IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

ITA Nos.95-97 /Kol/2015
Assessment Years : **2009-10 & 2010-11**

West Bengal Co-operative Milk Producers Federation Ltd., Kolkata (PAN: AAAAW 0454 H) (Appellant)	-versus-	D.C.I.T., Circle-51, Kolkata (Respondent)

For the Appellant: Shri I.Banerjee, FCA
For the Respondent: Shri David Z.Chawngthu, Addl. CIT., Sr.DR

Date of Hearing : 09.11.2017.
Date of Pronouncement :

ORDER

PER N.V.VASUDEVAN, JM:

ITA No.95 & 96/Kol/2015 are appeals by the Assessee against a common order dated 13.10.2014 of CIT(A)-XXXII Kolkata relating to AY 2009-10 and 2010-11.

2. The only issue that arises for our consideration in these appeals by the assessee is as to whether the revenue authorities were justified in adding a sum of Rs.64,12,937/- in A.Y.2009-10 and a sum of Rs.63,77,467/- in A.Y.2010-11 from Mother Diary treating the aforesaid receipts as income of the assessee.

3. The facts and circumstances under which the aforesaid appeals arise for consideration are as follows :

The assessee is a state level Cooperative Milk producers Federation. It was registered on 13.05.1994 by the Registrar of Cooperative Society West Bengal under the West Bengal Cooperative Society Act 1983. The objects of the assessee are to carry out activities for promoting production, procurement, processing and marketing of milk and milk products for economic development of farming community through the affiliated Milk Unions. There are other objects in clause 3.2, 3.2.1. and 3.2.2. of

the assessee and these are basically in furtherance of the main objects which is promotion of production, processing and marketing etc of milk and milk products. The Government of West Bengal is also a member of the assessee. Any registered cooperative milk producers union falling within the jurisdiction of the assessee shall be entitled to hold a membership of the assessee. The milk union means the District Cooperative Milk Producers Union Ltd affiliated with the assessee. The assessee has control in the way in which the member milk unions procure, process and market milk and milk products. The assessee, as already stated, is a state level cooperative milk producers federation. Among the main activity of the assessee one of the important activities is to channelize milk from district level to organised milk dairies, namely Mother Dairy(Govt. of West Bengal Project) and Metro Dairy an entity in which the assessee holds 47% ownership.

4. At a meeting of the Board of Directors held on 21.07.1998, the directors of the assessee resolved to constitute a fund comprising of contributions from the assessee from mother dairy (out of the amount ear marked for infrastructure development of the unions) and from the state Government. It was resolved to utilise the funds so collected for development of infrastructure of the milk unions who are members of the assessee. The scheme was called as Technical Support Scheme. The Scheme known as Technical Support Scheme will here-in-after refer to as TSS. The relevant resolution reads thus :

> "15.CONSIDERATION OF PLANS AND PROGRAMMES FOR INFRASTRUCTURE DEVELOPMENT OF MILK UNIONS AND UTILISATION OF INFRA-STRUCTURE DEVELOPMENT FUND PAYABLE BY MOTHER DAIRY TO MILK UNION FOR SETTING UP 1 LN2 PLANT AND CONSIDERATION OF UTILISATION OF RESERVE FUND OF BIMUL AND KISHAN FOR INFRASTRUCTURE DEVELOPLMENT IN THEIR AREAS.
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> Resolution No. 12. 19
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> MD proposed the introduction of a new Fund comprising contributions from the Federation, from the Mother Dairy out of the entire amount earmarked for infrastructure development of the Unions, and from the State Govt. out of the entire amount payable by the Federation to it as dividend on its share capital in

.the Federation. This fund would be utilised alongwith suitable contribution from the Unions for development of infrastructure of the Unions. The Board approved the proposal of the scheme to be styled as Technical Support Scheme. The Task Force headed by the Principal Secretary, ARDD would examine the proposals in this regard and approve the proposals for sanction of fund under this scheme.

The Board also decided that the milk unions should introduce portable milking machine in their respective area. A detailed proposal should be prepared by the milk unions and submit to the Federation by September'98.

Regarding the scheme submitted by the Director, AH & VS for setting up one 32 LPH LN2 plant in Calcutta the Board that the committee would examine the said scheme.

The Board further decided that the Federation. would contact with the Bihar Federation in connection with supply of LN2 to the Milk Unions since the rate of LN2 appeared to be comparatively cheap."

5. The contributions received by the assessee from Metro dairy towards TSS was not considered as income of the assessee in any of the assessment prior to A.Y.2009-10 and 2010-11. In A.Y.2009-10 Mother Dairy deducted tax at source u/s.194C of the Act treating the payment as a payment made for execution of a work, on the contributions made by it to TSS. This prompted the AO to look into the nature of the amount received by the assessee from Mother Dairy. He was of the view that the amount received by the assessee was in the nature of contractual payment and therefore should be regarded as income. He accordingly treated the receipts towards TSS from Mother Dairy as income of the assessee. In respect of similar contribution received from Metro Dairy the AO did not consider the same as income of the assesse.

6. On appeal by the assessee CIT(A) was of the view that just because Mother Dairy deducted tax at source u/s 194C of the Act the amount in question cannot be treated as income. Nevertheless the CIT(A) was of the view that the addition made by the AO was justified for the following reasons :-

1. The Provisions of Section 194C of the Act are not involved in the transaction of Rs.63,77,467/- paid by Mother Dairy to the assessee under the TSS and it is not a contractual payment per-se.

2. The assessee is a tax paying entity. It is an Apex Level Body of Milk Cooperatives but it is run on commercial lines. It charges lee for service rendered and also fixes charges for use of its trade-mark/brand names. **Funds paid by Mother Dairy to the assessee is an exaction made by the assessee federation in view of its monopolistic control over the milk/dairy supplies.** In the hands of the Mother Dairy such a payment is of course a revenue expense. However, it is the nature of the receipt in the hands of the assessee that is of Concern to the A.O. The assessee' s control over the Mother Dairy is due to its control over its Management and due to its control over the supply from the Cooperative Unions. **The TSS is thus a charge levied by the assessee on Mother Dairy.** Further, the **Mother Dairy is not a member of the assessee federation and yet it was forced to part with the funds under the garb of TSS without having any say in the Final utilization of the fund.** The payment once made is not revocable. **After the payment is made by Mother Dairy. the assessee owns the money. There is no force in the argument of the assessee that this TSS fund is an earmarked fund for the development of the Cooperative Union because it is in any case the prime objective of the assessee in the first place. Therefore whether the assessee employs its earned money or obtains the funds because of its overarching control over the Mother Dairy the effect is the same.**

7. For the above reasons, the CIT(A) upheld the action of the AO in brining to tax sum received from Mother Diary towards TSS. Aggrieved by the aforesaid order of CIT(A) the assessee is in appeal before the Tribunal.

8. We have heard the submissions of the ld. Counsel for the assessee and the Learned DR.

9. The learned counsel for the Assessee submitted the contribution from Mother Dairy towards should not be treated as income of the assessee. The submission of the ld. Counsel for the assessee was that similar contributions received in the past were not treated as income. The character of the receipt in the hands of the Assessee is capital receipt and ot in the nature of income. The decision for the creation of TSS Grant had been adopted long time back, in 1998, in a meeting in which the Minster in charge of ARDD, Government of WB, had been chairman. The said decision had been taken after a unanimous decision of a high powered committee 'comprising the Principal Secy, ARDD, Govt of WB, several District Magistrates, Representative of

National Dairy Development Board (NDDB) etc. A task force was also formed to implement the said scheme, formulated at the State Government Level under the stewardship of The Minister in Charge himself. This scheme had been formulated under a Governmental Guideline and not on the sweet will of the Assessee. The Assessee is an Apex Co-operative Society and all its decisions had been that of a Government of the State. The Assessee should not be equated with a Private Body or entity where little governmental control exists. All these decisions had been a part of Government Policy. The formation of a Task force substantiates the same.

10. It was submitted that the allegations of the CIT(A) that the Assessee enjoys monopolistic control over the supply and distribution of milk is without any basis and that the Assessee was only implementing policies of the Government regarding supply of milk and milk products to the benefit of farmers and consumers. He also pointed out that similar contribution by Metro Dairy to TSS Grant of Rs. 3545251.00 was on the same footing as that of Mother Dairy, but such contributions were not regarded as income.

11. His further submission was that in the immediately preceding assessment year of 2008-09, there had been no adverse outcome in relation to such TSS Grant, either in the Assessment Order or in the Appellate Order. In the preceding year there had been similar grants from both Mother Diary and Metro Diary but no explanation for this abrupt change of stand had come from either of the lower authorities. He also highlighted the fact that all the utilizations had been made solely for infrastructure development like commissioning of Homogenizer, erection of LPD Bulk Milk Cooler, purchase of laboratory equipment, Cost of DG set etc. He submitted that state wide network of milk production and distribution calls for constant development of robust infrastructure and the co-operatives are not capable of achieving the same unless a financial support for the same is regularly received. It was the policy of the Government to make it available through this modus operandi. The Ld. CIT(A) had

placed too much emphasis on the form rather than the substance and the purpose of the Grant.

12. The Ld. DR however contended that the assessee was constituted for the purpose of making profits from manufacture, distribution of sale of milk and milk products. The amounts received though it was for improvement of infrastructure was in the course of business and therefore assumes the character of income. A query was raised by the Bench as to whether the money spent by the assessee for the purpose of TSS is claimed as an expenditure and whether the entire fund is brought to tax without considering the money spent for the purpose of envisage by TSS. It was agreed by the parties that the expenditure part of TSS has not been considered but the entire receipts from Mother Dairy towards TSS has been considered as income of the assessee by the revenue authorities.

13. We have given a careful consideration to the rival submissions. We have also perused various details furnished by the assessee in the paper book. The first aspect that needs to be understood is accounting treatment of the TSS by the assessee in its books of accounts. Though entries in the books of accounts are not conclusive, but in the present case the manner in which the fund was treated by the assessee in its books of accounts assumes importance. The assessee shows TSS fund in the balance sheet as a liability under the head deposits receipt. The assessee therefore treated the amount received towards TSS as not its income but receipt which is a burdened with an obligation to be spent for a particular purpose by the assessee. The service charges received by the assessee from various milk unions are for specific services rendered. The milk unions show service charges and contribution to TSS separately and had not deducted tax at source on the component of TSS but deducted tax only on service charges. The service charges as we have already seen paid to the assessee for specific services rendered by it to the milk unions. A perusal of the manner in which the moneys lying in the TSS are spent is reflected in the copy of the ledger account of the assessee placed at pages 4 to 7 of the assessee's paper book. A perusal of the same

shows that the amounts are spent for capital expenditure for e.g. on 08.08.2008 a sum of Rs.6,33,750/- was spent for supply, erection and commission of 1000 LPH Homogenizer at Mayurakshi Milk Union. It is thus clear from a perusal of accounting entries in the books of accounts and the minutes of the board meeting of the assessee dated 21.07.1998 by which the TSS fund was created that the assessee was under obligation to spent TSS only for certain specific purpose. The assessee was not the owner of the fund and cannot claim any right to use the fund in any manner that it desires. It was made more for improving the infrastructure of the milk unions for effective distribution and supply of milk.

14. The learned counsel for the Assessee made submissions that the contribution towards TSS received from Mother Diary was in the nature of a capital subsidy and in this regard relied on certain judicial pronouncements which are to the effect that if the subsidy is for the purpose of brining into existence a capital asset or for establishing a new industry, it should be regarded as capital receipt not chargeable to tax. According to him contributions to TSS were made for meeting capital expenditure and therefore the receipt in question should be regarded as capital receipt not chargeable to tax. We are of the view that the receipt in question cannot be regarded as subsidy in the sense it was a voluntary contribution by Mother Diary and others. We have already seen that in the resolution dated 21.7.1998, it was resolved that the Assesssee, Mother Diary (out of the entire amount earmarked for infrastructure development of the Unions) and State Government (out of the amount payable by the Assessee to the State Government as dividend on its share capital) would contribute to a Fund called TSS. The various milk unions were also free to contribute to TSS. The fund so created was to be used only for infrastructure development of the Unions. It was also resolved that a task force headed by principal secretary, ARDD would examine proposals for utilization of the fund and approve the proposals. We should not forget that all the milk unions are members of the Assessee. The Milk Unions operate at the district or primary level and the Assessee operates at the State level. All the milk unions and the Assessee operate for their own interest and operate on the principles of mutuality. Therefore it cannot be said that the contribution to the fund are in the

nature of subsidy which is generally understood as a form of financial aid or support extended to an economic sector (or institution, business, or individual) generally with the aim of promoting economic and social policy. We therefore do not deem it appropriate to consider the various judicial pronouncements cited by the learned counsel for the Assessee in this regard.

15. The learned counsel for the Assessee also made submissions that in the past assessments similar receipts were not treated as income and the revenue cannot take a stand contrary to the stand taken in the past. On this submission, the learned DR rightly pointed out that in the past assessment the question whether contribution to TSS were to be regarded as income or not was not examined at all and this is the first year in which such question was examined. Therefore the principal of Res Judicata would not be applicable. Even principal of consistency in assessment would not apply for the reason that there was no conscious decision taken by the revenue authorities on the question whether contributions received by the Assessee towards TSS would be in the nature of income or not. We therefore do not agree with the submission made by the learned counsel in this regard.

16. The learned counsel also made submission that deduction of tax at source by Mother Diary u/s.194C of the Act cannot be the basis to conclude that the sum received was in the nature of income. On this aspect, we find that even CIT(A) came to the conclusion that deduction of tax at source by the payee cannot be the basis to treat receipt as income and the true nature of the receipt has to be examined in the light of the legal position. Therefore, we are of the view that this submission made by the learned counsel for the Assessee also does not hold water.

17. In our view every receipt or amount received/accounted, is not income. Amount received is income in the hands of the assessee if he has title/right over the said amount in form of dominion and right to use the said amount. We find support for our conclusions as above from a decision of the Hon'ble Delhi High court in the case of CIT Vs. DTTDC in ITA Nos. 166/2001, 161/2004 & 320/2004 & ITR Nos. 30 -

33/1997 dated 20th March, 2012. The facts of the aforesaid case are identical to the facts of the case of the Assessee in the present appeal. The Assessee in the case before the Hon'ble Delhi High Court was a Government Company established by the Government of NCT of Delhi. In a meeting held on 24th April, 1989, it was observed that the Articles of Association and objectives of the assessee should be expanded to include investments in transport infrastructure particularly bridges, grade separators, underpasses and pedestrian cross, over bridges or sub-ways. It was also noticed that there was substantial shortage of funds being faced for creation of the said infrastructure in Delhi. There was a need to establish separate mechanism whereby resources, apart from the plan resources, were tapped and a major programme mounted. Retail trade in country liquor and 50 degree U.P. Rum was then undertaken by Excise Department, Delhi Administration. It was decided that this retail trade should be transferred to the assessee w.e.f. 15th May, 1989. The minutes of the said meeting record that this would generate a surplus of Rs. 100 crores in three financial years from 1989 to 1992 and enable construction of 20 flyovers and a substantial number of pedestrian facilities. The assessee did not treat "Transport Infrastructure Utilisation Fund as income on the ground that these receipts were mandatorily required to be spent for construction of flyovers etc. and were not to be regarded as receipts which are in the nature of income. While dealing with the aforesaid claim of the Assessee, the Hon'ble Delhi High Court observed as follows:

> "25. Every receipt or amount received/accounted, is not income. Amount received is income in the hands of the assessee if he has title/right over the said amount in form of dominion and right to use the said amount. When examining, the concept of 'income' one has to keep in mind, commercial reality, specialty of the situation rather than pure theoretical or doctrine aspects. The business aspect of the matter has to be viewed as a whole but without disregarding the statutory language. Depending upon the nature and character of the deposits/payments, should be given to hold whether or not the amount received was income/profit.
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> 32. In Siddeshwar Sahakari Sakhar Karkhana Ltd. vs. CIT & Ors., (2004) 270 ITR 1 (SC), the word 'income' or 'profit' was examined and interpreted. In the

said case, issue arose whether deposits/payments made in different heads/parties was diversion of income at source or not and whether the deposits/funds have to be included in the income earned. The Supreme Court emphasized that the nature and character of the deposits/payments is determinative and relevant. Reference was made to the earlier decision in the case of CIT vs. Bazpur Coop. Sugar Factory Ltd. (1988) 172 ITR 321 (SC) where the amounts credited to loss equalization and capital redemption reserve fund were held to be income/profit. It was held in the said case that the assessee had proprietary interest over the fund and enjoyed dominion. It was observed that the line of enquiry must focus on ascertaining the true nature and character of the receipt and this does not stop at merely determining whether the realization was in course of trade. All realizations do not get impressed with the character of revenue receipts includable in the taxable income. The focus has to be into the true nature, character and purpose of realization. The amounts which are held as deposits and have to be returned at a specified point of time or happening of specified contingency, which is not otherwise uncertain; which are treated as someone's else money and when the assessee does not have unfettered dominion over the money, are good indicators not to categorize as the receipt as income. The Supreme Court expounded that the following questions should be raised and answered: (1) Do the receipts bear a character of income at the time it reached the hands of the assessee? (2) Does the title in the receipt vest with the assessee? (3) Does the assessee exercise complete dominion over the funds in question? (4) Does the assessee regarded the money as that of a third party or treat the money of that of a third party, with assessee having no unfettered dominion over the same? (5) Does the assessee stand in the position of debtor in relation to those funds/deposits? (6) What is the primary purpose of collection of said amount?

33. It was elucidated and explained in S. Shahakari Shakkar Karkhanna Ltd. (supra) :-

> "These factors may broadly satisfy the first test applied in Bazpur Co-operative Sugar's case *1988+ 172 ITR 321 (SC). The following are the relevant observations in this regard (page 329) :
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> > "It is clear that these amounts which were deducted by the respondent from the price payable to its members on account of supply of sugarcane were deducted in the course of the trading operations of the respondent and these deductions were a part of its trading operations. The receipts by way of these deductions must, therefore, be regarded as revenue receipts and are liable to be included in the taxable income of the respondent."

However, it needs to be clarified that the line of inquiry, in order to determine the true nature and character of the receipts, does not stop at ascertaining the mere fact whether the realisation was in the course of trading operations. The moment it is found that certain amounts were deducted by the assessee out of

the price payable to its members who supplied the raw material, the conclusion does not necessarily follow that all such realisations get impressed with the character of revenue receipts, giving rise to taxable income in the hands of the assessee. It is not any and every receipt linked to the trading activity that acquires the quality of revenue receipt. The Tribunal or the court should go further and delve into the true nature, character and purpose of the realisations. If the amounts are meant to be held as deposits liable to be returned to the depositor at a specified point of time or on the happening of specified contingencies which are by no means uncertain or is otherwise treated as members' money--the depository having no unfettered dominion over the said funds, then, it is difficult to characterise them as the income of the assessee. The realisation of monies from the grower- members in the course of trading operations could as well be construed to be an occasion, mode or convenient point of time at which the "deposit" could be collected. Perhaps keeping this legal position in view, notwithstanding what has been stated in the earlier portion of the judgment, the learned judges proceeded to address the next question, i.e., whether the receipts by way of deductions could be regarded as deposits as described in the bye-laws. While answering that question in the negative, the court pointed out that it is the true nature and quality of the receipt that is material but not the head under which it is entered in the account books--a principle which is reiterated in a catena of decisions. The court then went on to conclude that the receipts by way of deductions from the purchase price were not in the nature of deposits. In this context, the reasoning of the Bench may be noticed (page 330 of [1988] 172 ITR) :

> "The essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfilment of certain conditions. Under the unamended bye-law, the amounts deducted from the price and credited to the said fund were first liable to be used in adjusting the losses of the respondent-society in the working year; thereafter in the repayment of initial loan from the Industrial Finance Corporation of India and then for redeeming the Government share and only in the event of any balance being left, it was liable to be converted to share capital. The primary purpose for which the deposits were liable to be used were not to issue shares to the members from whose amounts the deductions were made but for discharging of liabilities of the respondent-society. In these circumstances, the receipts constituted by these deductions were really trading receipts of the assessee-society. . ."

34. Thus it is the true nature of the receipt and purpose thereof is the determinative factor and the relevant principle to apply to decide whether or not an amount should be included or excluded from the profit/income. This requires examination of the question from various angles as noticed above, do the receipts bear a character of income at the time when it reaches the hands of the assessee? Does the money vest with the assessee once and for all? Whether the assessee exercises complete dominion over the fund or is it to be regarded

as the money of the depositors or a third person. When an assessee does not have dominion over the fund it is difficult to categorise the same as income. On consideration of the applicable byelaws, the Supreme Court in Siddheshwar Sahakari Sakhar Karakhana Ltd. (supra) allowed the appeal of the assessee holding inter-alia that it was difficult to hold that the assessee exercised complete dominion over the "deposits" or had title over the same. We may note that in the same decision there were certain other categories of deposits which were retained by the assessee in order to remit them to the Government. These included Prime Minister's Relief Fund, Late Y.B. Chavan Memorial Fund and Hutment Fund. It was held that these funds were required to be remitted to the Government and Trusts and assessee had merely acted as an agent to collect the amount and remit the same and therefore not profit/income. These funds were, however, distinguished from the "Area Development Fund" in the following manner:-

> "The Area Development Fund, as we see from the various communications placed in the paper-book, is meant to enable the co-operative sugar factories to render socio-economic services in the area of operation. The area development programmes may cover agricultural extension, irrigation facilities, educational and medical services, development of animal husbandry and poultry, drought relief work and so on. By doing so, the sugar co-operatives will be supplementing the efforts of the Government in promoting the socio-economic development of the area. The board of directors of the co-operative society are required to pass a resolution specifying the details of expenditure proposed to be incurred from out of the area development fund. They should obtain the sanction of the Director of Sugar for incurring such expenditure. Such information is also required to be placed before the general body of the society and the approval to be obtained from the general body. On June 21, 1988, the Agriculture and Co-operation Department of the Government of Maharashtra framed certain directive principles laying down the modalities of utilization of Area Development Funds. The said order was issued in exercise of the power under section 79A of the Maharashtra State Co-operative Societies Act. This order passed during the middle of the last assessment year relevant to these appeals gives statutory basis for the already existing practice. It is difficult to equate this fund to the other categories of funds, as has been done by the Tribunal and affirmed by the High Court. Unlike the other funds like Chief Minister's Relief Fund, the amount collected towards Area Development Fund is retained by the sugar factory itself and utilized as per the guide lines issued by the Government or the National Co-operatives Development Corporation. The collective body of the society and its elected representatives take the decision as to how much amount has to be spent and for what purposes. The Director of Sugar or other designated official, no doubt

> acts in a supervisory capacity to oversee that the funds are properly utilized. On that account, it cannot be said that the collection is made by the society as an agent of the Government or the proprietary interest in the funds is vested with the Government. The conclusion has been reached by the Tribunal mainly on the basis of the requirement of prior sanction of the Director of Sugar for incurring the expenditure. Such restriction prescribed in the larger interest of the society itself does not in any way detract from the fact that the societies concerned do exercise dominion over the fund and deal with that money subject of course to the guidelines and restrictions evolved by the Government. The Tribunal failed to approach the question in proper perspective on an analysis of the relevant circulars and orders. The High Court too fell into an error in invoking the theory of diversion of income at source. The crux of the matter is that there has never been a diversion of income to a third party (Government) before it reached the assessee. The receipts in the form of Area Development Fund always remained with the assessee."
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> 35. Similarly, the Supreme Court referred to the sugarcane development fund and observed that the case of the Revenue was on stronger footing. The beneficiaries were none other than the member of the sugar cooperative society and the Directors were to ensure that the benefit accrues to the members in form of augmentation of sugarcane production. The assessee had dominion over the said fund but the only restriction was in the manner and mode of using the said fund. A supervisor role was played by the Directorate of Sugarcane.
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> 36. ……..Mere realization of an amount in course of trading was not determinative whether the amount received was income. The court/authorities must determine the nature and character of the receipts before the amount can be taxed as income……. The assessee did not exercise dominion over the said fund/deposit and deal with the said fund/deposit…..”

18. We are of the view that the receipt in the present case will have to be tested on the lines indicated in para-34 of the decision of the Hon’ble Delhi High Court set out above. We are also of the view that in the present case, if the receipt in question is held as income, then the corresponding money spent by the Assessee from TSS have to be regarded as expense (though they might have been laid out for meeting capital expenditure) and only the net receipt can be brought to tax. Since all these aspects have not been examined by the revenue authorities, we deem it fit and proper to set aside the order of the CIT(A) and remand for fresh consideration by the AO, the question whether the receipt in question has to be regarded as income of the Assessee

or not. The AO will afford opportunity of being heard to the Assessee before deciding the issue.

19. For statistical purpose, the appeals of the Assessee being ITA No.95 & 96/Kol/15 are treated as allowed.

ITA No.97/Kol/2015

20. This is an appeal by the assessee against the order dated 13.10.2014 of CIT(A)-XXXII, Kolkata relating to A.Y.2010-11.

21. In this appeal the assessee has challenged the order of CIT(A) whereby the CIT(A) confirmed the order of the AO imposing penalty on the assessee u/s 271(1)(c) of the Act.

22. The penalty u/s 271(1)(c) of the Act was levied by the revenue authorities for the reasons that the amount received by the assessee from Mother Dairy towards TSS was not declared by the assessee as income but was claimed by the assessee as capital receipt and not in the nature of income. While deciding the quantum appeal for A.Y.2010-11 we have set aside the order of the CIT(A) and remanded the issue for fresh consideration by the AO. Therefore the order of the CIT(A) confirming the order of the AO imposing penalty on the Assessee u/s.271(1)(c) of the Act has also to be set aside for consideration afresh in the light of the fresh order to be passed by the AO in the light of the directions given in this order. It was submitted by the learned counsel for the Assessee that the issue as to whether money received under TSS is capital receipt not chargeable to tax or revenue receipt chargeable to tax is a highly debatable issue on which two views are possible. In these circumstances, according to him, it cannot be said that the assessee either concealed particulars of income or furnish inaccurate particulars thereof. He also highlighted that in assessment years 2009-10 the revenue did not consider the contribution of Mother Dairy to TSS as income. It is only in A.Y.2009-10 that there was TDS on the payments made on TSS

u/s 194C of the Act that the revenue sought to tax the same as income. In these circumstances, according to him, levying of penalty u/s 271`(1)(c) of the Act cannot be sustained.

23. We are of the view that since the order in quantum appeal is being set aside for fresh consideration by the AO, the order imposing penalty should also be set aside for consideration de novo by the AO in the light of the assessment to be made afresh. We therefore allow the appeal of the Assessee for statistical purpose.

24. In the result the appeals are treated as allowed for statistical purpose.

Order pronounced in the Court on 17.11.2017.

Sd/-	Sd/-
[Waseem Ahmed]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 17.11.2017.

[RG PS]

Copy of the order forwarded to:

1.West Bengal Co-operative Milk Producers'Federation Ltd., LB-2, Sector-III, Salt Lake City, Kolkta-700098.
2.D.C.I.T., Circle-51, Kolkata
3. C.I.T.(A)- XXXII, Kolkata 4. C.I.T-XVII, Kolkata
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O, ITAT Kolkata Benches