

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI ' E ' BENCH  
MUMBAI BENCHES, MUMBAI**

**BEFORE SHRI B RAMAKOTAIAH, AM & SHRI VIJAY PAL RAO, JM**

**ITA No. 5364/Mum/2009  
(Asst Year 2006-07)**

The Addl. Commr of Income Tax 15(1), Mumbai	Vs	The Total Packaging Services Shah Bldg No.3 2 <sup>nd</sup> Floor, Flat no.11 Ghagat Gally, Matunga Road (W) Mumbai 16
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>PAN No.</b>	<b>AADFT0749C</b>
Assessee by	Shri Satish R Mody
Revenue by	Shri G P Trivedi
Dt.of hearing	1 <sup>st</sup> Nov 2011
Dt of pronouncement	4 <sup>th</sup> Nov 2011

**PER VIJAY PAL RAO, JM**

This appeal by the revenue is directed against the order dated 16.7.2009 of the CIT(A) for the Assessment Year 2006-07.

2. The only effective raised by the revenue in this appeal is as under:

*"On the facts and circumstances of the case, the Id CIT(A) erred in law to hold that income from MODVAT credit is "derived from" industrial undertaking as contemplated in Sec. 80IB(1) ignoring the vital fact that the very source of such income was government policy imposing excise duty at differential rate, say 16% on the purchases of raw materials for the earlier assessment year and 8% on finished goods sold during the current financial year, which can be 'attributed to' industrial undertaking but not 'derived from' industrial undertaking."*

3 The assessee availed/set off Modvat credit of excise duty of earlier years amounting to Rs. 1.93 crores. The Assessing Officer questioned the allowability of deduction claimed u/s 80IB on Modvat credit. The assessee has submitted before

the Assessing Officer that the assessee could not set off/availed the Modvat credit of the earlier years because of excise duty on the purchase of raw material was 16% whereas on sale, it was 8%. Hence, the same was though available to the assessee; but could not be utilized because of the differential rates of excise duty on purchase of raw material and sale of goods. The Assessing Officer disallowed the claim of the assessee and held that the income has arisen because of differential rates of excise duty on purchase and sale; therefore, cannot be called as arising out of manufacturing activity of the undertaking.

3.1 On appeal, the CIT(A) allowed the claim of the assessee vide the impugned order.

4 Before us, the Id DR has mainly contended that since the Modvat credit was available with the assessee during the earlier years; therefore, this benefit has not arisen during the year under consideration and thus is not eligible for deduction u/s 80IB for the year under consideration.

4.1 On the other hand, the Id AR has submitted that the amount of income has arisen because of the differential rates of excise duty on purchase and sale and since the excise duty on sale was 8%; therefore, the assessee was not able to recover the full excise duty paid on purchases. Vide Finance Act 2006, the government has amended the structure of excise duty and reduced the excise duty from 16% to 8% on raw material used by the assessee. Due to the change in the rate of excise duty vide Finance Act 2006; the assessee was able to recover the excise duty paid in the earlier years by setting off of the excise duty paid on the purchases in the earlier years against the excise duty payable on sale during the year. Thus, the Id AR of the assessee has submitted that the income, in fact, arisen only during the year under consideration when the assessee availed the setting off of credit of

the excise duty. He has further submitted that the issue on merit is covered in favour of the assessee by the decision of the Hon'ble Guwahati High Court in the case of Commissioner of Income-tax v. Meghalaya Steels Ltd. reported in 332 ITR 91 as well as the order dated 29<sup>th</sup> April 2001 of the Delhi Bench of the Tribunal in ITA No. 3303/Del/2010.

5 We have heard the rival contention and carefully perused the relevant material on record. Undisputedly, the Modvat credit earned by the assessee during the earlier years could not be availed and set off because of the huge difference of excise duty rates on purchase of raw material and sale of goods. Upto 31<sup>st</sup> March, 2005, the excise duty on raw material was 16% which the assessee used to pay whereas the excise duty on manufactured goods collected by the assessee was 8%. Therefore, it was not possible to recover the full excise duty paid on purchases from the excise duty collected on the finished goods. Vide Finance Act, 2006, the Government has amended the rates of excise duty and consequently, the excise duty on purchases of raw material by the assessee was reduced from 16% to 8%. Thus, only after the amendment vide the Finance Act 2006, the assessee was able not only to recover the full excise duty payable but also set off the Modvat credit earned in the earlier years.

5.1 It is not the case of the refund of excise duty in cash; but only a benefit of Modvat credit was available to the assessee, which could be set off and utilised against the collection of the excise duty on sale of goods w.e.f Assessment Year 2006-07. Therefore, this amount has been rightly taken into account as income for the year under consideration. Even otherwise, the Assessing Officer has not treated this amount as the income of the earlier years but denied the deduction on the ground that this is not the income derived from the industrial undertaking.

6 In view of the above discussion, we do not find any merit or substance in the contention of the Id DR.

6.1 On the issue whether this benefit of Modvat credit is the income derived from the industrial undertaking or not, the Hon'ble Guwahati High Court in the case of Meghalaya Steels Ltd. (supra), has held as under:

*"In so far as the second question is concerned, the Central excise duty refund claimed by the assessee is on the basis of an exemption notifications issued by the Ministry of Finance (Department of Revenue) being Notification No. 32 of 1999 and Notification No. 33 of 1999 both dated July 8, 1999. In terms of these notifications, a manufacturer is required to first pay the Central excise duty and thereafter claimed a refund on fulfilment of certain conditions. In the next month, after verification of the claim, the Central excise duty so deposited is refunded to the assessee if the conditions laid down in the notifications are fulfilled. In the present case, there is no dispute that the assessee was entitled to the Central excise duty refund.*

*The Central Board of Excise and Customs in its circular dated December 19, 2002 clarified that the refund is not on account of excess payment of excise duty but is basically designed to give effect to the exemption and to operationalise the exemption given by the notifications. In that sense, the Central excise duty refund does not appear to bear the character of income since what is refunded to the assessee is the amount paid under the modalities provided by the Department of Revenue for giving effect to the exemption notifications. There is also nothing to suggest that the assessee has recovered or passed on the excise duty element to its customers.*

*Even assuming the refund does amount to income in the hands of the assessee, it is a profit or gain directly derived by the assessee from its industrial activity. The payment of Central excise duty has a direct nexus with the manufacturing activity and similarly, the refund of the Central excise duty also has a direct nexus with the manufacturing activity. The issue of payment of Central excise duty would not arise in the absence of any industrial activity. There is, therefore, an inextricable link between the manufacturing activity, the payment of Central excise duty and its refund. In the circumstances, we are of the opinion that question No. 2 must be answered in the affirmative in favour of the assessee and against the Revenue."*

6.2 The Hon'ble High Court has decided the issue in favour of the assessee after considering the decision of the Hon'ble Supreme Court in the case of Liberty India vs CIT reported in 317 ITR 218. Accordingly, following the decision of the Hon'ble Guwahati High Court in the case of Meghalaya Steels Ltd (supra), we decide this issue against the revenue and in favour of the assessee.

7 In the result, the appeal filed by the revenue is dismissed.

Order pronounced on the 4<sup>th</sup>, day of Nov 2011.

Sd/

Sd/-

<b>( B RAMAKOTAIAH )</b> Accountant Member	<b>( VIJAY PAL RAO )</b> Judicial Member
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Place: Mumbai : Dated: 4<sup>th</sup>,Nov 2011

**Raj\***

Copy forwarded to:

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

/TRUE COPY/  
BY ORDER

Dy /AR, ITAT, Mumbai