आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.156/Viz/2021
(निर्धारण वर्ष / Assessment Year: 2017-18)

Nekkanti Sea Foods Limited, Visakhapatnam. PAN: AAACN 46664 J (अपीलार्थी/ Appellant)	Vs.	Principal Commissioner of Income Tax, Visakhapatnam. (प्रत्यर्थी/ Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Sri Pawan Chakrapani
प्रत्यार्थी की ओर से / Respondent by	:	Sri MN Murthy Naik, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	07/04/2022
घोषणा की तारीख/Date of Pronouncement	:	06/06/2022

O R D E R

PER S. BALAKRISHNAN, Accountant Member :

This appeal is filed by the assessee against the order of the Principal Commissioner of Income Tax (Central), Visakhapatnam in F.No. Pr.CIT(C)/263/2020-21, dated 29/03/2021 for the AY 2017-18.

2. At the outset, the Ld. AR submitted that in all the three appeals there is a delay of 111 days in filing the appeal before the Tribunal. In this regard the Ld. AR brought our attention to the petition filed by the assessee for condonation of the delay and submitted that the order of the

Ld. Pr. CIT (Central), Visakhapatnam was passed on 29/03/2021 which falls within the limitation period excluded by the Hon'ble Apex Court. Further, the Ld. AR submitted In this regard that as per the decision of the Hon'ble Supreme Court in SMW(A) No.3 of 2020, the period of limitation for filing the appeals under general laws and all special laws falling between 15/3/2020 and 28/02/2022 shall be excluded for calculating the delay. Considering the same, we hereby condone the delay of 111 days in filing the present appeals before the Tribunal and proceed to adjudicate the cases on merits.

3. The brief facts of the case are that the assessee is a limited company engaged in the business of export of frozen shrimp and other sea foods filed its return of income for the AY 2017-18 declaring a total income of Rs. 52,30,54,010/-. After processing the return of income U/s. 143(1), the case was selected for complete scrutiny under CASS and accordingly statutory notices U/s. 143(2) and 142(1) were issued in electronic format to the assessee calling for the information. The assessee's representative filed its reply on line through e-filing portal. The AO on examination of the information furnished by the assessee made a disallowance U/s. 14A r.w.r 8D for Rs.28,57,443/-. Thereafter, the Ld. Pr. CIT invoking the powers vested U/s. 263 of the Act noticed

that the assessment order passed is prima facie erroneous and prejudicial to the interest of the Revenue for the following reasons:

> *"An amount of Rs. 22,82,85,812/- claimed as 80IB(11A) deduction by the assessee-company was allowed by the AO without properly examining the issue that the income on which deduction was claimed is derived from the business of industrial undertaking or not."*

4. The Ld. Pr. CIT issued a show cause notice to the assessee on 5/3/2021. In response, the assessee-company made its submissions on 22/3/2021. Considering the submissions made by the assessee, the Ld. Pr. CIT directed the Assessing Officer to disallow a sum of Rs. 10,24,00,779/- arising from the receipt of duty draw back and Rs. 6,89,08,253/- arising from the sale of licenses considering it as not derived from the industrial undertaking so as to entitle the assessee to claim the benefit of deduction u/s. 80IB(11A) of the Act. The Ld. Pr. CIT relied on the decision laid down by the Hon'ble Supreme court in the case of Liberty India vs. CIT (SC) 317 ITR 218. Aggrieved by the order of the Ld. Pr. CIT, the assessee is in appeal before us.

5. The assessee has raised the following grounds of appeal:

> *"1. The order of the Hon'ble Pr. CIT (Central) Visakhapatnam passed U/s. 263 insofar as it is against the appellant is opposed to law,*

equity, weight of evidence, probabilities and the facts and circumstances in the appellant's case.

2. *The Hon'ble Pr. CIT has grossly erred in revising the order passed by the Assessing officer without appreciating that there is no error, much less prejudicial to the interests of the revenue to warrant a revision and therefore the order passed by the Hon'ble Pr. CIT is ultra vires to the scope of section 263 and requires to be cancelled under the facts and circumstances of the appellant's case.*

3. *The Hon'ble Pr. CIT has erred in not appreciating the settled position of law that, where there are two opinions possible on the an issue, section 263 cannot be exercised to invoke such as issue.*

4. *The Hon'ble Pr. CIT has grossly erred in revising the order passed by the Ld. AO without appreciating that there is no error, much less prejudicial to the interests of the Revenue to warrant a revision and therefore the order passed by the Hon'ble Pr. CIT is ultra vires to the scope of section 263 and requires to be cancelled under the facts and circumstances of the Appellant's case.*

5. *Without prejudice to the above Hon'ble Pr. CIT ought to have appreciated that the aforesaid issue on which the Hon'ble Pr. CIT had sought to revise the assessment order is a conscious view adopted by the Ld. AO, which is not shown to be erroneous and consequently, the jurisdiction under section 263 of the Act stands ousted and accordingly the impugned order passed deserves to be cancelled, under the facts and circumstances of the appellant's case.*

6. *The Hon'ble Pr. CIT is justified in passing the order U/s 263 of the Act, without giving proper opportunity to the appellant, under the facts and circumstances of the case.*

7. *The Hon'ble Pr. CIT ought to have appreciated the fact that appellant's case, will not fall under sub-section(1), explanation 2(b) of section 263 of the Act, under the facts and circumstances of the case.*

8. *The Hon'ble Pr. CIT is not justified to conclude that the deduction U/s. 80IB(11A) of the Act, of an amount being Rs. 22,82,85,812/- was allowed by the Ld. AO without properly examining the issue, under the facts and circumstances of the case.*

9. *The Hon'ble Pr. CIT, is not justified in directing the Ld. AO to re-do the assessment by taking into consideration the judgment of Apex Court, even when the facts of the appellant's case are distinguishable on merits, under the facts and circumstances of the case.*

10. *The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.*

11. In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity."

6. The Ld. AR submitted that the order of the Ld. Pr. CIT is *prima facie* erroneous on the ground that since the AO has examined the books of accounts of the assessee submitted before him. A mere change of opinion by the Ld. Pr. CIT is not in accordance with law. The Ld. AR further submitted that the assessee has received incentives framed under the Foreign Trade Policy arising out of the exports made by the assessee. The Ld. AR further submitted that these incentives are provided by the Government of India in making exports viable and more attractive in the international markets. The Ld. AR also submitted that the incentives are granted based on Free on Board (FOB) basis, authenticated and administered by the Commissioner of Customs in the shipping bills. The Ld. AR forcibly contended that these incentives are derived from the industrial undertaking and should be regarded as profits and gains of business. The Ld. AR also invited our attention to section 28(iiib) of the Income Tax Act, 1961 which provides that *"cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India"* should be treated as part of business profits. The Ld. AR further submitted that Taxation Laws (Amendment) Act, 2005 has inserted in section 28 a new clause-(iiid) with retrospective effect from 1/4/1998 that any profit on

the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 shall be treated as part of the business profits of the exporter. The Ld. AR also relied on the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Meghalaya Steels Ltd (2016) 383 ITR 217 (SC). The Ld. AR vehemently argued that the Liberty India (supra) judgment has been nullified by the ratio laid down in Meghalaya Steel Ltd (supra) in the year 2016 and hence the ratio laid down in Liberty India (supra) should not be valid. The Ld. AR also submitted that if there is no export sales, the assessee is not entitled for these incentives and hence it has direct link and nexus with the activities of the assessee industrial undertaking entitling deduction U/s. 80IB(11A) of the Act. The Ld. AR also relied on the following judgments:

1. CIT vs. Amit Corporation [2012] 21 taxmann.com 64 (Guj.)
2. CIT vs. Sun Beam Auto Limited – 332 ITR 167
3. CIT vs. Bariel India Ltd – 203 ITR 108
4. CIT vs. Vikas Polymers - 194 Taxman 57
5. Sarvana Developers vs. CIT – ITA No. 620/Bang/2011 & 48/Bang/2013
6. Malabar Industrial Co., Ltd vs. CIT – 243 ITR 83
7. CIT vs. MAX India Limited – (2013) 354 ITR 501

8. CIT & Anr. Vs. DG Gopala Gowda [2013] 354 ITR 501
9. CIT vs. Ashish Rajpal – [2010] 320 ITR 674
10. CIT vs. Contimeters Electricals (P) Ltd – 317 ITR 249.

6.1. Further, relying on the aforesaid judgments, the Ld. AR submitted that the claim of deduction U/s. 80IB(11A) be allowed by refraining the order of the Ld. Pr. CIT.

6.2 *Per contra,* the Ld. DR submitted that the Ld. Pr. CIT has rightly considered the decision of the Hon'ble Supreme Court in the case of Liberty India vs. CIT [2009] 317 ITR 218 (SC) that the duty drawback, sale of license etc., would constitute independent source of income beyond the first degree nexus between profits earned by the industrial undertaking and do not form part of the eligible undertaking for the purpose of 80IB of the Act. The Ld. DR also pleaded that the order of the Ld. Pr. CIT shall be upheld.

7. We have considered the rival submissions and perused the orders of the authorities below as well as the materials available on record. The admitted facts are that that there is no dispute by the Revenue Authorities regarding the entitlement of deduction to the assessee U/s. 80IB(11A) of the Act. The main contention of the Ld. AR is that the Ld. Pr. CIT has relied on the decision of the Hon'ble Supreme Court in the

case of Liberty India (supra) whereas the Hon'ble Supreme Court in its subsequent judgment in the case of Meghalaya Steels Ltd (supra) rendered a final verdict after referring to its earlier decisions in the case of Liberty India vs. CIT (supra). We have also observed that the Authorities below have failed to understand the Legislative Intent behind the insertion of a clause-(iiid) to section 28 of the Act with retrospective effect wherein it has been held that any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 shall be treated as part of the business profits of the exporter and assessed as "profits and gains of business or profession" and not under the head "income from other sources".

8. Since the issue revolves around the provisions of section 80IB(11A) of the IT Act, 1961, we find it appropriate and necessary to reproduce the provisions of section 80IB(1) & (11A) of the Act:

> ***"80IB(1):*** *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.*

80IB(11A) *The amount of deduction in a case of an undertaking deriving profit from the business of processing, preservation and packaging of fruits or vegetables or meat and meat products or poultry or marine or dairy products or from the integrated business of handling, storage and transportation of foodgrains, shall be hundred per cent of the profits and gains derived from such undertaking for five assessment years beginning with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains derived from the operation of such business in a manner that the total period of deduction does not exceed ten consecutive assessment years and subject to fulfilment of the condition that it begins to operate such business on or after the 1st day of April, 2001 :*

Provided *that the provisions of this section shall not apply to an undertaking engaged in the business of processing, preservation and packaging of meat or meat products or poultry or marine or dairy products if it begins to operate such business before the 1st day of April, 2009."*

We also find it appropriate to reproduce section 28(iiid) of the Act:

"Sec. 28(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) ;"

9. The only issue in the present case is the entitlement for deduction U/s. 80IB(11A) of the Act where the Pr. CIT referred to the decision of the Hon'ble Supreme Court in the case of Liberty India vs. CIT (supra) and directed the AO to exclude the export incentives for the purpose of computation of deduction U/s. 80IB(11A) of the Act. As the export incentives cannot be considered as profits derived from industrial activities for the purpose of claiming deduction U/s. 80IB(11A) of the Act, the reliance placed by the Ld. AR in the decision of the Hon'ble Supreme

Court in the case of Meghalaya Steels Ltd (supra) have merits in the case. Relevant paras 28 & 29 of Meghalaya Steels Ltd (supra) judgment delivered by the Hon'ble Supreme Court is extracted below for reference:

> *"28. 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 recognised 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 schemes 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 "profits and gains of business or profession", and not under the head "income from other sources".*
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> *29. For the reasons given by us, we are of the view that the Gauhati, Calcutta and Delhi High Courts have correctly construed Sections 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 held to be wrongly decided for the reasons given by us hereinabove."*

10. Therefore, in view of the subsequent decision of the Hon'ble Supreme Court in the case of Meghalaya Steel Ltd (supra), the findings recorded by the authorities below based on the decision of the Hon'ble

Supreme Court in the case of Liberty India (supra) cannot be held as sustainable as the Hon'ble Supreme Court in para 29 of its decision in Meghalaya Steel Ltd (supra) held that the Hon'ble Himachal Pradesh High Court having wrongly interpreted the judgment in the case of CIT vs. Sterling Foods [1999] 104 Taxman 204 and Liberty India (supra) to arrive at the opposite conclusion has held to be wrongly decided. We are therefore of the considered view that since the Hon'ble Supreme Court has overruled its earlier decision in the case of Liberty India (supra) the decision in the case of Meghalaya Steel Ltd (supra) holds good. Respectfully following the decision of the Hon'ble Apex Court in the case of Meghalaya Steel Ltd (supra), we hold that the export entitlements (MEIS) and the duty drawback of promotion scheme is an income asssessable under the head "profits or gains from business or profession" as per clause (iiib) and (iiid) to section 28 of the IT Act, 1961. In view of the above, the Ground No.8 raised by the assessee is allowed.

11. With respect to Grounds Nos.2, 3, 4, 5, 6, 7, & 9, we are of the considered view that since the ratio held in Meghalaya Steel Ltd (supra) over rides the ratio laid in Liberty India (supra), the AO has rightly considered the same and therefore the exercising his powers U/s. 263 by Pr.CIT is not valid and the ground Nos .2, 3, 4, 5, 6, 7, & 9 are allowed.

13. In the result, appeal of the assessee is allowed.

Pronounced in the open Court on the 6th June, 2022.

Sd/-	Sd/-
(दुव्वूरु आर.एल रेड्डी)	**(एस बालाकृष्णन)**
(DUVVURU RL REDDY)	(S.BALAKRISHNAN)
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखा सदस्य**/ACCOUNTANT MEMBER

Dated : 06.06.2022

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Nekkanti Sea Foods Limited, D.No.3-16/3, Ocean Drive Layout, Gudlavanipalem, Andhra Pradesh, 530045.
2. राजस्व/The Revenue – Pr. CIT (Central), Direct Taxes Building, MVP Colony, Visakhapatnam, Andhra Pradesh – 530017.
3. The Principal Commissioner of Income Tax, Visakhapatnam.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam