in the case of Liberty India Ltd., Vs. CIT (2009) 183 taxmann 349 (SC) wherein the Hon'ble Supreme Court held the DEPB and Duty Drawback Scheme were not related to the business of industrial undertaking per se for its manufacturing or production. Entitlement for DEPB or Duty Drawback Scheme arose, when the undertaking decided to export after manufacturing or production and this incentive was restricted only to the export of goods of a specified class. Consequently, if there was no export, there was no incentive from DEPB or Duty Drawback. This apart, DEPB or Duty Drawback Scheme did not provide refund of exemption from Central Excise Duty actually paid. Thus, the relationship under the DEPB or Duty Drawback Scheme, on the one hand, and the manufacturing or production, on the other, was not proximate and direct. The entitlement was based on the artifice of average amount of duty paid. According to the AO, the additional subsidy received by the Assessee, also was of a similar nature and therefore had to be regarded as "***profits and gains derived from eligible business".***

4. Aggrieved by the aforesaid order of the AO, the assessee preferred appeal before the CIT(A). The CIT(A) was of the view that the subsidy as well as the additional subsidy received by the assessee from the Karnataka Government was in lieu of electricity supply to farmers and others at subsidized rates. The Government of Karnataka compensated the assessee for the loss incurred for providing electricity at subsidized rates to weaker sections of the society / farmers. The CIT(A) was of the view that the subsidy was given to the

assessee to make good the loss as the assessee supplied electricity at subsidized rates. The CIT(A) also found that in Assessment Years 2006-07 and 2007-08, the CIT(A) in an order passed under section 263 of the Act held that the assessee would be entitled to claim deduction under section 80IA(4)(iv)(c) of the Act. The CIT(A) accordingly took the view that the assessee would be entitled to deduction under section 80IA(4)(iv)(c) of the Act on the additional subsidy received of Rs.412.67 Crores. Aggrieved by the order of the CIT(A), the Revenue has preferred the present appeal before the Tribunal.

5. As can be seen from the grounds of appeal of the Revenue, the primary reliance placed by the Revenue was on the decision of the Hon'ble Supreme Court in the case of Liberty India (supra) and Sterling Foods 237 ITR 53 (SC) and Cambay Electrical Supply Co. Ltd., 113 ITR 84. At the time of hearing, it was brought to our notice by the learned Counsel for the assessee that all these decisions were considered by the Hon'ble Supreme Court in the case of CIT(A) Vs. Meghalaya Steels Ltd., 383 ITR 217 (SC). The decision was referred in the context of section 80 IC of the Act. The words of which are identical to the provisions of section 80IA(4)(iv)(c) of the Act, the Hon'ble Supreme Court took the view that if the subsidy recoups, the expenditure which was incidental expenditure of assessee's business then that would be a subsidy which is inseparably connected with profitable business. The Court held that subsidies which went to reimbursement of cost in production of goods of particular business would also have to be included under head "profits and gains of business. The Hon'ble Court has considered the decision rendered by the Hon'ble Supreme Court in the case of Liberty India (supra) in the following words:

> *"16. The sheet anchor of Shri Rodhakrishnan's submissions is the judgment of this Court in* ***Liberty India v. Commissioner of Income Tax,*** *(2009) 9 SCC 328. This was a case referring directly to Section*

80-IB in which the question was whether DEPB credit or Duty drawback receipt could be said to be in respect of profits and gains derived from an eligible business. This Court first made the distinction between "attributable to" and "derived from" stating that the latter expression is narrower in connotation as compared to the former. This court further went on to state that by using the expression "derived from" Parliament intended to cover sources no): beyond the first degree. This Court went on to hold:-

> *"34. On an analysis of Sections 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-section(2), would be entitled to deduction under sub-section (1) only to the extent of profits derived from such industrial undertaking after specified date(s). Hence, apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a specified percentage of profits. This is the importance ofthe words "derived from industrial undertaking" as against "profits attributable to indus:-undertaking".*
>
> *35. DEPB is an incentive. It is given under Duty Exemption Remission Scheme. Essentially, it is a7-export incentive. No doubt, the object behind DEPB is to neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw materials, components etc.. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per basic customs duty and special additional duty payable on such deemed imports.*
>
> *36. Therefore, in our view, DEPB/Duty Drawback are incentives which flow from the Schemes framed by Central Government or from S. 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business under Section 80-IB. They belong to the category of ancillary profits of such Undertakings." (Paras 34,35 and 36)*

17. An analysis of all the aforesaid decisions cited on behalf of the Revenue becomes necessary at this stage. In the first decision, that. is in ***Cambay Electric Supply Industrial Company Limited v Commissioner of Income Tax, Gujarat II,*** *this Court held that since an expression of wider import had been used, namely "attributable to" instead Of "derived from", the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity. In short, a step removed from the business of the industrial undertaking would also be subsumed within the meaning of the expression "attributable to". Since we are directly concerned with the expression "derived from", this judgment is relevant only insofar as it makes a distinction between the expression "derived from", as being*

something directly from, as opposed to "attributable to", which can be said to include something which is indirect as well.

*18. The judgment in **Sterling Foods** lays down a very important test in order to determine whether profits and gains are derived from business or an industrial undertaking. This Court has stated that there should be a direct nexus between such profits and gains and the industrial undertaking or business. Such nexus cannot be only incidental. It therefore found, on the facts before it, that by reason of an export promotion scheme, an assessee was entitled to import entitlements which it could thereafter sell. Obviously, the sale consideration therefrom could not be said to be directly from profits and gains by the industrial undertaking but only attributable to such industrial undertaking inasmuch as such import entitlements did not relate to manufacture or sale of the products of the undertaking, but related only to an event which was post manufacture namely, export. On an application of the aforesaid test to the facts of the present case, it can be said that as all the four subsidies in the present case are revenue receipts which are reimbursed to the assessee for elements of cost relating to manufacture or sale of their products, there can certainly be said to be a direct nexus between profits and gains of the industrial undertaking or business, and reimbursement of such subsidies. However, Shri Radhakrishnan stressed the fact that the immediate source of the subsidies was the fact that the Government gave them and that, therefore, the immediate source not being from the business of the assessee, the element of directness is missing. We are afraid we cannot agree. What is to be seen for the applicability of Sections 80-IB and 80-IC is whether the profits and gains are derived from the business. So long as profits and gains emanate directly from the business itself, the fact that the immediate source of the subsidies is the Government would make no difference, as it cannot be disputed that the said subsidies are only in order to reimburse, wholly or partially, costs actually incurred by the assessee in the manufacturing and selling of its products. The "profits and gains" spoken of by Sections 80-IB and 80-IC have reference to net profit. And net profit can only becalculated y deducting from the sale price of an article all elements of cost which go into manufacturing or selling it. Thus understood, it is clear that profits and gains are derived from the business of the assessee, namely profits arrived at after deducting manufacturing cost and selling costs reimbursed to the assessee by the Government concerned."*

6. It is thus clear from the aforesaid decision that the DEPB and Duty Drawback Scheme were not, related to the business of industrial undertaking per se for its manufacturing or production. Entitlement for DEPB or Duty Drawback Scheme arose, when the undertaking decided to export after manufacturing or production and this incentive was restricted only to the export of goods of a specified class. Consequently, if there was

no export, there was no incentive from DEPB or Duty Drawback. This apart, DEPB or Duty Drawback Scheme did not provide refund of exemption from Central Excise Duty actually paid. Thus, the relationship under the DEPB or Duty Drawback Scheme, on the one hand, and the manufacturing or production, on the other, was not proximate and direct. The entitlement was based on the artifice of average amount of duty paid. The Hon'ble thereafter examined the scheme under which deduction u/s.80IC of the Act was claimed on Transport and power subsidy and came to the conclusion that in the case of transport subsidy, power subsidy and insurance subsidy, the relation between subsidy received, on the one hand, and the profits earned or the gains made, by an industrial undertaking, stand, well established. The Hon'ble Supreme Court distinguished its own decision in the case of Liberty India (supra) by pointing out that DEPB and Duty draw back rules did not envisage a refund of an amount ' arithmetically equal' to exemption duty or central excise duty actually paid by an individual importer/manufacturer. This is the striking difference between subsidies on transportation cost, power, interest and insurance, in the cases at hand, on the one hand, and Duty Drawback Scheme, on the other, inasmuch as the subsidies, so provided to the assesses concerned, are arithmetically equivalent to the cost of raw materials actually used in the manufacturing process and the finished goods, which is actually taken to the existing market for sale within and outside the north-eastern region and, similarly, the assessees concerned have the right to receive power subsidy, arising out of power bills paid, or interest subsidy or insurance subsidy, equivalent to the amount paid on interest and insurance respectively. These aspects of DEPB and Duty Drawback Scheme give rise to the inference that the decision, in Liberty

India (supra), was rendered, in the light of its own facts, and not for universal application.

7. In our view, the scrutiny of the scheme under which the assessee received additional subsidy is required to be seen. It is only after perusal of the scheme under which subsidy was given to the assessee, the principles laid down by the Hon'ble Supreme Court in the case of Meghalaya Steels (supra) can be applied to the facts of the case of the assessee. Since this exercise has not been carried out in the proceedings before the lower authorities, we are of the view that it would be just and appropriate to set aside the order of the CIT(A) and remand the issue to the AO for fresh consideration in the light of the decision cited by the learned DR before the Tribunal, after scrutiny of the scheme under which the assessee received the subsidy. Despite specific directions copies of the subsidy scheme has not been provided by the parties. In these circumstances, we have no other alternative but to remand the issue to the AO for consideration afresh in the light of the directions give above. The AO will afford opportunity of being heard to the assessee before deciding the issue. The assessee is also directed to file the relevant scheme and explain as to how the assessee is entitled to the claim for deduction. For statistical purposes, the appeal of the Revenue is treated as allowed.

8. In the result, appeal of the Revenue is treated as allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

(B. R. BASKARAN)	**(N. V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore.
Dated: 30th June, 2021.
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Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.