* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA 1441/2006**

% **Judgment reserved on: 26.08.2008**
Judgment delivered on:27.11.2008

COMMISSIONER OF INCOME TAX DELHI-IV ..... Appellant
Through : Ms. Prem Lata Bansal, Advocate

Versus

M/S DHARAM PAL PREM CHAND LTD ..... Respondent
Through : Mr.B.Gupta & Mr.R.K.Chaufla, Advocates

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?

2. To be referred to Reporters or not ?

3. Whether the judgment should be reported in the Digest ?

Rajiv Shakdher, J.

1. This is an appeal under Section 260A of the Income Tax Act (hereinafter referred to in short as the 'Act') preferred by the Revenue against the judgment dated 31.1.2006, passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 4031/Del/2003, in respect of, assessment year 2000-01.

1.1 The Revenue is aggrieved by the impugned judgment with respect to two issues:-

i) deletion of an addition of Rs 2,12,12,644 on account of sale of silver outside the books of account and,

ii) the allowance of deduction under Section 80-IB, in respect of, a sum of Rs 2,61,92,386 received by the assessee towards refund of excise duty, which according to the Revenue cannot form part of profit and gain 'derived' from the undertaking.

1st Issue

2. As regards this issue, the Tribunal relied upon its order dated 31.10.2005 for assessment year 1997-98 in ITA No. 3919/Del/2000 passed in the assessee's own case. By the said order, the Tribunal had allowed the appeal of the assessee. We find that this court, by an order dated 04.05.2007, has observed that the first issue has already been decided by this court in ITA No. 1306/2006 and hence, is no longer res integra. We have examined the judgment dated 04.05.2007 in ITA No. 1306/2006 wherein the said issue is decided against the Revenue. In view of the said order, the first issue is decided against the Revenue and in favour of the assessee.

2nd Issue

3. In so far as this issue is concerned, its disposal would require delineation of certain undisputed facts. These being:-

3.1 The assessee is engaged in the manufacture of flavoured chewing tobacco and Kiwam. The assessee has manufacturing units located at Barotiwala District Himachal Pradesh and in Agartala. In respect of the assessee's unit at Agartala, during the relevant period, the assessee was entitled to exemption from excise duty. The exemption to which the assessee was entitled, enured to the assessee by virtue of three notifications issued by the Government of India, Ministry of Finance being, notification numbers 32/99-CE, 33/99-CE and 48/99-CE (NT). All these three notifications were dated 8.7.99 (hereinafter referred to as the 'said notifications'). These notifications were forwarded to the assessee's company by FICCI vide communication bearing reference No.F.680/CE-N-8 dated 22.7.1999. In terms of the said notifications, the assessee was exempted from paying excise duty in respect of the product manufactured at its Agartala unit. The procedure for claiming the exemption was that the assessee would first clear the goods from its bonded warehouse by paying the requisite excise duty and thereafter, the assessee would claim refund of excise duty on the seventh day of the succeeding month in which clearance has been made. The net result was that in the first instance, excise duty was paid by the assessee while clearing the goods from the bonded warehouse which, was subsequently refunded in the succeeding month.

3.2 On 30.11.2000, the assessee filed a return declaring a total income of Rs 2,33,97,130/-. The return was processed under Section 143(1)(a) of the

Act. On 30.7.2001, the assessee filed a revised return. The case of the assessee was picked up for scrutiny. A notice under Section 143(2) of the Act was served on the assessee. The Assessing Officer, amongst others, raised an issue with respect to a claim for deduction under Section 80-IB on an income of Rs 2,56,45,785/- from the assessee's Agartala Unit which the assessee had arrived at by virtue of inclusion of the amount refunded as excise duty, amounting to Rs 2,61,92,386/- from Agartala Unit.

3.3 The Assessing Officer came to the conclusion that since the refund received on account of excise duty was not 'income derived' from any business of the industrial undertaking, that is, the Agartala Unit, the assessee was not entitled to include the same in the profit of the Agartala Unit, and consequently, no deduction would be allowed to the assessee in respect of that part of the income. The Assessing Officer, thus, concluded if the refund of excise duty was excluded, then, the Agartala Unit would show a loss and hence, the assessee would not be eligible for any deduction under Section 80-IB of the Act. Accordingly, by an order dated 28.3.2003/31.3.2003 the Assessing Officer disallowed the deduction under Section 80-IB of the Act.

3.4 The assessee being aggrieved by the same, preferred an appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to in short as 'CIT(A)']. The CIT(A) returned a finding of fact that the assessee company, at the relevant point in time, had a unit at Agartala, which was exempted from

payment of excise duty under the notifications referred to hereinabove, and had debited the profit and loss account and merely on receipt of the refund of excise duty, credited the amount to the profit and loss of the Agartala Unit. The CIT(A), thus, came to the conclusion that the net effect was Nil. In other words, the CIT(A) found that if the assessee had maintained separate excise account then the excise duty would have to be debited on one side and the refund would have to be credited on the other. The net effect in any event would be 'Nil'. He accepted the contention of the assessee that it cannot be denied the benefit of, perhaps, incorrect entries in the accounts.

3.5 The CIT(A) also noted that the procedure prescribed by the excise department was that the appellant company was required to pay excise duty upon clearance of goods from the bonded warehouse and could only thereafter receive refund in the subsequent month. This fact as noted by the CIT(A), was reflected by the assessee in the books by first debiting the excise duty and upon receipt of the fund credited in the profit and loss account. Importantly, the CIT(A) returned a finding that the excise duty was paid during the course of manufacturing activity which was the immediate and effective source of refund of excise duty. There was, thus, according to the CIT(A), a direct nexus between the business activity and the excise duty refund. The CIT(A) concluded by holding that there was no justification in, the Assessing Officer, excluding the excise duty refund from the income of the assessee's Agartala

Unit. He accordingly directed the Assessing Officer to include the excise duty refund in the total income of the assessee's Agartala Unit while allowing deduction under Section 80-IB of the Act.

3.6 The Revenue being aggrieved by the afore-mentioned order of the CIT(A), amongst others, preferred an appeal to the Tribunal in respect of the two issues referred to in Paragraph 1.1 hereinabove. As regards this issue, the Tribunal in Paragraph 15 of the impugned judgment agreed with the findings recorded by the CIT(A). It noted that the net effect of the entries was 'Nil', in as much as what was paid by the assessee, in consonance with the modalities provided for, under the notification, was refunded on the seventh day of the succeeding month. It also pointedly noted that had the assessee maintained a single account of excise duty in its books, in that eventuality, there would have been no surplus amount as refund of excise duty. In other words, nothing would have been carried as refund of excise duty. It noted that a mere book entry would not be decisive in coming to the conclusion that refund of excise duty formed part of assessee's income. In fact, what the respondent received as refund was its own money which it had paid under the scheme. It, thus, concluded that the amount of Rs2,61,92,386/- credited as refund of excise duty therefore could not be excluded from the profits and gains of business for the purpose of computing total income under Section 80-IB. The Tribunal, thus, concluded that the CIT(A)'s finding that the net effect in the book of entries

was 'Nil' was not perverse, and thus, did not find any reason to interfere with the decision reached by the CIT(A) in directing allowance of deduction without reduction of the aforesaid amount of Rs2,61,92,386/- from the income of the respondent/assessee. Accordingly, the Tribunal dismissed the appeal.

4. Having heard the learned counsels for both the Revenue, as well as, the assessee and perused the orders of the authorities below, we are of the view that the appeal deserves to be dismissed for the reasons given hereinafter.

4.1 A reading of the such notifications referred to hereinabove, would show that the Notification No.32/1999 provides for exemption from payment of excise duty in respect of goods specified in the first and second Schedules of the Central Excise Act, 1985 which are cleared from units located in the Growth Centre or an Integrated Infrastructure Development Centre, Export Promotions Industrial Park or an Industrial Estates or Industrial Area or Commercial Estate in an area specified in the annexure appended to the said notification. The exemption under this notification for the relevant period was available in respect of excisable goods manufactured by a new industrial unit which had commenced industrial production on or after 24.12.1997 or had undertaken substantial expansion by at least 25% in the installed capacity on or after 24th December, 1997. The exemption under the said notification was available for a period of 10 years from the date of the notification or from the date of commencement of commercial production whichever was later.

4.2 In order to obtain the exemption, the manufacturer was required to submit a statement to the concerned authorities, i.e., Central Excise, that the duty has been paid from the current account by the 7th of the succeeding month and the authorities were required to verify the claims and grant the refund of the amount of the duty paid from the current account during the month under consideration to the manufacturer by the 15th of the succeeding month.

4.3 Similarly, Notification No.33/1999 was issued in respect of Industrial units located in the entire North East Region comprising of seven States. The notification, however, extended exemption to specified goods referred to in the Schedule appended to the said notification. The other conditions were identical to the Notification No.32/1999. The third Notification being 48/1999, which was, issued on the same day as the first two i.e. 08th July, 1999 was issued to amend the modvat rules. The upshot of the said notification was that if the goods in respect of which exemption was granted by virtue of Notification Nos. 32/1999 and 33/1999 were used as input by another manufacturer then, even though, first manufacturer would have obtained refund on excise duty by virtue of the procedure prescribed in Notification Nos. 32/1999 and 33/1999, the subsequent manufacturer who would use such goods would be entitled to the entire amount as modvat credit. This is quite evident upon a plain reading of Notification No.48/1999, whereby the Central Government in exercise of its power conferred under Section 37 of the Central Excise 1994 has inserted Rules

57 JJ and 57V in the Central Excise Rules, 1944. The said Rule 57 JJ as inserted by the said Notification No. 44/1999 reads as follows:-

> "57 JJ Special dispensation in respect of inputs manufactured in factories located in specified areas of North East Region – Notwithstanding anything contained in these rules, where a manufacturer has cleared any of the specified inputs notified under rule 57A in terms of notification of the Government of India in the Ministry of Finance (Department of Revenue) No.32/99-Central Excise dated the 8th July, 1999 or Notification No.33/99-Central Excise, dated the 8th July, 1999, the credit of specified duty under the said rule paid on such inputs shall be admissible as if no portion of the duty paid on such inputs was exempted under any of the said notification."

4.4 Similarly amendment was made in respect of capital goods by insertion of Rule 57V which reads as follows:-

> ""57V Special dispensation in respect of inputs manufactured in factories located in specified areas of North East Region – Notwithstanding anything contained in these rules, where a manufacturer has cleared any of the capital goods described in rule 57Q, in terms of notification of the Government of India in the Ministry of Finance, (Department of Revenue) No.32/99-Central Excise, dated the 8th July, 1999, or Notification No.33/99-Central Excise, dated the 8th July, 1999, the credit of specified duty referred to in the said rule paid on such capital goods shall be admissible as if no portion of the duty paid on such capital goods was exempted under the said notifications."

4.5 Based on the said notifications, the submissions of the learned counsel for the Revenue has been two fold, (i) that the refund of the excise duty paid by the assessee has no direct nexus with the industrial activity carried out by the assessee. The assessee's entitlement to refund of excise duty is dependent on the said notification, (ii) in the event the assessee is allowed to claim deduction

under Section 80-IB of the Act then, in a sense, the assessee would be getting benefit twice over, firstly by virtue of deduction under Section 80-IB of the Act, and secondly, by virtue of the fact that it would have passed on the duty on the final product to its customers which would then be recovered by the assessee alongwith the sale price. Learned counsel for the Revenue, Ms.Prem Lata Bansal in support of her submissions has cited the following judgments:-

> *Commissioner of Income Tax* v. *Sterling Foods 237 ITR 579; Cambay Electric Supply Industrial Co Ltd* v. *Commissioner of Income Tax, Gujarat-II 113 ITR 84; Pandian Chemicals Ltd* v. *Commissioner of Income Tax (2003) 262 ITR 278; Commissioner of Income Tax* v. *Ritesh Industries Ltd (2005) 274 ITR 324; CIT* v. *Vishwanathan and Co(2003) 261 ITR 737; Commissioner of Income Tax* v. *J.B.Exports Ltd (2006) 286 ITR 603 (Delhi); Liberty India* v. *Commissioner of Income Tax 293 ITR 520 (P&H)*

4.6 As against this, the counsel for the assessee has relied upon the order of CIT(A) and the Tribunal to bring home the point that no substantial question of law has arisen in the present case. The counsel for the assessee has placed reliance on the following judgments:-

> *Liberty India v. Commissioner of Income Tax 293 ITR 520 (P&H); Commissioner of Income Tax v. Eltek SGS P.Ltd (2008) 300 ITR 6 (Delhi); Commissioner of Income Tax v. Five Star Rugs (2007) 293 ITR 553(P&H); Commissioner of Income Tax vs. India Gelatine and Chemicals Ltd 275 ITR 284 (Guj.)*

4.7 As stated above, the notifications clearly mandate that the exemption from excise duty is available only if the industrial activity carried out by the

assessee either in a new industrial undertaking or in an industrial undertaking in which installed capacity is increased by at least by 25%. It is thus clear that in the first notification, i.e., 32/1999 the exemption is area specific, while in the second notification, i.e., 33/1999 the exemption is specific to goods as referred to in the schedule appended to the said notification. It is thus clear that the exemption is directly relatable to an industrial undertaking manufacturing goods which are otherwise exgible to duty. The exemption is available either under Notification No 32/1999 or under Notification No 33/1999 dependent on where the unit is located or the type of goods manufactured by an assessee as specified in the relevant notification.

4.8 To our mind, the procedure for granting of exemption is, as indicated above, that the, assessee in the first instance, pays the excise duty from its current account. The statement with respect to clearances made, is submitted with the concerned Central Excise authorities by the 7th of the succeeding month. The Central Excise authorities after verifying the claim of the assessee are required to grant refund of excise duty paid from the current account during the month under consideration to the manufacturer/assessee by the 15th of the succeeding month. The notifications further provided that in the event it was not possible for the concerned authorities to verify the claim for refund of excise duty then it had to be made on provisional basis.

4.9 In these circumstances, the submissions of the learned counsel for the Revenue is that there is no direct nexus between refund of excise duty paid or that the refund of excise duty paid was dependent on the said notifications is, to say the least, completely untenable. As a matter of fact as found by the Tribunal, as well as, the CIT(A) in the instant case, the assessee has adopted an incorrect accounting methodology. The assessee as found by the authorities below had on the payment of excise duty debited the profit and loss account and upon receipt of refund credited the profit and loss account. The net effect on the profit and loss was 'nil' on account of the methodology followed by the assessee. There was thus, according to us, no reason to exclude the amount of refund of excise duty in arriving at "profit derived" for the purposes of claiming deduction under Section 80-IB of the Act.

4.10 The other contention of the learned counsel for the Revenue that the assessee by virtue of Notification No. 48/1999 would claim double benefit by having passed on the duty paid to its customers then recovering it in the form of sale price, even while claiming deduction under Section 80-IB of the Act is also misconceived and deserves to be rejected at the very threshold. The reason being, firstly, no such case has been set up by the Revenue before any of the authorities below. This Court cannot be called upon for the first time to appreciate submissions which have no factual foundation. Secondly, what is important to note is that the assessee as mentioned hereinabove is in the

business of manufacturing chewing tobacco and kiwam. These goods by themselves are not inputs for any other goods and hence, the apprehension of the Revenue that the assessee would claim a benefit of Notification No. 48/1999 has no substance.

4.11 In, so far as, the judgments referred to by the learned counsel for the Revenue are concerned, according to us, they have no relevance with respect to the issue at hand. In the case of ***Commissioner of Income Tax*** v. ***Sterling Foods : 237 ITR 579,*** the Supreme Court was interpreting the provisions of Section 80 HH of the Act. The Supreme Court was called upon to adjudicate income derived from the sale of import entitlements granted by the Central Government under the Export Promotion Scheme which the assessee could use itself or sell the same to others. The issue before the Supreme Court was whether the income from such import entitlements could be included in the total income for the purposes of claiming relief under Section 80 HH of the Act. The Supreme Court came to the conclusion in the said case that the source of import entitlements was not the industrial undertaking of the assessee. According to the Supreme Court, the source of import entitlement in the circumstances was Export Promotion Scheme of the Central Government whereunder the export entitlements became available. The Supreme Court further went on to hold that the expression "derived from" entailed a direct nexus between profit and gains and the industrial undertaking. In that case, the Supreme Court found that the

nexus was not direct but only incidental. According to us, the ratio of this judgment has no application to the case in the instant case. In the instant case both the CIT(A), as well as, the Tribunal found that the refund of excise duty had a direct nexus with the manufacturing activity carried out by the assessee.

4.12 The second case which was cited by the counsel for the Revenue was ***Cambay Electric Supply Industrial Co Ltd*** v. ***Commissioner of Income Tax, Gujarat-II: 113 ITR 84.*** In this case, the Supreme Court was called upon to adjudicate as to whether the assessee would be required to deduct an unabsorbed development rebate while arriving at eligible profits under Section 80E of the Act. It is important to note that at the relevant point of time under Section 80E of the Act, the expression which obtained in the said provision on which deduction could be claimed, was, profits and gains "attributable to" the business specified in the provision. In the instant case, we are not only dealing with a different expression which is "derived from" but also facts which are completely different from those in the said case. According to us this case is completely distinguishable.

4.13 The third case cited by the learned counsel for the Revenue is ***Pandian Chemicals Ltd*** v. ***Commissioner of Income Tax : (2003) 262 ITR 278***. In this case the Supreme Court was called upon to construe the provisions of Section 80-HH of the Act, in the background of the claim of the assessee, that interest on deposits with Tamil Nadu Electricity Board be treated as income derived by

the industrial undertaking of the assessee for the purposes of deduction under Section 80 HH of the Act. The Supreme Court came to the conclusion that the expression "derived from" had a much narrower connotation than the expression 'attributable to' as observed in the earlier decision of the Supreme Court noted hereinabove, i.e., ***Cambay Electric Supply Industrial Co Ltd*** *(supra)*. The Supreme Court affirmed the decision of the Madras High Court which disallowed inclusion of interest on deposits made with the Tamil Nadu Electricity Board for the purposes of claiming deduction under Section 80-HH of the Act. The Supreme Court held that the derivation of the profits on the deposits made with the electricity Board cannot be said to flow directly from the industrial undertaking of the assessee. As observed by us while discussing the decision of the ***Sterling Foods*** *(supra),* in the instant case there is a finding of fact to the contrary. Hence, ratio of the decision of the Supreme Court in the said case has no applicability to the facts of the present case.

4.14 The fourth case cited by the learned counsel for the Revenue was ***Commissioner of Income Tax*** v. ***Ritesh Industries Ltd*** ***:(2005) 274 ITR 324***. A Division Bench of this Court was called upon to construe the provisions of Section 80-I of the Act in the context of the claim of the assessee for inclusion of amounts received as "duty drawback" for the purposes of ascertainment of profits or gains derived from the industrial undertaking within the meaning of provision of Section 80-I of the Act. The Division Bench of this Court applying

the ratio of the judgments of the Supreme Court in the case of ***Sterling Foods*** *(supra),* ***Cambay Electric Supply*** *(supra)* as also the judgment of Madras High Court in the case of ***Commissioner of Income Tax*** v. ***Vishwanathan and Co*** ***: (2003) 261 ITR 737*** came to the conclusion that "duty drawback" could not be regarded as profit or gain derived from an industrial undertaking as the immediate and proximate source was not the industrial undertaking but the claim for "duty drawback". The view of the Division Bench of this Court to which one of us, (i.e., Badar Durrez Ahmed J.) was a party, was based in the context of the facts obtaining in the said case. In the instant case the proximity with industrial activity is clear and there is no scope for holding otherwise.

4.15 The fifth case which was cited by the Revenue was of ***Vishwanathan and Co*** *(supra)* : ***261 ITR 737***. This case need not detain us any further as the Division Bench of this Court in ***Ritesh Industries*** *(supra)* has referred to the same. The said case also refers to the provisions of the Act under Section 80 HH of the Act. This case does not deal with the provision of 80 IB of the Act. The other case on which reliance has been placed by the learned counsel for the Revenue was ***Commissioner of Income Tax*** v. ***J.B.Exports Ltd*** ***: (2006) 286 ITR 603 (Delhi)*** . A Division Bench of this court was called upon to construe Section 80-I of the Act. A bare perusal of the Section 80-I when compared with Section 80-IB would show that the language of the two provisions is materially different. Section 80-I of the Act allows an assessee to claim deduction in

respect of "profits and gains derived from an industrial undertaking ……." As against this under Section 80-IB, the assessee is entitled to claim deduction from "profits and gains derived from any business referred to in business……..". The Division Bench relied upon ***Ritesh Industries*** *(supra)* and allowed the appeal of the Department by holding that money received on account of duty drawback could not be included in arriving at profits and gains derived from an industrial undertaking for the purposes of claiming deduction under Section 80-I of the Act. As discussed above, the provision, as well as the language of the provisions in issue in the case of ***J.B.Exports*** *(supra)* and the instant case are materially different.

4.16 As against this, the learned counsel for the assessee drew our attention to a judgment of another Division Bench of this Court in the case of ***Commissioner of Income Tax*** v. ***Eltek SGS P.Ltd*** : ***(2008) 300 ITR 6 (Delhi)*** In the said case, this Court was called upon to adjudicate as to whether the assessee would be entitled to include "duty drawback" in deduction of profits and gains under Section 80-IB of the Act for the purposes of claiming deduction. The Division Bench after taking into account the ratio of the judgment of the Supreme Court in ***Cambay Electric Supply*** *(supra)*, as well as, ***Sterling Food*** *(supra)* came to the conclusion that the expression "derived from" which the Supreme Court was called upon to construe in the aforementioned cases and the expression "profits and gains derived from any

business" were materially different. The Division Bench went on to hold that for claim of deduction under Section 80-IB of the Act, there was no requirement that there ought to be a direct nexus between the activity of industrial undertaking and the profit and gain in respect of which deduction was sought. In this regard the Division Bench of this Court in ***Eltek SGS*** *(supra)* has agreed with the observations of the Division Bench of the Gujarat High Court in the case of ***Commissioner of Income Tax*** v. ***India Gelatine and Chemicals Ltd : (2005) 275 ITR 284*** .

5. Having considered the decisions cited by the learned counsel for the Revenue, as well as, by the counsel for the assessee, we are of the view that in the instant case, as noted above, the factual aspects are required to be kept in mind. The finding of the authorities below is, that the, refund of excise duty is pivoted on the manufacturing activity carried on by the assesse. Once such a finding of fact has been returned we need not go further and examine the immediate and proximate source of refund of excise duty. In other words, as to whether there was direct nexus between the refund of excise duty and industrial activity. As a matter of fact, in the questions proposed by the Revenue, there is no specific question, that this finding of the authorities below is perverse. There is of course a very broad based and general question that the order passed by the ITAT is perverse in law and on facts. According to us, such a question is vague. A perusal of the grounds of appeal would substantiate this

aspect of the matter. There is no ground taken by the Revenue whereby the substantial findings of fact have been challenged by the Revenue as being perverse.

5.1 An important aspect of the matter which clearly distinguishes the instant case from the facts of the other cases cited before us is, that the net effect of the accounting methodology employed by the assessee was that it did not, in sum and substance, impact the derivation of profits and gains ascertainable for the purposes of deduction under Section 80-IB of the Act.

5.2 As noted by the Division Bench of this Court in ***Eltek SGS*** *(supra)*, the language of Section 80-IB is materially different from those obtaining in the cases cited by the counsel for the Revenue in ***Sterling Foods*** *(supra)*, ***Cambay Electric Supply*** *(supra)* ***J.B. Exports*** *(supra)*, ***Vishwanathan & Co*** *(supra)*, as well, as ***Ritesh Industries*** *(supra)*. The language with respect to the provisions referred to in such cases except ***Cambay Electric Supply*** *(supra)*, read as "profits and gains derived from an industrial undertaking" as against the language appearing in Section 80-IB of the Act which is "profit and gains derived from any business". We respectfully agree with the view of the Division Bench in ***Eltek SGS*** *(supra)* which has held that the test of proximity, i.e., direct nexus with the industrial activity is not necessary while claiming deduction under Section 80-IB of the Act.

6. In the circumstances, we are of the opinion that the judgment of Tribunal deserves to be sustained. No substantial question of law has arisen for our consideration. In the result, the appeal is dismissed.

RAJIV SHAKDHER, J

BADAR DURREZ AHMED, J

November 27, 2008
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