

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

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

Sh. Yogesh Kumar US, Judicial Member

ITA No. 5114/Del/2018 : Asstt. Year : 2010-11

ITA No. 5640/Del/2018 : Asstt. Year : 2011-12

ITA No. 5641/Del/2018 : Asstt. Year : 2012-13

Sharda Exports, C/o Mr. Jitendra Kumar Gupta, Partner of M/s Sharda Exports, 219, Railway Road, Meerut, Uttar Pradesh-250002	Vs	DCIT, Circle-2, Meerut
(APPELLANT)		(RESPONDENT)
PAN No. ABOFS0079G		

ITA No. 6568/Del/2018 : Asstt. Year : 2010-11

ITA No. 6569/Del/2018 : Asstt. Year : 2011-12

ITA No. 6570/Del/2018 : Asstt. Year : 2012-13

ITA No. 6571/Del/2018 : Asstt. Year : 2013-14

ITA No. 6572/Del/2018 : Asstt. Year : 2015-16

DCIT, Circle-2, Meerut	Vs	Sharda Exports, B-96, Eastern Avenue, Sainik Vihar, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. ABOFS0079G		

Assessee by : Sh. Rajkumar Gupta, CA

Revenue by : Sh. H. K. Choudhary, CIT DR

Date of Hearing: 22.02.2023

Date of Pronouncement: 12.05.2023

ORDER

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

The present appeals have been filed by the assessee and the Revenue against the orders of the Id. CIT(A), Meerut dated 09.07.2018, 10.07.2018, 11.07.2018 and 13.07.2018.

2. Since, the issues involved in assessee and Revenue the appeals are similar, they were heard together and being adjudicated by a common order.

3. In ITA No. 5114/Del/2018, following grounds have been raised by the assessee:

"1. That the Authority below had erred in Law and facts of the case in disallowance the deduction as claimed by the appellant under section 80-IC of the Income Tax Act, 1961 on the Duty Drawback of Rs 7,44,38,944/- for the relevant year under consideration.

2. That the Authorities below had erred in facts and law of the case to make various observations in their respective orders.

3. That the Authorities below had either ignored or had not appreciated the submissions made by the appellant on the duty draw back claim made by the Assessee firm.

4. That the Interest charged under section 234B and 234C being wholly ill- legal deserve to be deleted, at any rate without prejudice the interest has charged was very excessive."

4. In ITA No. 6568/Del/2018, following grounds have been raised by the Revenue:

"1. Whether in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) has erred in law and fact in allowing deduction u/s 80IC of the I.T. Act, 1961 @100% on the total business income ignoring the principle of natural justice as neither any remand report was called for from the A.O. nor any opportunity of hearing was provided to the A.O. inspite of the fact that the A.O. had made request for hearing to the CIT(A) through ITNS-51.

2. *Whether in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) has erred in law and fact in allowing deduction u/s 80IC of the I.T. Act, 1961 @100% on the total business income without taking into consideration the very fact that the primary condition of availing benefit u/s 80IC of the Act remains to be fulfilled which is that the undertaking is not found by splitting up or reconstruction of a business already in existence as all the necessary factors of production like land, labour, capital, entrepreneurship and goodwill continued from the old M/s Sharda Exports, Hardwar to New M/s Sharda Exports, Delhi, and hence the act of creating a new firm through execution of a new instrument viz. a new partnership deed does not actually create a new entity if almost all the assets and partners do remain the same.*

3. *Whether in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) has erred in law and fact in treating the old M/s Sharda Exports, Hardwar and new M/s Sharda Exports, Delhi to be two separate entities ignoring the fact that the very act of creating of a new firm through execution of a new partnership deed was a colorable ploy devised by the assessee to avail deduction u/s 801c of the Act @100% beyond the legitimate time limit allowed by the law notwithstanding the fact that no explanation was given by the partners of the old firm as to why they abruptly chose to dissolve their firm that was successfully running its business and had a turnover of about 100 Crores for A.Y. 2009-10 and how the new firm instantly achieved a turnover of Rs. 75 Crores in the very first year of its existence if the entire business operations had been started afresh from scratch.*

4. *Whether in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) has erred in law and fact in giving his finding that the A.O. got confused in assuming that the new firm came into existence on 01.04.2009 instead of taking the date of creation of new firm to be 01.01.2009 whereas the A.O. in his assessment order has mentioned that the new firm started its commercial activity from*

01.04.2009 and there is further infirmity in the order of the CIT(A) wherein it is held that no finished goods were taken over by Ms Meenakshi Gupta from old M/s Sharda Exports, Hardwar, whereas the audit report of the old M/s Sharda Exports for the year ending 31/03/2009 and the submissions made by the assessee firm in this respect clearly reflect that finished goods worth Rs. 12,196,47,491/- were transferred to Ms. Meenakshi Gupta.

5. That in the facts and circumstances of the case, the order of the Id. Commissioner of Income Tax(A), Meerut may be set aside and that of the A.O. be restored."

Brief facts:

5. M/s Sharda Exports (PAN: AACFS8466H) started business in 1983 from Meerut having partners namely,

Shri Jitendra Kumar Gupta

Smt Meenakshi Gupta W/o Sh. J.K. Gupta

Shri Aditya Gupta S/o Sh. J.K. Gupta

Shri Ashish Gupta S/o Sh. J.K. Gupta

6. M/s Sharda Exports (PAN: AAYFS1694N) came into existence in the F.Y.2004-05 and this firm was dissolved in the F.Y.2009-10.

7. The assessee M/s Sharda Exports (PAN: ABOFS0079G) came into existence from 01.04.2009 having partners namely,

Shri Jitendra Kumar Gupta

Shri Aditya Gupta S/o Sh. J.K. Gupta

Shri Ashish Gupta S/o Sh. J.K. Gupta

8. The assessee claimed deduction u/s 80IC of the Income Tax Act, 1961 from the A.Y. 2010-11 onwards. The instant assessee had turnover of Rs.75 Cr. in the first year of business. The moot allegation of the Assessing Officer was that the assessee went on changing the firm structure only to claim deduction u/s 80IC and the assessee could not have had a turnover of Rs.75 Cr. at the beginning of the business and the entire new business is the changed form of the old business.

A.Y. 2010-11 to 2013-14 and A.Y. 2015-16

Allowability of Deduction u/s 80-IC:

9. The AO held that a business unit can't work in isolation. In fact a business unit is an organic entity, it moves in a wave. There are so many external relations which keep on working when a business unit conduct it's business activities. There is management, workers, business premises, sellers, purchasers, job workers, commission agents etc. in fact when all of them perform their duties in synchronization then fruit full results comes. All these factors make the business unique. The AO held that the change in the form of the firm of the old "M/s Sharda Exports" and New "M/s Sharda Exports" is only to circumvent the limitations provided for claim of exemption u/s 80IC. To prove so, the AO pointed out apparently convincing and substantial facts which are as under:

1. The name of the new firm remained same i.e. M/s Sharda Exports.
2. The partners of the firm are of same family members and the only difference is that Smt. Meenakshi Gupta came out of the new firm.

3. The business premises in Haridwar, was the same.
 4. The nature of business is the same.
 5. The new firm M/s Sharda Export using same bank accounts.
 6. The list of sellers, purchasers, job workers are same.
 7. The 42 sale parties of earlier firm are same for the new firm.
 8. The job working agency, commission agents were also same.
10. Therefore, the AO held that as far as above factors are concerned there is no substantial difference in new M/ s Sharda Exports in comparison to old M/s Sharda Exports. The AO held that owing the commonalities, the assessee is a "going concern" and continued to do the operations which hitherto were being done. The AO has also held that the land and stock of the earlier firm has been duly transferred to the new firm and hence there was no change of business. Quoting the provisions of Section 80IC of the Act, the AO held that after understanding the correct intension of the legislature and on interpretation of various principles, the assessee was using the tool of forming a new firm in the same name at the same premises to claim deduction u/s 80IC @ 100% beyond the time limit permissible as per the law. Holding thus, the Assessing Officer disallowed the deduction claimed by the assessee u/s 80IC.
11. Aggrieved, the assessee filed appeal before the Id. CIT(A) who deleted the addition made by the AO. Ergo, the revenue filed appeal before us.

12. During the arguments before us, the Id. DR succinctly brought to our notice, the similarities of the business as mentioned in the Assessment Order which have been duly quoted in the above part of the order, provisions of the Act and explained at length with regard to reconstruction and splitting of the entity. The Id. DR has also argued that the machinery which has been used earlier is still being used in the existing entity and hence no deduction is allowable.

13. On the other hand, the Id. AR argued that the firm came into existence w.e.f. 01.01.2009 and it began to manufacture articles from 01.04.2009 and hence the Assessment Year 2010-11 is the initial Assessment Year for claiming of deduction u/s 80IC @ 100% which has been wrongly allowed by the AO @ 25% treating it as 6th year of the old firm.

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

15. We find that deed of partnership dated 01.01.2009 was duly registered with Registrar of firms, New Delhi and VAT registration certificate was dated 01.03.2009. The Import Export code (IEC) registration certificate dated 02.04.2009 of the assessee has been perused. The assessee had Service tax registration certificate dated 21.10.2009 along with PAN and TAN. The assessee obtained registration certificate by carpet export promotion counsel on 12.06.2009 and VAT assessment order has been completed for A.Y. 2010-2011 of the assessee firm on 10.08.2011.

16. The assessee had purchased new plant & machinery needed for the manufacturing activity as against the contention of the Revenue that the old machinery is being used. The AO has also allowed depreciation on the new machinery. The depreciation schedule has been examined by us with regard to the addition to the fixed assets. Such addition to fixed assets has not been disputed by the AO. We find, no legal infirmity in conducting business by the firm consisting of family members as partners. While the allegation of the revenue was that the same bank account of the old firm has been used, the facts on record shows that the old firm account No. 036805000757 whereas the assessee's bank account No. 036805002303 which is contrary to the allegation of the revenue. The name of the old firm and the new firm being the same is not a determinative factor to hold that it is a case of same firm. The assessee being in the same line of business was aware of the business contacts, parties, commission agents and hence the turnover in the initial year itself is remarkable. Sh. Jitendra Kumar Gupta was given land and building at Haridwar where the business activity was carried on towards return/ share on his capital. The same has been introduced as his contribution in the new firm. No adverse view can be taken on this issue. Similarly, Smt. Meenakshi Gupta was given the stock of raw material and semi-finish goods of the old firm towards return/ share of her capital on dissolution. She was also a partner in Tirupathi Carpets, which she brought in this semi-finished stocks in Tirupathi Carpets, which firm carried out further work for value addition of about Rs.2 Cr. thereon, after which it was purchased by the assessee from M/s Tirupathi Carpets. These facts have not been in dispute. The purchases by the assessee from Tirupati Carpets,

Meerut cannot be viewed adversely for the inference that old and new firm are one and the same. It is also to be submitted that Tirupathi Carpets is assessed to income tax. This transaction stands declared in the books of Tirupathi Carpets for A. Y. 2010-2011 which was accepted in its Income Tax assessment.

17. The old Firm was dissolved vide deed of dissolution dated and effective from 01.04.2009, as per the copy of dissolution deed. The assessee firm came into existence on 01.01.2009 which is evident from the copy of deed of partnership dtd. 01.01.2009 as per records which the A.O. wrongly noted in the assessment order as 01.04.2009. The said partnership deed has also been got registered with the "Registrar of Firms" vide certificate in "Form-A" dated 12.04.10. In this registration certificate, the date of joining has been specified as "01.01.2009". It shows that during the period 01.01.09 till 31.03.09, the old as well as the appellant firm, simultaneously existed. This construction of the dates persuaded him to reach to a diabolic conclusion that the old firm got closed and immediately new firm got started.

18. It is a fact on record that 1st export dispatch has taken on 05.05.2009. The old machinery has not been used as indicated by the invoices of the new machinery which was purchased from the third party. The evidences proves that it is a case where new plant & machinery has been acquired which was not previously used. Hence, the conditions for the eligibility of claim u/s 80IC in the case of a new industrial undertaking stands

satisfied. Hence, we decline to the interfere with the reasoned order of the Id. CIT(A).

19. In the result, the appeals of the revenue are dismissed.

ITA No. 5114/Del/2018 : Asstt. Year : 2010-11

ITA No. 5640/Del/2018 : Asstt. Year : 2011-12

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80-IC on Duty Draw Back:

20. In assessment order, the A.O. has stated that deduction u/s 80IC is not allowable on the incentives received/receivable in the form of duty drawback because these incentives are paid to the exporters by the government under export policy. As per the A.O., these incentives may be attributable to the business activity, but they are not the profits derived by an industrial undertaking from an eligible business therefore no deduction u/s 80IC was allowable on duty drawback.

21. The Id. CIT(A) disallowed the deduction u/s 80IC on the duty drawback. Relying on the order of the ITAT in the case of M/s Sharda Exports (PAN: AAYFS1694N) in ITA No. 3597/Del/2012 vide order dated 14.06.2013 which reads as under:

"In the computation for deduction u/s 80IC, assessee has included a sum which represents the DEPB receipts. The learned counsel for the assessee has placed on record a note as to how deduction on DEPB receipts u/s 80IC are admissible. However, we find that this issue is squarely covered against the assessee by the decision of Hon'ble Supreme Court in the case of Liberty India Vs. CIT reported in 317 ITR 218. Hon'ble Court has held that DEPB receipts are not derived from an industrial undertaking rather their genesis is from the beneficiary scheme formulated under Central

Excise Act etc. They are the ancillary profit The learned counsel for the assessee submitted that the Hon'ble Supreme Court has not taken into consideration the amendment in sec.28 which has been given effect from 1st of April 1998. This amendment suggests that on sate of DEPB receipts, if there is any profit then it will be a revenue receipts. We find that this amendment urns, brought by Act of 2005, w.e.f. 01.04.1998. The decisions of the Hon'ble Supreme Court is dated 31.09.09. Thus, the decision of Hon'ble Supreme Court is subsequent to the amendment hence, the decision cannot be distinguished on this argument. In view of the above discussion, we direct the assessing officer to allow the deduction u/s 80IC of the Act as per law excluded on the DEPB receipts."

22. Further, we find that the matter has been adjudicated recently by the Hon'ble Apex Court in the case Saraf Exports Vs. CIT in CA No. 4822 of 2022. In view of the decision in the case of Meghalaya Steel where the transport and interest subsidies were held to be eligible for deduction as they were held to have been derived from the business of the undertaking and thus an argument was made that the said decision has widened the scope of deduction. The case of Meghalaya Steels Limited dealt with transport subsidy, interest subsidy and power subsidy and the Hon'ble Apex Court held that since these subsidies directly affect the cost of manufacturing, they have a direct nexus with the profits and gains of the undertaking and since these subsidies have a direct nexus, they can be said to be derived from the industrial undertaking. While dealing with the decision in the case of Liberty India, the Hon'ble Apex Court distinguished Duty Entitlement Pass Book and Duty Drawback Schemes and specifically observed that the DPEB/Duty Drawback Scheme is not related to the business of an industrial undertaking for manufacturing or selling its products and the

DEPB entitlement arises only when the undertaking goes on to export the said product.

23. The same view has been reiterated in the case of Saraf Exports Vs CIT. Hence, respectfully following the judgment of Hon'ble Supreme Court in various cases as mentioned above, we hereby affirm the decision of the Id. CIT(A).

24. It was also brought to our notice that the assessee has opted for VSV for the years before us. In the result, the appeals of the assessee are dismissed.

Order Pronounced in the Open Court on 12/05/2023.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 12/05/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR