आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** डॉ. एस. टी. एम. पवलन, न्यायिक सदस्य, के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND DR. S. T. M. PAVALAN, JM

आयकर अपील सं./I.T.A. No. 2050/Mum/2011
(**निर्धारण वर्ष /** Assessment Year: 2006-07)

Dyna Hitech Power Systems Ltd. Dyna House, Plot No. A-57, MIDC, Sector I, Andheri (East), Mumbai-400 093	**बनाम**/ Vs.	Asst. CIT-8(3), Aaykar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACD 5391 A		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Kishore K. Poddar
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri B. P. K. Panda

सुनवाई की तारीख / **Date of Hearing**	:	12.02.2014
घोषणा की तारीख / **Date of Pronouncement**	:	25.04.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-16, Mumbai ('CIT(A)' for short) dated 07.12.2010, partly allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2006-07 vide order dated 14.11.2008.

2. The appeal raises two issues per its two grounds, which we shall take up in seriatim. The first ground relates to an addition in respect of unutilized modvat credit,

effected in the sum of Rs.1,59,649/- u/s.145A of the Act read with *Explanation* thereto. The same stood confirmed by the ld. CIT(A) in appeal in-as-much as it was confirmed that the adjustment of the unutilized modvat, both for the opening stock and purchases, still left an unutilized credit for the impugned sum, and which was therefore to be added to the value of the closing stock u/s.145A. Reliance for the purpose has been placed by the Revenue on the decisions in the case of *CIT vs. Malayala Manorama Co. Ltd.* [2002] 253 ITR 378 (Ker) and *CIT vs. Mahavir Alluminium Ltd.* [2008] 297 ITR 77 (Del). Aggrieved, the assessee is in appeal.

3. We have heard the parties, and perused the material on record.

3.1 The facts of the case are largely undisputed. This issue (i.e., the application of section 145A *qua* the unutilized modvat credit), is no longer *res integra*, having been examined over a series of decisions by the tribunal, besides thus by the higher courts of law. We may for the sake of convenience and clarity in the matter reproduce the head notes of a decision in the case of *Herclues Pigment Industry vs. ITO* (in ITA No. 271/Mum/2012 dated 29.05.2013, 'H' Bench)/[2013] 93 DTR (Mum)(Trib) 49). After examining the matter at length, duly noting the decisions by the higher courts as well as the principles involved, it, in sum, opined as under:

> 'Accounts—Method of accounting—Unutilized cenvat credit (UCC)—Assessee claimed to have valued its closing stock inclusive of all taxes—It follows inclusive method of accounting following mandate of section 145A, which is, in fact, otherwise tax-neutral, so that it should not result in any enhancement or change in income—AO made addition on account of outstanding balance in unutilised cenvat credit account—CIT(A) observed that entire unutilised MODVAT credit pertains to current year; opening balance in account being nil, directed adjustment of outstanding balance in account to assessee's income inasmuch as same was only excise component on raw material, semi-finished goods and finished goods in stock—Held, Section 145A is only an accounting prescription, statutorily mandated, which is in consistence with the accepted accounting principles of valuation at cost or, in case of finished goods, at market value, where it is less than cost—Valuation of stock considered in its proper perspective, could never be a source of income or profit—Assessee's accounts cannot be said to be in accordance with section 145A—Outstanding untilized Cenvat credit reflected as a part of cost of raw material as at year-end was balancing

figure, and does not represent the excise component on the raw material, or even that on the closing inventories of finished and semi-finished goods—Only adopting all the figures at correct values would lead to correct profit in terms of Section 145A, and balance in UCC a/c (for the time being) cannot be taken as a surrogate measure of excise component in inventories at that point of time—UCC a/c, as being prepared, was not in consistence with accounting principles—Only a correct statement of current assets and liabilities, i.e., which are not on capital account, in balance-sheet, would enable reflection of correct operating results for the relevant accounting period—Only booking of profit (against excess recovery of excise duty) would enable an agreement of the outstanding balance in UCC a/c with excise component in closing inventories, so that accounts, whether maintained on gross or net basis, reflect current asset in respect of excise paid thereon at the same, correct value—Further, it is only this, reckoning 'profit' on excess recovery as the difference between the profit per the two statements prepared on net and gross basis, that would state UCC a/c at correct value of current asset represented by it, where accounts are maintained on net basis, bringing profit per two methods at par—Provision becomes tax-neutral only when duty is paid on value addition, else not, in view of *non obstante* provision of Section 43B—That, however, cannot be a ground for not observing the method of accounting that yields correct profits or operating results—Even where accounting treatment provides correct results, provision of section 43B would have to be given due effect—Same cannot be defeated by non-booking statutory liability in respect of excise in accounts—Sections 43B and 145A, both *non obstante* provisions, are to be read in harmony—In final analysis, tax neutrality of net method is subject to it being established, with the *non obstante* provision of section 43B, which in fact obtains irrespective of the method of accounting followed, assuming a crucial significance when liability in respect of all levies as accrued are booked or accounted for.'

3.2 In view of the afore-said analysis by the tribunal, which in fact represents its consistent view in the matter, it stands clarified that there is no principle in accountancy which would sanction or authorize the inclusion of the unutilized modvat credit as part of the value of the closing stock and thereby go to increase the income for the relevant year. The said credit is essentially *qua* an account maintained by the assessee for the purpose of the deposit of duty with the excise department. The mandate of law per section 145A would stand met and satisfied only upon scrupulously following its prescription, i.e., by valuing the opening and closing inventories as well as the purchases and sales during the

year at inclusive of all duties and levies incident thereon. We, therefore, only consider it fit and proper that the matter is like wise restored back to the file of the Assessing Officer (A.O.) to give effect to the direction/s afore-stated, which we confirm and adopt, after of course hearing the assessee in the matter. We decide accordingly. As regards the decisions relied upon by the Revenue (refer para 2 of this order), which we have perused, the same being on different issues altogether, are not relevant.

4. The second and the only other issue arising in the instant appeal relates to the non-admissibility of the certain incomes, aggregating to Rs.10,45,582/-, in the computation of income eligible for deduction u/s.80-IB of the Act, as under:

Interest	Rs.3,19,378/-
Other income	Rs.1,42,074/-
BST refund	Rs.4,96,260/-
Commission	Rs.87,870/-

The same stand excluded by the A.O. on account of being non-business incomes and, in any case of the matter, being non-manufacturing receipts, so that the same were not derived from the assessee's eligible unit so as to qualify for deduction u/s.80-IB of the Act. The same stood confirmed by the ld. CIT(A) on the same basis of the same reasons, relying on a series of decisions by, among others, the apex court, as in the case of *Pandian Chemicals Ltd. vs. CIT* [2003] 262 ITR 278 (SC); *CIT vs. Autokast Ltd.* [2001] 248 ITR 110 (SC); *CIT vs. Sterling Foods* [1999] 237 ITR 579 (SC); and *Tuticorin Alkali Chemicals & Fertilizers vs. CIT* [1997] 227 ITR 172 (SC). Aggrieved, the assessee is in appeal.

5. We have heard the parties, and perused the material on record.

5.1 The law in the matter is well-settled, and toward which the Revenue has relied on a series of decisions by the apex court, with its' decision in the case of *Liberty India vs. CIT* [2009] 317 ITR 218 (SC), which is also in the context of section 80-IB, reiterating the same view. The issue, as we discern, is whether any of the said receipts could be said to be derived from the business of the assessee's eligible undertaking in-as-much as the

relevant provision of section 80-IB(1) employs the words 'derived' from the business referred to in sub-sections (3) to (11) of the section, further referring to it as the 'eligible business'. This aspect has been the subject matter of consideration by the tribunal in the case of *Tessitura Monti (P.) Ltd. vs. ITO* [2013] 141 ITD 531(Mum.) [22 ITR (Trib) 329]. Though the said decision is in context of s. 10B of the Act, the same, employing the same expression, i.e., profits derived from the business of the eligible undertaking, is *pari materia* and, thus, relevant. The words 'business of the undertaking', it stands explained, are wider in ambit than the words 'profits of the undertaking' and, therefore, any profit which is derived from the business of the assessee's undertaking would qualify to be the profits of the business of the undertaking, and upon excluding that attributable to domestic turnover (or non-qualified exports), would be the profits derived by the hundred per cent. export-oriented undertaking from exports, as contemplated in section 10B(1), and on which deduction is to be allowed. *In other words, the word "derived" would control or guide the word "profits" in the deduction provision*, but the activity from which the profits are derived is the economic activity that comprises the business of the eligible undertaking, rather than being restricted strictly to the eligible undertaking. *As such, as long as a receipt is intimately and inextricably connected with the "business of the undertaking", it cannot be excluded in reckoning the eligible profits under section 10B(1).* The contention that the profits derived by an undertaking are simply the profits of the business adjusted in the ratio of the 'export turnover' to the 'total turnover' in view of section 10B(6) of the Act was in fact repelled by the tribunal, stating that that rather represents one of the three steps involved in arriving at the eligible profit; the first step being to ascertain if the assessee's undertaking is an eligible undertaking u/s.10B, and the second being the determination of the profits as derived by/from the eligible undertaking, which represents the fundamental condition for the application of the provision of section 10B(1). The different credits under consideration in that case were:

(a) interest on monies held in fixed deposit with the bank for availing of credit facilities by way of letter of credit and bank guarantee;

(b) interest on fixed deposits and bank accounts on surplus funds;

(c) sales tax refund and excise duty drawback for an earlier period, being not payable by an export unit;

(d) scrap sale; and

(e) miscellaneous income comprising canteen recovery, discount and fine from workers, credited to the account head "other income" by the assessee in its books of account,

with the tribunal proceeding to decide on the exigibility of each of these receipts on the anvil of the *ratio* afore-stated. The same would, in our view, apply in equal measure to the instant case as well. Reference in this context may also be made to the decision by the hon'ble jurisdictional high court in the case of *CIT vs. Rachna Udhyog* [2010] 230 CTR (Bom) 72 (copy on record).

5.2 We shall proceed receipt-wise:

a) Interest income on bank deposit (Rs.3,19,378/-)

As explained in the case of *Tessitura Monti (P.) Ltd*. (supra), where the monies held in deposit account/s form part of the regular arrangement adopted or followed by the bank for extending non-fund based credit facilities to its constituents, the same can only be regarded as integral to the assessee's business and, accordingly, would form part of the profits of the business of the assessee's industrial undertaking. On the other hand, if and to the extent the deposit with the bank represents investment or parking of the assessee's surplus funds (for the time being), the same would in fact qualify to be considered as income assessable u/s.56. No case for deduction u/s.80-IB on such interest is made out. We decide accordingly.

b) Other income (Rs.1,42,074/-)

The same, as contended, is on account of sale of scrap arising out of the assessee's industrial undertaking. The same, again as clarified by the tribunal over a series of decisions, as also in the case of *Tessitura Monti (P.) Ltd*. (supra), and with reference to the decisions by the higher courts, would certainly qualify for deduction u/s.80-IB. Accordingly, subject to the verification of the said income being on account of sale of scrap, the assessee's claim is allowed.

c) BST refund (Rs.4,96,260/-)

The same represents refund of sales-tax from the Sales Tax Department. The same arising on account of a government policy toward non-levy of tax on either the purchases or sales from a class of undertakings to which the relevant scheme of the Govt. applies, the first degree relationship thereof would not be with the goods produced by the said undertaking, but with the said policy instrument of the State Government, seeking to provide incentive to units and thereby encourage the (relevant) industry. Accordingly, the same would not qualify for deduction u/s.80-IB, though shall without doubt form part of the assessee's business income, even as clarified by the tribunal in *Tessitura Monti (P.) Ltd*. (supra) with reference to the decision by the apex court in the case of *Liberty India* (supra).

d) Commission (Rs.87,870/-)

The same is admittedly earned from the trading division of the assessee's enterprise, which is stated to be a part of the industrial undertaking and does not represent any independent or isolated activity. We cannot but disagree. The same arises only on account of services rendered by the assessee, which is an economic activity apart from and independent of that of the industrial undertaking producing the goods. Accordingly, the same would not be eligible for deduction u/s.80-IB. We decide accordingly.

Before parting with our order, we may clarify that it is consistent with the order by the tribunal in the case of *Dy. CIT vs. Medley Pharmaceutical Ltd.* [2007] 109 TTJ 328 (Mum) relied upon before us.

6. In the result, the assessee's appeal is partly allowed.
परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on April 25, 2014

Sd/-	Sd/-
(Dr. S. T. M. Pavalan)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 25.04.2014

व.नि.स./Roshani, Sr. 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**