IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.143 of 2015 (O&M)
Date of decision: 26.4.2016

Pr. Commissioner of Income Tax I, Ludhiana

……Appellant

Vs.

M/s B.B.F. Industries Limited

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Rajesh Katoch, Advocate for the appellant-assessee.

Ms. Radhika Suri, Sr. Advocate with Ms. Rajni Pal, Advocate, for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.143, 146, 147, 190 and 191 of 2015 as learned counsel for the parties are agreed that similar questions are involved in all these appeals. However, the facts are being extracted from ITA No.143 of 2015.

2. ITA No.143 of 2015 has been preferred by the revenue under section

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 20.11.2014 Annexure A.IV passed by the Income Tax Appellate Tribunal, Chandigarh (in short, "the Tribunal") in ITA 1162/CHD/2012 for the assessment year 2006-07. The appellant had filed CM No.25157-CII of 2015 seeking permission to amend the substantial questions of law. The said application was allowed vide order dated 09.12.2015 and the following amended substantial questions of law were taken on record:-

"i) Whether on the facts and circumstances of the case the Hon'ble Income Tax Appellate Tribunal was right in law in quashing the reopening of the assessment under sections 147/148 of the Income Tax Act, 1961, holding the same to be a mere change of opinion and also on the grounds that the assessee at the time of original assessment proceedings had disclosed all the primary facts before the Assessing Officer, whereas the proceedings under section 147 of the Income Tax Act, 1961 were initiated within the period of four years from the end of the relevant assessment year and hence first proviso to section 147 of the Income Tax Act, 1961 was not applicable in the case of the assessee?

ii) Whether the Hon'ble Income Tax Appellate Tribunal is justified to hold that proceedings under section 147 of the Income Tax Act, 1961 are based upon change of opinion whereas the assessee had claimed deduction under section 80IB of the Income Tax Act, 1961 on various subsidies whereas the same was not admissible in view of the law laid down by the Hon'ble Apex Court in the case of ***Liberty India vs. CIT***, ***(2009) 317 ITR 218 (SC)***?

iii) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in allowing relief to the assessee by holding that various subsidies i.e. Interest subsidy, freight subsidy and insurance subsidy received by the assessee are capital receipt in nature?

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

iv) Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in allowing relief to the assessee by also accepting its alternative plea that after reducing these subsidies from the expenditure incurred, no further income was left under the head of subsidy, whereas actually by reducing the subsidy from the expenses, the assessee is claiming deduction under section 80IB on these subsidies in indirect manner by enhancing the profit of the eligible business to that extent?

v) Whether the Hon'ble Income Tax Appellate Tribunal is justified in law in allowing deduction under section 80IB of the Income Tax Act, 1961 on various subsidies received by the assessee, whereas the same is not allowable in view of the law laid down by the Hon'ble Apex Court in the case of ***Liberty India vs. CIT, (2009) 317 ITR 218 (SC)***?"

Questions No.(i) and (ii) have been claimed in ITA No.143 of 2011 only whereas Questions No.(iii) to (v) have been claimed in all the other connected appeals which are identical.

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.143 of 2015 may be noticed. Return declaring an income at ₹ 1,58,69,445/- was filed on 29.11.2006 and assessment was completed under section 143(3) of the Act on 26.11.2008 at an income of ₹ 2,15,83,400/-. Later on, the assessment was reopened under section 147 of the Act on 9.3.2011 and assessment was completed on 30.11.2011 at an income of ₹ 3,29,06,269/- after disallowing deduction under section 80IB of the Act amounting to ₹ 1,05,05,352/- on account of various subsidies by not treating the subsidies as part of profits eligible for deduction under section 80IB of the Act. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] against reopening of assessment as well as disallowance of deduction under section 80IB of the Act amounting to ₹ 1,05,05,3521/-. The CIT(A) upheld the action of the

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

Assessing Officer regarding reopening of assessment under section 147 of the Act as well as disallowing deduction under section 80IB of the Act. Still not satisfied, the assessee filed appeal before the Tribunal. Vide order dated 20.11.2014, Annexure IV, the Tribunal quashed the reopening of assessment under section 147 of the Act by relying upon various judgments and allowed the appeal. However, the issue relating to deduction under Section 80IB of the Act on various subsidies was adjudicated in favour of the assessee. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. Adverting to Questions No.(i) and (ii) as noticed above, regarding the issue qua reopening of the assessment relating to assessment year 2006-07 under section 147 of the Act on the ground of mere change of opinion, it has been categorically recorded by the Tribunal that the assessee had disclosed complete facts before the Assessing Officer at the stage of original assessment which were duly verified and thus, on mere change of opinion, reopening of the assessment could not be held to be valid and justified. The relevant findings recorded by the Tribunal on this issue read as under:-

> "17. The assessee, thereafter filed objections before Assessing Officer explaining that how assessee was eligible for deduction under section 80IB in respect of Unit I and Unit II at Samba, however, the Assessing Officer rejected the objections of the assessee vide letter dated 14.11.2011 (PB-57). In this letter, Assessing Officer accepted that mistake has been detected which led to change of opinion. It is, therefore, clear that all facts were known to the revenue department at the time of original assessment proceedings in respect of claim under section 80IB of the Act for Samba units and the Assessing Officer verified all the facts and there was no failure on the part of the assessee to disclose complete facts before Assessing Officer at assessment stage. No new material has come in existence and possession of the Assessing Officer for reopening of the assessment.

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

No tangible material was found against assessee and no fresh material came on record for reopening of the assessment. The decisions which are referred to in the reasons for reopening of the assessment i.e. decisions of the Hon'ble Supreme Court in the cases of Sterling Foods and Liberty India Limited (supra) were already considered by Assessing Officer while passing the original assessment order. Therefore, it is clearly a case of change of opinion on the part of the Assessing Officer and therefore, on mere change of opinion, reopening of the assessment could not be held to be valid and justified.

18. Considering the above propositions of law decided in various judgments quoted above, it is clear that Assessing Officer is not justified in reopening the assessment on mere change of opinion. The learned counsel for the assessee, on the basis of the replies filed before Assessing Officer at the original assessment proceedings has been able to prove that assessee disclosed all primary fact before Assessing Officer at the time of making original assessment order dated 26.11.2008. The Assessing Officer, after examining the replies and details on record, accepted the substantial claim of assessee of deduction under section 80IB in respect of units at Samba. Thus, the Assessing Officer formed the opinion on the basis of the facts and material on record by accepting the claim of assessee on the same issue on which assessment was reopened. The decision cited by learned DR would not support the case of the revenue because of the findings recorded above.

19. Considering the above discussion, we do not find any justification for the authorities below to justify the reopening of the assessment. The reopening of the assessment is thus clearly bad in law and is liable to be quashed. We accordingly set aside the orders of the authorities below in assessment year 2006-07 and quash the reopening of the assessment under section 147/148 of the Act. Appeal of assessee is allowed in assessment year 2006-07 on this ground.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx"

6. Adverting to Questions No.(iii) to (v), they relate to different subsidies,

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

i.e. interest on working Capital subsidy, Insurance subsidy and Freight subsidy received by the assessee and the issue therein is whether deduction under section 80IB of the Act was allowable in respect of these subsidies or not.

7. After examining the matter and the case law on the point and inter alia relying upon judgment of the Gauhati High Court in ***CIT vs. Meghalaya Steels Limited,*** (2013) 356 ITR 235 where various judgments including judgment of the Supreme Court in the case of ***Liberty India vs. CIT*** (supra) were considered, the Tribunal held that the Freight subsidy, insurance subsidy and interest subsidy are derived from industrial undertaking and eligible for deduction under section 80IB of the Act.

8. The revenue had challenged the aforesaid decision of the Gauhati High Court by way of Special Leave Petition. The Apex Court in ***Commissioner of Income vs. M/s Meghalaya Steels Limited,*** Civil Appeal No.7622 of 2014 decided on 9.3.2016 had affirmed the decision of the Gauhati High Court and dismissed the appeal of the revenue. The relevant observations made by the Apex Court in ***M/s Meghalaya Steels Limited's*** case (supra), read thus:-

> "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

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

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 be calculated by 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."

9. Adverting to the judgments relied upon by the learned counsel for the

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh

appellant-revenue, it may be noticed that the decisions in ***CIT vs. Ceramics India,*** (2012) 821 CCH 0261 (Gau.HC), ***CIT vs. Kiran Enterprises***, (2010) 327 ITR 520(HP) and ***CIT vs. Gheria Oil Gramudyog Workers Welfare Association,*** (2011) 330 ITR 117(HP), suffice it to notice that they were based on individual fact situation involved therein. Moreover, in view of the judgment of the Supreme Court in ***Meghalaya Steels Limited's*** case (supra), the appellant cannot derive any advantage from the said pronouncements.

10. The findings recorded by the Tribunal are based on appreciation of material on record and the relevant case law on the point. Learned counsel for the appellant-revenue has not been able to show any illegality or perversity in the said findings. Thus, the substantial questions of law are answered accordingly. The appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

April 26, 2016 **(Raj Rahul Garg)**
gs' **Judge**

GURBAX SINGH
2016.06.03 15:21
I attest to the accuracy and
integrity of this document
High Court Chandigarh