IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.405 of 2008

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1. The Commissioner of Income Tax-I, Patna
2. Assistant Commissioner of Income Tax, Circle-II, Patna

.... Assessing Officer/Appellants

Versus

Alkem Laboratories Ltd., Exhibition Road, Patna

.... Assessee/Respondent

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Appearance :

For the Appellant/s :Ms. Archana Sinha, Sr.Standing Counsel, Income Tax

For the Respondent/s : Mr. Ajay Kumar Rastogi with Mr. Parijat Saurav, Advocates

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 12-04-2016

Heard learned counsel for the appellant-Revenue and learned counsel for the assessee-respondent.

2. The appeal has been filed under Section 260A of the Income Tax Act, 1961 challenging the order dated 15.2.2008 passed by the Income Tax Appellate Tribunal, Patna Bench, Patna in ITA No. 471/Pat/2004 with respect to Assessment Year 2000-01 by which the appeal of the Department has been dismissed.

3. The assessee is a company and engaged in the business of manufacturing and trading in medicines. The return for the Assessment Year 2000-01 had been filed by the assessee. The assessee had, apart from others, made a claim of Rs.1,39,804/- on account of DEPB received by the assessee out of the total Rs.2,81,14,000/- with respect to Jagaria Unit. It had also claimed

depreciation at the rate of 25% with respect to its factory building taking it as a plant under Section 32 of the Income Tax Act. The Assessing Officer allowed depreciation at the rate of 10% only. The Assessing Officer disallowed the claim of the assessee under Section 80IB with respect to Jagaria Unit. Aggrieved by the same the assessee filed an appeal before the Commissioner of Income Tax (Appeal). The CIT appeal noted that the finding of fact has been recorded by the Assessing Officer in earlier years that the building in question is completely used for manufacturing of medicine and the finding has not been proved as wrong by any of the succeeding Assessing Officer as no new material has been brought on record disproving the original finding. He further noted that the ITAT, Patna Bench, Patna in a judgment dated 2.7.2004 for Assessment Years 1997-98 and 1998-99 in the case of the appellant has confirmed the original finding of the Assessing Officer stating that there was no infirmity in the original order of the Assessing Officer and, accordingly, the CIT(Appeal) ordered that the depreciation on factory building was to be allowed at the rate of 25%. With regard to Section 80 IB with respect to DEPB the CIT (Appeal) noted that the issue has been considered by the ITAT, Patna Bench, Patna while disposing of the appeal against order under Section 263 passed by the CIT in the case of the appellant for assessment years 1997-98 and 1998-99 in which it was held that there was no infirmity in the original order of the Assessing Officer implying thereby that receipts like packing material and DEPB had to be considered for considering deduction under Section 80IA/B. The appeal was accordingly allowed with respect to both the issues. On appeal to the Income Tax Appellate Tribunal by the Department being ITA No. 471 (Pat) of 2004, the same was dismissed. Aggrieved by the same the Revenue has filed the present appeal before this Court.

4. The appeal was admitted on the following two substantial questions of law :-

> "(1) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal has erred in considering income from DEPB Scheme as eligible income under Section 80IB when such income is not income derived from industrial activity ?
>
> (2) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal has erred in law to consider the factory building as plant when there was no information on the record to show that the building worked as an apparatus and not as merely a shelter for industrial activity ?"

5. Learned counsel for the appellant in support of the first question relies upon a decision of the Supreme Court in the case of **Liberty India vs. Commissioner of Income-Tax : [2009] 317 ITR 218(SC),** in paragraphs 14, 15 and 16 of which it has been held as

follows :

> "14. Analysing Chapter VI-A, we find that section 80-IB/80-IA are a code by themselves as they contain both substantive as well as procedural provisions. Therefore, we need to examine what these provisions prescribe for "computation of profits of the eligible business". It is evident that section 80-IB provides for allowing of deduction in respect of profits and gains derived from the eligible business. The words "derived from" are narrower in connotation as compared to the words "attributable to". In other words, by using the expression "derived from", Parliament intended to cover sources not beyond the first degree. In the present batch of cases, the controversy which arises for determination is : whether the DEPB credit/duty drawback receipt comes within the first degree sources ? According to the assessee(s), DEPB credit/duty drawback receipt reduces the value of purchases (cost neutralization), hence, it comes within first degree source as it increases the net profit proportionately. On the other hand, according to the Department, DEPB credit/duty drawback receipts do not come within first degree source as the said incentives flow from the incentive schemes enacted by the Government of India or from section 75 of the Customs Act, 1962. Hence, according to the Department, in the present cases, the first degree source is the incentive scheme/provisions of the Customs Act. In this

connection, the Department places heavy reliance on the judgment of this court in Sterling Foods [1999] 237 ITR 579. Therefore, in the present cases, in which we are required to examine the eligible business of an industrial undertaking, we need to trace the source of the profits to manufacture. (see CIT v. Kirloskar Oil Engines Ltd. reported in [1986] 157 ITR 762).

15. Continuing our analysis of section 80-IA/80-IB it may be mentioned that sub-section (13) of section 80-IB provides for applicability of the provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA, so far as may be, applicable to the eligible business under section 80-IB. Therefore, at the outset, we stated that one needs to read sections 80-I, 80-IA and 80-IB as having a common scheme. On a perusal of sub-section (5) of section 80-IA, it is noticed that it provides for the manner of computation of profits of an eligible business. Accordingly, such profits are to be computed as if such eligible business is the only source of income of the assessee. Therefore, the devices adopted to reduce or inflate the profits of eligible business have got to be rejected in view of the overriding provisions of sub-section (5) of section 80-IA, which are also required to be read into section 80-IB. (see section 80-IB(13). We may reiterate that sections 80-I, 80-IA and 80-IB have a common scheme and if so read it is clear that the said sections provide for incentives in the form of deduction(s) which are

linked to profits and not to investment. 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 of the words "derived from industrial undertaking" as against "profits attributable to industrial undertaking".

16. DEPB is an incentive. It is given under the Duty Exemption Remission Scheme. Essentially, it is an 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 a percentage of the FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by the 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. Therefore, in our view, DEPB/Duty drawback are incentives which

> flow from the schemes framed by the Central Government or from section 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."

6. It is evident from the aforesaid decision that in order to get the benefit of Section 80-IB deduction, the profit and gains must be derived from the eligible business, whereas with regard to DEPB/Duty drawback they have been held to be incentives which flow from the schemes framed by the Central Government or from section 75 of the Customs Act, 1962 and, hence, the same are not profits derived from the eligible business under section 80-IB and they belong to the category of ancillary profits of such undertakings.

7. Learned counsel for the assessee-respondent is unable to point out how in view of the aforesaid Supreme Court decision any other view of the matter can be taken on the first question and accordingly the decision of the Tribunal has to be set aside.

8. With regard to the second substantial question of law, learned counsel for the assessee-respondent brings to our notice a recent judgment of this Court passed on 16.3.2016 in Miscellaneous Appeal No. 405 of 2007 (M/s. Cachet Pharmaceuticals Pvt. Ltd. vs. Commissioner of Income Tax-I, Patna & another) in which the following substantial question of law was involved :-

> "Whether on the facts and in the circumstances of the case, the claim of the assessee that the building which houses the manufactory is a plant within the meaning of Section 43(3) of the Income Tax Act, 1961 and whether the assessee is entitled to claim the depreciation of the factory building at the rate of 25% ?"

9. The assessee in the said case had relied upon a recent Supreme Court decision in the case of Assistant Commissioner of Income Tax vs. Victory Aqua Farm Ltd. : [2015] 379 ITR 335 (SC), as also a judgment of the Apex Court in the case of Commissioner of Income Tax vs. Dr. B. Venkata Rao : [2000] 243 ITR 81 (SC), as well as a judgment of the Karnataka High Court in the case of Deputy Commissioner of Income-Tax vs. ASTRA-IDL Ltd. : [2001] 247 ITR 564 (Kar). In the aforesaid decisions the functional test was applied by the Apex Court and the Karnataka High Court to determine whether a particular building was especially designed as a tool of business, to qualify as plant for higher depreciation at the rate of 25%. On the other hand, the Revenue relies upon a decision of the Apex Court in the case of Commissioner of Income-Tax vs. Anand Theatres: [2000] 244 ITR 192 (SC). This Court noted that the decision in Anand Theatres case had not noticed the earlier decision in Dr.B. Venkata Rao case (supra) and the Supreme Court in the later case in Victory Aqua Farm Ltd. had found that it was difficult to read the

judgment in the case of Anand Theatres so broadly and held that the said decision had to be considered as an authority only with respect to Anand Theatres, which was the question under consideration in the said case.

10. Further, considering that the Assessing Officer has recorded in the earlier assessment orders that the factory building is a plant and the assessee is entitled to higher depreciation at the rate of 25%, this Court applying the functional test had held that the building which was constructed solely for the manufacturing of medicine was a plant and was entitled to higher depreciation at the rate of 25%. The aforesaid question of law was accordingly decided in favour of the assessee and against the Revenue.

11. In view of the facts of the present matter, as noted above, learned counsel for the Revenue is unable to distinguish the same from the facts of the case of M/s. Cachet Pharmaceuticals Pvt. Ltd. (supra), although she sought to rely upon the decision of the Apex Court in Anand Theatres case (supra).

12. Considering the fact that in the case of the assessee itself for the previous two assessment years, 1997-98 and 1998-99, it has been found that the building was used as a plant and entitled to the benefit of depreciation at the higher rate of 25%, the contention of the Revenue in this regard has to be rejected.

13. In the light of the aforesaid discussions, the first

substantial question of law is answered in the affirmative in favour of the Revenue and against the assessee. The second substantial question of law is answered in the negative against the appellant-Revenue and in favour of the assessee.

14. The appeal is, accordingly, partly allowed.

(Ramesh Kumar Datta, J)

(Sudhir Singh, J)

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