IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

Before Sh. Aakash Deep Jain, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 6153/Del/2017 : Asstt. Year : 2014-15

Narayan Industries, 504-A, Nagarjuna Apartments, Chilla Regulator, Mayur Vihar, Phase-1, New Delhi	Vs	ACIT, Circle-60(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. ADPPC2225D		

Assessee by : Sh. Rohit Jain, Adv. &
Ms. Manish Sharma, Adv.
Revenue by : Sh. N. K. Bansal, Sr. DR

Date of Hearing: 12.05.2022		**Date of Pronouncement: 30.05.2022**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Assessee against the order of the ld. CIT(A)-37, New Delhi dated 28.07.2017.

2. The Assessee has raised the following additional grounds of appeal:-

"Re: Request for admission of additional grounds of appeal - Section 253 of the Income Tax Act, 1961 read with Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963

The applicant craves leave to raise the following by way of additional grounds of appeal:

"1.2. That on the facts and circumstances of the case and in law, consideration received from sale of Focus License under the Focus Product Scheme (FPS) erroneously offered to tax, 'being in

the nature of a Capital receipt not liable to tax, should be directed to be excluded from the taxable income of the appellant. "

The brief facts giving rise to the above additional ground of appeal is as under:

In order to promote the exports, development of certain industries, employment generation, etc., the Government under the Foreign Trade Policy, provides subsidies and incentives to industries on the basis of different parameters set out in the respective schemes declared. The purpose of subsidy/ incentive schemes varies from development of backward areas to development of a lagging industry or to provide support to existing industries in difficult times of their operations, Whenever a scheme is declared, the purpose of the subsidy/incentive is set out in clear terms in rhc scheme itself.

The Government of India in its Foreign Trade Policy 2004 started Special Focus Initiatives with an object to continuously increase out percentage share of global trade and expanding employment opportunities especially in rural and semi-urban areas. Under the mother policy of Special Focus Initiative certain special focus initiatives for market diversification, technological up gradations, support to status holders were Identified for which specific schemes like Focus Market Scheme (FMS), Focus Product Scheme (FPS). Technological Upgradation Fund Scheme (TUF5), Status Holders Incentive Scheme (SHIS) were started.

In Foreign Trade Policy 2006, under the Special Focus Initiative, Focus Product Scheme (FPS) was introduced with an objective to incentivize export of such products which have high employment intensity in rural .and semi-urban areas, so as to offset the inherent infrastructure inefficiencies and other associated costs involved in marketing of these products. The scheme was launched in 2006 and subsequently, several amendments were made to the scheme by adding more products eligible for export incentives under the scheme and giving different rate of duty credit scrip concessions.

As per the policy, in order to achieve the underlying objective of the FPS, Duty Credit Scrip at prescribed percentage of FOB value of exports is issued to the exporter. Duty credit scrip is a license to import commodities in a duty free manner for the scrip value. The face value of scrip so issued is intended to offset/ reimburse various costs involved in manufacturing/ marketing of the products exported outside India. The exporter en-cashes such scrip by selling the same in the

market, which is either sold at profit or at discount vis-a-vis the face value of the scrip.

The applicant, during the year under consideration, as per the regulations of the abovementioned (FPS) scheme received scrips/ license having face value of Rs.2,00,65,667 which were sold for a consideration amounting to Rs, 1,91,78,974 which was duly credited to the profit and loss account. The appellant under misconception of law, offered the incentive for taxation.

in this regard, it is submitted that the taxation of incentive/ subsidy by whatever name called, is determined by the purpose for which the same is granted and not the form / mode / manner in which the incentive is received/ disbursed. The law in this regard fairly well settled and reference may be- made to the following decisions:

- *Salmey Steel and Press Works vs. CIT: 228 ITR 253 (SC)*
- *CIT vs. Ponni Sugar and Chemicals Limited. 306 ITR 392 (SC)*
- *CIT vs. Chaphalkar Brothers: 400 ITR 279 (SC)*

The purpose for which the incentives have been given, it is submitted, can be gauged from the objects and reasons behind introduction of the Policy. If the purpose of the incentive was to enable the assessee to run the business more profitably, then, the receipt is on revenue account. If the object of the assistance was to enable the assesses to set up a new unit or to .expand the existing units, then the receipt was on the capital account.

In the present case, the incentive in the form of Focus License was granted primarily for the "purpose' of to promoting export of products which have high export intensity/ employment potential, so as to offset infrastructural inefficiencies and other associated costs involved in marketing of these products and hence constituted capital receipt not liable to tax under normal provisions of the Act.

In the following decisions, the Tribunal has been pleased to hold incentive received under FPS to be in the nature of a capital receipt not liable to tax:

- *PCT vs. Nitin Spinners Ltd: 1TA 31/2019 (Raj.)*
- *CIT vs. Sham Lai Bansal: 200 Taxman 14 (P&H)*
- *Suvidha Spiners Pvt Ltd vs. DCIT: 1TA Nos.65 and 66/Jodh/2018 (Jodhpur Trib.)*
- *Eastman Exports Global Clothing Pvt Ltd vs. JCIT: 2016-ITL-4113 (Chennai Trib.)*

The additional ground of appeal is being raised on the applicant being recently advised of the correct legal position and the omission to raise the aforesaid additional ground of appeal earlier was neither willful nor deliberate. Further, the aforesaid additional ground raises purely a legal issue regarding the character of the incentive received, which has to be decided on the basis of the purpose set out in the Scheme, which is a government/ gazette/ notified public document, available in public domain, The adjudication of the said ground, therefore, do not require any investigation into fresh facts; relevant being already on record.

For the aforesaid reasons, it is respectfully prayed that the additional ground may kindly be admitted and adjudicated on merits.

Prayer:

In view of the above, the additional grounds of appeal calls for being admitted and adjudicated on merits by virtue of the discretion vested in your Honour under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 and the decision of the Supreme Court in the case of National Thermal Power co. Ltd Vs. CIT 229 ITR 383 as also the decision in the case of Jute Corporation of India v. C1T: 187 ITR 688.

3. Admission of the additional ground has been opposed in principle by the ld. DR. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from

raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand

P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

4. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

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

"1. That the CIT(A) erred on facts and in law in confirming the action of the assessing officer in denying deduction under section 80-IC of the Income Tax Act, 1961 ("the Act") on the consideration received on sale of Focus Scrip/ License amounting to Rs. 1,91.78,974 holding that the same is not derived from industrial undertaking.

1.1 That the CIT(A) erred on facts and in law in not appreciating that the consideration received on sale of Focus Scrip/ License was towards reimbursement of cost of manufacture or sale of products/ goods forming part of profit and gains derived from the business of eligible undertaking and therefore, admissible for deduction under section 80IC of the Act.

2. That the CIT(A) erred on facts and in law in confirming the action of the assessing officer in

denying deduction under section 80-IC of the Act on the amount of duty drawback of Rs. 1,52,07,079 holding that the same is not derived from the industrial undertaking.

3. That the CIT(A) erred on facts and in law in not admitting and disregarding the additional evidence placed on record substantiating the contentions raised by the appellant.

4. That the CIT(A) erred on facts and in law in confirming the action of the assessing officer in denying deduction under section 80-IC of the Act on interest on KDR amounting to Rs.6,58,683.

5. That the CIT(A) erred on facts and in law in erred on facts and in law in confirming imposition of interest under sections 234B and 234C of the Act."

6. The appellant is a partnership firm engaged in the business of manufacturing and export of home furnishings item like, quilts, bedspread, cushion cover, etc. In the return, the appellant claimed deduction under section 80-IC of the Income-tax Act, 1961 ('the Act') in respect of profits derived from its manufacturing units in the State of Uttarakhand.

Focus Products Scheme:

7. During the year under consideration, the assessee received consideration amounting to Rs.1,91,78,974/- from sale of Focus Scrip/ License received under "Focus Products Scheme" under the Foreign Trade Policy which was claimed as deduction under section 80-IC of the Act.

8. In the assessment order, the Assessing Officer denied deduction of income received from sale of FPS on the ground that such income is not related to manufacture or sale of the products

of the undertaking and is only related to a post manufacturing event, which is not eligible for deduction under section 80-IC of the Act as per the decision of the Hon'ble Supreme Court in the case of Sterling Foods 237 ITR 579 (SC).

9. On appeal, the ld. CIT(A), vide order dated 28.07.2017 upheld the addition made by the assessing officer and held that on perusal of the policy it cannot be upheld that the consideration received on sale of focus scrip/ License is a reimbursement of cost incurred since the scrip is available only post export. It was further held that consideration received on sale of focus scrip / license cannot be considered as profits and gains derived from industrial undertaking by placing reliance on the judgment of Hon'ble Supreme Court in the case of Liberty India Ltd 317 ITR 218 (SC).

10. We find that the following case, similar issue of subsidy raised for the first time before the Tribunal, was admitted and duly adjudicated by the Tribunal:

- Shree Balaji Alloys vs. ITO 127 TTJ 129 (Asr. ITAT)- Confirmed by Supreme Court in 287 CTR 459 (SC)
- Indo Java & Co. vs. IAC 30 ITD 161 (Del ITAT)(SB)
- Crystal Crop Protection Pvt. Ltd. vs. DCIT in ITA No. 1539 of 2016 (Del. ITAT)
- Tripti Manthol Inds vs. ITO in ITA No. 58 of 2011 (Asr. ITAT)

11. The Government of India in its Foreign Trade Policy 2004 started Special Focus Initiatives with an object to continuously increase our percentage share of global trade and expanding employment opportunities especially in rural and semi-urban

areas. Under the policy of Special Focus Initiative certain special focus initiatives for market diversification, technological upgradation, support to status holders were identified for which specific schemes like Focus Market Scheme (FMS), Focus Product Scheme (FPS), Technological Upgradation Fund Scheme (TUFS), Status Holders Incentive Scheme (SHIS) were started.

12. In Foreign Trade Policy 2006, under the Special Focus Initiatives, Focus Product Scheme (FPS) was introduced with an objective to incentivize export of such products which have high employment intensity in rural and semi-urban areas, so as to offset the inherent infrastructure inefficiencies and other associated costs involved in marketing of these products. The scheme was launched in 2006 and subsequently, several amendments were made to the scheme by adding more products eligible for export incentives under the scheme and giving different rate of duty credit scrip concessions.

13. Focus Product Scheme (FPS) was first introduced with the objective to incentivize export of such products which have high export intensity/ employment potential, so as to offset infrastructure inefficiencies and other associated costs involved in marketing of these products. The scheme was launched in 2006 and subsequently, several amendments were made to the scheme by adding more products eligible for export incentives under the scheme and giving different rate of duty credit scrip concessions.

14. The amount of incentive received under Technology Upgradation Fund Scheme (TUFS) was considered as a Revenue subsidy in the following cases:

- CIT vs. Shyam Lal Bansal 200 Taxman 14 (P&H HC)
- CIT vs. Gloster Jute Mills Ltd. 416 ITR 458 (Cal. HC)
- Jai Bhagwan Oil & Flour Mills vs. Union of India (2009) 14 SCC 63
- Shiv Shakti Flour Mills (P.) Ltd vs. CIT 390 ITR 346 (Gauhati HC)
- DCIT vs. Sutlej Textiles & Industries Ltd in ITA 5142/Del/2013 (AY 2009-10)
- DCIT vs. Sutlej Textiles and Industries Ltd: ITA 337/Del/2015 (AY 2011-12)
- DCIT v. Sutlej Textiles and Industries Ltd.: 44 CCH 287 (Kol. ITAT)
- DCIT vs. BSL Ltd.: 183 ITD 675 (Kol Trib.)
- DCIT vs. JK Cement Ltd.: ITA 499/Lkw/2010 (Lucknow Trib.)
- Sipca India (P.) Ltd. vs. DCIT: 186 TTJ 289 (Kol Trib.)
- DCIT vs. Gloster Jute Mills Ltd. 33 ITR (Trib) 322 (Kol. ITAT)
- Suvidha Spiners Pvt. Ltd. vs. DCIT: ITA Nos. 65 & 66/Jodh/2018 (Jodhpur Tribunal)
- Crystal Crop Protection Pvt. Ltd. vs. DCIT: ITA No. 1539 of 2016 (Del. ITAT)

15. In light of the aforesaid, applying the 'purpose test' laid down by the Hon'ble Supreme Court in various decisions, particularly Sahney Steel (supra) and Ponni Sugars (supra) and also the direct judicial precedents referred supra, we hold that Focus Products Incentive in the nature of capital receipt not liable to tax under the provisions of the Income Tax Act, 1961.

Duty Draw Back:

16. During the year under consideration, the assessee received duty drawback amounting to Rs. 1,52,07,079/-, which is in the nature of refund granted under section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944 to refund the component of custom duty and excise duty paid on materials used in manufacture of exported goods.

17. The Assessing Officer held that the profits of the industrial undertaking included the amount of duty drawback, which is not eligible for deduction under section 80-IC of the Act as per the decision of the Hon'ble Supreme Court in the case of Liberty India Limited317 ITR 218 (SC). The ld. CIT(A) confirmed the action of the Assessing Officer.

18. Before us, the ld. AR at the outset submitted that no surplus/ profit accrued to the appellant as a result of receipt of the duty drawback since the said amount was received merely as reimbursement of duty paid as part of purchase price of various materials procured for manufacturing purposes. The submissions of the ld. AR are as under:

"Reference was made to the decision of Hon'ble Supreme Court in the case of Liberty India (supra). In para 17 of the judgment, their Lordships recognized that section 75 of the Customs Act, 1962 and section 37 of the Central Excise Act, 1944, empower Government of India to provide for repayment of customs and excise duty paid by an assessee. The Court also recognized that duty drawback is fundamentally in the nature of refund of average amount of duty paid on materials of any particular class or description of goods used in the manufacture of export goods of specified class, though such refund is not arithmetically equal to customs duty or central excise duty actually paid by an individual importer-cum-manufacturer. Therefore, the Court concluded, "profits derived by wav of such incentives do not fall within the expression "profits derived from industrial undertaking" in Section 80-IB." (Refer para 17 of the Judgment).

To reiterate, it is emphasized that though receipt on account of duty drawback is in principle, not eligible for deduction under section 80-IB of the Act but only profits, if any derived by way of such incentive is required to be excluded for computing eligible profits and not the gross amount of incentives.

The aforesaid contention is, fortified by the provisions of section 28(iiid) of the Act, which separately covers "profits from transfer of DEPB" and not the gross amount of DEPB credits/ incentives and the decision of the Hon'ble Supreme Court in the case of Topman Exports elaborately discussed supra.

To summarise, the Hon'ble Apex Court held that incentives by way of DEPB credits has two components, firstly face value of DEPB credit which is in the nature of assistance given to an exporter to pay customs duty on its imports; and secondly, the profits which would be any amount realized by the assessee over and above the face value of DEPB credits.

On a harmonious reading of the decisions of the Supreme Court in the case of Liberty India (supra) and Topman Exports (supra), it must be appreciated that for the purpose of computing profits eligible for deduction under section 80-IC of the Act, only "profits derived by wav of such incentives" are required to be excluded and not the gross value of such incentives.

The aforesaid contention of the appellant is supported by Circular No.39 of 2016 dated 29.11.2016 issued by the CBDT after the decision of the Hon'ble Supreme Court in the case of CIT v. Meghalaya Steels Limited: 383 ITR 217 (SC) (discussed supra in Ground of Appeal Nos. 1 to 1.2).

The fundamental principle that emerges from the aforesaid decisions and the CBDT circular, it is respectfully submitted, is that reimbursement of any cost incurred in the course of manufacture of eligible goods/ product does not inherently result in any separate species of profit/ income, but is merely in the nature of reimbursement/ refund of the cost so incurred and such reimbursement is

therefore, not required to be excluded from the eligible profits for computing deduction under section 80-IB/80-IC of the Act.

It is only as a matter of presentation as per Generally Accepted Accounting Principles, that duty drawback and other similar incentives are required to be separately disclosed on the credit side of the Profit & Loss Account. That, however, does not change the fundamental character of the said amount, being in the nature of refund of duty element embedded in the cost of material purchased for manufacture of goods."

19. Heard the arguments of both the parties and perused the material available on record.

20. We have gone through the judgment of Hon'ble Supreme Court in the case of CIT Vs. Meghalaya Steel Ltd. which dealt with transport subsidy, interest subsidy, power subsidy, insurance subsidy and treating them as profits derived from business. The difference between "*profit attributable to*" and "*profits derived from*" a business are examined in detail. It said ,

21. A series of decisions have made a distinction between "profit attributable to" and "profit derived from" a business.

22. In Cambay Electric Supply Industrial Co. Ltd. v CIT [1978] 113 ITR 84 (SC), the Court held that since an expression of wider import had been used, namely "attributable to" instead of "derived from", the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity. In short, a step removed from the business of the industrial undertaking would also be subsumed within the meaning of the expression "attributable to".

23. The judgment in CIT vs. Sterling Foods, 104 Taxman 204 (SC) laid down a very important test in order to determine whether profits and gains

are derived from business of an industrial undertaking. There should be a direct nexus between such profits and gains and the industrial undertaking or business. Such nexus cannot be only incidental. On an application of the aforesaid test to four subsidies mentioned the Hon’ble court held that there was a direct nexus between profits and gains of the industrial undertaking or business, and reimbursement of such subsidies.

24. The Hon’ble Court enunciated that what is to be seen is whether the profits and gains are derived from the business. It said so long as profits and gains emanate directly from the business itself, the fact that the immediate source of the subsidies is the Government would make no difference, as it cannot be disputed that the said subsidies are only in order to reimburse, wholly or partially, costs actually incurred by the assessee in the manufacturing and selling of its products. The "profits and gains" spoken of in provisions-in-question have reference to net profit. And net profit can only be calculated by deducting from the sale price of an article all elements of cost which go into manufacturing or selling it. Thus understood, it is clear that profits and gains are derived from the business of the assessee, namely profits arrived at after deducting manufacturing cost and selling costs reimbursed to the assessee by the Government concerned.

25. In CIT vs. Sterling Foods [1999] 104 Taxman 204, on the issue, whether income derived by the assessee by sale of import entitlements on export being made, was profit and gain derived from the respondent's industrial undertaking under Section 80HH of the Indian Income Tax Act. This Court referred to the judgment in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) and emphasized the difference between the wider expression "attributable to" as contrasted with "derived from". The Hon’ble court held that the industrial undertaking itself had to be the source of the

profit. The business of the industrial undertaking had directly to yield that profit. The Hon'ble Court in conclusion held as under:

"We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in the circumstances, only be said to be the Export Promotion Scheme of the Central Govt. whereunder the export entitlements become available. There must be for the application of the words "derived from", a direct nexus between the profits and gains and the industrial undertaking. In the instant case the nexus is not direct but only incidental. The industrial undertaking exports processed sea food. By reason of such export, the Export Promotion Scheme applies. Thereunder, the assessee is entitled to import entitlements, which it can sell. The sale consideration therefrom cannot, in our view, be held to constitute a profit and gain derived from the assessees' industrial undertaking." (Para 13)

26. In Pandian Chemicals Ltd. vs. CIT [2003] 262 ITR 278/129 Taxman 539 (SC), the Hon'ble Court dealt with the claim for a deduction under Section 80HH of the Act. The question before the Court was as to whether interest earned on a deposit made with the Electricity Board for the supply of electricity to the appellant's industrial undertaking should be treated as income derived from the industrial undertaking under Section 80HH. It was held that although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The derivation of profits on the deposit made with the Electricity Board could not be said to flow directly from the industrial undertaking itself.

27. In the case of Liberty India's the question was whether DEPB credit or Duty drawback receipt could be said to be in respect of profits and gains

derived from an eligible business. The Hon'ble Court first made the distinction between "attributable to" and "derived from" stating that the latter expression is narrower in connotation as compared to the former. The Hon'ble Court held that by using the expression "derived from" Parliament intended to cover sources not beyond the first degree. It was held as under:

"34. On an analysis of Sections 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-section (2), would be entitled to deduction under sub-section (1) only to the extent of profits derived from such industrial undertaking after specified date(s). Hence, apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a specified percentage of profits. This is the importance of the words "derived from industrial undertaking" as against "profits attributable to industrial undertaking".

35. DEPB is an incentive. It is given under Duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object behind DEPB is to neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw materials, components etc.. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per basic customs duty and special additional duty payable on such deemed imports.

36. Therefore, in our view, DEPB/Duty Drawback are incentives which flow from the Schemes framed by Central Government or from S. 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business under Section 80-IB. They belong to the category of ancillary profits of such Undertakings."

28. The Hon'ble Court has held that there should be a direct nexus between such profits and gains and the industrial undertaking or business. Such nexus cannot be only incidental. In the instant case by reason of an export promotion scheme, an assessee was entitled to import entitlements which it could thereafter sell. Hence, the same could not be said to be directly from profits and gains by the industrial undertaking but only attributable to such industrial undertaking inasmuch as such import entitlements did not relate to manufacture or sale of the products of the undertaking, but related only to an event which was post-manufacture namely, export.

29. The judgment of Hon'ble Supreme Court in the case of Liberty India v. Commissioner of Income Tax, reported in (2009) 317 ITR 218 (SC) wherein it was held that subsidy by way of customs duty draw back could not be treated as a profit derived from the industrial undertaking is very specific to the issue of duty draw back. The judgment of the Apex Court in the case of Liberty India (supra) was in relation to the subsidy arising out of customs draw back and duty Entitlement Pass-book Scheme (DEPB) similar to the facts of the instant case. Hence, keeping in view the judgment of the Hon'ble Apex Court, we hereby affirm the order of the ld. CIT(A).

Interest on KDR:

30. Heard the arguments of both the parties and perused the material available on record.

31. During the relevant year, it was argued that in order to avail overdraft facility, the bank mandated pledge of fixed deposits. Against fixed deposits so pledged, overdraft limit is allowed to the extent of 90% of the amount of fixed deposit. Interest is charged on the overdraft facility is more than the interest allowed on the fixed deposits with the bank.

32. In the present case, the appellant, in order to avail overdraft facility, made fixed deposits of Rs.22.86 Lakhs, out of the business funds available with the appellant. The said fixed deposits were pledged with the bank for availing overdraft facility. Interest on FDR was granted @ 9% p.a., whereas interest on overdraft facility was charged by the bank @11% p.a.

33. The appellant received interest of Rs.6,58,683/- and incurred bank interest and commission charges of Rs.33,14,931/- which included interest on overdraft facility. It was argued that interest expenditure on overdraft facility availed exceeded interest income on fixed deposit pledged to avail such facility. There was, thus, no interest income effectively earned by the appellant and therefore, interest income was not required to be excluded for the purpose of computing profit eligible for deduction under section 80-IC of the Act.

34. It was argued that the issue as to whether gross interest or net interest has to be considered is no longer res-integra and it

has been held in the following decisions that only net interest has to be considered:

- ACG Associated Capsules (P.) Ltd. vs. CIT 343 ITR 89 (SC)
- Shri Ram Honda Power Equipments 289 ITR 475 (Del.)(approved by SC in [2012] 18 taxmann.com 137 (SC))
- CIT vs. Nectar Life Science Ltd. 203 Taxman 318 (Del.)
- CIT vs. Taj International Jewellers 335 ITR 144 (Del.)
- CIT vs. UK Bose 212 Taxman 399 (Del.)
- CIT vs. Paliwal Industries 222 Taxman 61 (P&H)
- CIT vs. Infosys Technologies Ltd 352 ITR 74 (Kam)
- CIT vs. Gokkuldas Exports 333 ITR 214 (Kar.)

35. After going through the entire issue, we hold that interest earned out of the fixed deposit made from the surplus funds being not connected to the manufacturing activity and do not form an integral part of the profits derived from industrial unit is not eligible for deduction. Interest is an unearned passive income derived out of non manufacturing activity.

36. Reliance is being placed on the judgment in the case of Pandian Chemicals Ltd. v. CIT [2003] 262 ITR 278/129 Taxman 539 (SC) wherein it was held that the question before the Court was as to whether interest earned on a deposit made with the Electricity Board for the supply of electricity to the assessee's industrial undertaking should be treated as income derived from the industrial undertaking under Section 80HH. The Hon'ble Court held that although electricity may be required for the purposes of the industrial undertaking, the deposit required for its supply is a step removed from the business of the industrial undertaking. The

derivation of profits on the deposit made with the Electricity Board could not be said to flow directly from the industrial undertaking itself. Captivating the same analogy of the Hon'ble Apex Court in the case of the assessee, the interest on the fixed deposits kept with the bank though may be required for the purpose of obtaining over draft facility, it can be said that it is a step removed from the business of the industrial undertaking. Hence, we hereby affirm the action of the ld. CIT(A).

37. In the result, the appeal of the assessee is partly allowed.
Order Pronounced in the Open Court on 30/06/2022.

Sd/-	Sd/-
(Aakash Deep Jain)	**(Dr. B. R. R. Kumar)**
Vice President	**Accountant Member**

Dated: 30/06/2022

Subodh Kumar, Sr. PS
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR