<u>आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम</u>

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.No.223/Vizag/2015**

(निर्धारण वर्ष / Assessment Year: 2011-12)

Grandhi Venkata Satya Lakshmi Kantha Rao L/R of Grandhi Subba Rao Guntur [PAN No.ACKPG6041R]	Addl. CIT, Range-1 Guntur
(**अपीलार्थी** / Appellant)	(**प्रत्यार्थी** / Respondent)

आयकर अपील सं**./I.T.A.No.239/Vizag/2017**

(निर्धारण वर्ष / Assessment Year: 2011-12)

ACIT, Circle-1(1), Guntur	Grandhi Venkata Satya Lakshmi Kantha Rao L/R of Grandhi Subba Rao Guntur
(**अपीलार्थी** / Appellant)	(**प्रत्यार्थी** / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri G.V.N. Hari, AR
प्रत्यार्थी की ओर से / Respondent by	:	Shri P.S. Murthy, DR
सुनवाई की तारीख / Date of hearing	:	23.02.2018
घोषणा की तारीख / Date of Pronouncement	:	16.03.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

The appeal filed by the assessee is directed against order of the Principal Commissioner of Income Tax (PCIT), Guntur dated 27.3.2015 for the assessment year 2011-12 and the appeal filed by the revenue is against the order of the Commissioner of Income Tax (Appeals)-1 {CIT(A)}, Guntur vide ITA No.80/15-16/CIT(A-1)/GNT dated 31.1.2017.

ITA No.223/Vizag/2015:

2. The assessee filed return of income declaring total income of ₹ 9,07,99,872/-. The return was processed u/s 143(1) and the case was selected for scrutiny and the assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') on total income of ₹ 9,16,30,590/-. In the assessment, the A.O. made the disallowance relating to the contribution of group gratuity fund to the LIC of India and completed the assessment. Subsequently, the Principal CIT has taken up the case for revision u/s 263 of the Act and found that the assessee had received a sum of ₹ 32,00,06,767/- consisting of excise duty of ₹ 27,82,86,041/- and interest thereon of ₹ 4,23,14,726/- as excise duty refund during the year under consideration but the

assessee has not admitted the same to tax. Therefore, the Ld. PCIT held that the assessment made u/s 143(3) of the Act is erroneous and prejudicial to the interest of the revenue and accordingly issued the notice u/s 263 of the Act calling for the explanation of the assessee. During the revision proceedings, the assessee contested the show cause notice both on jurisdiction as well as on merits. The Ld.AR submitted before the PCIT with regard to jurisdiction that the AO has examined the issue during the assessment proceedings and allowed the deduction, hence there is no case for revision u/s 263 of I.T.Act. The PCIT considered the argument of the assessee, verified the records and held that while completing the assessment, the A.O. has not even asked any question or raised any clarification during the assessment proceedings with regard to taxability of the central excise refund and the assessee also did not bring the issue before the A.O. In the absence of any positive indication or material evidence on record, it is only assumption of the assessee that the A.O. did examine the issue and applied his mind. Accordingly, rejected the ground of objection raised by the assessee on jurisdiction issue holding that there was no application of mind.

On merits, the assessee argued that mere receipt of refund from Central Excise Department does not mean that the liability has ceized to exist and can be brought to tax u/s 41(1) of the Act . In the assessee's case the entitlement of receipt is in dispute, hence the refund is taxable or not can be decided only in the year in which the matter is finally settled by Hon'ble Supreme Court and accordingly offered to tax in the assessment year 2013-14.

The Ld. PCIT placing reliance on the Hon'ble Supreme Court decision in the case of Polyflex (I) Limited Vs. CIT (2002) 257 ITR 343 held that the excise duty refund pursuant to the decision of Cegat shall be subject to tax u/s 41(1) of the Act and possibility of refund being set at naught on the future date will not be relevant consideration. Accordingly, held that the central excise duty refund received by the assessee in the year under consideration is taxable receipt for the assessment year 2011-12 and directed the A.O. to pass the consequential order adding the central excise duty refund to the income.

3. Aggrieved by the order of the PCIT, the assessee is in appeal before this Tribunal. During the appeal hearing, Ld. A.R. brought the various facts to our notice leading to excise duty refund to the assessee as under:

i. The assessee is an individual engaged in the business of preparation and sale of betel nut. Initially, the assessee classified on 15.9.1995 the product under tariff heading 2107 'Betel nut powder known as Supari' and paid Central excise duty at applicable rate. Later, on 17.9.1997, the assessee filed a declaration for classification of the product under tariff heading 0801. The Asst. Commissioner of Income Tax, Central Excise vide his order dated 14.10.1988 rejected the contention of the assessee and held that the product is rightly classified under tariff heading 2107.

ii. Assessee went on appeal before the Commissioner of Customs and Central Excise and the Ld. Commissioner vide order dated 6.5.2004 set aside the order passed by the Asst. Commissioner and held that the assessee is entitled for consequential relief. The assessee paid excise duty under protest from 25.7.1997 to 10.5.2004 and stopped payment of duty w.e.f. 11.5.2004.

iii. The Hon'ble CESTAT vide order dated 12.4.2005 restored the order of the Asst. Commissioner and this order was upheld by the Hon'ble A.P. High Court vide order dated 15.9.2005. However, vide order dated 19.3.2007, the Hon'ble Supreme Court reversed

the order of the Hon'ble High Court and CESTAT and upheld the order of the Commissioner, Customs and Central Excise. The review petition filed by the revenue was also dismissed on 19.3.2009.

iv. Vide application dated 7.5.2008, the assessee requested for refund of excise duty paid under protest. The assessee requested for refund of ₹ 32,03,97,583/- consisting of ₹ 27, 83,24,027/- towards duty paid by cash and ₹ 4,46,35,804/- towards duty paid through Modvat credit.

v. The Dy. Commissioner of Customs, Central Excise vide his order dated 29.4.2010 held that the assessee is otherwise eligible for refund but they are not entitled for refund since the assessee has not passed on the duty burden to the tax payers, therefore, he ordered that the amount shall be credited to consumer welfare fund established u/s 12C of the Central Excise Act, 1944.

vi. Vide order dated 6.8.2010, the Commissioner held that the assessee is entitled for refund of ₹ 27,82,86,041/- being paid through PLA. This order was upheld by CESTAT vide order dated 7.2.2011 and they have ordered for the interest as well. In pursuance of the order of the CESTAT, the assessee received the

refund during the financial year 2010-11 relevant to the assessment year 2011-12 and sum of ₹ 32,06,00,767/- being the refund of the duty amounting to ₹ 27,82,86,041/- and interest thereon.

vii. The assessee kept this amount as a liability in the books of account as the dispute regarding whether the assessee is entitled for refund or not has not attained finality in as much as the revenue preferred further appeal to the Hon'ble High Court of A.P.

viii. The order of the CESTAT was upheld by the Hon'ble High Court vide order dated 11.8.2011 and the SLP filed by the revenue stood dismissed by the Hon'ble Supreme Court on 27.2.2012.

ix. After communication of the order of the Hon'ble Supreme Court in April, 2012, the assessee transferred in to the profit and loss account, the amount shown initially as liability in the books of accounts.

4. The Ld. A.R. during the appeal hearing argued that the assessee filed its return of income for the assessment year 2011-12 on 30.9.2011 admitting total income of ₹ 9,07,99,870/- and the total tax including interest paid by the assessee was ₹ 2,83,34,307/-. In the financial

statement forming part of the return of income, the assessee had disclosed an amount of ₹ 32,06,00,767/- received as payable to CBEC and the assessee had enclosed the copy in paper book page No.6 in the balance sheet.

5. The case of the assessee was taken up for scrutiny and during the assessment proceedings, the A.O. issued notice u/s 142(1) of the Act on 19.7.2013 and then the A.O. asked the complete details with regard to liabilities in the balance sheet. The assessment was duly completed after examination of the information filed by the assessee. Hence, the assessee argued that since the information was disclosed in the return of income in the balance sheet and the A.O. has completed assessment after verification of the books of accounts and complete information filed by the assessee, the A.O. has considered the issue, hence, there is no error committed by the A.O. for revising the proceedings u/s 143(3) of the Act.

6. The assessee had already admitted the said receipt for the assessment year 2013-14 immediately after crystalisation of the liability. When the case was picked up for revision u/s 263 of the Act, the assessee had already admitted the income for the assessment year 2013-14 and paid the taxes. Therefore, there is no tax effect and the

incidence is tax neutral, hence, argued that assessing officer was justified in accepting the contention of the assessee that the amount received during the financial year 2010-11 was in the nature of liability and the same assumed the character of income only in the year 2012-13 relevant to the A.Y. 2013-14.

The Ld. A.R. further submitted that the Ld Principal Commissioner of Income Tax is not correct in placing reliance in the case of Polyflex (I) Ltd. (supra) of Hon'ble Supreme Court. The issue in the Polyflex (I) Ltd. is only whether the excise duty refund was assessable to tax u/s 41(1) of the Act. In the assessee's case, the issue is not limited to the receipt of Central excise duty refund but it is attached with the entitlement of refund. The Asst. Commissioner has passed an order in the case of assessee stating that the refund should go to the consumer welfare fund. Though the refund was issued in 2010-11, the issue with regard to the entitlement of refund whether it should go to consumer welfare fund or to the assessee was in dispute till such time, the matter was finally settled by Hon'ble Supreme Court. In the case of Polyflex (I) Ltd. (supra), the issue with regard to the crediting of the central excise duty refund to consumer welfare fund is not involved. Hence, argued that the facts of the Hon'ble Supreme Court are not applicable to the

assessee's case. Further, the Ld. A.R. submitted that the assessee had already admitted the income during the financial year 2012-13, relevant to the assessment year 2013-14. By taking up the case for revision u/s 263 of the Act, the PCIT has directed the A.O. to tax the central excise refund but no direction was given for the assessment year 2013-14 in which the assessee had already admitted the income, which amounts to double taxation of the same amount twice, once in the assessment year 2011-12 and second time in the assessment year 2013-14. The revision sought to be made by the Commissioner of Income Tax is revenue neutral. The income of the assessee both for 2011-12 and 2013-14 is liable to be taxed at the maximum marginal rate and as such tax liability in respect of refund of excise duty is marginal whether it is assessment for the assessment year 2011-12 or 2013-14. The assessee also relied on the decisions of CIT Vs. Triveni Engineering Industries Ltd. 336 ITR 374, CIT Vs. Aditya Builders 378 ITR 75 (Bom) and CIT Vs. Excel Industries (2013) 358 ITR 285 (SC).

7. On the other hand, the Ld. D.R. relied on the orders of the Commissioner of Income Tax passed u/s 263 of the Act and argued that the Commissioner of Income Tax has rightly directed the A.O. to tax the Central excise refund and there is no mistake in the order of the

Commissioner of Income Tax, accordingly, requested to uphold the order of the Ld. PCIT.

8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee had received the refund of ₹ 32,06,00,767/- during the financial year 2010-11 relevant to the assessment year 2011-12 in pursuance of the order of CESTAT. The Asst. Commissioner of Central Excise passed the order on 29.4.2010 holding that the assessee is otherwise eligible for refund but the assessee is not entitled to the refund since the assessee has not passed on the duty burden to the tax payers. Therefore, the Dy. Commissioner of Customs and Central Excise has ordered that the amount should be credited to the consumer welfare fund established u/s 12C of the Central Excise, 1944,hence, the dispute is not settled with the order of the CESTAT and the same is attached with the liability to pay the same to Consumer welfare fund. Since the revenue has preferred the appeal before the Hon'ble High Court of Andhra Pradesh and subsequently agitated the matter before the Hon'ble Supreme Court the dispute with regard to the entitlement of refund remained unsettled and continued till the matter was settled by Hon'ble Supreme Court in April, 2012 relevant to the assessment year

2013-14. The assessee has transferred the central excise duty immediately to the income account on receipt of the Hon'ble Supreme Court order and paid the taxes. Thus, facts of the assessee's case are different from the decision of Hon'ble Supreme Court in the case of Polyflex (I) Pvt. Ltd. (supra) relied upon by the Ld. PCIT. In the assessee's case, the issue with regard to the entitlement of refund was set at rest by Hon'ble Supreme Court by an order in Feb'12 which was received by the assessee in April, 2012 and immediately on receipt of order of the Supreme Court, the Ld. A.R. stated that the assessee has reversed the liability shown under the head CBEC to the income account and accordingly offered to tax. In the facts and circumstances unless Hon'ble Supreme Court settles the issue, the assessee cannot become the absolute owner to offer the same as income. The income accrues to the assessee when it is available to the assessee unconditionally without any further liability attached with the same. Till such time issue is settled by the Hon'ble Supreme Court, it is not clear whether the assessee is entitled for refund or the assessee has to pass on the benefit to the consumer welfare fund. Therefore, we are of the considered opinion that the assessee becomes absolute owner of the receipt of central excise duty refund only after rendering the judgement by the Hon'ble Supreme Court. Hon'ble Bombay High Court with regard to the

year of allowability of expenditure in the case of Triveni Industries Engineering Limited (2011) 336 ITR 374 (Bom) relied upon by the assessee held as under:

> ***"11.*** *After considering the submissions of the counsel on the either side, in the given facts, we are prima fade of the view that arguments of the learned counsel for the assessee to prevail. The learned counsel for the Revenue may be correct in stating the proposition of law, generally. No doubt, unless the expenditure is actually incurred or it accrued in the relevant year, it would not be allowed as deduction. Such a liability has to be in praesenti. However, at the same time, in the given scenario where in relation to the project works undertaken by the assessee, completed contract method of accounting is followed, which is consistent with the accounting standards and these accounting standards also lay down the norms indicating the particular point of time when the provisions for all known liabilities and losses has to be made, the making of such a provision by the assessee appears to be justified more so when the assessee had recognized gain as well on such project during this year itself. This appears to be in consonance with principle of matching cost and revenue as well. However, in the projected scenario of this case, after taking stock of the entire situation, we are of the opinion that it is not necessary to conclusively answer the aforesaid questions formulated. It is because of the reason that we find that the entire exercise is revenue neutral. It may be pointed out that it is a matter of record that against the provision of Rs. 139 lakhs, the assessee had to actually incur expenditure of Rs. 218.03 lakhs, i.e., more than the provision made. It is undisputed that the expenditure incurred by the assessee on the project is admissible deduction. The only dispute that the Revenue seeks to raise is regarding the year of allowability of expenditure. Considering that the assessee is a company assessed at uniform rate of tax, the entire exercise of seeking to disturb the year of allowability of expenditure is, in any case, revenue neutral.*
>
> *12. We are reminded of the classic observations made by Justice Tendolker in the case of the CIT vs. vs. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Born), which reads as under:*
>
> *"We have often wondered why the IT authorities, in a matter such as this where the deduction is obviously a permissible deduction under the IT Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of*

bonus was granted in the asst. yr. 1952-53 or in the asessment year corresponding to the accounting year 1952, that is in the asst. yr. 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."

13. The aforesaid observations of the Bombay High Court were reiterated by this Court in the case of CIT vs. Shri Ram Pistons & Rings Ltd. (2008) 220 CTR (Del) 404, as under:

"Finally, we may only mention what has been articulated by the Bombay High Court in CIT vs. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Born) as follows :.....

In the reference that is before us there is no doubt that the assessee had incurred an expenditure. The only dispute is regarding the date on which the liability had crystallized. It appears that there was no change in the rate of tax for the asst. yr. 1983-84 with which we are concerned. The question, therefore, is only with regard to the year of deduction and it is a pity that all of us have to expand so much time and energy only to determine the year of taxability of the amount."

14. In such circumstances, we are of the view that insofar as present appeal is concerned, substantial questions of law that need to be answered do not arise. We, therefore, dismiss this appeal on this ground alone."

9. Similarly, Hon'ble Bombay High Court in the case of Aditya Builders (2015) 378 ITR 75 with regard to the dispute the year of permissible deductions held as under:

"9. So far as the alternative submission made by Mr. Malhotra viz, the Link View Project should have also been brought to tax under the Project Completion Method is concerned, the same does not arise for our consideration as Commissioner in his order dated 27 March 2012 has specifically directed adoption of Percentage Completion Method of accounting to subject the income arising on Link Corner Project to tax. In any view of the matter, the profits on Link Corner Project has been offered to tax and accepted in the subsequent Assessment Year i.e. A. Y. 2008-09. In fact, this Court in CIT Vs. Nagri Mills Co. Ltd. (1958) 33 ITR

681 (Born), has observed as under:
"We have often wondered why the IT authorities, in a matter such as this where the deduction is obviously a permissible deduction under the IT Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the asst. yr. 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the asst. yr. 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."

10. Accordingly, the questions raised for our consideration do not give rise to any substantial question of law."

10. Hon'ble Supreme Court in the case of CIT Vs. Excel Industries Ltd. (2013) 358 ITR 295 (SC) held that when the rate of tax remained the same in the present assessment year as well as the subsequent assessment year, the revenue has not been deprived of any tax. For the sake of convenience, we extract relevant paragraph of the Hon'ble Supreme Court which reads as under:

32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."

11. Further, as per order of the Dy. Commissioner, Customs, the assessee is not entitled for refund, hence, the refund received in pursuance of the order of the CESTAT even if be treated as income u/s 41(1) of the Act, still the net income would be zero since the liability lies to the assessee with the consumer welfare fund subsisted till the Hon'ble Supreme court settled the issue. Hence, the assessee requires to transfer this amount to consumer welfare fund but not to the income account of the assessee. Therefore, receipt held by the assessee is in fiduciary capacity till such time the issue is finally settled at the level of Hon'ble Supreme Court and he cannot be held to be owner of the asset.

Therefore, we hold that in view of the peculiar circumstances exist in the assessee's case by virtue of the order fo the Dy. Commissioner of Customs and Central Excise with regard to the entitlement of the Central Excise refund the same is crystalised in the year of final settlement by Hon'ble Supreme Court, accordingly we hold that the assessee has rightly offered the central excise refund as income for the assessment year 2013-14 and the order of the Commissioner of Income Tax is unsustainable. Accordingly, we

set aside the order of the Principal Commissioner of Income Tax passed u/s 263 of the act and allow the appeal of the assessee.

ITA No.239/Vizag/2017:

12. The assessee filed return of income in this case for the assessment year 2011-12 on 30.9.2011 and the assessment was completed u/s 143(3) of the Act by an order dated 5.3.2014 on total income of ₹ 9,16,30,599/-. The Principal Commissioner of Income Tax has taken up the case for revision u/s 263 of the Act and observed that the assessee had received sum of ₹ 32,06,00,767/- as Central Excise duty refund but not offered the same as income in the year 2011-12. Hence, the Principal Commissioner of Income Tax has taken up the case for revision u/s 263 of the Act and directed the A.O. to assess the receipt of ₹ 32,06,00,767/- for the assessment year 2011-12 and to pass the consequential order. Accordingly, the A.O. passed the consequential order dated 22.6.2015 on total income of ₹ 41,22,31,357/-. In the reassessment, the A.O. made the addition of ₹ 32,06,00,767/- relating to central excise duty refund.

13. Aggrieved by the order of the A.O., the assessee filed appeal before the CIT(A) and the Ld. CIT(A) allowed the appeal of the assessee.

14. Aggrieved by the order of the CIT(A), the revenue is in appeal before this Tribunal challenging the relief allowed by the Ld. CIT(A). We have adjudicated the assessee's appeal in respect of the order passed u/s 263 of the Act and allowed the appeal of the assessee. Hence, the appeal filed by the revenue has become infructuous and the same is dismissed.

15. In the result, the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

The above order was pronounced in the open court on 16th Mar'18.

Sd/-	Sd/-
(वी. दुर्गाराव)	**(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam:
दिनांक /Dated : 16.03.2018
VG/SPS
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – Grandhi Venkata Satya Lakshmi Kantha Rao, L/R of Grandhi Subba Rao, D.No.25-8-53/2, Sampath Nagar, Guntur-523 002.
2. प्रत्यार्थी / The Respondent – The Addl. CIT, Range-1, Guntur
3. आयकर आयुक्त / The Principal CIT, Guntur
4. आयकर आयुक्त (अपील) / The CIT (A), Guntur
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम **/** DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM