IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'B' : NEW DELHI)

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER

AND

SH.ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 7839/Del/2018, A.Y. 2011-12
ITA No. 7470/Del/2018, A.Y. 2013-14
ITA No. 2836/Del/2018, A.Y. 2014-15

M/s. Candor Gurgaon Two Developers And Projects Pvt. Ltd. (formerly known as Unitech Developers and Projects Pvt. Ltd.) PAN : AAACU8404B	Vs.	CIT, Circle-18(1), Room No. 193, C.R. Building, New Delhi
Candor Gurgaon Two Developers And Projects Pvt. Ltd. (formerly known as Unitech Developers and Projects Pvt. Ltd.) PAN : AAACU8404B		ACIT, Circle-5(2), New Delhi
Candor Gurgaon Two Developers And Projects Pvt. Ltd. (formerly known as Unitech Developers and Projects Pvt. Ltd.) PAN : AAACU8404B		ACIT, Special Range-9, New Delhi

ITA No. 6315/Del/2017, A.Y. 2010-11
ITA No. 7762/Del/2019, A.Y. 2012-13
ITA No. 3879/Del/2018, A.Y. 2014-15

M/s. Candor Kolkata one Hi tech Structures P. Ltd. (formerly known as Unitech Hi-Tech Structures Pvt. Ltd. and earlier known as Unitech Hi-Tech Structures Ltd.) PAN : AAACU8404B	Vs.	DCIT, Circle-18(1), New Delhi

M/s. Candor Kolkata one Hi tech Structures P. Ltd. (formerly known as Unitech Hi-Tech Structures Pvt. Ltd. and earlier known as Unitech Hi-Tech Structures Ltd.) PAN : AAACU8404B M/s. Candor Kolkata one Hi tech Structures P. Ltd. (formerly known as Unitech Hi-Tech Structures Pvt. Ltd. and earlier known as Unitech Hi-Tech Structures Ltd.) PAN : AAACU8404B		DCIT, Circle-27(1), New Delhi ACIT, Circle – 5(2), New Delhi
Appellant		Respondent

Assesseeby	Sh. K.M.Gupta, Adv. And Ms. Saloni Sheetal, Adv.
Revenue by	Sh. Ajay Kumar Arora, Sr. DR

Date of hearing:	22.05.2023
Date of Pronouncement:	14 .06.2023

ORDER

Per Bench :

The assessee is in appeal challenging the following orders of ld. Tax Authorites Below :-

Sl. No.	Appellant Name	A.Y.	ITA No.	A.O. Dated	CIT Dated
1.	Candor Gurgaon Two Developers (hereinafter	2011-12	7839/Del./2018	17.02.2014	25.09.2018

	mentioned as Entity no 1)				
2.	Candor Gurgaon Two Developers	2013-14	7470/Del/2018	31.03.2016	25.09.2018
3.	Candor Gurgaon Two Developers	2014-15	2836/Del/2018	30.12.2016	19.01.2018
4.	Candor Kolkata One Hi-Tech (here in after mentioned as Entity no 2)	2010-11	6315/Del/2017	26.03.2013	14.08.2015
5.	Candor Kolkata One Hi-Tech	2012-13	7762/Del/2019	30.03.2016	08.08.2019
6.	Candor Kolkata One Hi-Tech	2014-15	3879/Del/2018	30.12.2016	23.03.2018

2. Heard and perused the record. The facts in brief are that assessee is in the business of developing SEZ in IT/ITES Sector and lease-out the premises for rent and maintaining the said SEZ. The cases of all assessee were taken up for scrutiny in the respective years and primarily the grounds raised in the appeals can be summarized in the form of following issues which are common.

2.1 The issue no.1, pertains to the disallowance made u/s 14A raised in ITA no 7762 for AY 2012-13 of Entity 2, ITA no 7839 for AY 2011-12 of Entity 1 and ITA no 7470 for AY 2013-14 of Entity 1.

2.2 The issue no.2, concerns the action of Ld. AO in increasing the book profits of the assessee computed u/s 115JB of the Act by disallowance of expenses u/s 14A of the Act, raised in ITA no 7762 for AY 2012-13 of Entity 2, ITA no 7839 for AY 2011-12 of Entity 1 and ITA no 7470 for AY 2013-14 of Entity 1.

2.3 The issue no 3, is the question of denial of deduction u/s 80-IAB of the Act, on income from car parking rentals on the allegation that they do not have direct nexus with the business carried on by the assessee. Raised in ITA no

7762 for AY 2012-13 of Entity 2, ITA no 3879 for AY 2014-15 of Entity 2, ITA no 7839 for AY 2011-12 of Entity 1, ITA no 7470 for AY 2013-14 of Entity 1

2.4 The issue no 4, is the question of denial of deduction u/s80-IAB of the Act, on interest income on the allegation that they do not have direct nexus with the business carried on by the assessee. Raised in ITA no 7762 for AY 2012-13 of Entity 2, ITA no 3879 for AY 2014-15 of Entity 2, ITA no 7839 for AY 2011-12 of Entity 1 and ITA no 7470 for AY 2013-14 of Entity 1

2.5 Issue no 5, is raised in ITA no 3879 for AY 2014-15 of Entity 2, pertaining disallowance of brokerage expenses.

2.6 In regard to assessment year 2010-11 of Entity no 2, apart from the various grounds the appellant company has raised ground no. 1 that appeal was dismissed by the Ld. CIT(A) for non-prosecution and without passing speaking orders on merits.

3. In regard to the **issue no 1 of disallowance u/s 14A of the Act** on hearing the parties it comes up that there is no denial to the proposition of law that the Ld. Assessing Officer must record his satisfaction in terms of Section 14A(2) of the Act with regard to the suo moto disallowances made by an assessee. The assessee has claimed that no satisfaction has been recorded by the Ld. AO and relying the judgment of Hon'ble Supreme Court of India in Maxopp Investment Ltd. vs. CIT (2018) 91 taxmann.com 154 (SC) it is submitted that the issue has been considered in favour of the assessee in ITA No. 4032/Del/2015 (supra). The Ld. DR however tried to resist the argument of Ld. AR submitting that the order of Ld. AO has sufficient reasons for disallowance. After taking into consideration the nature of business of the assessee and the expenditure, the Bench is of considered view that the findings arrived by the Co-ordinate Bench

in ITA No. 4032/Del/2015 (supra) are squarely applicable and for the benefit, relevant para 8 and 9 are reproduced below :

> *"8. Ground No.3 concerns challenge to the disallowance of Rs.22,99,529/- made by the Assessing Officer under Section 14A of the Act. In this regard, we take note of the following arguments raised on behalf of the assessee, i.e., (i) a* suo motu *disallowance of Rs.5,45,306/- has been carried out which is the total indirect expenses and all other expenses claimed are directly attributable to SEZ operations and has no relation to the exempt income earned by way of dividend on mutual fund investment (ii) where* suo motu *disallowance has been made, the Assessing Officer is required to form 'satisfaction' in terms of Section 14A of the Act for higher disallowance which has not been made and thus the formula provided for quantification of disallowance under Rule 8D would not automatically apply.*
>
> *9. We find merit in the plea of the assessee that the disallowance cannot exceed the actual expenditure incurred in relation to the earning of the exempt income. In the instant case, no direct expenses has been incurred and the disallowance has been carried out under Rule 8D(2)(iii) of the Rules in respect of indirect expenses. The disallowance has been carried out at Rs.22,99,529/- (being 0.5% of the average value of investments) in place of the disallowance offered amounting to Rs.5,45,306/-. The action of the Assessing Officer is apparently without application of mind inasmuch as the actual indirect expenditure available for allocation is Rs.5,45,306/- only. Other expenses incurred are stated to be directly attributable to SEZ operation and thus cannot be subjected to estimated disallowance qua be exempt income. We thus find merit in the plea of the assessee. The Assessing Officer is directed to restore the position claimed by the assessee in this regard."*

Accordingly, the grounds arising of this issue in the respective appeals are decided in favour of the assessee.

4. In regard to **issue no 2 of computation of the book profits u/s 115JB** of the Act by invoking provisions of Section 14A, on hearing the parties it comes up that Revenue could not dispute the settled proposition of law that the disallowance u/s 14A of the Act is a notional disallowance and therefore, by taking recourse to Section 14A of the Act the amount cannot be added back to

book profits under clause (f) of section 115JB of the Act. Reliance in this regard can be placed on the judgment of Co-ordinate Bench at Delhi in the case of ***Vireet Investment (P.) Ltd. vs. ACIT [2017] 82 taxmann.com 415 (Delhi-Trib.)*** and the judgment of Hon'ble Karnataka High Court in case of ***Sobha Developers Ltd. vs. DCIT [2021] 125 taxmann.com 72 (Karnataka)***. It will be still beneficial to reproduce para 7 of the judgment of Hon'ble Karnataka High Court :

> *7. Thus from perusal of the relevant extract of section 115JB, it is evident that sub-section (1) of section 115JB provides the mode of computation of the total income of the assessee and tax payable on the assessee under section 115JB of the Act. Sub-section (5) of section 115JB provides that save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee being a company mentioned in this section. Therefore, any expenditure relatable to earning of income exempt under section 10(2A) and section 10(35) of the Act is disallowed under section 14A of the Act and is added back to book profit under clause (f) of section 115JB of the Act, the same would amount to doing violence with the statutory provision viz., sub-sections (1) and (5) of section 115JB of the Act. It is also pertinent to mention here that the amounts mentioned in clauses (a) to (i) of Explanation to section 115JB(2) are debited to the statement of profit and loss account, then only the provisions of section 115JB would apply. The disallowance under section 14A of the Act is a notional disallowance and therefore, by taking recourse to section 14A of the Act, the amount cannot be added back to book profit under clause (/) of section 115JB of the Act. It is also pertinent to mention here that similar view, which has been taken by this court in Gokaldas Images (P.) Ltd. (supra) was also taken by High Court of Bombay in CIT v. Bengal Finance & Investments (P.) Ltd. [IT Appeal. No. 337 of 2013, dated 10-2-2015], It is pertinent to note that in Rolta India Ltd., the Supreme Court was dealing with the issue of changeability of interest under sections 234B and 234C of the Act on failure to pay advance tax in respect of tax payable under section 115JA/115JB of the Act and therefore, the aforesaid decision has no impact on the issue involved in this appeal. Similarly, in Maxopp Investment Ltd. (supra) the Supreme Court has dealt with section 14A of*

the Act and has not dealt with section 115JB of the Act. Therefore, the aforesaid decision also does not apply to the fact situation of the case.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered in favour of the assessee and against the revenue. In the result, the order passed by the tribunal dated 9-1-2015 insofar as it pertains to the findings recorded against the assessee is hereby quashed.

In the result, the appeal is allowed."

Accordingly the grounds arising of this issue in the respective appeals are decided in favour of the assessee.

5. On hearing both the sides it comes up that the **issue no 3 pertaining to allowability of the deduction u/s 80-IAB of the Act** with regard to car parking rentals is covered in favour of the appellant/assessee as the issue has been examined by the Tribunal in ITA no. 4032/Del/2015 vide order dated 30.09.2022 in the matter of M/s. Unitech Developers and Projects Ltd. which has now merged with the appellant Candor Kolkata One Hi-Tech Structures Pvt. Ltd. In this context, it will be beneficial to reproduced the findings of co-ordinate Bench which concludes the matter in favour of the assessee by following observations in para 3 and 4 :

"3. Before us, the Id. counsel for the assessee submitted that the assessee has leased out completed areas of the said notified SEZ to various tenants and has earned operating lease rentals from the aforesaid property which represents the main component of the income reported by it. Incidental to the operating lease rental, the assessee has also earned income from car parking rentals as business income. Elowever, the benefit of deduction under Section 80IAB was denied to car parking rentals whereas the lease rental from the property was accepted by the Revenue. Similarly, the income earned from sale of waste oil arising from use of generator etc and sale of scrap items which are part and parcel of the industrial activity has been unjustifiably placed outside the ambit of beneficial provision. In this regard, it was contended that the

income earned from car parking rental has direct and immediate nexus with the lease rentals. The provision of car parking services is essential part of carrying out the business of development, operation and maintenance of SEZ. An instruction No.50 dated 15th March, 2010 issued by Government of India, Ministry of Commerce and Industry, Department of Commerce was adverted and was submitted that income by way of car parking is part of authorized activities as per the guidelines. Another reference was made to communication No. F 2/115/2005-EPZ Government of India, Ministry of Commerce and Industry, Department of Commerce (SEZ Section) dated 30th January, 2008 and was asserted that car parking has been included as part of authorized operations in SEZ. It is thus contended that car parking cannot be separated from the main business of SEZ and hence there is no justifiable reason to deny benefits on income from car parking rental in this backdrop.

4. We have carefully examined the issue and perused the orders of the lower authorities. In the light of documentary evidences placed by way of notifications and instructions from competent authorities, it is manifest that car parking rentals have been reckoned as authorized operation in SEZ. In the light of express guidelines issued by the Government as referred to and relied upon, we are of the view that the income from car parking rental would squarely qualify for deduction under Section 80IAB of the Act."

In the light of aforesaid grounds in respective appeals arising out of the issue no 3 stands determined in favour of the assessee.

6. The issue no **4 pertaining to allowability of 80-IAB reduction on interest income** is claimed by the assessee to be covered in favour of the assessee by the judgment of Hon'ble Supreme Court of India in the case of ***Meghalaya Steels Ltd. vs. CIT [2016] 67 taxmann.com 158 (SC)***. It can be observed that Hon'ble Supreme Court of India in the case of Meghalaya Steels Ltd. (supra) has made observations in regard to that the issue in para no. 17-23

"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 *119941 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., *120001 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 r2000l 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 bgnefit 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 120091 317 ITR 218 (SCI 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.*

We have lot 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."*

7. The assessee has claimed that the fixed deposit receipts were created as the Collateral security which are covered by the aforesaid observations and there appears to be no denial to aforesaid arguments and accordingly the grounds arising out of this issue stand decided in favour of the assessee.

8. As with regard to the issue no 5 being ground of brokerage in ITA No. 3879/Del/2018, it can be observed that the invoices produced on behalf of the appellant at page no. 1 and 3 of the paper book clearly mention the details of the premises let out and the party to whom the lease was made. The copies of lease deed have also been placed on record. Ld. Tax Authorities have fallen in error in want of more evidences. When assessee is engaged in the business of rental of the properties then engaging brokers for procurement of the tenants is a common practice and the expenses of brokerage thus, have to be considered to have been incurred in ordinary course of business.

9. Apart from that Ld. Counsel for the assessee has argued that in any case, the whole income of the assessee is tax free by virtue of Section 80IAB of the

Act so the disallowances of expenditure makes the issue revenue neutral. Thus, the ground raised in ITA no. 3879/Del/2018 is decided in favour of the assessee.

10. As in regard to ground no 1 raised in ITA No. 6315/Del/2017 it can be observed that the Ld. CIT(A) has marked the absence of appellant/ assessee and dismissed the appeal for non-prosecution. The law is now settled that the Ld. CIT(A) as first appellate authority is supposed to decide the grounds on merits and thus, the issues are required to be restored to the files of Ld. CIT(A).

11. As a consequence of above determination of the grounds in favour of appellants their **appeals stand allowed.**

Order pronounced in the open court on 14th June, 2023.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 14 .06.2023

Binita, SR.P.S
Copy forwarded to:
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4. CIT(Appeals)
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