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% 15.10.2009

Present: Ms. Sonia Mathur, Adv. for the Appellant.
Ms. Kavita Jha, Adv. for the Respondent.

+ ITA No. 1024/2009
ITA No. 1025/2009

(COMMON ORDER)

* Admit.

Following substantial question of law arises for determination in both these appeals.

1. Whether on a correct interpretation of the provisions of Section 80IB, the ITAT was correct in law in allowing the claim of the assessee for deduction under Section 80IB in respect of Duty Entitlement Pass Book (DEPB) by holding the same to be profit and gain derived from the industrial undertaking?

With the consent of the Id. counsel, we have heard the matter finally.

The Assessing Officer was of the opinion that provisions of Section 80IB were attracted in respect of DEPB. The CIT(A) affirmed this direction by relying on the judgment of the Supreme Court in the case of *Commissioner of Income Tax vs. Sterling*



Food (237 ITR 579). According to the CIT(A) that case related to admissibility of deduction under Section 80HH on profits from sale of import entitlement, wherein it was held by the Apex Court that for the application of word "derived from" a direct nexus between the profits and gains on the one hand and industrial undertaking on the other hand must exist and the import entitlements were only incidental.

The ITAT, however, rejected the aforesaid plea of the Revenue and allowing the appeal of the Assessee herein, held that the Assessee would be entitled to deduction under Section 80IB of the Income Tax Act in respect of DEPB amount as well. While doing so, the Tribunal referred to the judgment of this Court in **Commissioner of Income Tax vs. Eltek SGS Pvt. Ltd. (300 ITR 6).**


According to the Department, the view taken in the judgment of this Court in *Eltek's* case was not correct and contrary to the Supreme Court's judgment in *Sterling's* case. The Department had challenged the judgment of this Court pronounced in *Eltek's* case and other connected matters. The Supreme Court has since decided those appeals vide its judgment dated 31st August, 2009 in ***M/s Liberty India vs. Commissioner of Income Tax*** holding that:



"16. DEPB is an incentive. It is given under duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object behind DEPB is to neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw materials, components etc. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per basic customs duty and special additional duty payable on such deemed imports. Therefore, in our view, DEPB/Duty Drawback are incentives which flow from the Schemes framed by Central Government or from Section 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business under Section 80-IB. they belong to the category of ancillary profits of such Undertakings."

Following the aforesaid judgment the issue is decided in favour of the Revenue. The impugned judgment of the Tribunal is hereby set aside and the order of the Assessing Officer is restored.

Appeal is disposed of accordingly.


A.K. SIKRI, J.


SIDDHARTH MRIDUL, J.

October 15, 2009

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