

ITAT/145/2018
IA No.GA/2/2018 (Old No.GA/1086/2018)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX,
CENTRAL-2, KOLKATA
-Versus-
M/S. BARAK VALLEY CEMENTS
LTD.

Appearance:
Mr. Vipul Kundalia, Adv.
Mr. Anurag Roy, Adv.
...for the appellant/revenue.

Mr. Pranit Bag, Adv.
Ms. Ashis Choudhury, Adv.
Ms. Aindrilla Basu, Adv.,
. . . for the respondent/assessee.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 6th July, 2022.

The Court:- This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 2nd August, 2017 passed by the Income Tax Appellate Tribunal 'B' Bench, Kolkata in I.T. (SS) A. Nos. 137 to 141/Kol/2016 for the assessment years 2007-08 to 2011-12.

The revenue has raised the following substantial questions of law for consideration :

- i) *Whether on the facts and in the circumstances of the case, the Learned Appellate Tribunal, has erred in law while treating the amount of VAT reemission as eligible for deduction under Section 80IC of the Income Tax Act, 1961, when essentially, it is of the nature of duty drawback and cannot be called profit derived from industrial undertaking and cannot be reckoned in computing deduction under Section 80IC of the Income Tax Act, 1961?*
- ii) *Whether on the facts and in the circumstances of the case, the Learned Appellate Tribunal, has erred in allowing deduction under Section 80IC of the Income Tax Act, 1961 on VAT remission while is contrary to law laid down in the case of Ritesh Industrial Ltd. reported in (2005) 274 ITR 324 and also in the case of CIT Versus H.M. Steels Ltd. reported in [2015] 62 Taxmann.com 252 (Punjab & Haryana)?*
- iii) *Whether on the facts and the circumstances of the case, the Learned Appellate Tribunal, has erred in allowing the deduction under Section 80IC of the Income Tax Act, 1961 on VAT remission by relying the decision in the case of Meghalaya Steels which is distinguishable and not applicable in the instant case since it was on the issue of subsidy and not on VAT reemission?*

We have heard Mr. Vipul Kundalia, learned standing counsel appearing for the appellant/revenue and Mr. Pranit Bag, learned counsel appearing for the respondent/assessee.

The short question involved in this appeal is whether the remission of Value Added Tax (VAT) extended to the respondent/assessee pursuant to a scheme formulated by the State Government can be claimed as a deduction under Section 80IC of the Act. The learned tribunal had disposed of a batch of matters and the assessee's case pertains to remission of VAT which the assessee contended to form part of the profits and gains of the eligible unit and, therefore, the benefit of Section 80IC could be applicable to the assessee. The learned tribunal had followed the decisions in the assessee's own case passed by the Guwahati Tribunal for the assessment years 2008-09 and 2009-10 vide order dated 19th November, 2013 and also the decisions of the Guwahati tribunal in other cases as well, namely, in the case of *ACIT Vs. G.L. Coke Pvt. Ltd. in ITA No.43/Gau/2009* dated 5th April, 2010 and in the case of *JBB Lime Industry in ITA No.58/Gau/2009* dated 5th April, 2010 and allowed the assessee's appeal.

The revenue is before us challenging the said order. After we have elaborately heard the learned counsel appearing for the parties and carefully perused the materials placed on record, we are of the opinion that we need not labour much to find out any answer to the substantial questions of law which have been raised before

us. In fact, such questions have been considered and answered by the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Meghalaya Steels Ltd., reported in (2016) 6 SCC 747.

The learned counsel appearing for the appellant/revenue placed strong reliance upon the decision of the Hon'ble Supreme Court in *Liberty India Vs. CIT*, reported in (2009)9 SCC 328 and submitted that the remission of VAT is not directly relatable to the business of an industrial undertaking for manufacturing or selling its product and, therefore, the assessee is not entailed to claim deduction under Section 80IC of the Act. The decision in *Liberty India* was considered by the Hon'ble Supreme Court in *Meghalaya Steels* and the relevant portion of the judgment is as follows :

"20. *Liberty India* being the fourth judgment in this line also does not help the Revenue. What this Court was concerned with was an export incentive, which is very far removed from reimbursement of an element of cost. A DEPB drawback scheme is not related to the business of an industrial undertaking for manufacturing or selling its products. DEPB entitlement arises only when the undertaking goes on to export the said product, that is, after it manufactures or produces the same. Pithily put, if there is no export, there is no DEPB entitlement, and therefore, its relation to manufacture of a product and/or sale within India is not proximate

or direct but is one step removed. Also, the object being DEPB entitlement, as has been held by this Court, is to neutralise the incidence of customs duty payment on the import content of the export product which is provided for by credit to customs duty against the export product. In such a scenario, it cannot be said that such duty exemption scheme is derived from profits and gains made by the industrial undertaking or business itself".

As pointed out by the Hon'ble Supreme Court, the DEPB entitlement arises only when the undertaking goes on to export the said product, that is, after it manufactures or produces the same and if there is no export, there is no DEPB entitlement and, therefore, its relation to manufacture of a product and/or sale within India is not proximate or direct but is step removed. The Hon'ble Supreme Court took note of the decision of this Court in the case of *Merinoply & Chemicals Ltd. Vs. CIT*, reported in (1994) 209 ITR 508. The Hon'ble Supreme Court had quoted the relevant paragraph of the said judgment which is as follows :

"21. The Calcutta High Court in Merinoply & Chemicals Ltd. v. CIT, held that transport subsidies were inseparably connected with the business carried on by the assessee. In that case, the Division Bench held: (SCC Online Cal para 28)

28. We do not find any perversity in the Tribunal's finding that the scheme of transport subsidies is inseparably connected with the business carried on by the assessee. It is a fact that the assessee was a manufacturer of plywood, it is also a

fact that the assessee has its unit in a backward area and is entitled to the benefit of the scheme. Further is the fact that transport expenditure is an incidental expenditure of the assessee's business and it is that expenditure which the subsidy recoups and that the purpose of the recoupment is to make up possible profit deficit for operating in a backward area. Therefore, it is beyond all manner of doubt that the subsidies were inseparably connected with the profitable conduct of the business and in arriving at such a decision on the facts the Tribunal committed no error."

In our considered view, the facts of the case in Merinoply & Chemicals Ltd. (supra) are more or less identical to the case on hand. In the said case the assessee was a manufacturer of plywood and has its unit in a backward area and was entitled to certain benefits under a scheme formulated by the State Government. However, on facts, the assessee therein claimed the transport expenditure to be incidental expenditure of the assessee's business and while considering the said plea, it was pointed out that the subsidy recoups and that the purpose of recoupment is to make up the possible profit for operating in a backward area and the subsidises were inseparably connected with the profitable conduct of the business and, therefore, the assessee was entitled to the benefit of Section 80IC of the Act. The Hon'ble Supreme

Court in Meghalaya Steels Ltd. (supra) held that the decision in Merinoply & Chemicals Ltd. (supra) correctly appreciated the legal position. Undisputed facts of the case on hand is that the assessee had set up their business in a backward area. Consequently, they were entitled to the benefit of a scheme under which the assessee upon collection of VAT from the customer on sale is entitled to a remission of 99 per cent as issued by the Commercial Tax Department. This remission obviously is a business receipt because the assessee is allowed to retain the amount for the growth of the business and, therefore, the VAT remission in the hands of undertaking is very much business income. The learned standing counsel for the appellant/revenue had placed reliance on the decision of the High Court at Delhi in the case of *Commissioner of Income Tax, Delhi - V, New Delhi Vs. Ritesh Industries Ltd.*, reported in (2005) 274 ITR 324. The said case pertains to duty drawback claim and which issue had been considered by the Hon'ble Supreme Court in Meghalaya Steels Ltd. Therefore, the decision could not render any assistance to the case of the revenue before us. Reliance was also placed on the decision of the Punjab and Haryana High Court in the case of *Commissioner of Income Tax, Patiala Vs. M/s. H.M. Steels Ltd.*, reported in 2015 SCC

Online P & H 13151. In the said case the issue was whether the sales tax rebate can be said to be derived from any business. What has been granted to the respondent/assessee is a remission of the VAT by which 99 per cent of the VAT collected from the customer on sale of the product is permitted to be retained by the assessee and only 1 per cent is to be remitted to the Department. Therefore, there is a market difference between a scheme of remission and a rebate on sales tax. Therefore, the decision in *H.M. Steels Ltd.* (supra) is also distinguishable on facts. While on this issue, we take note of the decision of the Hon'ble Court in *Sahney Steel and Press Works Ltd. Vs. CIT*, reported in [1997] 228 ITR 253 (SC) wherein the Hon'ble Supreme Court held that the nature of subsidy needs to be commissioned by the Court in each case. The decision of the Hon'ble Supreme Court in *Sahney Steel and Press Works Ltd.* (supra) would be of great relevance to the case on hand. The Hon'ble Supreme Court pointed out that when subsidy is given for the purpose of operating an industry more profitably, the subsidy would be revenue receipt and being revenue receipt, it has to be taxed in accordance with law meaning thereby that the profits and gains derived from or derived by, an industrial undertaking in a case, where operational cost is reduced by providing subsidy, in any

form, the profits and gains earned, because of such subsidy, would be eligible for deduction under Section 80IC or 80IB, as the case may be. Further, the Hon'ble Supreme Court in *CIT Vs. Rajaram Maize Products*, reported in [2001] 251 ITR 427 (SC) and *CIT Vs. Eastern Electro Chemical Industry*, reported in [1999] 9 SCC 20 held that when a subsidy granted by the Court, is operational in nature, which helps in generation of profits for any industrial undertaking, such a profit, is indeed, covered by the provisions embodied under Section 80IB or 80IC of the Act.

In the light of the above discussions, we are of the view that the tribunal had rightly allowed the appeals filed by the assessee and no grounds have been made out to interfere with the said order. Accordingly, the appeal fails and the same is dismissed and the substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the connected application being IA No.GA/2/2018 (Old No.GA/1086/2018) stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)