

**HIGH COURT OF JAMMU AND KASHMIR  
AT SRINAGAR**

ITA No. 04/2010  
MP No. 391/2010

Date of order: April 26<sup>th</sup> 2017.

Khyber Cement Pvt. Ltd.

Versus

Commissioner of Income Tax & Ors.

Coram:

**Hon'ble Mr Justice Ramalingam Sudhakar, Judge  
Hon'ble Mr. Justice Ali Mohammad Magrey, Judge**

Appearing Counsel:

For Appellant(s):  
For Respondent(s):

Mr. Z. A. Shah, Sr. Adv. with Mr. Hanan, Adv.  
Mr. J. A. Kawoosa, Adv.

- |      |   |         |
|------|---|---------|
| (i)  | Whether to be approved for reporting in Press/Media     | Yes/No. |
| (ii) | Whether to be approved for reporting in Digest/ Journal | Yes/No. |

**ORAL**

**1.** Appeal is of the year 2010.

**2.** The appeal stands admitted to hearing on three questions of law. However at the time of final hearing, the Court is inclined to reframe the question of law in the following manner:-

- (i) *Whether the Assesses who has received transport subsidy and excise refund is entitled to deduct under section 80-IB of the Income Tax Act, 1961.*
- (ii) *Whether the revenue earned in disallowed amount, the assessee's claim of the said amount from the income.*
- (iii) *The third question which has been raised is in relation to deduction in respect of Rs. 23,922/- which is interest earned on FDR under section 80-IB of Income Tax Act.*

3. On the third question in respect of interest, *Mr. Z. A. Shah, Sr. Adv.* fairly states that assessee would pay the same without prejudice with liberty to raise this plea in appropriate proceedings if required. The same is permitted. The second question of law is not pressed.
4. This leaves us with first question of law which covers the excise duty refund as well as transport subsidy.
5. The assessee is a manufacturer of cement. It is said to be an industrial undertaking, eligible for 100% exemption in relation to profit and gains derived from industrial undertaking under section 80-IB of the Income Tax Act, 1961 (hereinafter referred to as the "Act").
6. Appellant contends that he has filed his return of income on 29.03.2006, declaring the income as Nil, claiming deduction under section 80-IB of the Income Tax Act. Among various exemptions, appellant claiming the exemption in relation to excise duty refund in a sum of Rs. 1,52,38,466/-, transport subsidy of Rs. 83.05902/-. The Assessing Officer declined to grant the benefit and the Commissioner Appeals upheld the same and the Tribunal confirmed the said order. Aggrieved by the said order, appeal is before us.
7. The issue relating to excise duty refund in relation to claim in terms of Section 80 IB of Income Tax Act was considered by this Court in ***ITA No. 02 of 2010 dated***

**31.01.2011, in M/S Shree Balaji Alloys & Ors. vs. Commissioner of Income Tax & Anr,** by virtue of an exhaustive and detailed judgment, analysing the industrial policy of the State and the need for granting the benefit of excise refund on the industrial undertaking.

**8.** The Court held in paras 26 to 31 as under: -

*(26) In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, cannot by any stretch of reasoning, be construed as production of operational incentives for the benefit of assess alone.*

*(27) Thus, looking to the purpose, of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the Public Interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellants-assesses, cannot be construed as mere Production and Trade Incentives, as held by the Tribunal.*

*(28) Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available*

*only to the bonafide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.*

*(29) The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the Character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for perpetual employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.*

*(30) For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, interest subsidy and Insurance subsidy were Production Incentives, hence Revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel and Ponni Sugars cases( Supra)*

*(31) The finding of the Tribunal that the incentives were Revenue Receipt is, accordingly, set aside holding the incentives to be Capital Receipt in the hands of the assesses.*

- 9.** The Court held that excise refund to be capital receipts in the hands of assesses and deduction u/s 80 IB of the Act. This decision was up held by the Hon'ble Supreme Court in ***Commissioner of Income Tax v. M/S Meghalaya Steels Ltd. reported in (2016) 3 192, and in case M/S Shree Balaji Alloys v. Commissioner of Income Tax and anr, reported in (2011) 1 JKJ 914 (HC).*** Therefore, the appellant is entitled to deduction under section 80-IB in respect of excise duty refund of Income Tax Act.
- 10.** In so far as the transport subsidy is concerned in the case of ***Commissioner of Income Tax income Tax***

***Vs. M/S Meghalaya Steels Ltd, reported in ( 2016)***

**3 Scale 192,** the Supreme Court held that the benefit of deduction under section 80-IB of the Income Tax Act is applicable to transport subsidy. Relevant para reads as follows:-

*"It only remains to consider one further argument by Shri Radhakrishnan. He has argued that as the subsidies that are received by the respondent, would be income from other sources referable to section 56 of the Income Tax Act, any deduction that is to be made, can only be made from income from other sources and not from profits and gains of business, which is a separate and distinct head as recognized by Section 14 of the Income Tax Act. Shri Radhakrishnan is not correct in his submission that assistance by way of subsidies which are reimbursed on the incurring of costs relatable to a business, are under the head "income from other sources" which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income. Section 28(iii)(b) specifically states that income from cash assistance, by whatever name called, received or receivable by any person against exports under any scheme of the Government of India, will be income chargeable to income tax under the head "profits and gains of business or profession". If cash assistance received or receivable against exports scheme are included as being income under the head "profits and gains of business or profession", it is obvious that subsidies which go to reimbursement of cost in the production of goods of a particular business would also have to be included under the head "profit and gains of business or profession", and not under the head "income from other sources".*

*For the reasons given by us, we are of the view that the Gauhati, Calcutta and Delhi High Courts have correctly construed section 80-IB and 80-IC. The Himachal Pradesh High Court, having wrongly interpreted the judgments in Sterling Foods and Liberty India to arrive at the opposite conclusion, is, is held to be wrongly decided for the reasons given by us hereinabove".*

- 11.** A circular No. 39/2016 dated November 29<sup>th</sup>, 2016, issued by Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi is also on the aforesaid terms.
- 12.** In view of the above, the question of law are answered in favour of the assessee and the appeal is allowed.

**(Ali Mohammad Magrey)**  
**Judge**

**(Ramalingam Sudhakar)**  
**Judge**

**Srinagar**  
*April 26<sup>th</sup>, 2017*  
*"Ab. Rashid"*