

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 9TH DAY OF FEBRUARY, 2018

PRESENT

THE HON'BLE MRS. JUSTICE S. SUJATHA

AND

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

ITA Nos.100025-100027/2017 C/W
ITA No.100028/2017

BETWEEN:

1. M/S. HUBLI ELECTRICITY SUPPLY CO.,
P.B. ROAD, NAVANAGAR,
HUBBALLI-580025,
REPRESENTED BY ITS
FINANCIAL ADVISOR,
SRI.B. ABDUL WAJID,
AGED ABOUT 53 YEARS,
S/O SRI.B.ABDUL HAI.

...COMMON APPELLANT

**(BY SRIYUTHS V.K. GURUNATHAN, H.R.KAMBIYAVAR,
S PARTHASARATHI JINITHA CHATTERJEE, MALLAHARAO K
AND SMT. PRATHIBHA K, ADVS.)**

IN ITA Nos.100025-27/2017

AND:

1. THE DEPUTY COMMISSIONER
OF INCOME-TAX, CIRCLE 3 (1),
CR BUILDING ANNEXE,
P.B. ROAD, NAVANAGAR,
HUBBALLI-580025.

...RESPONDENT

(BY SRI. Y V RAVIRAJ, ADV.)

IN ITA NO.100028/2017

1. THE COMMISSIONER OF INCOME TAX,
CR BUILDING ANNEXE,
P.B. ROAD, NAVANAGAR,
HUBLI-580025.

...RESPONDENT

(BY SRI. Y V RAVIRAJ, ADV.)

ITA Nos.100025-27/2017 ARE FILED U/SEC.260A OF THE INCOME-TAX ACT, 1961, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE AND ALLOW THE APPEALS AND SET ASIDE THE ORDER OF THE INCOME-TAX APPELLATE TRIBUNAL DATED:17.02.2017 BEARING ITA NOS.537 TO 539/Bang/2013 FOR THE ASSESSMENT YEARS 2006-07 TO 2008-09 (ANNEXURE-A) AND THE ORDERS OF THE LOWER AUTHORITIES.

ITA No.100028/2017 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTION OF LAW AS STATED ABOVE AND ALLOW THE APPEAL AND SET-ASIDE THE ORDERS OF THE INCOME TAX APPELLATE TRIBUNAL DATED 12.08.2016 BEARING NO.ITA NOS.1638/BANG/2013 FOR THE ASSESSMENT YEAR 2006-07(ANNEXURE-A) ORDER OF THE REVISIONAL AUTHORITY UNDER SECTION 263 OF THE ACT DATED 24.03.2011 (ANNEXURE-C).

THESE APPEALS COMING ON FOR *ADMISSION*, THE SAME HAVING BEEN HEARD AND RESERVED ON 22.01.2018, THIS DAY, **S.SUJATHA J.**, DELIVERED THE FOLLOWING:

JUDGMENT

These appeals are filed under Section 260A of the Income Tax Act, 1961 ('the Act' for short), by the assessee challenging the order of the Income Tax Appellate Tribunal "B" Bengaluru Bench (for short, 'ITAT') for the Assessment Years 2006-07 to 2008-09.

2. The following substantial questions of law are raised in ITA Nos.100025-27/2017:

- i) Whether in law the Tribunal was right in refusing to adjudicate the appeal in ITA No.537/Bang/2013 for the assessment year 2006-07 on merits, on the ground that the revision order under Section 263 dated 24.03.2011 of the Revisional Authority had attained finality due to the reason that appeal in ITA No.1638/Bang/2013 against the said revision order was dismissed on limitation by the ITAT?
- ii) Whether the benefit of deduction under Section 80-IA(4)(iv)(c) could be denied to the items of income that were derived by the business undertaking which were

inextricably linked to its business operations especially when such items of income went to reduce the element of cost of running of business?

iii) Whether the Tribunal was right in law in upholding the orders of the lower authorities which treated certain items of income that were derived by the business undertaking from its business and that had gone to reduce the cost of operation of the business as 'other income' and not as 'income from profits and gains of business'?

iv) Whether the order of the Tribunal is good in law in as much as the Tribunal has not considered the ratio of the judgment of the Apex Court in CIT Vs. M/s. Meghalaya Steels Ltd. (2016) 383 ITR 217 (SC)?

3. The following substantial questions of law are raised in ITA No.100028/2017.

i) Whether the Tribunal was right in law in dismissing in limine the appellant's plea of condonation of delay, without considering the principles enunciated by the Hon'ble Supreme Court?

- ii) Whether the order of the Tribunal can be held to be good in law, when it dismissed the appeal of the appellant solely on the ground of limitation without examining the merits of the appeal especially against the background that the subject-amounts involved in the appeal were not liable to be charged to tax?
- iii) Whether the order of the Tribunal can be held to be good in law, when its order of dismissal of the appeal solely on the ground of limitation leads to charging to tax certain amounts that are otherwise eligible for deduction, thus resulting in violation of the provisions of Article 265 of the Constitution of India?

4. The appellant, a wholly owned company of Government of Karnataka is engaged in the business of distribution of electricity. During the assessment year 2006-07, its income included the following items of income which were treated as “income from profits and gains of business”.

- 1) Interest on bank Fixed deposits Rs.4,53,925
- 2) Interest on loans to societies

Income from trading	Rs.13,770
3) Profit on sale of stores	Rs.4,47,120
4) Sale of scrap	Rs.11,60,671
5) Other misc. receipts from trading	
Miscellaneous receipts	Rs.30,58,776
6) Rental from staff quarters	Rs.28,53,683/-
7) Rental from others	Rs.1,36,591
8) Excess found on physical	
Verification of cash	Rs.4,419
9) Excess found on physical	
Verification of materials stock	Rs.4,19,297
10) Commission for collection of	
Electricity duty	Rs.1,79,85,415
11) Misc. recoveries	Rs.8,43,44,983
12) Rebate from power generators	Rs.4,45,21,271

Total	Rs.15,53,99,921

5. The appellant's case was selected for scrutiny, subsequently, an assessment order was passed under Section 143(3) of the Act by the assessing officer accepting the returned income declared by the appellant. Thereafter, the revisional authority invoking the provisions under Section 263 of the Act, set-aside the scrutiny assessment, without directing a fresh assessment. It is the contention of the assessee that the said revision order setting-aside the assessment order passed under Section 143(3) of the Act, without directing a fresh assessment as envisaged under sub-

section(1) of the Section 263 of the Act, made assessee to believe that the assessee has to await fresh order before further course of action is taken. Due to the said bonafide belief, the appeal was not filed against the said order of revision within a period of limitation. Belated appeal filed against the order of revision was dismissed by the ITAT solely on the ground of limitation. Subsequently, consequential assessment order under Section 143(3) read with Section 263 of the Act was passed by the assessing authority, without authority of law. Assessing authority instead of treating the claim made by the assessee as 'income from profits and gains of business' relating to certain items treated the same as 'income from other sources'. Thus, no deduction was given under Section 80-IA(4)(iv)(c) of the Act, and the same was brought to charge.

6. Aggrieved by the same, an appeal was preferred by the assessee against the order of the assessment under Section 143(3) read with Section 263 of the Act before the Commissioner of Income Tax

(Appeals) (for short, 'the CIT(A)') which came to be dismissed. The appellant filed an appeal before the ITAT against the said appellate order passed by the CIT(A). In the meantime, assessment orders for the A.Y.2007-08 as well as 2008-09 were concluded in the same line, disallowing the claim of deduction under Section 80-IA(4)(iv)(c) of the Act. The authorities treated the items of income claimed as 'other income' and charged the same to tax. Against these matters, the appeals were filed before the ITAT. All these appeals for the A.Y. 2006-07 to 2008-09 were clubbed together, heard and disposed of by the common order, dated 17.02.2017. The ITAT disallowed the income of the claim made inasmuch as following items are concerned:-

- i) Interest income
- ii) Profit on sale of stores
- iii) Miscellaneous receipts from trading
- iv) Rental income
- v) Commission for collection of electric duty
- vi) Penalty recovered from suppliers/contracts

vii) Unclaimed balance and difference between
WDV/book value of released asset.

viii) Miscellaneous recovery from employees of
Rs.8,45,452/-

7. The items which are not reduced from the profits of the assessee as per the profits and loss account for the purpose of computing deduction are as under:

- i) Department of exam fees
- ii) Sale of department books
- iii) Sale of forms
- iv) Sale of scrap/stock excess found
- v) Meter reading testing charges
- vi) BBC theft ca collected etc.

8. Being aggrieved by the same, the appellant is in appeal challenging the order of the revisional authority as well as the orders passed by the ITAT for the A.Y.2006-07, 2007-08 and 2008-09.

9. Sri.V.K. Gurunathan, learned counsel appearing for the appellant/assessee would contend that the subsequent assessment order as well as the

appellate orders passed by the CIT(A) and ITAT relating to the A.Y. 2006-07 were based on the order of the revisional authority passed under Section 263 of the Act. Section 263 of the Act provides that the Commissioner may call for and examine the record of any proceeding under the Act and if he considers that any order passed therein, by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment however, the order of revisional authority setting aside the assessment order without directing a fresh assessment is contrary to the provisions of Section 263 of the Act. Appeal filed by the assessee belatedly with a delay of 913 days was not condoned by the appellate authority and the same came

to be rejected in further appeal before the ITAT. The assessee was under a bonafide impression that a fresh order of the assessing authority shall be passed before further course of action is taken. However, when the consequential order was passed by the assessing officer, an appeal was filed before the CIT(A), which was heard on merits and then it was realized that the appeal ought to have been filed under Section 263 of the Act before the ITAT. The ITAT however, failed to appreciate the same in a right perspective. Hence, dismissal of the appeal has caused mis-carriage of justice and collection of tax without authority of law, contrary to Article 265 of the Constitution of India affecting the rights of the assessee is unjustifiable.

10. It was contended that the assessing officer had no quarrel on the proposition that the assessee is entitled to deduction in respect of profits and gains of industrial undertaking engaged in infrastructure development etc. in terms of Section 80-IA(4)(iv)(c) of the

Act, which postulates that the undertaking which undertakes substantial renovation and modernization of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2017 shall be entitled for deduction, where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-section(4). This view is reversed by the authorities while passing the consequential orders, pursuant to the order of Revisional Authority.

11. Reference was also made to Section 4(2) of the Karnataka Electricity (Taxation on Consumption) Act, 1959 and Circular No.05/2004, dated 15.07.2005, inasmuch as extension of tax benefit under Section 80-IA of the Act, in case of substantial renovation and modernization of transmission and distribution lines in the power sector.

12. In support of his contentions, learned counsel placed reliance on the following judgments:

- I) *COMMISSIONER OF INCOME TAX VS. GOVINDA CHOUDHURY & SONS, (1993) 203 ITR 0881*
- II) *COMMISSIONER OF INCOME TAX VS. MEGHALAYA STEELS LTD. (2016) 383 ITR 0217*
- III) *THE COMMISSIONER OF INCOME TAX & ANOTHER VS. M/S. WIPRO LTD. (ITA NO.507/2002, DD 25.08.2010)*
- IV) *PANDIAN CHEMICALS LTD. VS. COMMISSIONER OF INCOME (2003) 262 ITR 0278(SC)*

13. Learned counsel Sri.Y.V. Raviraj, appearing for the Revenue supporting the impugned orders submitted that in order to claim deduction under Section 80-IA(4)(iv)(c) of the Act, it is essential to establish that the income of the assessee includes any profits and gains derived from an industrial undertaking

should be towards reimbursement of manufacturing or selling cost, such income should reduce the cost of manufacturing/selling and resultant increase in profit of the industrial undertaking. The claim with respect to the items disallowed by the Tribunal certainly falls under the head “income from other sources” not coming within ambit of Section 80-IA(4)(iv)(c) of the Act. It was submitted that the miscellaneous receipts, rental income, commission for collection of electric duty, penalty recovered from suppliers/contractors, unclaimed balance and difference between the WDV and books value of the released asset and the miscellaneous recovery from the employees, obviously is neither the income derived from the industrial undertaking nor the realization to reduce the cost of manufacturing/cost of sale of manufactured goods. It is essential that the amount of recovery of certain expenses recovered by the assessee and debited to profit and loss account, some material has to be placed on record to reduce the profits from profit of the assessee. The items disallowed by the

Tribunal cannot be held to be unjustifiable. The Tribunal being last fact finding authority has examined the factual aspects in a great detail and allowed the benefit of deduction under Section 80-IA(4)(iv)(c) of the Act to the items which were denied by the assessing authority and the appellate authority. No further deduction can be allowed, not relatable to income derived by the industrial undertaking. Merely for the reason that the same is characterized as income from the business by the assessee, the same cannot be construed as allowable deduction under Section 80-IA(4)(iv)(c) of the Act.

14. It was submitted that the revisional authority exercising the power under Section 263 of the Act revised the order of the Assessing authority, which was erroneous so far as prejudicial to the interest of the revenue. Revisional authority while canceling the assessment though has not directed a fresh assessment, consequential order being passed and the same being challenged by the assessee, assessee is

estopped from challenging the order of the revisional authority passed under Section 263 of the Act; more particularly, with an inordinate delay of 913 days. As such, the ITAT was right in rejecting the appeal filed by the assessee relating to the A.Y.2006-07 challenging the order of the revisional authority.

15. Learned counsel made an attempt to distinguish the judgments relied upon by the learned counsel appearing for the appellant to contend that the same are not applicable to the facts of the present case.

16. We have heard the learned counsel appearing for the respective parties and perused the material on record.

17. Section 80-IA(4)(iv)(c) of the Act is excerpted for ready reference:-

80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

(4)*This Section applies to_*

(i) xxxxx

(ii) xxxxx

(iii)xxxxxx

(iv) an undertaking which,

(a)xxxx

(b)xxxx

(c) undertakes substantial renovation and modernization of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2017.

18. Section 263 of the Act reads thus:

Revision of orders prejudicial to revenue.

(1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment.

19. In view of the said provisions, it is manifestly clear that the revisional authority while canceling the assessment has to direct a fresh assessment.

20. In the case of **Govinda Choudhury & Sons** (supra), the Hon'ble Apex Court has observed thus:

“ 6. This brings us to a consideration of the second question. The sum of Rs.2,77,692 was received by the assessee as interest on the amounts which were determined to be payable to the assessee in respect of certain contracts executed by the assessee and in regard to the payments under which there was a dispute between the two parties. The assessee is a contractor. His business is to enter into contracts. In the course of the execution of these contracts, he has also to face disputes with the State Government and he has also to reckon with delays in payment of amounts that are due to him. If the amounts are not paid at the proper time and interest is awarded or paid for such delay, such interest is only an accretion to the assessee's receipts from the contracts. It is obviously attributable and incidental to the business carried on by him. It would not be correct, as the Tribunal has held, to say that this interest is totally de hors the contract business carried on by the assessee. It is well-settled that interest can be assessed under the head "Income from other sources" only if it cannot be brought within one or the other of the specific heads of charge. We find it difficult to comprehend how the interest receipts by the assessee can be treated as receipts which flow to him de hors the business which is carried on by him. In our view, the interest payable to him certainly 5 of

the same character as the receipts for the payment of which he was otherwise entitled under the contract and which; payment has been delayed as a result of certain disputes between the parties. It cannot be separated from the other amounts granted to the assessee under the awards and treated as "income from other sources". The second question is, therefore, answered in favour of the assessee and against the Revenue."

21. The Hon'ble Apex Court in the case of **Meghalaya Steels Ltd.** (supra) has held thus:

" 28. It only remains to consider one further argument by Shri Radhakrishnan. He has argued that as the subsidies that are received by the respondent, would be income from other sources referable to Section 56 of the Income Tax Act, any deduction that is to be made, can only be made from income from other sources and not from profits and gains of business, which is a separate and distinct head as recognized by Section 14 of the Income Tax Act. Shri Radhakrishnan is not correct in his submission that assistance by way of subsidies which are reimbursed on the incurring of costs relatable to a business, are under the head "income from other sources", which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income. Section 28(iii)(b) specifically states that income from cash assistance, by whatever name called, received or receivable by any person against exports under any scheme of the Government of India, will be income chargeable to income tax under the head "profits and gains of business or profession". If cash assistance received or receivable against exports schemes are included as being income under the head

"profits and gains of business or profession", it is obvious that subsidies which go to reimbursement of cost in the production of goods of a particular business would also have to be included under the head "profits and gains of business or profession", and not under the head "income from other sources"."

22. The High Court of Gujarat in ***Empire Pumps Pvt. Ltd Vs. Assistant Commissioner of Income Tax, (2015) 229 TAXMAN 0379 (Gujarat)*** has observed thus:

"10. *Thus, it is clear that the income from fixed deposit placed for business purpose cannot be treated as income from other source but must be seen as part of the assessee's business income. In the present case also the assessee was compelled to park a part of its funds in fixed deposits under the insistence of the financial institutions and therefore the income received thereupon cannot be termed to income from other sources."*

23. In the light of these judgments, it can be held that the income from cash assistance, by whatever name called, received or receivable by any person chargeable under the head "profits and gains of business or profession", shall be included under the

same head and not under the head “income from other sources”.

24. The Hon’ble Apex Court in the case of ***Meghalaya Steels Ltd.*** (supra), was dealing with the case where assistance was received to the assessee by way of subsidies, which were reimbursed on the incurring of costs relatable to a business. Similarly, in the case of ***Govinda Choudhury & Sons*** (supra), when the interest received by an assessee on the amount which are determined to be payable to the assessee in respect of certain contracts executed, held that the interest payable to the assessee certainly partakes the same character as of the receipts for the payment of which he was otherwise entitled to under the contract, which accrued due to the delay caused as a result of certain dispute between the parties.

25. On examining the present set of facts in the light of these judgments of the Hon’ble Apex Court, we are of the considered view that penalty recovered from

suppliers/contractors for delay in execution of works contract stand on the same footing as that of the case of **Govinda Choudhury & Sons** (supra); if for any reasons, the suppliers/contractors caused delay in execution of works contract and penalty received by the assessee in terms of the contract, obviously it relates to receipts relatable to the business and cannot be treated as “income from other sources”. Hence, the penalty recovered from suppliers/contracts to an extent of Rs.4,31,07,307/- is allowable deduction under Section 80-IA of the Act.

26. Unclaimed balance outstanding for many years which pertains to S.D./EMD of Contractor written back on their books of accounts also partakes the character of the receipts which arise mostly due to non performance of the obligation originating from contract. This amount is relating to the business undertaking and the same has to be construed as income derived by the industrial undertaking. It cannot be accepted how

there is no direct nexus with the business of the assessee as held by the authorities and the ITAT.

27. As regards miscellaneous recovery from employees, ITAT in para-20 of its order, it is observed thus:

20. Now we are left with only one item i.e. miscellaneous recovery from employees of Rs.8,45,452. Regarding this item, nothing has been shown that these are on account of recovery of certain expenses incurred by the assessee and debited to Profit and Loss account and therefore, regarding reduction of this item from the profit of the assessee, we find no infirmity in the order of ld. CIT(Appeals).

28. Since no material was placed on record to show that this amount was recovered on account of certain expenses incurred by the assessee and debited to profit and loss account, finding of the authorities, on this point disallowing the deduction is justifiable and the same is affirmed.

29. As regards difference between WDV and books value of released assets, it is discernible that this income is not derived by an industrial undertaking nor

it reduces the cost of manufacturing/cost of sale of the assessee. Hence, this view of the ITAT stands confirmed in disallowing the deduction.

30. It was argued by the learned counsel appearing for the appellant that the assessee is entitled to deduction towards Commission for collection of electricity duty. Electricity duty is collected by the assessee from the consumers of electricity and the same is remitted to the government, in that process, commission is collected for the said service. This commission is nowhere related to the business activities of the assessee. Hence, we are of the opinion that the rejection of the claim made towards income derived by the undertakings for collection of commission under Section 80-IA(4)(iv)(c) of the Act by the authorities is justifiable.

31. It was pointed out that in terms of Section 4(2) of the Karnataka Electricity (Taxation Consumption) Act, 1959, licensee may be granted a

rebate of such amount as made from time to time to be determined by the State Government regard being had to the cost of collection of the electricity tax incurred by such licensee. However, the said amount of rebate shall not be electricity tax collected by the licensee.

32. On account of the same, the assessee has claimed deduction under the head rebate from power generators, which has been denied by the authorities. This amount of rebate when certainly related to the business activities of the assessee and brings down the cost of manufacture of the goods, the assessee is entitled for deduction towards rebate collected.

33. In the case of ***Empire Pumps Pvt. Ltd.*** (supra), the High Court of Gujarat has held that the income earned from fixed deposit placed for business purposes cannot be treated as “income from other sources”, but must be seen as part of the assessee’s business income. We are in respectful agreement with the same. The amount of deposit parked in the

bank(FD for opening of LC to Power Grid Corporation Ltd., PGCIL) deserves to be considered for deduction under Section 80-IA(4)(iv)(c) of the Act.

34. As regards the rental income, it is also required to be observed that it is an independent income having no direct nexus towards reimbursement of manufacturing or selling expenses, in the absence of the fact that the assessee was paying rent of staff quarters which was debited to profit and loss account. Thus , it cannot be construed as income derived from the industrial undertaking. This view of the Tribunal does not call for any interference by this Court. We confirm the finding of the Tribunal on this aspect.

35. Other items namely department exam fees, sale of service register/departmental books, sale of forms/booklet etc., sale of scrap/stock excess found, meter rating testing charges (part of business income), Back Billing Charges (BBC) theft cases collected are

already held to be allowable deduction under Section 80-IA(4)(iv)(c) of the Act by the ITAT.

36. For the foregoing reasons, we answer the substantial questions of law in favour of the revenue and against the assessee as far as certain items of income are concerned, i.e., miscellaneous recovery from employees, difference between WDV/book value of released assets, commission for collection of electricity duty, rental income. Income derived from the items, viz., penalty recovered from suppliers/contracts, unclaimed balance outstanding pertaining to SD/EMD of contractor written back in the books of accounts, rebate from power generators, interest income (FD for opening of LC to Power Grid Corporation Ltd., PGCIL) are allowable deduction under Section 80-IA(4)(iv)(c) of the Act, the substantial questions of law relating to these items are answered in favour of the assessee.

37. In view of the aforesaid, we are of the considered opinion that the dismissal of the I.T.A.

No.1638/Bang/2013 by the ITAT on the ground of limitation without going into the merits of the case is unjustifiable when the issue was considered on merits while adjudicating the consequential orders. Hence, the substantial questions of law relating to the revisional order under Section 263 of the Act is held in favour of the assessee and against the Revenue.

38. In the result, the appeals are disposed of as indicated above.

Sd/-
JUDGE

Sd/-
JUDGE

JTR