

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI
BEFORE SHRI RAJENDRA SINGH,AM AND SHRI VIVEK VARMA, JM

आयकर अपील सं./I.T.A. No.2448/M/2011
(निर्धारण वर्ष / Assessment Year: 2007-08)
&
आयकर अपील सं./I.T.A. No. 7061/M/2011
(निर्धारण वर्ष / Assessment Year: 2008-09)

Frigorifico Allana Limited, Allana House, Allana Road, Colaba Mumbai 400001	<u>बनाम/</u> Vs.	Addl. CIT RG.1(1) Aayakar Bhavan, M.K. Road Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACF0861F		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.6873/M/2011
(निर्धारण वर्ष / Assessment Year: 2008-09)

Addl. CIT RG.1(1) Aayakar Bhavan, M.K. Road Mumbai-400 020	<u>बनाम/</u> Vs.	Frigorifico Allana Limited, Allana House, Allana Road, Colaba Mumbai 400001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACF0861F		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by	:	Shri Jitendra Jain
प्रत्यर्थी की ओर से/ Respondent by	:	Ms. Vijay shankar

सुनवाई की तारीख / Date of Hearing	:	05.11.2013
घोषणा की तारीख / Date of Pronouncement	:	05 .11.2013

आदेश / ORDER

Per Bench Rajendra Singh, A. M.:

The appeal by the Assessee for A.Y.2007-08 and the Cross Appeals for A.Y.2008-09 are directed against the order dated 30.11.09 and 13.07.2011 of CIT(A) for A.Y.2007-08 and 2008-09 respectively. These appeals which were heard together and also involve common issues are being disposed off by a single consolidated order for sake of convenience.

2. We first take up the appeals of the assessee in **ITA No.2448/M/11(A.Y.2007-08)** and **ITA No.7061/M/11(A.Y.2008-09)**. The disputes raised in both the appeals are identified which relate to allowability of exemption u/s.80IB in relation to incentives. The assessee has also raised an additional ground in which plea has been raised that in case incentives are not found eligible for deduction, the corresponding expenses incurred for earning incentives should be reduced from such income.

2.1. The facts in brief are that the assessee who was engaged in the business of processing, preservation and packaging of fruits had claimed deduction, in respect of Duty Entitlement Pass Book(DEPB) and Vishesh Krishi Gram Upaj

Yojana(VKGUY) amounting to Rs.58,95,090/- for A.Y.2007-08 and Rs.47,4,559/- for A.Y. 2008-09. The assessee claimed deduction u/s.80IB in respect of the incentives also. The AO, however, asked the assessee to explain as to why deduction in respect of incentives should not be disallowed in view of the judgment of Hon'ble Supreme Court in case of Liberty India[(2009) 317 ITR 218]. The assessee submitted that Hon'ble Supreme Court in case of Liberty India (supra) was concerned with the deduction u/s.80IB in respect of the incentives when the language used in the section was "profits derived from industrial undertaking" whereas the assessee had claimed deduction u/s.80IB(11A) in which the language used was "profits gains derived from the business of undertaking". Therefore, the judgment of Hon'ble Supreme Court was not applicable to the facts of the present case. The AO, however, did not accept arguments advanced and observed that only the profits derived from the business of undertaking could be exempt which was not so in the present case as incentive was not derived from the business of undertaking. He therefore, disallowed the claim of the deduction. In appeal, CIT(A) agreed with the finding of AO that the incentive was not derived from the business undertaking but it flowed from the scheme framed by the Central Government. It was, therefore, not the profits derived from eligible business u/s.80IB. He, accordingly, confirmed the disallowance made by AO aggrieved by which the assessee is in appeal before the Tribunal.

2.2. Before us, learned AR for the assessee reiterated the submissions made before lower authorities that the judgment of Hon'ble Supreme Court in case of Liberty India(supra) was not applicable to the year under consideration in which language of the section had undergone change and deduction u/s.80IB(11A) was allowable in respect of business of undertaking which is much wider in scope compared to the phrase "profits from industrial undertaking" used the earlier. It

was also submitted that in case the claim of the assessee was rejected, the cost incurred in earning of the incentives should also be excluded while excluding the incentives at the time of computation of deduction u/s.80IB. The learned DR, on the other hand, strongly supported the orders of authorities below and argued that the issue was fully covered by the judgment of Hon'ble Supreme Court in case of *Liberty India* (supra). The learned DR also objected to additional ground raised by the assessee on the ground that facts relating to incurring of expenditure for earning of incentives were not on record and therefore, such issue could not be raised before the tribunal.

2.3. In reply, the learned AR for the assessee submitted that the assessee had not raised the issue for the first time before the tribunal but this issue had also been raised before CIT(A) in Ground No.3.4 for A.Y.2007-08. Moreover it was also pointed out such claim was only consequential as on denial of deduction u/s.80IB, not only the income but also the expenses should be excluded in relation to the incentives.

2.4. We have perused the records and considered the matter carefully. The dispute is regarding allowability of deduction u/s.80IB in respect of incentives such as DEPB received by the assessee from the Government. The assessee was engaged in the business of processing, preservation and packaging of fruits and accordingly was eligible for deduction u/s.80IB(11A). The issue whether deduction u/s.80IB could be allowed in respect of incentives had been considered by Hon'ble Supreme Court in case of *Liberty of India* (supra) in which the Hon'ble Supreme Court held that the only profit derived from eligible business was entitled for deduction u/s.80IB and the section did not cover profit from source beyond the first degree. In other words incidental profits or the profits attributable of the

business for the undertaking which are not directly derived from eligible business are not to be considered for deduction.

2.5. The learned AR for the assessee has argued that the said judgment is not applicable to the facts of the present case as the language used in u/s.80IB applicable for the assessment year with which the Hon'ble Supreme Court was concerned "profits and gains derived from the undertaking" whereas the language used in section 80IB(11A) with which the assessee is concerned in "profits and gains derived from the business of the undertaking" which has wider scope and therefore includes incidental profits also such as incentives. We are however, unable to except arguments advanced by the learned AR. The Hon'ble Supreme Court in case of Liberty of India (supra) was concerned with A.Y.2001-02 when the language used was the profits and gains derived from any business referred in sub-section (3) i.e. the eligible business. Therefore, it is clear that even in A.Y.2001-02 only the profits and gains derived from eligible business of undertaking was entitled for deduction. Moreover this aspect had also been argued before Hon'ble Supreme Court by the department that for all practical purposes the words "eligible business" and "industrial undertaking" had been used interchangeably and therefore, there was no material difference between section 80I and section 80IB. The Hon'ble Supreme Court had decided the issue after considering these submissions and therefore, the argument raised by the learned AR cannot be accepted. It is also pertinent to point out here that in view of judgment of Hon'ble Supreme Court in case Liberty of India (supra), only profits and gains derived from the eligible business has to be considered. In other words, direct source of such profits has to be the eligible business. Therefore, the argument based on the phraseology "profits and gains from industrial undertaking" and "profits and gains from business undertaking" are not relevant as the direct source of the incentives is the scheme of the Government and not the

undertaking or the business of undertaking. Therefore, in our view, the issue is fully covered by the judgment of Hon'ble Supreme Court in case of Liberty of India (supra). We accordingly, confirm order of CIT(A) denying the claim of deduction u/s.80IB.

2.6. We however find substance in the additional ground raised by the assessee regarding exclusion of expenses also incurred for earning of incentives. Such plea in our view is only consequential. The assessee had claimed deduction in respect of incentives also and if incentives are to be excluded following the judgment of Hon'ble Supreme Court in case of Liberty India (supra), the corresponding expenses if any incurred for earning for incentive have also to be excluded. We therefore, do not find any merit in the argument advanced by the learned DR that the additional ground should not be entertained. The ground had been raised before CIT(A) also and it is not that the ground has been raised for the first time before the tribunal. Even otherwise being consequential in nature, the claim has to be considered while giving effect to the judgment of the Hon'ble Supreme Court in case of Liberty India (supra). We accordingly, restore to this aspect to the file of CIT(A) to examine the issue relating to incurring of expenditure for earning of the incentives and in case it is found that expenses have been incurred these have also to be excluded while excluding the incentives from the computation of deduction u/s.80IB. The CIT(A) will pass order on this aspect after allowing opportunity, of hearing to the assessee.

3. The appeal of the Revenue in **ITA No.6873/M/11 for the A.Y.2008-09**. The only dispute raised by the revenue in this appeal is regarding disallowance of expenses relating to exempt income u/s.14A of the IT Act. The AO during the assessment proceedings noted that the assessee made investment of

Rs.70,16,55,407/- on which dividend income had been declared in A.Y.2007-08 and earlier years which was exempt u/s.10 of the IT Act. AO, therefore asked the assessee to explain as to why expenses should not disallowed in relation to such investments as per rule 8D. The assessee submitted that it had not earned any dividend income during the year. The assessee however offered for disallowance the direct expenses being demat charges for which 561/- The assessee further submitted that the investments had been made out of own fund and therefore, no interest expenditure had been incurred. The AO, however, observed that even if no dividend income had been earned during the year the income if earned was exempt and, therefore, provisions of section 14A were applicable. It was also observed by him that rule 8D was applicable in case for the assessee for the relevant assessment year 2008-09 as held Hon'ble High Court of Bombay in case of **Godrej Boyce Mfg Co [328 ITR 81]** . AO, therefore, computed the disallowance as per Rule 8D @ .5% of the investments which came to Rs.3509194/- in addition to the disallowance for direct expenditure of Rs.561/-. AO thus disallowed total sum of Rs.35,09,755/-.

3.1. In appeal, the assessee submitted before CIT(A) that AO was not justified in disallowance of Rs.35,09,755/-. It was also submitted that no disallowance u/s. 14A could be made as the assessee had not earned any dividend income from the investment made. The CIT(A) agreed with the submissions of the assessee that no disallowances could be made as there was no dividend income. He therefore, directed the AO to delete the addition made aggrieved by which the revenue is in appeal before the Tribunal.

3.2. Before us the learned DR assailed the order of CIT(A). It was submitted that CIT(A) was not justified in holding that provisions u/s.14A were not applicable if no dividend income was earned. It was argued that the income from the

investments was in the form of dividend which was exempt and therefore, section 14A was applicable. He placed reliance on the decision of special bench of the Tribunal in case of *M/s. Chemi Investment Limited* [317 ITR 86]. The learned AR for the assessee did not raise any dispute relating to the applicability of provisions of section 14A even if no dividend income was earned. However, it was pointed out by him that the CIT(A) had not decided on merit and therefore the issue was required to restore back. It was also submitted that in an identical case of the sister concern i.e., *M/s. Frigorifico Allana Limited*, the Tribunal in ITA no.6870/M/11 for A.Y.2008-09 had restored the issue to lower authorities.

3.3. We have perused the records and considered material carefully. The disputes in regarding disallowance of expenses u/s.14A in relation to investment made in shares/units income from which was exempt from tax. The assessee had earned dividend income from these investments in the earlier years which was exempt from tax. Dividend income was exempt from tax this year also but the assessee had not earned any dividend income during the year. The CIT(A) has held that provisions of section 14A are not applicable if no dividend income is actually earned. The order of CIT(A) cannot be upheld as the same is contrary to the decision of special bench of Tribunal in case of *M/s. Chemi Investment Limited* (supra). The order of CIT(A) is, therefore, set aside on this point. The CIT(A) has not decided the issue on merit regarding the quantum of disallowance on which specific plea had been raised by the assessee before him. We therefore, restore this issue to the file of CIT(A) for passing afresh order on merit after necessary examination and after the allowing opportunity to the assessee.

4. In the result the appeal of the revenue is allowed for statistical purposes whereas those by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 05.11.2013

Sd/-

(Vivek Verma)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(Rajendra Singh)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 05 .11.2013

.नि.स./A.K.Patel. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai