

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
 BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
 AND
 SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos. 207 and 208/Del/2015
 (Assessment Year: 2010-11 , 2011-12)

DCIT, Circle Haridwar, Old Industrial Area, D-29 and 30, Industrial Area, Haridwar	Vs.	Kirby Building Systems India (Uttaranchal) Pvt. Ltd, Plot No. 2, Sector-11, IIE, SIDCUL, Haridwar PAN: AACCK5926G
(Appellant)		(Respondent)

CO Nos. 250 and 251 /Del/2015
 (In ITA No. 207/Del/2015)
 (Assessment Year: 2010-11 and 2011-12)

Kirby Building Systems India (Uttaranchal) Pvt. Ltd, Plot No. 2, Sector-11, IIE, SIDCUL, Haridwar PAN: AACCK5926G	Vs.	DCIT, Circle Haridwar, Old Industrial Area, D-29 and 30, Industrial Area, Haridwar
(Appellant)		(Respondent)

In ITA Nos 315 and 316/Del/2015
 (Assessment Year: 2010-11 and 2011-12)

Kirby Building Systems India (Uttaranchal) Pvt. Ltd, Plot No. 2, Sector-11, IIE, SIDCUL, Haridwar PAN: AACCK5926G	Vs.	DCIT, Income Tax Office (Aayakar Bhawan), Industrial Area, Haridwar
(Appellant)		(Respondent)

Revenue by :	Shri Amit Jain, Sr. DR
Assessee by:	Shri Sudhanshu Sharma, FCA,
Date of Hearing	30/07/2018
Date of pronouncement	11/09/2018

O R D E R

PER BENCH

1. These are the bunch of six appeals in case of same assessee for two Assessment Years filed by the assessee and revenue. Parties made their

submission and these are heard together and disposed off by this common order.

AY 2010-11

2. The revenue has raised the following grounds of appeal in ITA No. 207/Del/2015 for the AY 2010-11: -

- "1. The Ld. CIT(A) has erred in law and on facts in holding that the receipt on account of foreign exchange fluctuation amounting to Rs. 2,85,59,697/- is eligible for deduction u/s 80IC ignoring the ratio established by the Hon'ble Supreme Court in the case of Liberty India Vs. CIT 183 Taxman 349 (2009) as per which the "income derived from industrial undertaking has been held to be eligible for the said deduction and not the income attributable to industrial undertaking".*
- 2. The Ld. CIT (A) has erred in law and on facts in holding that customer advances written back amount to sale and can be said to be derived from the eligible business u/s 80IC ignoring the ratio established by the Hon'ble Supreme Court in the case of Liberty India Vs. CIT 183 Taxman 349 (2009) as per which the "income derived from industrial unde taking has been held to be eligible for the said deduction and not the income attributable to industrial undertaking".*
- 3. The Ld. CIT (A) has erred in law and on facts in holding that sundry balances of provisions written back amounting to Rs.30,74,769/- are eligible for deduction u/s 80IC ignoring the ratio established by the Hon'ble Supreme Court in the case of Liberty India Vs. CIT k83 Taxman 349 (2009) as per which the "income derived from industrial undertaking has been held to be eligible for the said deduction and not the income attributable to industrial undertaking."*

3. The assessee has raised the following grounds of appeal in CO No. 250/Del/2015 for the Assessment Year 2010-11: -

- "1. Respondent (assessee) wishes to affirm that we have filed detailed submissions before the Hon'ble CIT(Appeals) Dehradun in support of our appeal against the order of AO, the same have been deliberated upon in detail and CIT(Appeals) Dehradun has passed his order on merits of the case. Assessee thus wishes to be present during the hearing of the case in order to re-present his contention if necessary.*
- 2. Assessee has filed a cross-appeal bearing No. 315/Del/2015 on an addition upheld by the CIT(Appeals) Dehradun relating to the same*

asst. year; hence the assessee prays for clubbing of both appeals in order to arrive at a clear decision on the matters raised by the AO in his original order dt 29.01.2013."

4. The assessee has raised the following grounds of appeal in CO No. 315/Del/2015 for the Assessment Year 2010-11: -
- "1. Because on facts and in circumstances of the case, the CIT(A) 1 Dehradun has erred in not allowing the benefit of deduction u/s 80-IC on the miscellaneous receipts recovered from customers on account of business expenses and related costs, despite the same being eligible to deduction*
 - 2. Because on facts and in circumstances of the case, the CIT(A)-1 Dehradun has erred by not appreciating the submissions made by the assessee as well as brushing aside the various court pronouncements & material made available to him.*
 - 3. That the assessee reserves the right to introduce any other ground of appeal and new facts with the kind permission of your honours."*
5. For the Assessment Year the assessee company is engaged in manufacture of pre-engineered buildings. Assessee is claiming deduction u/s 80IC since AY 2007-08. Assessee filed its return of income on 14.08.2010 showing total income of Rs. Nil. The assessee claimed deduction u/s 80IC of Rs. 173087243/-. The Id Assessing Officer passed an assessment order wherein, he held that assessee is not eligible deduction u/s 80IC on foreign exchange of Rs. 28559697/-, **miscellaneous income, customer's advance written back etc.** Consequently, the total income of the assessee was assessed at Rs. 71371250/-. The assessee challenged the same before the Id CIT(A). The Id CIT(A) held that assessee is eligible for deduction u/s 80IC on foreign exchange fluctuation. He further held so for sale of scrap, sundry balance and customer advance written back. However, he held that on misc income assessee is not eligible for deduction. Therefore, assessee and AO both are in appeal before us.

6. Vide ground No. 1 the revenue has challenged that foreign exchange fluctuation amounting to Rs. 28559697/- is not eligible for deduction u/s 80IC.
7. The Id Departmental Representative supported the order of the Id Assessing Officer and submitted that such income is not derived from the industrial undertaking. He further relied on the decision of the Hon'ble Supreme Court in case of Liberty India Vs. CIT.
8. The Id Authorised Representative relied on para No. 10 of the order of the Id CIT(A). He further stated that in CIT Vs. Nobel Software Development India Pvt. Ltd 260 CTR 272, Hon'ble Karnataka High Court after considering the decision of the Hon'ble Supreme Court held that assessee is eligible for deduction on such income. It was further stated **that identical issue has been considered in assessee's own case for** Assessment Year 2008-09 and it has been held that such foreign exchange gain is eligible for deduction u/s 80IC of the Act.
9. We have carefully considered the rival contentions. The issue is now squarely covered in favour of the assessee by the decision of CIT Vs. Priyanka Gems 367 ITR 575 and CIT Vs. Metrochem Industries Ltd. Both these decisions have considered the decision of the Hon'ble Supreme Court in Liberty India Vs. CIT 317 ITR 218. In view of this we do not find any infirmity in the order of the Id CIT(A) in holding that foreign exchange gain is income derived from industrial undertaking and is eligible for deduction u/s 80IC of the Act. Ground No 1 is dismissed.
10. The second ground of appeal of revenue is against holding that customer advances written back is also income derived from industrial undertaking.
11. The Id Departmental Representative relied upon the order of the Id Assessing Officer whereas, the Id AR relied upon the order of the Id CIT(A).
12. We have carefully considered the rival contentions as well as perused the orders of the lower authorities. The customer advances are in the nature of advances against the various orders. When such jobs are cancelled by

the customer the assessee recovers the cost of material and consumable supply to the customer from the advance received and shows it as advances written back. Therefore, this partakes the character of sale and hence is income derived from industrial undertaking. The Id CIT(A) has also given these reasons for deciding the issue in favour of the assessee. The Id Departmental Representative could not show us any reason that why above sum cannot be income derived from industrial undertaking. In view of this we do not find any infirmity in the order of the Id CIT(A) in holding that customer advances written back is income derived from the industrial undertaking as it has direct nexus with it, hence, eligible for deduction u/s 80IC of the Act. Ground No. 2 of the appeal is dismissed.

13. Ground No. 3 of the appeal is against the order of the Id CIT(A) holding that sundry balances of provisions written back amounting to Rs. 3074769/- is income derived from industrial undertaking and eligible for deduction u/s 80IC of the Act. The assessee submitted that this amount was debited to the profit and loss account of Assessment Year 2009-10 as business expenditure. Therefore, it has gone to reduce the income of the assessee in earlier previous year and now same is written back and therefore, it is going to swell the profit of the industrial undertaking during the year. It was stated by Id Assessing Officer that it does not have a first degree nexus with the eligible business of the assessee. Hence, he denied deduction thereon. The Id CIT(A) decided the issue in favour of the assessee. As the provision made was considered as reduction in eligible profit its reversal should be considered as income of undertaking.
14. We do not find any infirmity in the order of the Id CIT(A), hence ground No. 3 is dismissed.
15. Accordingly, ITA No. 207/Del/2015 filed by the AO is dismissed.
16. The CO No. 250/Del/2015 is just supporting the order and does not agitate any specific issue but is general in nature hence, same is dismissed.

17. ITA No. 315/Del/2015 filed by the assessee is on the issue that miscellaneous income recovered from customer on account of business expenses and related cost has been held by the Id CIT(A) as income not derived from industrial undertaking.
18. The Id Authorised Representative submitted that same is allowable whereas, the Id DR relied upon the order of the Id Assessing Officer.
19. We have carefully considered the rival contentions and also perused the orders of the Id CIT(A) who vide para No 13.1 has held that miscellaneous recoveries is an independent source of income beyond first degree of nexus with the industrial undertaking, hence, is not eligible for deduction u/s 80IC of the Act. We do not find any infirmity in the order of the Id CIT(A). Accordingly, the ITA NO. 315/Del/2015 filed by the assessee is dismissed.

Assessment Year 2011-12

20. For Assessment Year 2011-12 the order of the Id CIT(A)-I, Dehradun dated 10.02.2014 is challenged by revenue raising solitary ground of appeal in ITA No. 208/Del/2015: -
 - "1. *The Id CIT(A) has erred in law and on facts in holding that customer advances written back amount to sale and can be said to be derived from the eligible business u/s 80IC ignoring the ration establishes by the Hon'ble Supreme Court in the case of Liberty India Vs. CIT 183 Taxmann 349 (2009) as per which the "income derived from industrial undertaking" has been held to be eligible for the said deduction and not the income attributable to industrial undertaking.*"
21. The assessee has also challenged by filing a CO No. 251/Del/2015 for the Assessment Year 2011-12 raising following grounds of appeal: -
 - "1. *Respondent (assessee) wishes to affirm that we have filed detailed submissions before the Hon'ble CIT(Appeals) Dehradun in support of our appeal against the order of AO, the same have been deliberated upon in detail and CIT(Appeals) Dehradun has passed his order on merits of the case. Assessee thus wishes to be present during the hearing of the case in order to re-present his contention if necessary.*

2. *Assessee has filed a cross-appeal bearing No. 316/Del/2015 on an addition upheld by the CIT(Appeals) Dehradun relating to the same asst. year; hence the assessee prays for clubbing of both appeals in order to arrive at a clear decision on the matters raised by the AO in his original order dt 05.02.2014."*

22. The assessee has also filed appeal against the order of Id CIT(A) raising following grounds of appeal in ITA No. 316/Del/2015 for the Assessment Year 2011-12: -

"1. **BECAUSE ON FACTS AND IN CIRCUMSTANCES OF THE CASE, THE CIT (A) 1 DEHRADUN HAS ERRED IN NOT ALLOWING THE BENEFIT OF DEDUCTION U/S 80-IC ON THE MISCELLANEOUS RECEIPTS RECOVERED FROM CUSTOMERS ON ACCOUNT OF BUSINESS EXPENSES AND RELATED COSTS, DESPITE THE SAME BEING ELIGIBLE TO DEDUCTION.**

2. **BECAUSE ON FACTS AND IN CIRCUMSTANCES OF THE CASE, THE CIT (A) 1 DEHRADUN HAS ERRED BY NOT APPRECIATING THE SUBMISSIONS MADE BY THE ASSESSEE AS WELL AS BRUSHING ASIDE THE VARIOUS COURT PRONOUNCEMENTS & MATERIAL MADE AVAILABLE TO HIM.**

3. **THAT THE ASSESEE RESERVES THE RIGHT TO INTRODUCE ANY OTHER GROUND OF APPEAL AND NEW FACTS WITH THE KIND PERMISSION OF YOUR HONOURS."**

23. At the time of hearing the Id Authorised Representative submitted that in appeal of the revenue the solitary ground raised is against the order of the Id CIT(A) where the customer's advance returned of Rs. 1439750/- held by the Id Assessing Officer that same is not income derived from industrial undertaking and therefore, not eligible for deduction u/s 80IC of the Act was reversed. The Id CIT(A) held that such income is income derived from industrial undertaking following the order of his predecessor for Assessment Year 2009-10. It was stated that the tax effect involved in the appeal is Rs. 478249/- and therefore, it is covered by Circular No. 3/2018 dated 11.07.2018.

24. The Id Departmental Representative also agreed with the same.

25. At the outset of the hearing itself, the Id. DR brought to our attention that CBDT vide Circular No.03/2018 dated 11TH July 2018 has decided that the revenue would not prefer an appeal before the Tribunal if the tax effect is less than Rs.20 lakhs. Therefore, he pleaded that the appeal of the revenue be decided as per the instruction of the CBDT. Ld AR also reiterated same facts.

26. We have heard both the sides on the issue and perused the material. We find that the CBDT vide circular dated 11th July 2018 has revised the monetary limit for filing the appeal by the department before Income Tax Appellate Tribunal, Hon'ble High Courts and Hon'ble Supreme Court. The relevant para of the aforesaid circular is reproduced as under :-

"3. Henceforth, appeals/SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder :-

<i>Sl.No.</i>	<i>Appeals in Income tax matters</i>	<i>Monetary Limit(in Rs.)</i>
<i>1.</i>	<i>Before Appellate Tribunal</i>	<i>20,00,000</i>
<i>2.</i>	<i>Before High Court</i>	<i>50,00,000</i>
<i>3.</i>	<i>Before Supreme Court</i>	<i>1,00,00,000</i>

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case."

27. We find that the tax effect involves in the appeal of the Revenue is below Rs.20 lakhs. **There is no dispute that the Board's instructions or directions** issued to the Income-tax authorities are binding on those authorities, therefore, the Department should have withdrawn/not pressed the present appeal in view of the aforesaid instruction since the tax effect in the instant appeal is less than the amount of Rs.20 lakhs.

28. In view of the above, Circular No.3/2018 dated 10.07.2018 will apply to all pending appeals. Therefore the precedent, it is held that the appeal is not maintainable in the instant case as the tax effect is less than Rs.20 lakhs. Accordingly, it is held that appeal filed by the revenue is not maintainable.

29. In the result, appeals filed by the department is dismissed.
30. As the assessee has filed cross objection No. 251/Del/2015 in the above appeal same is also dismissed.
31. The assessee has also filed an appeal in ITA No. 316/Del/2015 wherein, assessee has challenged the action of the Id CIT(A) in holding that miscellaneous receipt of Rs. 962208/- received by the assessee is not income derived from industrial undertaking and therefore, same is not eligible for deduction u/s 80IC of the Act.
32. The brief facts of the case is that assessee is a company who filed its return of income on 28.11.2011 showing of Rs. 1939867/- which was subsequently revised on 17.05.2012. The assessee is in the fifth year of claim of deduction u/s 80IC of the Act with respect to its factory situated in notified area engaged in manufacturing of pre-engineered building. During the year the assessee has received a sum of Rs. 962208/- as miscellaneous income. Same was stated to be arising out of cancellation of job orders. Assessee received advance money from the customers and in the event of cancellation of such jobs the assessee recovers the cost of material and consumables supplies to customers. It also recovers the cost of tendering, transportation and loss on account of transit and credits it as miscellaneous income. The Assessing Officer held that this income is not eligible for deduction u/s 80IC of the Act . The order of the Id Assessing Officer was passed as per the order of his predecessor in the **assessee's own case for AY 2009-10**.
33. The assessee challenged the same before the Id CIT(A) who also upheld the same based on the order in case of the assessee for AY 2009-10. Therefore, assessee is in appeal before us.
34. The Id Authorised Representative reiterated the same submission as were tendered before lower authorities.
35. The Id Departmental Representative also relied on the orders of the lower authorities and submitted that as the issue is already decided in the case

of the assessee for AY 2008-09 which has not been challenged before the coordinate bench, same is required to be confirmed.

36. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have already decided this issue in appeal of the assessee for AY 2010-11 in this order. Therefore, following the same reasoning we hold that miscellaneous income of the assessee is not eligible for deduction u/s 80IC of the Act, accordingly, appeal of the assessee is dismissed.

37. All six appeals are accordingly disposed off by this order.
Order pronounced in the open court on 11/09/2018.

-Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 11/09/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi