IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E'
BEFORE SHRI G.E.VEERABHADRAPPA, VICE PRESIDENT AND
SHRI RAJPAL YADAV, JUDICIAL MEMBER

ITA No.3303/Del/2010
Asstt.Year: 2007-08

M/s J.K.Aluminium Co. 302, Amber Tower, Azadpur Commercial Complex, Azadpur, Delhi-110033.	vs	Income Tax Officer, Ward 20(3), New Delhi.
PAN: AAFFJ0625F.		
(Appellant)		(Respondent)

Appellant by: Shri Ved Jain & Mrs Rano Jain, CAs
Respondent by: Shri Jayant Mishra, CIT(DR)

O R D E R

PER VEERABHADRAPPA, V.P.

This is an appeal filed by the assessee arising out of the order dated 24.05.2010 of the CIT (Appeals) for the assessment year 2007-08.

2. The only issue in this appeal relates to the assessee's claim for deduction u/s 80IB in respect of refund of excise duty. The assessee is a firm engaged in the business of manufacture of aluminum wire rods at IGP, SIDCO, Phase-II Samba, Jammu & Kashmir. During the assessment proceedings, the assessee had filed computation of taxable income wherein deduction u/s 80IB amounting to Rs 5,85,84,089/- was claimed. The A.O went through the details and found that the assessee had received excise duty refund of Rs 5,68,41,800/- during the financial year. The A.O by applying

ratio laid down by the Supreme Court in the case of **Liberty India vs. CIT 225 CTR 233** and the decision of ITAT, Amritsar Bench, in the case of **M/s Shree Balaji Alloys vs. ITO in ITA No.255/Asr/2009** for the assessment year 2005-06 did not accept the assessee's claim for relief u/s 80IB of the Act in relation thereto. When this was proposed to the assessee, the assessee furnished a judgment of Delhi High Court in the case of **CIT vs. Dharampal Premchand Ltd. 317 ITR 353** wherein this issue has been claimed to have been decided in its favour. The A.O, however, taking support from the decision of the Supreme Court, went on to disallow the claim of the assessee in respect of this excise duty refund.

3. The learned counsel for the assessee pointed out that decision of Delhi High Court in CIT vs. Dharampal Premchand Ltd. 317 ITR 353 has since been affirmed by the Hon'ble Supreme Court and, therefore, the issue has reached finality and the same , according to him, requires to be decided in its favour. The same stand is now being reiterated before us.

4. The assessee has also filed copy of the Notification No. 56/2002 of Central Excise at pages 26 & 27 of the paper book, copy of the excise refund orders at pages 28 to 45 of the paper book and copy of ledger a/c of excise duty paid, PLA a/c , PLA (education cess) A/c, PLA recoverable and PLA refund at pages 46 to 55 of the paper book. Relying upon these, it was strongly argued that in the light of the decision of Delhi High Court in Dharampal Premchand Ltd. (supra), the assessee's claim must be accepted.

5. The learned D.R, on the other hand, vehemently pointed out although the decision of Delhi High Court which is jurisdictional High Court, has

since been affirmed by the Supreme Court, the ratio of the Apex Court in Liberty India 225 CTR 233 supports the departmental stand.

6. We have carefully gone through the records and in our view the decision rendered by the jurisdictional High Court in the case of Dharmpal Premchand Ltd. (supra) covers the issue in favour of the assessee. The Hon'ble Delhi High Curt has clearly set out the procedure for granting of exemption under the Scheme. The assessee in the first instance paid the excise duty from its current account. The statement with respect to clearance is made, is submitted to the concerned authorities i.e. central excise by the 7th of the succeeding month. The authorities after verifying the claim of the assessee are required to grant the refund during the month under consideration to the manufacturer by the 15th of the succeeding month where it was not possible for the concerned authorities to verify the claim of the assessee; thus has to be made on provisional basis. Explaining the above procedure, the jurisdictional High Court observed as under (page 362):

> *"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 u/s 80IB of the Act."*

6.1 The Court further at page 364 held:

> *"The fourth case cited by the learned counsel for the Revenue was CIT vs. 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 80I 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 CIT vs. Vishwanathan & 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 Durre 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."

6.2 At page 366, the jurisdictional High Court held:

"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 u/s 80IB of the Act."

6.3 The above decision of the Delhi High Court has since been approved by the Supreme Court where department has filed an SLP. At the first hearing the assessee was ordered to file an additional affidavit indicating therein the accounting treatment that is followed by the assessee as is clear from the following order:

"Supreme Court in the case of CIT vs. Dharam Pal Prem Chand Ltd. order dated 11.1.2010:

"The special leave petition shall stand over for four weeks in order to enable the assessee herein to file an additional affidavit indicating therein the accounting treatment which has been given by the assessee to the expenses incurred towards payment of excise duty."

6.4 In the present case of the assessee, the rules that are placed in the paper book clearly envisage refund of the amount arithmetically equal to the excise duty paid. The excise duty refund order which is placed at pages 29 &

30 are reproduced, just to show how this case is identical to the procedure and the scheme dealt with by the jurisdictional High Court in the case of Dharampal Premchand Ltd.:

"BRIEF FACTS OF THE CASE

M/s J&K Aluminum Co., Industrial Growth Centre, SIDCO, Phase-II, Samba, District Jammu, are holding Central Excise Registration No.AAFFJO625FXM001 dated 03.03.2006 are engaged in the manufacture of Aluminum Wire Rod falling under Tariff item No.76011040 of the 1st Schedule to the Central Excise Tariff Act 1985 (5 of 1986).

2. The party has filed a refund claim of Rs.61,05,409/- on account of Central Excise duty and Education Cess paid through PLA for the month of July 2006 under Notification 56/2002-CE dated 14.11.02 as amended. The unit is claiming refund in the category of new units, commencing production after 14.6.2002 as per Notification.

3. The verification report was called for from jurisdictional Range Office, Range Officer vide report C.No.GL-6(65)J/RBC-PBC/Refd/JKA/2006/606 dt. 30.8.2006 has confirmed after verification that the unit started its commercial production on 15.5.2006 as per DIC Registration No. MSU/2005/79 dated 22/10/2006. The party purchased land for establishing the unit was taken on lease from SIDCO on 11th August 2005 and after this the party installed new machinery from February 2006 to May 2006. The party has given permission for installation to two D.G. sets of (1x500 KVA & 1x82.5 KVA) NOC for which ahs been issued by the Chief Engineer, Electric Maintenance and R.E. Wing, PDD Jammu vide his office order No. CEJ/TS-I/83A/9437-41 dated 7.11.2005 and certificate of fitness in this regard was issued on 5.5.2006. As per certificate No.OQ/556 and OQ/719 dated 27.10.2005 and 29.8.2006 respectively issued by Tehsildar Samba, unit is located under Khasra No.82 min, 83 min falling under IGC Samba, Jammu which is mentioned in annexure to the Notification No. 56/2002-CE dt. 14.11.02 as amended. Range Officer has further confirmed that the party cleared goods valued at Rs.6,57,22,059/- on payment of Central Excise duty of Rs.1,05,15,521/- and Education Cess of Rs.2,10,310/- in the following manner:-

(1) Duty paid through PLA	Rs.59,85,691/-
(2) Edu.Cess paid through PLA	Rs. 1,19,718/-
(3) Duty paid through CENVAT credit account	Rs. 45,29,830/-
(4) Ed.cess paid through CENVAT credit account	Rs. 90,592/-

Range Office has confirmed that there is nil closing balance of Cenvat Credit at the end of the month and hence the refund claim of Rs.59,85,691/- is admissible to the

party, which may be sanctioned by way of Cheque, Refund claim of Rs.1,19,718/- in respect of education cess is not admissible in terms of notification No.56/2002-CE dated 14.11.2002 (as amended).

4. I have carefully gone through the case records including the report of jurisdictional Range Officer mentioned above. I find that the party has claimed refund of Rs.59,85,691/- on account of Central Excise duty and Rs.1,19,718/- on account of Education Cess paid through PLA. I also find that unit started its Commercial Production on 15.5.2006 as per DIC Registration No. MSU/2005/79 dated 22.10.2006. The party purchased land for establishing the units was taken on lease from SIDCO on 11th August 2005 and after this the party installed new machinery from February 2006 to May 2006. The party has given permission for installation of two D.G. sets of (1x500 KVA & 1x82.5 KVA) NOC for which has been issued by the Chief Engineer, Electric Maintenance and R.E. Wing, PDD Jammu vide his office order No.CEJ/TS-1/83A/9437-41 dated 7.11.2005 and certificate of fitness in this regard was issued on 5.5.2006. As per certificate No.OQ/719 dated 29.8.2006 of Tehsildar Samba, Jammu, unit is located duenr Khasra No. 82 min, 83 min & 84 min (which are parts of Khasra No. 82, 83 & 84 respectively) classified during Bandobast under the type of land viz Meredeem Banjar Qadeem, Gair Mumkin situated at industrial growth center, Samba of village Mendhera, Tehsil Samba, which is mentioned in annexure-II to the Notification No. 56/2002-CE dt. 14/11/02 as amended. I observe that refund of Rs 1,19,718/- claimed by the party on account of payment of Education Cess paid through Account Current (PLA) is not admissible to the party on the ground that the Education Cess has been levied under the Finance Bill 2004 and not under any of the Acts mentioned in the subject notification. Therefore, I hold that refund of Rs 1,19,718/- claimed on account of Education Cess is not admissible to the party and is liable to be rejected. The refund of Rs 59,85,691/- claimed on account of Central Excise duty paid through Account Current (PLA) during the month of July,2006 is admissible to the party in terms of Notification No. 56/2002-CE dated 14/11/2002 as amended.

5. Having regards to the above discussion and findings, I pass the following order in this case:

O R D E R

(i) I sanction the refund of Rs 59,85,691/- (Rupees Fifty nine lacs eighty five thousand six hundred ninety one only) by cheque to M/s J&K Aluminum Co., Industrial Growth Centre, SIDCO, Phase-II, Samba, District Jammu on account of Excise Duty paid through Account Current (PLA) for the month of July, 2006, in terms of Notification No.56/2002-CE dt. 14/11/2002 as amended.

(ii) I reject the refund of Rs 1,19,718/- (Rupees one lac nineteen thousand seven hundred eighteen only) claimed on account of Education Cess by the party.

Sd/-
ASSISTANT COMMISSIONER

Regd. A/D
M/s J&K Aluminum Co.,
Industrial Growth Centre, SIDCO,
Phase-II, Samba, District Jammu."

6.5 As we have observed from the papers in the paper book, the exempt amount has been paid as is evident from the orders granting the refund which are placed. The Supreme Court after examining the affidavits passed on 11.01.2010 in the case of CIT vs. Dharam Pal Prem Chand Ltd. and after hearing both the parties, eventually dismissed the appeal of the Department against order of Delhi High Court on 22.02.2010. As is clear, the Notification dated 14.11.2002 exempts the amount of excise duty paid by the assessee as such excise duty per se is not leviable. In order to ensure proper control over the transactions, the Notification only requires the manufacturers to first deposit the excise duty and then claim the refund of the same next month. Thus the refund is assessee's own money itself in a way security deposit which is being refunded on submission of the evidence depositing the same. Therefore, in our view this is not an income at all. Therefore, the A.O, in our view, was not justified in making a separate addition of income and thereby denying the relief eligible u/s 80.IB of the Act on that amount.

7. Before we part with the matter, we think it fit to deal with the contention of the Revenue that the decision of the Apex Court in Liberty India (supra) concludes the issue in favour of the revenue. We may say the judgment in the case of Liberty India was on the issue of DEPB/Duty Draw

Back which was an incentive and was not concerned with the refund of the amount paid. The Court in that case has negated the contention of the assssee at page 234 by observing as under:

> *"The Rules do not envisage a refund of an amount arithmetically equal to customs duty or central excise duty actually paid by an individual importer-cum-manufacturer. Sub-section (2) of Section 75 of the Customs Act requires the amount of drawback to be determined on a consideration of all the circumstances prevalent in a particular trade and also based on the facts situation relevant in respect of each of various classes of goods imported."*

7.1 The case of the assessee before us is concerned with the refund of excise duty and consideration of the same for deduction u/s 80IB of the Act. The Scheme as well as the methodology of the operations are all discussed so as to highlight the distinction of this case from the decision of Liberty India. In any case, the decision of Dharam Pal Prem Chand Ltd. of Delhi High Court has been affirmed by the Supreme Court which fact itself cannot be ignored as the case of Dharampal Premchand Ltd. was concerned with the issue relating to section 80.IB of the Act.

8. In the result, the appeal is allowed.

Pronounced in Open Court on 29.04.2011.

Sd/-	sd/-
(Rajpal Yadav)	(G.E.Veerabhadrappa)
JUDICIAL MEMBER	VICE PRESIDENT

Dated: April 29 ,2011.
DRS

Copy of the order forwarded to:

1. Appellant,
2. Respondent,
3. CIT
4. CIT(A)
5. DR

Asstt.Registrar, ITAT