HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

ITA No.5/2008

Date of order: 31.08.2017

M/s Kashmir Tubes V. Income Tax Officer and ors.

Coram:

Hon'ble Mr. Justice Alok Aradhe, Judge
Hon'ble Mr. Justice B.S. Walia, Judge

Appearing counsel:

For the petitioner/appellant (s) : Mr. Subash Dutt, Advocate with Mr. Suraj Singh Wazir, Advocate.

For the respondent(s) : Mr. KDS Kotwal, Adv for Revenue.

i/ Whether to be reported in Press/Media : Yes/No

ii/ Whether to be reported in Digest/Journal : Yes/No

Per Alok Aradhe,J:-

This appeal under Section 260-A of the Income Tax Act, 1961 (for short 'the Act') was admitted by this Court on following substantial questions of law:

(i) Whether the activity of galvanization would amount to manufacture?

(ii) Whether the Income Tax Appellate Tribunal committed an error of law in not accepting interest subsidy received by the appellant being reimbursement of the interest paid to the Bank on working capital advances for increasing the production of the industrial undertaking is income derived from such industrial undertaking and is entitled to deduction under Section 80 IB of the Income Tax Act.

(iii) Whether the Income Tax Appellate Tribunal committed an error of law in not allowing the deduction of EPF under Section 43B of the Income Tax Act, though EPF was deposited before the date of filing of return under Section 139(1) of the Income Tax Act.

2. Background facts leading to filing of this appeal briefly stated are that the appellant is a small scale industry which is engaged in the manufacture of black and galvanized iron pipes. The appellant also undertakes the job work of galvanization of other parties. The appellant is registered with the Industries Department for the manufacture of black pipes, galvanized pipes and for the job of galvanization. It is the case of the appellant that appellant is entitled to deduction on the process of manufacture and production of goods under Section 80 IB of the Act. The appellant filed the return for the Assessment Year 2001-2002 in which it claimed deduction on account of galvanization. However, the Income Tax Officer vide order dated 27.02.2004 inter alia held that galvanization does not amount to manufacture by placing reliance on decision rendered in Kolkata High Court in the case of **CIT v. Hindustan Metal Refineries Work, 128 ITR 472 (Cal).** Being aggrieved, the appellant preferred an appeal which was dismissed by the Commissioner of Income Tax (Appeals) and the order passed by the Commissioner of Income Tax (Appeals) was affirmed by the Income Tax Appellate Tribunal (for short 'the Tribunal') vide order dated 07.12.2007. In the aforesaid factual background, this appeal has been filed.

3. Learned counsel for the appellant submitted that if by adopting the process, a new commodity/good comes into existence which is fit for use, the same would amount to manufacture. It is also submitted that under Section 80 IB of the Act, even if the process does not amount to manufacture, still in view of the fact that the appellant is engaged in the activity of production, the appellant is entitled to the benefit of deduction under Section 80 IB of the Act. Alternatively, it is submitted that Section 80 IB of the Act provides that where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11A) and (11B), such business being hereinafter

referred to as the eligible business, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section. In particular, learned counsel for the appellant has invited the attention of Court to Section 80-IB (2)(iii) of the Act.

4. It is further submitted by learned counsel for the appellant that decision rendered by Delhi High Court in the case of **CIT v. Eeltek SGS (P) Ltd. (2008) 300 ITR 6 (Delhi)** has been affirmed by the Supreme Court in **CIT v. Meghalaya Steel Ltd. (2016) 284 CTR 0321**. It is also argued that even if the appellant is neither a manufacturer nor producer, he is still entitled to deduction under Section 80-IB of the Act. It is further submitted that that the issue with regard to deduction of income derived from Industrial undertaking and its deduction under Section 80-IB of the Act is squarely covered by decision of Division Bench of this Court in the case of Shri Ram Singh v. CIT, J&K in ITA No.2/2006 decided on 09.08.2016. Similarly, the issue with regard to deduction of Employees Provident Fund under Section 43B of the IT Act is covered by the decision of the Supreme Court in the case of CIT v. Alom Extrusions Ltd. (2009) 319 ITR 0306 (SC). In support of his submissions, learned counsel for the appellant has referred to decision in the cases of **CIT v. Hindustan Metal Refining works (P) Ltd. (1981) 128 ITR 472 (Calcutta), Empire Industries Ltd. and anothers v. UOI, 162 ITR 846 (SC), Ujagar Printers v. U.O.I, (1989) 74 STC 401(SC), Laminated Packings (P) Ltd. V. Collector of Central Excise, 1990 SCC (4) 51, Standard Packaging And Ors. v. Union of India, 1985 (4) ECC 299, Vijay Kumar v. CIT in ITA No.108/2012 (J & K High Court), CIT v. Lovlesh Jain, (2012) 67 DTR 0232 (Delhi), CIT v. Oracle Software**

India Ltd. (2010) 320 ITR 546 (SC), CIT v/s Esquire Translam Industries & Nexus Transcore Industries, (2012) 344 ITR 0308, ITO V. Arihant Tiles & Marbles (P) Ltd. (2010) 320 ITR 0079 (SC), CIT v. Perfect Liners (1983) 142 ITR 0654 (Madras), CIT V. Budharaja & Co. (SC),(1993) 204 ITR 413, CIT V. Dharam Pal Prem Chand Ltd.,, (2009) 317 ITR 353 (Delhi), CIT v. Dr. V.P. Gopinathan, 248 ITR 449 (SC).

5. On the other hand, learned counsel for the Revenue submitted that it was not the case of the appellant before the authorities that the appellant is engaged in the production activity. All along the case of the appellant before the authorities is that the process of galvanization amounts to manufacture. It is submitted that process of galvanization does not amount to manufacture. It is urged that the appellant cannot be permitted to take a new plea before this Court that he is engaged in the activity of production. In support of the aforesaid submissions, reference has been made to the decision of the Supreme Court in the case of **Gujarat Steel Tubes Ltd v. State of Kerala, AIR 1990 SC 1779** and the case of **Sidhartha Tubes Ltd. v. Commissioner of Customs and Central Excise, Indore (MP), 2005 (8) Supreme 511.**

6. It is further submitted that under Section 80-IB of the Act in order to claim deduction, the incentive granted by the government cannot the treated as profit or gain. In support of the aforesaid submission, reference has been made to the decisions of the Supreme Court in the case of **Commissioner of Income Tax, Kernataka v. Sterling Foods Manglore, AIR 1999 SC 2036** and decision of Delhi High Court in the case of **CIT v. Ritesh Industries, 2004 192 CTR Delhi 81.**

7. We have considered the submissions made by both the sides and have perused the record. The Supreme Court in the case of **Empire Industries Ltd. and anothers** supra has held that process creating something else

having a distinctive name, character and use would be manufacture. In **Ujagar Printers supra**, the Supreme Court again had the occasion to deal with the question whether Grey Fabric after undergoing various processes of bleaching, dying, sizing, finishing etc emerges as a different commodity. The aforesaid question was answered in the affirmative and it was held that the same would amount to manufacture. In **Laminated Packings (P) Ltd. supra,** the Supreme Court held that activity of lamination also amounts to manufacture. In **CIT v. Lovlesh Jain supra,** the Supreme Court held that if an operation or process that tenders a commodity or article fit for use, which otherwise is not fit, the change/process would fall within the meaning of the expression 'manufacture'. Similar view was taken in the case of **CIT v. Esquire Translam Industries and Nexus Transcore industries supra**. In **M/s Maruti Suzuki India Ltd. v. Commissioner of Central Excise, New Delhi, (2015)13 SCC 186**, the Supreme Court has held that manufacture implies a change but every change is not a manufacture yet every change of an article is the result of treatment, labour and manipulation but something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use.

8. At this stage, we deem it appropriate to take note of the Circular issued by the Department namely Circular No.528 dated 16.12.1988 by which the department itself has held that the expression manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more was necessary and there must be transformation; a new and different article must emerge having a distinct name, character or use. Thus manufacture implies bringing in something new. It was further held that term "processing" has a wider meaning than the term "manufacture".

9. In the backdrop of aforesaid well settled legal position as well as the Circular issued by the department itself, we may now examine whether the activity of galvanization undertaken by the appellant amounts to manufacture. The appellant is admittedly engaged in the manufacture of black pipes as well as galvanized iron pipes. The appellant also undertakes to manufacture all galvanized iron pipes by galvanization of raw pipes of customers on job work basis. The pipe is required to undergo the processes of prickling, rinsing, fluxing, drier, zinc tank and water quenching for the purpose of galvanization of iron pipe. After the completion of the entire processes, the end product which comes into existence is called galvanized iron pipe which is a different commercial commodity than iron pipe. A galvanized iron pipe is sold at a higher price than an iron pipe and a galvanized iron pipe is used for laying water lines, manufacture of different machinery and plants and for other purposes for which iron pipes cannot be used. Thus, galvanized iron pipe is a different commercial commodity than a iron pipe, therefore the activity of galvanization in our considered opinion amounts to manufacture.

10. At this stage, we may refer to the decisions relied by learned counsel for the Revenue in the case of **Gujarat Steel Tubes Ltd supra.** In the aforesaid decision, the Supreme Court while dealing with the provisions of Central Sales Tax Act had the occasion to deal with the issue whether galvanized pipes or Steel Tubes fall within the meaning of section 14(iv) and (xi) of the Central Sales Tax Act. In the aforesaid context, it was observed that the purpose of galvanizing iron pipe is merely to make it weather-proof and it still remains a steel tube and the galvanization does not bring a new commodity into existence. The aforesaid decision is of no use to the Revenue in the fact situation of the case as the case has been rendered in the context of Section 14(iv) and (xi) of the Central Sales Tax Act, 1956. Similarly, the decision in the case of **Sidhartha Tubes Ltd**

supra, again deals with the provisions of the Central Excise Act and therefore has no application to the obtaining factual matrix of the case. Accordingly, the first substantial question of law is answered in favour of the assessee and against the Revenue.

11. Now we may advert to the second substantial question of law. The aforesaid issue is no longer *res integra* and has been dealt with by the Supreme Court in the case **of Commissioner of Income Tax v. Meghalaya Steel Ltd. supra**, the relevant extract of which reads as under:-

> 18. The judgment in Sterling Foods lays down a very important test in order to determine whether profits and gains are derived from business or an industrial undertaking. This Court has stated that there should be a direct nexus between such profits and gains and the industrial undertaking or business. Such nexus cannot be only incidental. It therefore found, on the facts before it, that by reason of an export promotion scheme, an assessee was entitled to import entitlements which it could thereafter sell. Obviously, the sale consideration therefrom could not be said to be directly from profits and gains by the industrial undertaking but only attributable to such industrial undertaking inasmuch as such import entitlements did not relate to manufacture or sale of the products of the undertaking, but related only to an event which was post manufacture namely, export. On an application of the aforesaid test to the facts of the present case, it can be said that as all the four subsidies in the present case are revenue receipts which are reimbursed to the assessee for elements of costs relating to manufacture or sale of their products, there can certainly be said to be a direct nexus between profits and gains of the industrial undertaking or business, and reimbursement of such subsidies. However, Shri Radhakrishnan stressed the fact that the immediate source o the subsidies was the fact that the Government gave them and that, therefore, the immediate source not being from the business of the assessee, the element of directness is missing. We are afraid we cannot agree. What is to be seen for the applicability of Sections 80-IB and 80-IC is whether the profits and gains are derived from the business. So long as profits and

> gains emanate directly from the business itself, the fact that the immediate source of the subsidies is the Government would make no difference, as it cannot be disputed that the said subsidies are only in order to reimburse, wholly or partially, costs actually incurred by the assessee in the manufacturing and selling of its products. The "profits and gains" spoken of by Section 80-IB and 80-IC have reference to net profit. And net profit can only be calculated by deducting from the sale price of an article all elements of cost which go into manufacturing or selling it. Thus understood, it is clear that profits and gains are derived from the business of the assessee, namely, profits arrived at after deducting manufacturing cost and selling costs reimbursed to the assessee by the Government concerned."

The aforesaid decision also has taken into account the decision relied upon by the learned counsel for the Revenue rendered in the case of **Commissioner of Income Tax, Karnataka supra.** Accordingly, the second substantial question of law is also answered in the affirmative, in favour of the assessee.

12. Now we may refer to the third substantial question of law which is also no longer *res integra* and is covered by the decision of the Supreme Court in the case of **CIT v. Alom Extrusions Ltd supra**, wherein the Supreme court has held that relaxation allowed by 1st proviso to Section 43B of the Act was restricted only to tax, duty, cess and fee, and did not apply to contributions to labour welfare funds. Since the second proviso to Section 43B of the Act resulted in implementation problems, it was deleted by Financial Act, 2003, thereby equating tax, duty, cess and fee with contributions to welfare funds. It was further held that the aforesaid amendment operates retrospectively, that is, w.e.f. 01.04.1988, i.e. the date of insertion of the 1st proviso. In view of the aforesaid enunciation of law by the Supreme Court, the third substantial question of law framed

by this court is also answered in the affirmative and in favour of the assessee.

13. Accordingly, the order passed by Income Tax Officer dated 27.02.2004, order passed by Commissioner of Income Tax (Appeals) dated 24.01.2005 and the order passed by the Income Tax Appellate Tribunal dated 07.12.2004 are hereby quashed. In the result, the appeal is allowed.

(B.S. Walia) **(Alok Aradhe)**
Judge **Judge**

Jammu:
31.08.2017
Raj Kumar