IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.854/Bang/2022
Assessment year : 2017-18

M/s. Menzies Aviation Bobba (Bangalore) Pvt. Ltd., Plot No.C-04 L, Cargo Terminal 1, Kempegowda International Airport, Bangalore – 560 300. **PAN: AAECM 6862D**	Vs.	The Assistant Commissioner of Income Tax, Circle 4(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Pavan Kumar, R S V S, Advocate
Respondent by	:	Shri K R Narayana, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	24.11.2022
Date of Pronouncement	:	.12.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is against the order of the CIT(Appeals), National Faceless Appeal Centre, Delhi [NFAC] dated 20.7.2022 for the assessment year 2017-18.

2. The assessee raised the following grounds:-

1. The order of the learned CIT(A), Income tax Department, National Faceless Appeal Centre (NFAC), Delhi is arbitrary,

against the provisions of law, judicial decisions and contrary to the facts of the case and is therefore unsustainable.

2. The learned CIT(A) erred in confirming the disallowance of Rs.3,13,43,633 U/s80IA of the I.T. Act made by the Assessing Officer, holding Business Income as Income from Other Sources, without providing any decision about the Head of Income.

3. The learned CIT(A) erred in confirming the disallowance of Rs.3,13,43,633 made by the Assessing Officer without appreciating that the income is assessable as Business Income and not as Income from Other Sources

4. The learned CIT(A) erred in holding that the Business Income of Rs.3,13,43,633 was not derived from the Eligible Business without giving any reasons

5. The learned CIT(A) erred in holding that the Business Income of Rs.3,13,43,633 was not derived from the Eligible Business when the direct nexus between the income and the Eligible Business was clearly established and is evident from the facts and circumstances of the Appellant

6. For the grounds stated above and for the grounds which may be permitted to be adduced at the time of hearing of the appeal it is prayed that the disallowance made in the assessment order be deleted and justice rendered.

3. The assessee is engaged in the business of providing cargo handling services to airlines and clearing, forwarding at Bangalore International Airport Ltd. [BIAL]. The assessee filed return of income for AY 2017-18 on 30.11.2017 declaring a total income of Rs.4,89,21,770 which was revised on 29.3.2019 declaring an income of Rs.4,89,93,460. The case was selected for scrutiny under CASS and a notice u/s. 143(2) was duly served on the assessee. The AO disallowed

a sum of Rs.36,68,95,134 claimed as a deduction u/s. 80IA while completing the assessment. Further the AO held that a sum of Rs.3,13,43,633 received as rental income by the assessee is liable to be taxed under the head 'income from other sources' and accordingly made an addition towards the same.

4. Aggrieved, the assessee filed appeal before the CIT(Appeals), who upheld the disallowances/additions. The assessee is in appeal before the Tribunal aggrieved by the order of the CIT(A).

5. The ld AR furnished a detailed written submission which is taken on record in page no.2 to 17 of paper book. The ld. AR submitted that assessee has been awarded the concession by BIAL to build and operate the cargo handling facility for a period of 15 years till 2023. The cargo terminal is a custodian under the Customs Act (pg. 97 of PB) and accordingly a customs bonded area for handling international and domestic cargo. He submitted that the terminal is an integrated facility for receipt, storage and transfer of inbound and outbound cargo. The assessee provides services to cargo agents, cargo handlers, airlines, banks, post office, etc. for which the assessee provided office space for smooth functioning of operations and quick handling of various documentations in the cargo terminal. It is also submitted that subletting is done in accordance with the terms agreed with BIAL which has a say in the same. Therefore, it is the submission of the ld. AR that rental income earned by the assessee is intrinsically connected

to the core business and is therefore derived from the cargo business. Accordingly, he prayed that the addition made treating the rental income as income from other sources is to be deleted.

6. Without prejudice, the ld. AR submitted that this is the 9th year of claim of deduction u/s. 80IA and in all the earlier years the revenue has accepted the rental income as part of the business income of the assessee and therefore it cannot change its stand for the year under consideration alone when there is no change in the facts. In this regard, reliance was placed on the decision of Hon'ble Karnataka High Court in the case of *CIT . Telco Construction Equipment Co. Ltd. [2021] 127 taxmann.com 488 (Kar)*.

7. The ld. AR also made an alternate plea that in case the income is to be treated as income from other sources, then the corresponding expenses relating to renting of the property should be allowed as a deduction.

8. The ld. DR drew our attention to the fact that the CIT(Appeals) has accepted the rental income as business income of the assessee. However, he has denied the benefit of deduction u/s. 80IA to the assessee on the ground that the rental income is not 'derived from' the business of the assessee. The ld. DR in this regard relied on the following decisions of the Supreme Court:-

(i) CIT v. Sterling Foods, [1999] 237 ITR 579/104 Taxman 204 (SC)

(ii) Cambay Electric Supply Industrial Co. Ltd. v CIT [1978] 113 ITR 84 (SC)

(iii) Liberty India v. CIT [2009] 183 Taxman 349 (SC)

9. The ld. DR drew our attention to the relevant findings of the Hon'ble Supreme Court in the above listed cases to submit that the income earned should not be incidental to the business, but should be derived from the business and that there should be a direct nexus between the income earned and the business. He therefore submitted that the rental income though accepted as business income is not derived from the cargo business of the assessee and therefore cannot be eligible for deduction u/s. 80IA.

10. With regard to the alternate plea of the assessee, the ld. DR submitted that the issue of rental income was not examined by the revenue in the earlier years and therefore it cannot be contended that the revenue has accepted the eligibility of rental income being allowed as deduction u/s. 80IA. The ld. DR submitted that if 'rental income' is treated as income from other sources, then the issue may be remitted to the AO to examine the related expenses and allow the claim.

11. We have considered the rival submissions and perused the material on record. According to the provisions of section 80IA where the gross total income of an assessee includes any profits and gains

derived by an undertaking or an enterprise from any eligible business referred to in sub-section (4) shall be allowed a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years in accordance with and subject to the provisions of this section, be allowed.

12. It is not in dispute that the rental income is part of the business income of the assessee. The main issue for our consideration is whether the rental income earned by the assessee is derived from the cargo business and thereby eligible for deduction u/s.80IA. The concept of "income derived from" in contrast to other related concept like "income attributable to" has been a subject matter of discussion in various decision of the Apex Court. Highlights of some of the principles laid down by these judicial pronouncements are –

(i) Receipts which are incidental to the actual conduct of the business of industrial undertaking yet the same may not fall within the expression of 'derived from' - *Cambay Electrical Supply Co. Ltd. 113 ITR 84*

(ii) The nexus between the income and the industrial undertaking was should be direct and not incidental, otherwise it would not fall within the expression 'profits derived from industrial undertaking' - *Sterling Foods 237 ITR 53 (SC) & Pandian Chemicals Ltd. 262 ITR 278(SC)*

(iii) When Section 80-IA/80-IB refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives but what attracts the incentives under Section 80-IA/80-IB is the generation of profits (operational profits). - *Liberty India Ltd. Vs CIT [2009] 183 Taxman 349 (SC)*

(iv) The words "derived from" are narrower in connotation as compared to the words "attributable to". - *Liberty India Ltd. Vs CIT [2009] 183 Taxman 349 (SC)*

(v) By using the expression "derived from", Parliament intended to cover sources not beyond the first degree from where the profit/income is generated. - *Liberty India Ltd. Vs CIT [2009] 183 Taxman 349 (SC)*

(vi) There should be direct and proximate connection between carrying on business and the income earned - *Vellore Electric Corpn. Ltd. v. CIT [1997] 93 Taxman 401/227 ITR 557 (SC)*

13. The Hon'ble Supreme Court in the case of CIT(A) vs Meghalaya Steels Ltd [2016] 67 taxmann.com 158 (SC) has discussed all these principles while deciding whether the subsidy received by the assessee is eligible for deduction u/s.80IB/80IC. Before proceeding further to consider the merits of assessee's case it is relevant to reproduce the extracts from the decision of this case where it is held that –

> "17. An analysis of all the aforesaid decisions cited on behalf of the Revenue becomes necessary at this stage. In the first decision, that is in Cambay Electric Supply Industrial Co. Ltd.'s case (supra) this 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". Since we are directly concerned with the expression "derived from", this judgment is relevant only insofar as it makes a distinction between the expression "derived from", as being something directly from, as opposed to "attributable to", which can be said to include something which is indirect as well.

18. The judgment in Sterling Foods case (supra) lays down a very important test in order to determine whether profits and gains are derived from business or an industrial undertaking. This Court has stated that there should be a direct nexus between such profits and gains and the industrial undertaking or business. Such nexus cannot be only incidental. It therefore found, on the facts before it, that by reason of an export promotion scheme, an assessee was entitled to import entitlements which it could thereafter sell. Obviously, the sale consideration therefrom 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. On an application of the aforesaid test to the facts of the present case, it can be said that as all the four subsidies in the present case are revenue receipts which are reimbursed to the assessee for elements of cost relating to manufacture or sale of their products, there can certainly be said to be a direct nexus between profits and gains of the industrial undertaking or business, and reimbursement of such subsidies. However, Shri Radhakrishnan stressed the fact that the immediate source of the subsidies was the fact that the Government gave them and that, therefore, the immediate source not being from the business of the assessee, the element of directness is missing. We are afraid we cannot agree. What is to be seen for the applicability of Sections 80-IB and 80-IC is whether the profits and gains are derived from the business. 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 by Sections 80-IB and 80-IC 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.

19. Similarly, the judgment in Pandian Chemicals Ltd.'s case (supra) is also distinguishable, as interest on a deposit made for supply of electricity is not an element of cost at all, and this being so, is therefore a step removed from the business of the industrial undertaking. The derivation of profits on such a deposit made with the Electricity Board could not therefore be said to flow directly from the industrial undertaking itself, unlike the facts of the present case, in which, as has been held above, all the subsidies aforementioned went towards reimbursement of actual costs of manufacture and sale of the products of the business of the assessee.

20. Liberty India's case (supra) being the fourth judgment in this line also does not help Revenue. What this Court was concerned with was an export incentive, which is very far removed from reimbursement of an element of cost. A DEPB drawback scheme is not related to the business of an industrial undertaking for manufacturing or selling its products. DEPB entitlement arises only when the undertaking goes on to export the said product, that is after it manufactures or produces the same. Pithily put, if there is no export, there is no DEPB entitlement, and therefore its relation to manufacture of a product and/or sale within India is not proximate or direct but is one step removed. Also, the object behind DEPB entitlement, as has been held by this Court, is to neutralize the incidence of customs duty payment on the import content of the export product which is provided for by credit to customs duty against the export product. In such a scenario, it cannot be said that such duty exemption scheme is derived from profits and gains made by the industrial undertaking or business itself.

21. The Calcutta High Court in Merinoply & Chemicals Ltd. v. CIT [1994] 209 ITR 508, held that transport subsidies were inseparably connected with the business carried on by the assessee. In that case, the Division Bench held:—

> "We do not find any perversity in the Tribunal's finding that the scheme of transport subsidies is inseparably connected with the business carried on by the assessee. It is a fact that the assessee was a manufacturer of plywood, it is also a fact that the assessee has its unit in a backward area and is entitled to the benefit of the scheme. Further is the fact that transport expenditure is an incidental

> expenditure of the assessee's business and it is that expenditure which the subsidy recoups and that the purpose of the recoupment is to make up possible profit deficit for operating in a backward area. Therefore, it is beyond all manner of doubt that the subsidies were inseparably connected with the profitable conduct of the business and in arriving at such a decision on the facts the Tribunal committed no error."

22. However, in CIT v. Andaman Timber Industries Ltd., [2000] 242 ITR 204/109 Taxman 135 (Cal.), the same High Court arrived at an opposite conclusion in considering whether a deduction was allowable under Section 80HH of the Act in respect of transport subsidy without noticing the aforesaid earlier judgment of a Division Bench of that very court. A Division Bench of the Calcutta High Court in Cement Mfg Co. Ltd.'s case (supra) by a judgment dated 15.1.2015, distinguished the judgment in Andaman Timber Industries Ltd.'s case (supra) and followed the impugned judgment of the Gauhati High Court in the present case. In a pithy discussion of the law on the subject, the Calcutta High Court held:

> 'Mr. Bandhyopadhyay, learned Advocate appearing for the appellant, submitted that the impugned judgment is contrary to a judgment of this Court in the case of CIT v. Andaman Timber Industries Ltd. reported in [2000] 242 ITR 204/109 Taxman 135 wherein this Court held that transport subsidy is not an immediate source and does not have direct nexus with the activity of an industrial undertaking. Therefore, the amount representing such subsidy cannot be treated as profit derived from the industrial undertaking. Mr. Bandhypadhyay submitted that it is not a profit derived from the undertaking. The benefit under section 80IC could not therefore have been granted.
>
> He also relied on a judgment of the 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.
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> We have not been impressed by the submissions advanced by Mr. Bandhyopadhyay. 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). Both the incentives considered by the Apex Court in the case of Liberty India could be availed after the manufacturing activity was over and exports were made. But, we are concerned in this case with the transport and interest subsidy which has a direct nexus with the manufacturing activity inasmuch as these subsidies go to reduce the cost of production. Therefore, the judgment in the case of Liberty India v. Commissioner of Income Tax has no manner of application. The Supreme Court in the case of Sahney Steel and Press Works Ltd. & Others versus Commissioner of Income Tax, reported in [1997] 228 ITR at page 257 expressed the following views:—

". . . . . Similarly, subsidy on power was confined to 'power consumed for production'. In other words, if power is consumed for any other purpose like setting up the plant and machinery, the incentives will not be given. Refund of sales tax will also be in respect of taxes levied after commencement of production and up to a period of five years from the date of commencement of production. It is difficult to hold these subsidies as anything but operation subsidies. These subsidies were given to encourage setting up of industries in the State of Andhra Pradesh by making the business of production and sale of goods in the State more profitable.'

23. We are of the view that the judgment in Merinoply & Chemicals Ltd.'s case (supra) and the recent judgment of the Calcutta High Court have correctly appreciated the legal position.

24. We do not find it necessary to refer in detail to any of the other judgments that have been placed before us. The judgment in Jai Bhagwan Oil and Flour Mills' case (supra) is helpful on the nature of a transport subsidy scheme, which is described as under:

"The object of the Transport Subsidy Scheme is not augmentation of revenue, by levy and collection of tax or duty. The object of the Scheme is to improve trade and commerce between the remote parts of the country with other parts, so as to bring about economic development of remote backward regions. This was sought to be achieved by the Scheme, by making it feasible and attractive to

industrial entrepreneurs to start and run industries in remote parts, by giving them a level playing field so that they could compete with their counterparts in central (non-remote) areas.

The huge transportation cost for getting the raw materials to the industrial unit and finished goods to the existing market outside the state, was making it unviable for industries in remote parts of the country to compete with industries in central areas. Therefore, industrial units in remote areas were extended the benefit of subsidized transportation. For industrial units in Assam and other north-eastern States, the benefit was given in the form of a subsidy in respect of a percentage of the cost of transportation between a point in central area (Siliguri in West Bengal) and the actual location of the industrial unit in the remote area, so that the industry could become competitive and economically viable." (Paras 14 and 15)

25. The decision in Sahney Steel and Press Works Ltd.'s case (supra) dealt with subsidy received from the State Government in the form of refund of sales tax paid on raw materials, machinery, and finished goods; subsidy on power consumed by the industry; and exemption from water rate. It was held that such subsidies were treated as assistance given for the purpose of carrying on the business of the assessee.

26. We do not find it necessary to further encumber this judgment with the judgments which Shri Ganesh cited on the netting principle. We find it unnecessary to further substantiate the reasoning in our judgment based on the said principle.

27. A Delhi High Court judgment was also cited before us being Dharam Pal Prem Chand Ltd.'s case (supra) from which an SLP preferred in the Supreme Court was dismissed. This judgment also concerned itself with Section 80-IB of the Act, in which it was held that refund of excise duty should not be excluded in arriving at the profit derived from business for the purpose of claiming deduction under Section 80-IB of the Act.

28. ***

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 (supra) and Liberty India's cases (supra) to arrive at the opposite conclusion, is held to be wrongly decided for the reasons given by us hereinabove.

30. All the aforesaid appeals are, therefore, dismissed with no order as to costs."

14. From the plain reading of the above judicial pronouncement of Hon'ble Supreme Court, it can be said that so long as profits and gains emanate directly from the business itself and that income earned is inseparably connected with the business carried on by the assessee the assessee would be eligible to get a deduction u/s.80IA.

15. The assessee has entered into a Service Providers Right Holders Agreement (SPRH) with Bangalore International Airport Limited whereby the assessee is required to provide seamless cargo handling services on a 365 * 7 *24 basis without any material interruptions during the term of the agreement. Schedule A of the agreement provides description of the cargo services as extracted below –

SCHEDULE A

Description of Cargo Services

The SPRH shall provide the following Cargo Services for both domestic and international cargo:

- Outbound cargo including receiving cargo from landside shippers, screening, building ULDs, providing weighing, storage, preparing shipments for transport to aircraft and providing all related document handling services;

- Inbound cargo including receiving cargo from Handlers, breaking down ULDs, storage of cargo and ULDs, preparing shipments for pick-up by landside shippers, and providing all related document handling services;
- Transfer cargo including storage, breaking down and building ULDs, and providing all related document handling services;
- Customs procedures (document preparation as required by customs etc.) for all cargo products where customs control is needed (under the control of and in cooperation with the custom authorities)
- Irregularity Handling
- Post Office Mail (provide all services required by Postal Facilities)

These Services include following ground handling services in terms of the IATA Standard Ground Handling Agreement:

Section 5	**Cargo and Mail Services**
5.1	Cargo and Mail Handling – General
5.2	Customs Control
5.3	Irregularities Handling
5.4	Document Handling
5.5	Physical Handling Outbound/ Inbound
5.6	Transfer/ Transit Cargo
5.7	Post Office Mail
Section 7	**Security**
7.2.	Cargo and Post Office Mail

All other ground handling services as defined under the IATA Standard Ground Handling Agreement shall not be provided for by the SPRH. In particular, the SPRH shall not undertake the physical handling of cargo and mail between the Air Carrier and the Facility.

All services and activities which are directly linked to and/ or incidental to the provision of the above mentioned services shall be performed and undertaken by the SPRH including but not limited to the following services:

- Operation of the Cargo Facilities
- Maintenance of the Cargo Facilities
- Administrative work

16. From the above it is clear that providing cargo service as agreed between the assessee and BIAL includes cargo handling services, mailing services, post office mail services etc. We notice from the perusal of records that the assessee has entered into License Agreement for using of the space in the Cargo Terminal operated by the assessee with Cargo Handling Agents, Airlines, Banks, Post Office etc. The list of licensee from whom the assessee has received the rental income is given page 120 to 123 of paper book. In our view therefore the service commitment by the assessee to BIAL is directly related to the services provided by the licensees who have taken the space in the cargo terminal. We also see merit in the argument that in order to meet the requirement of cargo services 365* 7*24, it is essential for the licensees' to operate within the cargo terminal so that the assessee can provide uninterrupted cargo service as committed to BIAL. From the perusal of the various terms of the sample agreements entered by the assessee with the licensees (page 124 to 156 of paper book) it is noticed that the licensees' cannot use the facility for any purpose other than for supporting the cargo services. Renting of the space is an integral part of the cargo business of the assessee since the licensees are using the space to render services which are committed by the assessee to BIAL as part of Cargo services. In view of these discussions, we are of the considered view that the rental income is inseparably connected with the business carried on by the assessee and

emanate directly from the business of the undertaking. Accordingly we hold that the rental income derived by the assessee from Cargo Agents, Airlines, Banks etc., is derived from the cargo business and eligible for deduction u/s. 80IA. The addition is deleted.

17. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 05th day of December, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 05th December, 2022.

/*Desai S Murthy* /

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.