Acit, Chandigarh vs M/S International Fresh Farm Products ... on 27 July, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH

BEFORE MS. DIVA SINGH, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.311/Chd/2015
(Assessment Year : 2010-11)

M/s International Fresh Farm Products(India) Ltd., #3, Sector 5, Chandigarh. PAN: AAACI5038D	Vs.	The A.C.I.T., Circle 1(1), Chandigarh.

ITA No.703/Chd/2015
(Assessment Year : 2012-13)

M/s International Fresh Farm Products(India) Ltd., #3, Sector 5, Chandigarh. PAN: AAACI5038D	Vs.	The A.C.I.T., Circle 1(1), Chandigarh.

And

ITA No.754/Chd/2015
(Assessment Year : 2012-13)

The A.C.I.T., Circle 1(1), Chandigarh. (Appellant)	Vs.	M/s International Fresh Farm Products(India) Ltd., #3, Sector 5, Chandigarh. PAN: AAACI5038D (Respondent)

Appellant by	:	Shri Parikshit Aggarwal
Respondent by	:	Smt.Chandra Kant, Sr.DR
Date of hearing	:	12.07.2017
Date of Pronouncement	:	27.07.2017

O R D E R

PER ANNAPURNA GUPTA, A.M. :

The above appeals pertain to the same assessee with the appeal in ITA No. 311/Chd/2015 having been filed by the assessee against the order passed by the Ld. CIT(Appeals), Chandigarh dated 4.10.2013 for assessment year 2010-11 while the appeals filed in ITA No. 703/Chd/2015 and in ITA No. 754/Chd/2015 are cross appeals filed by the assessee and Revenue against the order of Ld. CIT(Appeals)-I, Chandigarh dated 3.6.2015 relating to assessment year 2012-13.

2. It was common ground between both the parties that the issue involved in the appeals was identical. Therefore they were heard together and are being disposed off by way of this common order. For the sake of convenience we shall be dealing with the assessee's appeal in ITA No. 311/Chd/2015.

ITA No. 311/Chd/2015 (Assessee's Appeal):

3. Ground No.1 raised by the assessee reads as under:

> "That the Learned CIT(A) has erred in upholding disallowance of deduction U/s 80IB(11) of the Income Tax Act, 1961. That the action of the learned CIT(A) is de-void of any merits as non- claim of deduction in earlier years due to ignorance cannot be aground for sustaining the disallowance of deduction. The appellant company satisfies all the conditions for claim of deduction U/s 80IB(11) of the Income Tax Act, 1961. It is prayed that the deduction be allowed .

4. The assessee in the aforesaid ground has challenged the action of the Ld. CIT(Appeals) in upholding the denial of deduction claimed u/s 80IB(11) of the Income Tax Act, 1961 (in short 'the Act').

5. Brief facts relevant to the issue are that the assessee had claimed deduction amounting to Rs.27,66,031/- u/s 80IB(11) of the Act which allows deduction of profits derived from the business of setting up and operating a cold chain facility for agricultural produce. Before the Assessing Officer the assessee demonstrated that it was running a cold chain facility for storage and transportation of agricultur al produce. The Assessing Officer after examining the agreement entered into by the assessee with M/s Pepsico India Holding (P) Ltd. for cold storage management, disallowed the claim of deduction stating that the assessee was not doing any cold chain business directly but was only providing services to M/s Pepsico India Holding (P) Ltd. and earning income from contract and rent. The Assessing Officer further stated that though the assessee had entered into the said agreement with M/s Pepsico India Holding (P) Ltd. in the year 2005 and had been providing services to its since then it had never claimed the said deduction in earlier years. The Assessing Officer, therefore, held that the assessee was not entitled to deduction u/s 80IB(11) of the Act since it did not fulfill conditions laid down therein. The deduction, therefore, claimed of Rs.27,66,031/- was added back to the income of the assessee.

6. The matter was carried in appeal before the Ld. CIT(Appeals) who upheld the order of the Assessing Officer. The relevant findings of the Ld. CIT(Appeals) at paras 2.3 to 2.3.5 are as under:

> 2.3 I have considered the facts of the case and the submission of the Ld. Counsel. The appellant had claimed deduction u/s 80IB of Rs. 27,66,031/-, whereas as per the

audit report in form No. 10CCB, the allowable deduction is only Rs, 10,77,611/- and so the claim of deduction of the appellant is not as per the audit report (claim is higher by Rs.16,88,420/-).

2.3.1 The appellant company had claimed before the Assessing Officer that it was eligible for deduction u/s 80IB(11), since it was running cold chain facility and satisfied the conditions laid down for the said deduction. However, before me the appellant has argued that the Assessing Officer has disallowed the claim of deduction 80IB (11A)of the Act, but this argument of the appellant is not correct, since the Assessing Officer has actually disallowed the claim u/s

80.IB(11), claimed by the appellant. Thus, there was misrepresentation either before the Assessing Officer or the undersigned in the appellate proceedings.

2.3.2 It is also seen that the. appellant had not claimed deduction u/s 80IB in any of the earlier years and has claimed the same for the first time during the year under consideration.

Relevant provision relating to this issue is sub-section (11) of section 80IB, which is reproduced below for the sake of ready reference:

"Notwithstanding anything contained in clause (iii) of sub-section (2) and sub-sections (3), (4) and (5), the amount of deduction in a case of industrial undertaking deriving profit from the business of setting up and operating a cold chain facility for agricultural produce, shall be hundred per cent, of the profits and gains derived from such industrial undertaking for five assessment years beginning with the initial assessment year and thereafter, twenty-five per cent, (or thirty per cent, where the assesses is a company) of the profits and gains derived from the operation of such facility in a manner that the total period of deduction does not exceed ten consecutive assessment years (or twelve consecutive assessment years where the assesses is a co-operative society) and subject to fulfilment of the condition that it begins to operate such facility on or after the 1st day of April, 1999 but before the 1st day of April 2004."

2.3.3 Thus, the deduction is 100% of the profits and gains derived from eligible industrial undertaking for first five years beginning with the initial assessment year and thereafter 30% of the profits and gains derived from such industrial undertaking. The point is why such a claim was not made by the appellant during the earlier years. When questioned, the representative of the appellant stated that the claim was not made in the earlier years because the appellant was not aware of the law in this regard. To me, it appears that the claim was not made in the earlier years because the appellant was too well aware of the law and was conscious of the fact that it was not entitled to benefit of this provision. Even for the year under appeal, for which the appellant obviously, took a chance, it has not held a consistent stand.

2.3.4 It is also observed that the appellant has provided services to M/s Pepsico and earning income from contract and rent. The appellant has not segregated the amount eligible for deduction u/s 80IB out of the Receipts from Pepsico, but this observation/ finding is not much relevant, since it has been held that the appellant is not eligible for deduction u/s 80IB of the Act.

2.3.5 In view of the above, it is held that the appellant is not eligible for deduction u/s 80IB of the Act and the finding of the Assessing Officer in this regard is upheld, though on different grounds. Ground of appeal No.1 is dismissed."

7. Aggrieved by the same, the assessee has come up in appeal before us. During the course of hearing before us, the Ld. counsel for assessee made detailed arguments against the disallowances so made. The Ld. counsel for assessee pointed out that the assessee was running a cold chain facility and assessment year 2004-05 was the first year of commencing operations. The Ld. counsel for assessee pointed out that the impugned assessment year, i.e. 2010-11, was the 7th year since it had commenced operations and it was in this year that the assessee had for the first time claimed deduction u/s 80IB(11) of the Act. Thereafter the Ld. counsel for assessee pointed out that from the order of the Ld. CIT(Appeals) it emerged that the primary reason for denying deduction u/s 80IB(11) of the Act were two fold;

a) since the aforesaid deduction had not been enclaimed in the earlier year;

b) since it had merely rented out premises to M/s Pepsico India Holding (P) Ltd. for storage of agricultural produce and the revenue earned was rental income which was taxable under the head 'income from house property' and not business income.

8. Thereafter the Ld. counsel for assessee stated that it was amply demonstrated both to the Assessing Officer and the Ld. CIT(Appeals) that the assessee had not merely leased out it premises of cold storage to M/s Pepsico India Holding (P) Ltd. for storing its agricultural produce but had also rendered services and take all responsibility for the proper storage of the goods and that it was a consolidated agreement for providing cold storage facility to M/s Pepsico India Holding (P) Ltd.. The Ld. counsel for assessee at this juncture drew our attention to the copy of the agreement entered into with M/s Pepsico India Holding (P) Ltd. which was reproduced in the assessment order also at pages 4 to 8. The same is reproduced hereunder also for reference:

> COLD STORE MANAGEMENT AGREEMENT This agreement is made at this 15th day of May, 2005 BETWEEN PepsiCo India Holdings Pvt Ltd, (FritoLay Division), a company incorporated under the Companies Act 1953 and having its registered office at 3B, DLF Corporate Park, Ciutab Enclave- Hi, Gurgaon, Haryana and head office at 4m Floor, Tower A, Global' Business Park, Gurgaon Haryana, and factory at Village Channo hereinafter referred to as PIH (which expression shall unless the context'"

otherwise 'repugnant to the context or meaning there of be deemed to include Its successors in business and assigns) of the ONE PART AND M/S international Fresh Farm Products (India) Limited a company incorporated under the Companies Act, 1956 and having, its registered office at House, no 3," Sector 5, Chandigarh, hereinafter referred to IFF (which expression shall unless the context otherwise repugnant to the context or meaning there of be deemed to include its successors in business and assigns). On the Other PART.

WHEREAS

1) PIH Is engaged in the distribution of snack food products (hereinafter called "PIH Products") manufactured by Peps! Foods Private Limited for PIH at its factory located at Channo (hereinafter called PFL Factory").

2) IFF approached PIH and offered Its services for management of cold store for storage of potatoes owned and owned and stored by PIH (hereinafter "PIH Products") at the cold store owned and managed by IFF and located at Village Channo (hereinafter "IFF Cold Store").

3) PIH has decided to entrust alt functions relating to cold store management to IFF AND WHEREAS PIH and IFF have agreed to the terms and conditions set out in this agreement as under;

NOW THIS AGREEMENT WITNESSETH AS UNDER

1. Responsibilities of IFF PIH hereby agrees to entrust and allow IFF and IFF, In turn, agrees to undertake for and on behalf and for the benefit of PIH the following functions in respect of the PIH Products from time to time:

a) Receipt of PIH goods at IFF Cold Store.

b) Storage and Preservation of PIH goods as per the terms of this agreement.

c) Transportation of PIH goods from IFF Cold Store to PIH Factory located at Village Channo.

d) Conduct Physical Verification of PIH goods.

1. Warehousing

a) IFF shall store the PIH Products received by it in IFF Cold Store

b) IFF shall receive the PIH Products from the PIH as per instructions received from PIH from time to time and issue a Goods Receipt for the same.

c) IFF shall take all reasonable care for storage of the PIH Products and shall be deemed to be in the position of a bailee in relation to such goods.

d) Both the parties agree that transaction relating to Receipt & Issue of PIH Products, affecting the stock balances in the inventory system for stocks at IFF Cold Store shall be effected under the control of IFF' and PIH reserves the right to audit such transactions to determine the source of each transaction.

e) IFF shall be responsible to follow such storage norms as are specified in Annexure-2

f) The parties hereto agree to the Review and Reporting Schedule contained in the operating protocol contained in Annexure 3.

g) The ownership of entire stocks at the IFF Cold Store shall remain with PIH at all times.

2. T r a n s f e r f r o m IF F C o l d st o r e

a) A IF F s h al l k e e p 2 (T wo) n o . o f tr u c k s of th e s p e c if ic at i o n me n t io n e d A n n e x u r e 1 of th i s ag r e e me n t a t al l ti me s a t th e IF F C o l d S to r e f o r tr an s p o r t of th e P IH P r o d u c ts to th e P IH F ac to r y.

b) BIFF shall be liable for any loss, damage, mis-delivery, non-delivery or shortage of the Products by reason of any acts of omission or commission on their part or by its employees, contractors, agents or sub-agents. IFF shall within two weeks from the date of any demand made by PIH in that behalf without demur and notwithstanding any objection raised by them, and without any right of set-off or counter claim, reimburse PIH the amount of loss incurred by PIH, failing which PIH shall be entitled to recover such amounts from them in any manner it deems fit.

c) IFF shall, in the performance of its obligations under this agreement, use its best endeavors to promote the interest of PIH and comply with the instructions and directions of PIH issued from time to time.

d) IFF will be fully responsible for the Products received by it for any shortages/loss/damage in transit between IFF Cold Store and PIH Factory.

e) IFF shall arrange to procure all required licenses and/or comply with all regulations and laws.

3. Relationship It is clearly understood between PIH and IFF that the relationship between PIH and IFF shall be on principal to principal basis and IFF shall not act as an Agent or shall not represent itself as a representative of PIH in any manner to third party. Both parties, shall be responsible towards their respective employees and compliance with statutory laws. IFF agrees to indemnify and keep indemnified PIH against any non-compliance and vice-versa

4. Consideration PIH hereby agrees to pay IFF consideration as per Annexure- 4

5. Validity This agreement shall be effective from Feb 15th, 2005 and shall be valid for a period of 3 years, provided that either party may with three months prior notice in writing terminate this agreement in the event of breach of any of the terms of this agreement by the other party.

Provided further that the parties may review the scope of services and pursuant costs after every 12 months, the first review by November 15th, 2005.

6. Arbitration If any dispute or differences shall arise between the parties hereto relating to the operations mentioned herein above or any other aspect thereof or if any matter shall arise as to the meaning or construction of any of the provisions of this agreement all such disputes or differences shall be referred to in accordance with Arbitration- & Conciliation Act 1996, and the place of such arbitration shall be in the State of Punjab. This Agreement is made and executed on this the 27th day of January 2006, between M/s international Fresh Farm Products (India) Ltd., a limited company having its registered office at, H No. 3, Sector 5, Chandigarh - 160

022. Herein after called 'IFFPIL' (which expression shall unless otherwise repugnant to the context or meaning thereof be deemed to include its successors in business and assigns) of the ONE FART AND M/s PepsiCo India Holdings- Private Limited (FritoLay Division), a company incorporated under the Companies Act, 1956 and having its registered office at 3B, Corporate Park OLF Qutab Enclave, Phase 111, Gurgaon, Haryana and an office a(13'" Floor. Mohan Dev Building 13 Tolstoy Marg, New Delhi and having its factory at Village Chnnno Distt Bhawanigarh, Punjab herein after called 'PIH1 (which expression shall unless otherwise repugnant to the context or meaning thereof be deemed to include its "successors In business and assigns) of the OTHER PART. WHEREAS

1) PIH manufactures, sells and distributes a large range of packaged salted snack food products under the trade marks Lays, Uncle Chipps, Kurkure, Namkeen, Lehar Namkeen, Cheetos etc.. and requires cold storage facilities for the storage of potatoes used in the manufacture of some of these products

2) IFFPL has entered into a Cold Store Agreement dated December 1, 2004 with PepsiCo India Holdings Private Limited (FritoLay Division) for lease of its Cold Store located at Village Channo (the "Cold Store").

3) IFFPL and PIH have agreed to in make certain improvements to the facilities available In the Cold Store To this end IFFPI shall, at its own cost, install certain additional amenities and fixtures In the Cold Store which PJH has agreed to take on lease on the terms and conditions contained herein.

NOW THEREFORE IN CONSIDERATION OF THE REPRESENTATIONS AND WARRANTIES CONTAINED HEREIN THIS AGREEMENT WITNESSETH AS FOLLOWS:

1) IFFPIL will build racks in 3 chambers (chamber #1,2 and

3) and in half area of chamber #4 of the Cold Store (the "Facilities") as per the agreed design and, handover to PIH for use by February 1, 2006

2. PIH shall take the Facilities on lease from IFFPL for rent of Rs.227,000/-(Rupees two lacs twenty seven thousand only} (the "Rent") per month to be paid by PIH to IFFPIL from the date the Facilities are handed over for use to PIH.

3) This agreement shall subsist for a period of 5 (five) years form the date of handover of the Facilities to PIH (!.«. February 1,2006) on the terms and conditions contained herein and shall expire on January 31, '20.11 unless terminated earlier in terms hereof.

4) The either party may terminate this agreement at any time during the term without assigning any reason by giving to the other 3 months written notice at the address contained herein.

5) In the event of-any dispute or difference lathe between the parties regarding the interpretation of this agreement or any other issue parties hereto shall refer the dispute to arbitration per the terms of the Arbitration and Conciliation Act, 1996. Courts in Delhi shall have exclusive jurisdiction.

9. The Ld. counsel for assessee pointed out therefrom that as per clause-2 of the said agreement the assessee had offered services for management of cold storage for storage of potatoes of M/s Pepsico India Holding (P) Ltd. (hereinafter referred to as 'PIH'). Referring to clause-3 of the said agreement the Ld. counsel for assessee pointed out that all functions relating to cold storage management had been entrusted to the assessee. Thereafter the Ld. counsel for assessee drew our attention to the responsibilities of the assessee in discharging its functions and pointed out that it included all activities right from receipt of goods from PIH at the cold storage to transporting the goods taken to PIH on demand including storing and preserving them in the interim period and conducting physical verification of the same. The Ld. counsel for assessee drew our attention to the warehousing clause and pointed out to point No. (c) therein which required the assessee to take all reasonable care of storage of the products and stated that the assessee would be in the position of bailee to such goods. The Ld. counsel for assessee thereafter drew our attention to clause dealing with transfer from assessee's cold storage and pointed out that the said clause required the assessee to keep two trucks at its disposal for transporting goods to PIH and that the assessee would be liable in case of any loss or damage, mis-delivery or non-delivery on its part.

10. The Ld. counsel for assessee thereafter stated that it is evident from the afore said agreement that the assessee had not merely let out its cold storage facility to PIH, since the responsibility of storing the agricultural produce of PIH properly in its facility rested with the assessee and it was the duty of the assessee to adequately store the agricultural produce sent by PIH to its cold storage facility. The Ld. counsel for assessee stated that after receiving the goods from PI

H for cold storage the entire responsibility for maintaining the goods in proper condition in its cold storage facility rested with the assessee and PI H thereafter had nothing to do with the goods and was also not involved in proper maintenance of the goods in the cold storage facility provided by the assessee. The Ld. counsel for assessee stated that it was evident from the above that the assessee was not merely providing premises to PI H but was providing cold storage facility to PI H and, therefore, the Ld. CIT(Appeals) had erred in holding that the assessee was as a consequence not entitled to deduction u/s 80IB(11) of the Act. The Ld. counsel for assessee placed reliance on the following case laws in support of its above contention:

1) CIT Vs. National Storage P. Ltd.
66 ITR 596 (1967) (SC)

2) CIT Vs. District Co-operative Federation
271 ITR 22 (2004) (All)

3) CIT Vs. Ambika Sheet Grah (P) Ltd.
84 CCH 289 (2013) (All)

4) ITO Vs. Ambika Sheet Grah (P) Ltd.
119 ITD 235 (2009) (Agr)

11. The Ld. counsel for assessee further pointed out that it had returned its income from cold storage facility provided as income under the head 'profits and gains from business and profession' and the Assessing Officer had assessed it as such. The Ld. counsel for assessee pointed out that the Assessing Officer had not treated the rental income earned by it as income under the head 'Income from house property'. Therefore also, Ld. Counsel for the assessee stated that, having assessed the income as income under the head 'income from business and profession' and not under the head 'income from house property', the Assessing Officer had not treated the aforesaid income as merely rent received by the assessee by letting out its property.

12. The Ld. counsel for assessee thereafter took up the second reason for denying deduction i.e. since the assessee had not claimed said deduction in earlier years. The Ld. counsel for assessee pointed out that it has been held by courts in a number of decisions that merely because deduction has not been claimed in earlier years, the assessee could not be denied deduction in a subsequent year. The Ld. counsel for assessee stated that it has been held that claiming deduction from the initial assessment year it is not a condition which is a pre-requisite for claiming deduction in subsequent years. The Ld. counsel for assessee

drewourattentiontothefollowingdecisionsinsupportofitsabovecontentions:

1) CIT Vs. Excel Softech Ltd.
219CTR405(2008(P&H)

2) Praveen Soni Vs. CIT
333ITR324(2011)(Del)

3) CIT Vs. Laxmi Metal Industries
236ITR130(1999)(All)

4) CIT Vs. Sunder Forging
ITA No. 242 of 2012 (P&H)

13. Thustheld.counselforassesseearguedthatdenialofdeductionu/s80IB(11)wasagainstthefactsandcircumstancesofthecaseandincontraventionofthelawinthisregard.

14. Per contra, the Ld. DR relied upon the orders of the Assessing Officer and Ld. CIT(Appeals). The Ld. DR further pointed out that the Assessing Officer had not investigated whether the assessee had commenced operations before 1.4.2004 which is an essential condition for claiming deduction u/s 80IB(11) of the Act and, therefore, requested that the matter be restored back to the Assessing Officer to establish this fact.

15. Tothis,theld.counselforassesseecounteredbysayingthatthedateofcommencementofoperationbytheassesseewasclearlypointedoutintheAuditReportoftheCharteredAccountantcertifyingtheassessee's claim of deduction u/s 80IB(11) of the Act, as 27.3.2004. The same was filed before the Assessing Officer during the course of assessment proceedings when he was examining the said claim of the assessee and merely because the Assessing Officer had not mentioned so in his order about this aspect it would not mean that he has not applied his mind to it and arrived at a conclusion that the assessee had commenced operations before the prescribed date. The Ld. counsel for assessee further pointed out that by acceding to the request of the Ld. DR it would amount to reviewing the order of the Assessing Officer, the power for which lay only with the CIT and further pointed out that it would tantamount to giving second innings to the Assessing Officer on the impugned issue. The Ld. DR countered by saying that since this was the most basic condition to be fulfilled by the assessee for claiming deduction u/s 80IB(11) of the Act which apparently the Assessing Officer had not looked into, the matter should be sent back to the Assessing Officer with the directions to investigate the same.

16. We have heard the contentions of both the parties and perused the orders of the authorities below. The issue before us pertains to claim of deduction u/s 80I B (11) of the Act which reads as under:

> "(11) Notwithstanding anything contained in clause (iii) of sub-section (2) and sub-sections (3), (4) and (5), the amount of deduction in a case of industrial undertaking deriving profit from the business of setting up and operating a cold chain facility for agricultural produce, shall be hundred per cent of the profits and gains derived from such industrial undertaking for five assessment years beginning with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains derived from the operation of such facility in a manner that the total period of deduction does not exceed ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) and subject to fulfilment of the condition that it begins to operate such facility on or after the 1st day of April, 1999 but before the [1st day of April, 2004]."

17. The said section allows deduction of profits derived by industrial undertakings from the business of setting up and operating of cold chain facility for agricultural produce.

18. In the present case, the fact that the assessee is the owner of a cold storage facility is not denied. The bone of contention or the primary reason for denying the deduction to the assessee by the Revenue is that the profits earned by the assessee have not been derived from the business of operating the cold chain facility for agricultural produce but in fact are mere rental earned from letting out the facility of cold storage.

19. Having heard the arguments of the Ld. counsel for the assessee and on going through the agreement entered into by the assessee with PI H, on account of which the entire income was earned by the assessee, we find that we are in agreement with the contention of the Ld. counsel for the assessee that it had provided cold chain facility to PI H and had not merely let out its premises to PI H. As pointed out by the Ld. counsel for the assessee the agreement provided for the assessee to assume all responsibility pertaining to storing the agricultural produce sent by PI H to its cold chain facility. The assessee as per the agreement was responsible for maintaining and keeping the goods in proper condition and was required to render all services for the same. All functions and responsibilities vis-a-vis the goods sent for storage by PI H, beginning from receipt of goods, their storage and preservation, conducting physical verification and transporting goods back to PI H all rested with the assessee. The assessee was responsible for storing the goods with reasonable care and was in the position of a bailee in respect of those goods. The responsibility of transporting the goods back to PI H in good condition also rested with the assessee. The as

sesseewasalsoliableforanyloss,ordamagebyreasonofanyactofomissio norcommissiononitspartoronthepartofitsemployees. Meaningthereby thattherightfromthemomentthegoodswerereceivedbytheassesseether esponsibilityfortheirupkeeplaywiththeassesseetillitwasdeliveredback toPIH. TheRevenuehasnotbroughttoournoticeanyclauseintheagreeme ntwhichgaverightstoPIHtomanagethegoodsoncedeliveredinthecoldsto rage. PIHhasnotbeenshowntoustohavebeenincontrolofthecoldstoragef acility,whichwouldhavebeenthecaseifthepremiseshadbeenletouttoP IH. Infactwhatemergesfromtheagreementisthatthecoldchainfacilitywa sintheownershipandcontrolofthesassesseeanditwasrequiredtorendera llservicesforstoringtheagriculturalproducesenttoit. Whatemergesth erefofrefromthevariousclausespointedoutbytheLd. counselfortheassess eeisthattheassesseehaddefinitelynotmerelyletoutitscoldstoragepre misestoPIH,buthadinfactgivencoldstoragefacilitytoPIH. Therefore,the reisnoiotaofdoubtinourmindsinholdingthattheassesseewasindulgin ginthebusinessofoperatingcoldchainfacilityandwasnotmerelylletting outitscoldchainfacilitytoPIH. Thecaselawsrelieduponbythe Ld. counsel fortheassesseeinthisregardareapt. InthecaseofCommissionerofIncom eTaxvsDistrictCo-operativeFederation(2004)271ITR22(All),thedefin itionofcoldstoragebusinesswasborrowedfromWordsandPhrases,Per manentEditionVolume7Aasunder:

> "Cold storage business'--'doing a cold storage business' means carrying on the business of storing commodities in a cool place for hire or reward, and a packing house which used cold storage for preserving its own commodities alone, but did not receive and store for the public or any part thereof, is not 'doing a cold-storage business' within General Tax Act, 26th Dec., 1890, 22, imposing a tax 'on all packing houses doing a cold storage business.' [Stwart vs. Atlanta Beef Co. 18 S.E. 981, 985, 93 Ga. 12, 44, Am. St. Representation 119]."

20. Th e assessee in the p r e s e nt case has c l ea r l y d e m o n s t r at e d th a t it was c a r r y i n g on th e bu s i n e ss of s t o r i n g co mm o d i t i e s i n a co o l p l a ce f o r r e w a r d and t h e r e f o r e a s p e r t h e a b o v e d e f i n i t i o n can be s a f e l y s a i d t o b e c a r r y i n g o n c o l d st o r a g e bu s i n e ss .

21. Th e Hon'ble Apex C o u r t in the ca s e of C o m m i s s i o n e r o f I n co me Ta x v s N a t i o n a l St o r a g e P v t . L t d . (1 9 6 7) 6 6 I TR 5 9 6 (S C) w h i l e d e a l i n g w i t h t h e i s s u e w h e t h e r letting o ut of vaults for st o r i n g films t a nt am o u n t e d to in c o me de r i v e d fr o m ex e r c i s e of p r o p e r t y r i g h t s o r w a s a n a d v e n t u r e in t h e n a t u r e of t r a d e, h e l d a f t e r ex am i n i n g t h e f a c t s of t h e c a s e t h a t t h e s u b j e c t h i r e d w a s a c o m p l e x o n e s i n c e t h e a s s e s s e e had c o n s t r u c t e d s p e c i a l l y designed v a u l t s a n d r e n d e r e d o t h e r s e r v i c e s to t h e v a u l t h o l d e r s for s a f e k e e p i n g of t h e i t e m s a n d for d i s p a t c h i n g an d r e c e i v i n g t h e i t e m s . Th e H o n ' b l e a p e x c o u r t t h e r e f o r e h e l d t h a t t h e income d e r i v e d was not merely from the exercise of p r o p r i e t a r y r i g h t s but was in the n a t u re of

business income. The relevant findings are as under:

> "The assessee was carrying on an adventure or concern in the nature of trade. The assessee not only constructed vaults of special design and special doors and electric fittings, but also rendered other services to the vault- holders. It installed fire alarm and was incurring expenditure for the maintenance of fire alarm by paying charges to the municipality. Two railway booking offices were opened in the premises for the despatch and receipt of film parcels. This is a valuable service. It also maintained a regular staff consisting of a secretary, a peon, a watchman and a sweeper, and apart from that it paid for the entire staff of the Indian Motion Picture Distributors' Association an amount of Rs. 800 per month for services rendered to the licensees. These vaults could only be used for the specific purpose of storing of films and other activities connected with the examination, repairs, cleaning, waxing and rewinding of the films. The agreements are licences and not leases. The assessee kept the key of the entrance which permitted access to the vaults in its own exclusive possession. The assessee was thus in occupation of all the premises for the purpose of its own concern, the concern being the hiring out of specially built vaults and providing special services to the licensees. "The subject which is hired out is a complex one" and the return received by the assessee is not the income derived from the exercise of property rights only but is derived from carrying on an adventure or concern in the nature of trade."

22. In the present case undisputedly the assessee was the owner of the cold storages which again are specially designed structures and besides being the owner has also rendered services of cold storage taking all responsibility for the proper maintenance of the goods sent to it for storage. The assessee as per the above judgement was thus in occupation of the premises for the purpose of its own concern being hiring out the specially constructed storage facility and providing services to the licensees. The agreements in the present case were clearly licenses and not leases.

23. Moreover, we find no merit in the contention of the Revenue that since the assessee had not claimed deduction under the said section in earlier years, it was not entitled to claim the said deduction in the impugned year. A perusal of the conditions stipulated under the said section to be fulfilled by the assessee reveals that no such condition has been specifically stipulated in the said section. There is no requirement specified in section stating that the assessee has to necessarily claim deduction from the initial assessment year itself, in the absence of which it would not be entitled to claims so in the subsequent years. The sections of the Act have to be interpreted strictly and literally and no words or meaning can be added to what has been stated in the section. This is a basic rule of interpretation of Statute. In the absence of any specific stipulation in the section, we hold that the Ld. CIT (Appeals) had erred in stating that the assessee was not entitled to claim deduction under section 80IB(11) of the Act since

i t h a d n o t c l a i m e d t h e s a i d d e d u c t i o n i n t h e e a r l i e r y e a r s. Th e decisions relied upon by the L d . c o u n s el for t he assessee a re a pt . In th e case of CIT vs E x ce l Softech L t d . (2 0 0 8) 2 1 9 C TR 4 0 5 (P & H) t he j u r i s d i c t i o n a l H i g h C o u r t h a s i n t h e c o n t e x t o f e x em p t i o n g r a n t e d u/ s 1 0 B h e l d t h a t i n t h e a b s e n c e o f a n y s u c h s t i p u l a t i o n i n t h e s t a t u t e t h e r e i s n o b a r i n c l a i m i n g e x e m p t i o n f r o m a n y o f t h e a s s e s s m e nt y e a r s f r om t h e e l i g i b l e bl o c k of ye a r s . Th e r e l e v an t f i n d i n g s a t p a r a 7 o f t h e o r d e r a r e a s u nde r :

> "In our opinion, the contention raised by the Revenue is liable to be rejected. Sec. 10B of the Act reads as under :
>
> "10B. Special provisions in respect of newly established hundred per cent export-oriented undertakings--(1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee."

The aforesaid provision provides that subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee. Sub-s. (2) provides that this section applies to any undertaking which fulfils certain conditions, mentioned in this sub-section itself. The exemption under this section is available for 10 years. The initial year is the year in which the eligible undertaking begins to manufacture or produce articles or things or computer software. It is not disputed that the assessee unit fulfills all the conditions, as mentioned in sub-s. (2). In the present case, the assessee had started the development of computer software in the asst. yr. 1998-99 and was registered with the Software Technology Park w.e.f. 24th March, 2000, therefore, the 10 years period has to be reckoned from the asst. yr. 1998-99. The assessee has claimed exemption for the first time in the asst. yr. 2001-02, which is well within 10 years. Therefore, the unit of the assessee cannot be denied the said exemption on the ground that it is not the newly established undertaking in the assessment year in question. In our view, the words "newly established undertaking" are only to identify the initial year of the period of 10 years for which the assessee is eligible for claim of exemption under s. 10B of the Act. Sec. 10B(1) of the Act does not use the words "newly established undertaking". Only in the heading, the words "newly established hundred per cent export-oriented undertakings" have been mentioned. It is well-settled law that headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislation, only when the enacting words are ambiguous, but when the language of the section is clear, then the heading cannot be used to give a different effect to clear words in the section. In our view, there is no ambiguity in s. 10B of the Act, which provides exemption to certain newly established hundred per cent export oriented

undertakings, on fulfilling certain conditions, for a period of ten consecutive assessment years. The initial year is the year in which the eligible undertaking begins to manufacture or produce articles or things or computer software. Sec. 10B of the Act does not provide any restriction that in each of the years of claim, the export-oriented undertaking should be newly established. Indeed, relevance of "newly established undertaking" is only to identify the initial year of the period of ten years for which the assessee is eligible for claim of exemption under s. 10B of the Act. Since in the present case, undisputedly, the initial year is the asst. yr. 1998-99, therefore, the assessee was rightly held to be fully eligible for exemption under s. 10B of the Act for the assessment year under consideration i.e., 2001-02, as it was the fourth year, out of ten years beginning with the initial assessment year, in which it began to develop and export the computer software."

24. The Hon'ble Delhi High Court in the case of Praveen Soni vs CIT (2011) 333 ITR 324 in the context of deduction claimed u/s 80IB(3) also upheld this view at para 6 of its order as under:

> "If the assessee fulfils the requirement of small-scale industrial undertaking (which aspect shall be dealt while answering other question of law), it is not in dispute that the assessee would have qualified for this deduction from the asst. yr. 1998-99. Had the assessee claimed this benefit in that year, he would have been allowed this benefit for 10 consecutive years, i.e., till asst. yr. 2007-08. The assessee, thus, becomes entitled to claim the benefit in the asst. yr. 1998-99. However, merely because of the reason that though the assessee was eligible to claim this benefit, but did not claim in that year would not mean that he would be deprived from claiming this benefit till the asst. yr. 2007-08, which is the period for which his entitlement would accrue. The provisions contained in s. 80-IB of the IT Act nowhere stipulate any condition that such a claim has to be made in the first year failing which there would be forfeiture of such claim in the remaining years. It is not the case of the assessee that he should be allowed to avail this claim for 10 years from the asst. yr. 2004-05. The assessee has realized his mistake in not claiming the benefit from the first asst. yr. 1998-99. At the same time, the assessee foregoes the claim upto the asst. yr. 2003-04 and is making the same only for the remaining period. There is no reason not to give the benefit of this claim to the assessee if the conditions stipulated under s. 80-IB of the IT Act are fulfilled."

25. In view of the above, we hold that the assessee is entitled to deduction under section 80IB(11) of the Act and direct the Assessing Officer to grant the same in accordance with law.

26. We may also point out that we find no merit in the argument of the Ld. D.R. that the issue of allowability of claim under section 80IB(11) of the Act be restored back to the Assessing Officer for the purpose of determining whether the assessee had actually commenced it operation before 1.4.2004, which is an essential condition for claiming the said deduction. As pointed out by the Ld. counsel for the assessee, all relevant facts had been placed before the Assessing Officer

during the assessment proceedings and the date of commencement being 27.3.2004 was very much certified by the Chartered Accountant and mentioned in his certificate provided in Form No.10CCB. In such circumstances it is reasonable to presume that the Assessing Officer had applied his mind to the said facts and arrived at conclusion that the assessee fulfilled the conditions of commencing the operation before 1.4.2004. In any case, since this admittedly was not the reason for denying deduction under section 80IB(11) of the Act by the Assessing Officer, we cannot enhance scope of assessment by restoring the said issue to the Assessing Officer. The contention raised by the Ld. D.R. is, therefore, dismissed.

27. In view of the above ground No.1 raised by the assessee is allowed.

28. Ground No.2 raised by the assessee reads as under:

> "2. That in the facts and circumstances of the case the Ld CIT(A) is not justified in upholding the addition of Rs 410145/- as unexplained cash credits under section 68 of the Income Tax Act, 1961."

29. In the aforesaid ground, the assessee has challenged the disallowance of interest under section 36(1)(iii) of the Act.

30. Brief facts relevant to the issue are that the Assessing Officer made disallowance of interest pertaining to interest free advances made to two parties as under:

1) M/s Mega Food Park Ltd. = Rs.10,00,000/-

2) M/s Zenith Food & Nutrients Pvt. Ltd. = Rs.

for the reason that the business expediency of the said advance had not been established and the assessee was found to have diverted interest bearing funds for the purpose of making such advances.

31. The matter was carried in appeal before the Ld. CIT(Appeals) who upheld the order of the Assessing Officer.

32. Before us, the Ld. counsel for the assessee primarily raised only one contention that the aforesaid advance had been made out of own interest free funds of the assessee and no interest bearing funds has been used for the said purpose. Substantiating its contention the Ld. counsel for the assessee drew our attention to th

e b a l a n c e s h e e t o f t h e a s s e s s e e f o r t h e i m p u g n e d y e a r p l a c e d a t P a p e r B o o k p a g e N o s . 1 1 t o p o i n t o u t t h a t i t c l e a r l y r e f l e c t e d t h a t o w n f u n d s o f t h e a s s e s s e e i n t h e f o r m o f s h a r e h o l d e r s funds, being sh a r e capital an d reserves & s u r p l u s, a m o u n t e d t o R s . 1 5 . 9 8 c r o r e s , w h i c h i n c l u d e d R s . 2 . 8 c r o r e s s h a r e c a p i t a l a n d R s . 1 3 . 1 8 c r o r e s r e s e r v e s a n d s u r p l u s . Th e L d . c o u n s e l f o r t h e a s s e s s e e f u r t h e r d r e w o u r a t t e n t i o n t o Schedule 2 of the balance sheet, b e i n g S ch e d u l e of reserves an d su r p l u s , to po i nt out t h e r ef r o m that the r e v e n u e r e s e r v e s o f t h e a s s e s s e e i n t h e f o r m of b a l a n c e i n t h e P r o f i t a n d Lo s s A c c o u n t a m o u n t e d t o R s . 1 . 5 3 c r o r e s . Th e r e a f t e r t h e L d . c o u n s e l f o r t h e a s s e s s e e s t a t e d t h a t t h e total a d v a n c e s on which i n t e r e s t had been d i s a l l o w e d amounted to Rs . 4 4 . 7 5 lacs. Th e Ld. c o u n s e l for the a s s e s s e e , t h e r e f o r e , s t a t e d t h a t i t w a s e v i d e n t t h a t t h e a s s e s s e e h a d e n o u g h o w n f u n d s t o m a k e t h e i m p u g n e d advances. Th e Ld. counsel f or the a s s e s s e e t h e r e a f t e r s t a t e d t h a t i t h a d u t i l i z e d i t s i n t e r e s t b e a r i n g f u n d s c l e a r l y f o r t h e b u s i n e s s p u r p o s e o f t h e a s s e s s e e w h i c h i s e v i d e n t f r o m t h e f a c t t h a t t h e i n t e r e s t b e a r i n g f u n d s , c o m p r i s i n g o f o n l y s e c u r e d l o a n s , w h i c h i n c l u d e d l o a n s t a k e n f r o m SI DBI and HDFC truck loan. Th e L d . c o u n s e l f o r t h e a s s e s s e e drew our a t t e n t i o n to Schedule-3 of se c u r e d loans for pointing out this fact. Th e L d . c o u n s e l f o r t h e a s s e s s e e t h e r e a f t e r s t a t e d t h a t t h e l o a n f r o m SI D BI w a s a t e r m l o a n t a k e n f o r c o n s t r u c t i o n o f l a n d a n d b u i l d i n g a n d wa s u t i l i z e d f o r t h e s a i d p u r p o s e . So also HDFC truck loan was for the p u r p o s e o f f i n a n c i n g t h e p u r c h a s e o f t r u c k a n d h a d b e e n u t i l i z e d f o r t h e s a m e . Th e L d . c o u n s e l f o r t h e a s s e s s e e s t a t e d t h a t t h e a s s e s s e e h a d o n l y c u r r e n t a c c o u n t i n t h e b a n k r e f l e c t e d i n t h e S c h e d u l e o f c u r r e n t a s s e t l o a n s a n d advances, S c h e d u l e - 7 , a n d o n w h i c h n o i n t e r e s t h a d b e e n paid and funds from which ha d been u t i l i z ed for the p u r p o s e of m a k i n g t h e s a i d a d v a n c e s . Th e L d . c o u n s e l f o r t h e a s s e s s e e a l s o p o i n t e d o u t a n d s t a t e d a t B a r t h a t t h e u n s e c u r e d l o a n s t a k e n b y t h e a s s e s s e e c a r r i e d no i n t e r e s t . Th u s t h e L d . c o u n s e l f o r t h e a s s e s s e e p o i n t e d o u t t h a t i t i s e v i d e n t t h a t t h e i n t e r e s t b e a r i n g l o a n s i n a n y c a s e c o u l d n o t a n d h a d n o t b e e n u s e d f o r t h e p u r p o s e o f m a k i n g t h e s a i d a d v a n c e s a n d , t h e r e f o r e , a l s o t h e r e w a s n o r e a s o n f o r m a k i n g a n y d i s a l l o w a n c e o f i n t e r e s t u n d e r s e c t i o n 3 6 (1) (i i i) o f t h e A c t . Th e L d . c o u n s e l f o r t h e a s s e s s e e i n s u p p o r t o f i t s c o n t e n t i o n s t a t e d t h a t w h e r e e n o u g h o w n f u n d s a r e a v a i l a b l e t h e p r e s u m p t i o n i s t h a t t h e s a i d f u n d s h a v e b e e n utilized f or t he purpose of making the i nte r e s t free a d v a n c e s a n d r e l i e d u p o n t h e f o l l o w i n g c a s e l a w s:

1) H e r o C y c l e s P v t . L t d v s CI T, L u dhi a n a

3 7 9 I TR 3 4 7 (S C)

2) B r i g h t E nt e r p r i se s P v t . Lt d . v s CI T, J a l a n d h a

3 8 1 I TR 1 0 7 (P & H)

33. Th e L d . D . R . , o n t h e o t h e r h a n d , r e l i e d u p o n t h e o r d e r o f t h e L d . CI T (A p p e a l s) .

34. We have heard the contentions of both the parties. We find merit in the contention of the Ld. counsel for the assessee that where the nexus between interest bearing funds and interest free advances is ruled out and where the assessee has demonstrated the availability of enough own funds for the purpose of making the interest free advances, no disallowance under section 36(1)(iii) of the Act could be made. The Ld. counsel for the assessee has rightly relied upon case laws as cited before us. But at the same time, we find that all facts and figures leading to the said conclusion have now for the first time been pointed out to us. Since the said figures need to be verified we restore the issue back to the file of the Assessing Officer to verify the contention of the assessee that no interest bearing funds have been used for the purpose of making the said advances and also the availability of enough own surplus funds for making the said advances. The Assessing Officer is thereafter directed to decide the issue in accordance with law. Needless to say that the assessee be granted due opportunity of hearing by the AO.

This ground of appeal of the assessee is therefore allowed for statistical purposes.

35. The appeal of the assessee is allowed for statistical purposes.

ITA No. 703/Chd/2015 (Assessee's Appeal):

36. The assessee in this appeal has raised following grounds of appeal:

> "1. That on the facts, circumstances of the case and in law, the Worthy C1T(A), through his order dated 03.06.2015, has erred in passing that order in contravention of the provisions of Section 250(6) of the Income Tax Act, 1961.
>
> 2. That on law, facts and circumstances of the case, Worthy CIT (A) has erred in confirming the disallowance of deduction claimed by the appellant u/s 80-IB(11) of the Act amounting to Rs.1,21,36,078/- by erroneously holding that the appellant is not eligible for said deduction as the same was not claimed in prior years since the "initial assessment year". Both the lower authorities have grossly erred in holding that non-claim of eligible deduction u/s 80IB from the initial assessment year would be fatal to said claim in subsequent years.
>
> 3. That on law, facts and circumstances of the case, Worthy CIT (A), vide para 2.3.4 of his order for AY 2010-11, has erred in confirming the disallowance of deduction claimed by the appellant u/s 80-IB(11) of the Act amounting to Rs.1,21,36,078/-, wherein without making any decision on adverse inference drawn by the Ld. AO and seriously objected to by the appellant, he confirmed the disallowance since the issue had been decided against the appellant on other objections vide para 2.3.3 of his order for AY 2010-11. The Worthy CIT(A) has erred in not passing the order in regard to this issue and therefore the same deserves to be set-aside.

4. That on facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO. in making addition of Rs.6,00,000/- u/s 36(l)(iii) of the Act on estimated, arbitrary, presumptive and prejudiced basis without assigning any logical reasons and has erroneously disallowed the proportionate interest on advance given for business purpose to M/s Temptation Foods as interest free advance. Both the lower authorities have erred in appreciating the facts of the case and law applicable thereon.

5. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same."

37. It is relevant to observe here that it was submitted by both the parties that the facts and circumstances of this appeal are similar to the facts and circumstances in ITA No.311/Chd/2015.The findings given in ITA No.311/Chd/2015 shall therefore apply mutatis mutandis to this appeal also. This appeal of the assessee is also allowed for statistical purposes. ITA No.754/Chd/2015(Revenue's Appeal):

38. The only ground raised by the Revenue in the present appeal pertains to deletion of addition of Rs.2,41,360/- made u/s 14A of the Income Tax Act, 1961.

It is stated that in the present appeal the tax effect is less than the prescribed limit provided by the recent CBDT Circular.

39. According to Circular No.21/2015 dated 10.12.2015, the CBDT in supercession of earlier instructions has directed that department's appeals before ITAT shall not be filed in cases where the tax effect does not exceed the monetary limit of Rs.10 lacs. The tax will not include any interest thereon. It is further clarified that if in the case of an assessee, disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of disputed issues exceeds the monetary limits so specified. This instruction will apply retrospectively to pending appeals and appeals to be filed hence forth before the Tribunal. The pending appeals below the specified tax limit may be withdrawn/not pressed.

40. Admittedly, in the departmental appeal, the tax effect is less than Rs.10 lacs, therefore, departmental appeal is not maintainable. The learned CIT(Appeals) decided the issue in departmental appeal on facts and the case of the revenue would not fall in the exceptions provided in the above circular.

41. In view of the above, learned D.R. stated that since departmental appeal is filed against the CBDT instructions, therefore, he would not be pressing departmental appeal. Therefore, the above departmental appeal is dismissed being not pressed.

42. The appeal of the Revenue is dismissed.

43. In the result, both the appeals of the assessee are allowed for statistical purposes and the appeal of the Revenue is dismissed.

Order pronounced in the open court.

Sd/- Sd/-

(DIVA SINGH) (ANNAPURNA GUPTA)
JUDICIAL MEMBER ACCOUNTANT MEMBER
Dated : 27 th July, 2017
Rati
Copy to:
1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh