

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/140/2019
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
VS.
M/S. BRAHMAPUTRA CARBON LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 26th September, 2022

Appearance :
Mr. Smarajit Roychowdhury, Adv.
Mr. Soumen Bhattacharjee, Adv.
... for appellant
Mr. Subash Agarwal, Adv.
...for respondent

The Court : This appeal by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 23rd March, 2018 passed by the Income Tax Appellate Tribunal "D" Bench, Kolkata (Tribunal) in ITA No. 1990/Kol/2016 for the assessment year 2011-2012. The following substantial questions of law arise for consideration in this appeal:

- i) Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in deleting the additions made by the Assessing Officer under Section 80-IC of the said Act on Government subsidy and Excise Duty refund of Rs.8,64,029/- by relying upon a judgment of the Hon'ble Gauhati High Court in the case of Meghalaya Steel Limited reported in 332 ITR 91 despite the fact that the Excise Duty refund does not form part of net profit of

eligible industrial undertaking for the purpose of Section 80-IC in the light of the judgment of the Hon'ble Apex Court in the case of Liberty India –vs- CIT reported in 183 Taxman 349?

- ii) Whether in the facts and circumstances of the case and in law is the order of the Learned Income Tax Appellate Tribunal perverse?

We have heard Mr. Smarajit Roychowdhury, learned standing Counsel appearing for the appellant and Mr. Subash Agarwal, learned advocate for the respondent.

The short issue involved in this issue is whether the refund of excise duty obtained by the respondent/assessee could have been treated as profit from business and the assessee could have been granted the benefit of deduction under section 80IC of the Act. We find that identical issue was decided by the High Court of Gauhati in the case of Commissioner of Income-tax vs. Meghalaya Steels Ltd., 332 ITR 91 (Gauhati). The operative portion of the decision reads as follows :-

“18. Insofar as the second question is concerned, the Central excise duty refund claimed by the assessee is on the basis of an exemption notification issued by the Ministry of Finance (Department of revenue) being Notification No. 32 of 1999 and Notification No. 33 of 1999 both dated 8-7-1999. In terms of these notifications, a manufacturer is required to first pay the Central excise duty and thereafter claimed a refund on fulfilment of certain conditions. In the next month, after verification of the claim, the Central excise duty so deposited is refunded to the assessee if the conditions laid down in the notifications are fulfilled. In the present case, there is no dispute that the assessee was entitled to the Central excise duty refund.

19. The Central Board of Excise and Customs in its circular dated 19-12-2002 clarified that the refund is not on account of excess payment of excise duty but is basically designed to give effect to the exemption and to operationalise the exemption given by the notifications. In that sense, the Central excise duty refund does not appear to bear the character of income since what is refunded to the assessee is the amount paid under the modalities provided by the Department of revenue for giving effect to the exemption notifications. There is also nothing to suggest that the assessee has recovered or passed on the excise duty element to its customers.

20. Even assuming the refund does amount to income in the hands of the assessee, it is a profit or gain directly derived by the assessee from its industrial activity. The payment of Central excise duty has a direct nexus with the manufacturing activity and similarly, the refund of the Central excise duty also has a direct nexus with the manufacturing activity. The issue of payment of Central excise duty would not arise in the absence of any industrial activity. There is, therefore, an inextricable link between the manufacturing activity, the payment of Central excise duty and its refund. In the circumstances, we are of the opinion that question No. 2 must be answered in the affirmative in favour of the assessee and against the revenue.”

Identical view was taken by the High Court of Jammu & Kashmir in ITA No.2 of 2010, dated January 31, 2010 in the case of Shree Balaji Alloys & Ors. vs. Commissioner of Income Tax & Anr., wherein it was held as follows :-

“24) A close reading the Office Memorandum and the amendment introduced thereto with para No. 3 appearing in the Central Excise Notification Nos. 56 and 57 of November 11, 2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu and Kashmir and the generation of employment, so contemplated, was not only casual or temporary; but was on the other hand, of permanent nature.

25) Considered thus, the paramount consideration of the Central Government in providing the incentives to the New Industrial Units and Substantial Expansion of the existing units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self employment, hence a purpose in Public Interest.

30) For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence Revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel and Ponni Sugars cases (supra).”

The appeal filed by the revenue against the decision in the case of Shree Balaji Alloys in Civil Appeal No. 10061 of 2011 was dismissed by the Hon'ble Supreme Court by order dated April 19, 2016. The order reads as follows :-

“Heard Mr. K. Radhakrishnan, learned senior counsel appearing for the Revenue as well as Mr. Ajay Vohra, learned senior counsel appearing for the respondents.

The issue raised in these appeals is covered against the Revenue by the decision of this Court in “Commissioner of Income Tax, Madras Vs. Ponni Sugars and Chemicals

Ltd.”, reported in (2008) 9 SCC 337, or in the alternate, in “*Commissioner of Income Tax Vs. M/s Meghalaya Steels Ltd.*”, reported in (2016) 3 SCALE 192.

The appeals are, therefore, dismissed.

No costs.”

As against the order passed in the case of Meghalaya Steels Ltd., the revenue had preferred appeal before the Hon’ble Supreme Court in *Commissioner of Income-tax vs. Meghalaya Steels Ltd.*, 383 ITR 217 (SC) and the appeal filed by the revenue was dismissed.

Thus, the issue having been settled in favour of the assessee in the aforementioned decisions, we are inclined to apply the same to the case on hand.

In light of the above, the appeal filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)