

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27.02.2017

Coram

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

AND

THE HONOURABLE MR. JUSTICE M. SUNDAR

T.C. (Appeal) No. 701 of 2016

M/s. Cyber Pearl Information Technology
Park Private Limited (former known as
Ascendas IT SEZ (Chennai) Private Limited),
No. 9, 1st Floor, International Tech Park,
Taramani Road, Taramani,
Chennai-600 113. .. Appellant

vs.

Income Tax Officer,
Company Ward I(1),
Chennai-600 034. .. Respondent

Prayer : Tax Appeal filed under Section 260A of the Income Tax Act, 1961, against the order dated 29.04.2016, passed in ITA No. 1193/MDS/2015, on the file of the Income Tax Appellate Tribunal, Chennai C Bench. Preferred against the order of the commission of Income tax (Appeals I, Chennai in ITA.No.847/11-12/1, dt.30.01.2015 for the assessment year 2009-2010, and arising out of the Assessment order dt.30.12.2011 of the Income Tax-Dept in 9112/PAN-AAFCA5329L for the Assessment year 2009-10.

For Appellant : Mr. N.V. Balaji
For Respondent : Mr. T. Ravikumar
Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by Rajiv Shakdher, J.)

1. This is an appeal directed against the order dated 29.04.2016, passed by the Income Tax Appellate Tribunal, Chennai C Bench, Chennai (in short the Tribunal).

1.1. The appeal concerns the Assessment Year (AY) 2009-2010.

2. In order to adjudicate upon the appeal, the following broad facts are required to be noticed :

2.1. The assessee claims to be in the business of developing and leasing of Information Technology Parks (IT Parks in short). For the relevant AY, the assessee had filed its return in electronic-form on 25.08.2010, whereby, income declared was "NIL".

2.2. The assessee's case was picked up for scrutiny. Accordingly, notice under Section 143(2) of the Income Tax Act, 1961 (in short the Act), was issued to the assessee on 25.08.2011.

2.3. In these proceedings, the Assessing Officer discovered that the assessee had claimed deduction under Section 80-IAB of the Act to the extent of Rs.4,20,59,087/-. The said deduction included a sum of Rs.2,52,04,544/-. This amount, represented interest, which, the assessee had earned from security deposit made over by persons / entities, who had taken on lease, the facilities / infrastructure set up in the IT Parks.

2.4. The record would also show that the assessee had filed the prescribed form, i.e., Form 10CCB, wherein, the claim for deduction under Section 80-IAB was restricted to a sum of Rs.1,68,54,543/-.

3. Based on the aforesaid circumstances, the Assessing Officer on 30.12.2011, passed an order under Section 143(3) of the Act, whereby, the deduction was restricted to a sum of Rs.1,68,54,543/- The sum of Rs.2,52,04,544/-, which was interest received by the assessee from security deposit made over by lessees, as indicated above, was treated as income from other sources. Accordingly, a demand was raised.

4. Being aggrieved, the petitioner preferred an appeal with the Commissioner of Income Tax (Appeals) [in short the CIT (A)]. The aforesaid appeal was numbered as : ITA No.847/11-12/A-1 (New No.ITA118/CIT(A)-1/2011-12).

4.1. The CIT (A) vide order dated 30.01.2015, confirmed the order of the Assessing Officer.

5. The petitioner did not rest the matter there, and accordingly, carried the matter in appeal to the Tribunal.

5.1. The Tribunal, as indicated above, ruled against the petitioner vide the impugned judgment and order, which is assailed before us in the present appeal.

5.2. The operative part of the impugned judgment passed by the Tribunal, being relevant, is extracted hereafter :

"..... 7. We heard the rival submissions, perused the material on record and judicial decisions cited. The ld. Authorised Representative of assessee basic contention being assessee company is in the

business of developing software parks and leasing to software companies. These companies provide security deposits to the assessee company which are returnable on termination of lease. Such refund may be for a period of five years or more and the assessee company for liquidity purpose deposit the amount in fixed deposits in bank and interest is receivable and offered in financial statements and whether interest takes the characteristic profit from business undertaking which is disputed. On perusal of the assessment order, the assessee has claimed deduction u/s.80-IAB of the Act on the interest portion also but at the time of assessment based on the Auditor certificate from 10CCB claimed deduction only to the extent of Rs.1,68,54,543/- and accepted to that extent and ld. Assessing Officer treated balance of Rs.2,52,04,544/- as income from other sources. The ld. Authorised Representative before Commissioner of Income Tax (Appeals) has contested and filed additional grounds to treat interest income as business profits of undertaking eligible for deduction u/s.80-IAB of the Act. The ld. Commissioner of Income Tax (Appeals) considering the facts, provisions of law has elaborately discussed at para 5.2 of the order were assessee agreed the addition and claimed relief as per form 10CCB and upheld the order of the Assessing Officer. Now question arises whether after agreeing the addition on technical grounds, can assessee can claim further deduction, on legal aspect interest on FDR as income derived from industrial undertaking, the ld. Authorised Representative relied on judicial decisions and Tribunal decision to support the case. On perusal of the financial statements of the assessee company at page 35 of the paper book the main source of income being lease income and assessee offered interest income referred at Schedule 10 of page 41 of paper book. Further, similar interest income for the assessment year 2007-2008 was obtained. The ld. Authorised Representative could not support with explanation whether assessee has claimed deduction u/s.80-IAB of the Act for the assessment year 2008-09 on interest income. We found the assessee could not substantiate the direct nexus with the industrial undertaking and we rely on decision of Supreme Court in the case of Pandian Chemicals Ltd. V. CIT, 262 ITR 278, where it was held as under :

“The words “derived from” in section 80HH of the Income Tax Act, 1961, must be

understood as something which has a direct or immediate nexus with the assessee's industrial undertaking. Although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking.

Held, accordingly, that interest derived by the industrial undertaking of the assessee on deposits made with the Electricity Board for the supply of electricity for running the industrial undertaking could not be said to flow directly from the industrial undertaking itself and was not profits or gains derived by the undertaking for the purpose of the special deduction under section 80HH."

On application of ratio of above case, we are not inclined to interfere with order of the Commissioner of Income Tax (Appeals) on this ground and upheld the same and dismiss the appeal of the assessee....."

(emphasis is ours)

6. A perusal of the aforementioned extract of the judgment of the Tribunal would show that the assessee's claim for deduction qua the balance sum, i.e., Rs.2,52,04,544/- was rejected on two grounds :

6.1. First, that via the Auditor's certificate issued in Form 10CCB, the claim under Section 80-IAB had been restricted to Rs.1,68,54,543/-.

6.2. Second, that the interest received from security deposit in the sum of Rs.2,52,04,544/- had "no direct nexus" with the industrial undertaking. In this behalf, the Tribunal relied upon the judgement of the Supreme Court in : Pandian Chemicals Ltd. Vs. Commissioner of Income Tax, [2003] 262 ITR 278 (SC).

7. Mr.N.V.Balaji, who appears on behalf of the assessee, assails the judgment of the Tribunal on the following, broad, grounds :

7.1. First, the Tribunal, according to the learned counsel, did not appreciate the fact that in the income tax return filed by the assessee, the entire amount, which was a sum of Rs.4,20,59,087/- was claimed as deduction. Learned counsel submitted that merely because Form 10CCB restricted the claim to a sum of Rs.1,68,54,543/- could not be taken as a ground for denying the deduction, which otherwise, the assessee could claim as a matter of right under Section 80-IAB.

7.2. Second, that the interest derived from the security deposit, upon its investment in a fixed deposits with the bank,

was income, which were derived from business of developing a Special Economic Zone, and therefore, was amenable to deduction under Section 80-IAB. In support of his submission, learned counsel sought to place reliance on the judgment of the Bombay High Court in : Commissioner of Income Tax Vs. Jagdishprasad M.Joshi, (2009) 318 ITR 420 (Bom.).

8. On the other hand, Mr.T.Ravikumar, who appears for the Revenue, made the following submissions :

8.1. Firstly, according to the learned counsel, the assessee himself, had, in its Profit and Loss Account filed with the return, shown the sum of Rs.2,52,04,544/- as "income from other sources", and therefore, there was no reason for the Assessing Officer to treat it otherwise. In support of this submission, learned counsel for the Revenue, not only relied upon the contents of the Profit and Loss Account filed with the return, but also relied upon the observations recorded by the Assessing Officer in the assessment order dated 30.12.2011. Specific emphasis was laid by the learned counsel on that part of the assessment order, wherein, it is recorded that the assessee had indicated during the course of the assessment proceedings that, it had, "inadvertently" claimed a deduction in the sum of Rs.2,52,04,544/-.

8.2. It was, thus, submitted that because of the stand taken by the assessee, as agreed, the deduction was restricted to a sum of Rs.1,68,54,543/- while, the remaining amount, which is the amount in dispute, was treated as income from other sources.

8.3. As a corollary to this argument, Mr.Ravikumar also laid emphasis on the fact that in the first instance, Form 10CCB was filed on 30.09.2009, and that, it was this form, which was available to the Assessing Officer, when, assessment proceedings were concluded.

8.4. Learned counsel submitted that it was only, thereafter, that a revised Form 10CCB was filed, albeit, on 26.11.2012.

8.5. Therefore, as indicated above, the submission of the Revenue was that the assessee could not do an about turn, so to speak, after the assessment proceedings stood concluded.

8.6. On the merits of the claim made by the assessee, learned counsel submitted that for the interest earned by the petitioner, from security deposit, to be amenable to deduction under Section 80-IAB, such income, should have a "direct nexus" with the subject activity, which is, the business of developing a Special Economic Zone.

8.7. In other words, the submission was that only those profits and/or gains, which are derived by an undertaking or an enterprise from "any" business of developing a Special Economic Zone, would come within the purview of Section 80-IAB. In support of his submission, learned counsel relied upon the following judgments :

- (i).CIT V. A.S.Nizar Ahmed and Co., [2003] 259 ITR 244 ;
- (ii).CIT V. Menon Impex P. Ltd., [2003] 259 ITR 403 ;
- (iii).Pandian Chemicals Ltd. V. CIT, [2003] 262 ITR 0278 (SC)
- (iv).CIT, Delhi Vs. Shri Ram Honda Power Equip, [2007] 289 ITR 475(Delhi) ;
- (v).Dollar Apparels V. ITO, [2007] 294 ITR 484 (Mad.);
- (vi).Sakthi Footwear Vs. Assistant Commissioner of Income Tax, [2007] 317 ITR 0194 ;
- (vii).CIT V. Mereena Creations, 330 ITR 199; and
- (viii).CIT VS. Tamil Nadu Dairy Development Corporation Limited, [1995] 216 ITR 353 (Mad.)

9. We have heard the learned counsels for the parties and perused the record.

10. According to us, there are two aspects, which arise for consideration of the matter. First, whether the assessee had made the claim in the prescribed manner. It is not disputed before us, as it cannot be, that in the return filed by the assessee, the sum of Rs.2,52,04,544/- was shown as income from other sources. It is also not disputed before us that, when, Form 10CCB was filed, in the first instance, the claim for deduction under Section 80-IAB was restricted to a sum of Rs.1,68,54,543/-.

10.1. Qua the said sum, we put a pointed query to Mr.Balaji, as to whether the sum of Rs.1,68,54,543/- represented the rental income received from the lessees of IT Parks facilities.

10.2. Mr.Balaji, learned counsel for the assessee, affirmed the fact that the sum of Rs.1,68,54,543/- represented, purely, the rental income received from the lessees of IT Parks.

10.3. Therefore, the submission of the learned counsel for the assessee that the revised Form 10CCB should have been taken into account, to our mind, cannot add much mileage to the case of the petitioner, for the reason that before the Assessing Officer, the assessee, despite such situation obtaining, advisedly, continued to take the stand that the claim made in the return for deduction of the entire amount, which is a sum of Rs.4,20,59,657/- was a mistake that it and had been made "inadvertently".

10.4. It was, in our opinion, open to the assessee, perhaps, at that juncture, to assert that the assessee was entitled to a deduction for the entire amount, and therefore, should be granted deduction qua the same under Section 80-IAB. This aspect of the matter comes through quite clearly, if, one were to peruse the observations made in paragraph 2 of the assessment order :

"..... 2. During the year, the assessee had claimed deduction u/s 80-IAB to the tune of Rs.4,20,59,087/-. On perusal of records, it is seen that the assessee is in receipt of interest income of Rs.2,52,04,544/- which he had included as Business Profits for the purpose of claiming deduction u/s80-IAB. As per Section 80-IAB, Income generated by way of developing, maintaining & operating infrastructure facilities forms part of business profits of the undertaking. As this was put to the assessee, the assessee had stated that it had been inadvertently claimed for the purpose of 80-IAB and also stated that as per Certificate in Form 10CCB, 80-IAB has been claimed only to the extent of Rs.1,68,54,543/- Accordingly, the claim of 80-IAB is considered only to the extent of Rs.1,68,54,543/- and the balance amount of Rs.2,52,04,544/- is treated as Income from Other Sources and the assessment is completed u/s 143(3) of the Income Tax Act, 1961....."

(emphasis is ours)

10.3. Therefore, in our opinion, the Tribunal, rightly, based on what emanated from the record, restricted the deduction to the sum of Rs.1,68,54,543/-.

11. Which bring us to the other aspect of the matter. This aspect concerns the merits of the claim.

11.1. According to the learned counsel for the petitioner, interest derived from interest-free security deposit, which was invested in Fixed Deposits with the banks, was income derived from business of developing a Special Economic Zone, and hence, fell within the ambit of Section 80-IAB of the Act.

11.2. In order to appreciate this aspect of the matter, one would have to extract the relevant part of Sub-Section (1) of 80-IAB of the Act :

"80-IAB. (1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years."

(emphasis is ours)

11.3. As would be evident, upon a bare perusal of the provision, an assessee is entitled to a deduction of the specified amount from any profits and gains, which are derived by an undertaking or an enterprise from any business of developing a Special Economic Zone.

11.4. The term "derived", therefore, according to us, is critical in appreciating the kind of deduction, which would fall within the ambit of Section 80-IAB of the Act.

12. For this purpose, we may profitably extract the observations of the Supreme Court in : Pandian Chemicals Ltd., Vs. CIT, [2003] 262 ITR 278 (SC). Before we do that, let us set out the broad contours of the case.

12.1. This was a case, where, the assessee was claiming deduction under Section 80HH of the Act. The assessee had, in this particular case, derived interest from deposits made over to the electricity board for supply of electricity to its industrial undertaking.

12.2. The issue, which arose for consideration before the Supreme Court, was, whether the interest earned on deposits made over to the electricity board were profits and gains "derived" from an industrial undertaking and hence, eligible to the benefit available under the said provision.

12.3. The Supreme Court, rejected the claim of the assessee for deduction and, while doing so, observed that in appreciating the term "derived", the enquiry should stop as soon as the effective source of the income is discovered.

12.4. In other words, the Court held that there should be a "direct or immediate nexus" with the assessee's industrial undertaking. Since, the observations made by the Supreme Court in Pandian Chemicals case are apposite, as indicated above, the same are set forth hereafter:

"..... 4. Section 80HH of Income Tax Act grants deduction in respect of profits and gains "derived from" an industrial undertaking. The contention of the appellant before us is that interest earned on the deposit made with the Electricity Board for the supply of electricity to the appellants industrial undertaking should be treated as income derived from the industrial undertaking within the meaning of section 80HH. It is submitted that without the supply of electricity the industrial undertaking could not run and since electricity was an essential requirement of the industrial undertaking, the industrial undertaking could not survive without it. It is further pointed out that for the purpose of getting this essential input, the statutory requirement was that the deposit must be made as a precondition for the supply of electricity. Consequently, according to the appellant, the interest on the deposit should be

treated as income derived from the industrial undertaking within the meaning of section 80HH.

5. The High Court rejected the submission of the appellant by relying upon the decision of this court in *Cambay Electric Supply Industrial Co. Ltd., Vs. CIT*, [1978] 113 ITR 84 (SC), where this court had clearly stated that the expression "derived from" had a narrower connotation than the expression "attributable to" (page 93) :

"... In this connection, it may be pointed out that whenever the legislature wanted to give a restricted meaning in the manner suggested by the learned Solicitor-General, it has used the expression derived from, as, for instance, in section 80J. In our view, since the expression of wider import, namely, attributable to, has been used, the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity."

6. The word "derived" has been construed as far back in 1948 by the Privy Council in *CIT V. Raja Bahadur Kamakhya Narayan Singh*, (1948) 16 ITR 325 (PC) when it said :

"The word 'derived' is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment. And rent is not land within the meaning of the definition."

This definition was approved and reiterated in 1955 by a Constitution Bench of this court in the decision of *Mrs. Bacha F. Guzdar V. CIT*, [1955] 27 ITR 1 (SC). It is clear, therefore, that the word 'derived from' in section 80HH of the Income Tax Act, 1961 must be understood as something which has direct or immediate nexus with the appellants industrial undertaking. Although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The derivation of profits on the deposit made with Electricity Board cannot be said to flow directly from the industrial undertaking itself."

(emphasis is ours)

13. Besides the aforesaid judgement, we may also refer to the judgement of a Division Bench of this Court in *C.I.T. V.*

Menon Impex P. Ltd., [2003] 259 ITR 403 (Mad.), wherein, the Court was considering an issue, in the light of facts similar to the instant case, though in the light of the provisions of Section 10A of the Act, took the very same view qua the term "derived".

13.1. In CIT V. Menon Impex P. Ltd. The Court was called upon to decide as to whether deposits made for opening of Letters of Credit, which earned interest, was income derived from exports.

13.2. This Court rejected the contention of the assessee that interest received on deposit made over to open Letters of Credit was income derived by an industrial undertaking carrying on the business of export. In reaching this conclusion, the Division Bench took recourse to the judgment of the Supreme Court in : Cambay Electric Supply Industrial Co. Ltd. V. CIT, [1978] 113 ITR 84, which, as indicated above, is adverted to in Pandian Chemicals case. The observations of the Division Bench, which are relevant, are extracted hereinbelow:

".... Section 10A of the Act provides that the profits and gains derived by an assessee from an industrial undertaking to which that section applies shall not be included in the total income of the assessee. The Supreme Court in the case of Cambay Electric Supply Industrial Co. Ltd. V. CIT, [1978] 113 ITR 84 has held that the words "derived from" are narrower in scope than the words "attributable to".

In the case of CIT V. Sterling Foods [1999] 237 ITR 579, the Supreme Court observed that (headnote) : "the word 'derive' is usually followed by the word 'from' and it means : 'get, to trace from a source; arise from, originate in, show the origin or formation of' ". It was pointed out that unless the source of the income is from an industrial undertaking, such income cannot be regarded as "derived from" industrial undertaking. It was held that the income derived from sale of import entitlements could only be said to be the export promotion scheme and not the industrial undertaking. It was also observed by the court that where nexus between profits and gains and the industrial undertaking was not direct, but incidental, such income could not have been regarded as having been derived from industrial undertaking.

In this case the interest received by the assessee was on deposits made by it in the banks. It is that deposit which is the source of income. The mere fact that the deposit made was for the purpose of obtaining letters of credit which letters of credit were in turn used for the purpose of business

of the industrial undertaking does not establish a direct nexus between the interest and the industrial undertaking.”

(emphasis is ours)

13.3. There are several other judgements, which take the same view. However, we do not wish to burden our judgment with the views taken in other cases. Suffice it to say that the view taken by us is also the view taken in other cases, such as, Dollar Apparels V. ITO, [2007] 294 ITR 484; Sakthi Footwear V. Assistant Commissioner of Income Tax, [2009] 317 ITR 0194; CIT V. Mereena Creations, 330 ITR 199 ; CIT V. Shri Ram Honda Power Equip, [2007] 289 ITR 475.

14. Before we conclude, we must deal with the submission made by Mr. Balaji that the aforementioned judgements did not deal with the provision at hand.

14.1. In our opinion, what is relevant to note is that the provisions are pari materia and that the ratio of the judgements cited above is, as to what is the meaning to be given to the term “derived”.

14.2. The consistent view of the Courts has been that wherever, in such like sections, the expression “derived” is used, as against “attributable to”, the width and the amplitude is narrower. Therefore, courts have held consistently that in order to come to a conclusion as to whether such profits or gains, i.e., income, would be amenable to deduction, the effective source of such income is to be looked at. Once, it is found that the income is derived from a secondary source, which is not the effective source, it falls outside the purview of such like provisions, which provide for deductions with purpose of giving fillip to the designated activity, which, in the instant case, is the business of developing a Special Economic Zone.

15. We may also indicate that in so far as the judgement of the Bombay High Court in CIT V. Jagdishprasad M. Joshi, [2009] 318 ITR 420 (Bom.) is concerned, it has taken a view qua the provisions of Section 80-IA of the Act, which is contrary to the view taken by us. We are unable to persuade ourselves to agree with the view of the Bombay High Court.

15.1. We are informed that the Revenue has carried the matter in appeal to the Supreme Court, and the appeal so filed stands admitted.

16. Therefore, for the foregoing reasons, we find no infirmity in the order of the Tribunal. The appeal is, accordingly, rejected, as in our view, no substantial question of law arises for consideration. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

The Income Tax Officer,
Company Ward I(1),
Chennai-600 034.

2 Assistant Registrar Income Tax Appellate Tribunal
Rajaji Bhavan, IIIrd Floor, Besant Nagar, Chennai 90

3 The Commissioner of Income Tax-Appeals I
121, Mahatma Gandhi Road,
Nungambakkam, Chennai 34

4 The Income Tax officer,
Company Ward I (1) Chennai 34

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