

आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.308 & 309/PUN/2017
निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

Klaus Multiparking System Pvt. Ltd.,
5/3, Prashant Apartments,
B/h Karve Road,
Telephone Exchange,
Erandwane, Pune – 411004

.... अपीलार्थी/Appellant

PAN: AACCK3868R

Vs.

The Asst. Commissioner of Income Tax,
Circle 11(1), Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Kishore Phadke
प्रत्यर्थी की ओर से / Respondent by : Shri Ajay Modi

सुनवाई की तारीख / Date of Hearing : 12.04.2018	घोषणा की तारीख / Date of Pronouncement: 27.04.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by assessee are against separate orders of CIT(A)-7, Pune, both dated 25.10.2016 relating to assessment years 2010-11 & 2011-12 against respective orders passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. Both the appeals relating to the same assessee were heard together and are being disposed of by this consolidated order for the sake of convenience. In order to adjudicate the issues, reference is being made to the facts in ITA No.308/PUN/2017, relating to assessment year 2010-11.

3. The assessee in ITA No.308/PUN/2017, relating to assessment year 2010-11 has raised the following grounds of appeal:-

1. *The learned CIT(A) erred in law and on facts in sustaining the disallowance of Rs.1,97,738/- paid to Saraswati Transport Company for alleged non-deduction of TDS on reimbursement of octroi expenses.*
2. *The learned CIT(A) erred in facts in making an observation that the appellant has not demonstrated the bifurcation between octroi charges and transport charges from any bill of transporter. The learned CIT(A) ought to have appreciated that the bills of the Saraswati Transport Company submitted by the appellant mention the said two elements separately.*
3. *The learned CIT(A) erred in law and on facts in sustaining the disallowance of amortization of expenses incurred on account of increase in share capital of the company in AY 2008-09 amounting to Rs.23,300/-.*

4. The issue in grounds of appeal No.1 and 2 raised by the assessee is against disallowance of ₹ 1,97,738/- paid to Saraswati Transport Company for non-deduction of TDS on reimbursement of octroi expenses.

5. Briefly, in the facts of the case, the assessee was engaged in the manufacturing and sale of automatic parking systems. The assessee during the year under consideration had furnished the return of income declaring Nil income. The case of assessee was picked up for scrutiny. The first issue which was taken up by the Assessing Officer was lower deduction of tax at source by the assessee out of certain payments. The assessee pointed out that it had deducted TDS out of payments made to Clearfast Air Cargo Agencies Ltd. and Saraswati Transport Company was @ 1% on the basis of certificate obtained from the Income Tax Department. The Assessing Officer

on verification noted that beside the said concern in some other cases, the assessee had deducted tax at lower rates and disallowance of ₹ 4,45,662/- was made in the hands of assessee. Various other additions were also made by the Assessing Officer, which are not disputed before us and hence, no reference is being made in this regard, except for the issue raised vide ground of appeal No.3 against disallowance of amortization of expenses incurred on account of increase in share capital of ₹ 23,300/-.

6. The CIT(A) after considering explanation of assessee noted that the assessee had deducted tax at source @ 1% and there was certificate for lower rate of deduction @ 1%. He further noted that the assessee had not deducted tax at source on octroi charges reimbursed to Saraswati Transport Company. From the details given, octroi charges were ₹ 1,97,738/- and transport charges were only ₹ 3,955/-. Further, as per TDS certificate, total amount paid to Saraswati Transport Company was only ₹ 3,82,501/-. The CIT(A) from the perusal of bill and TDS certificate observed that TDS was not deducted on octroi charges. He was of the view that the payments made to Saraswati Transport Company were more than ₹ 3,82,501/-. The plea of assessee that TDS was not required to be deducted out of reimbursement of expenses, was not accepted by the CIT(A) on the ground that the assessee had failed to demonstrate that there was such reimbursement. The CIT(A) held that in view of the provisions of section 40(a)(ia) of the Act, the assessee was in default in not deducting the tax at source out of payments of ₹ 1,97,738/-.

7. The assessee is in appeal against the order of CIT(A).

8. The learned Authorized Representative for the assessee before us pointed out that the perusal of invoices of Saraswati Transport Company along

with octroi receipts filed before the authorities below, which clearly reflected that octroi payments were reimbursed to the said transporter. However, against transportation charges paid, tax was deducted at source and there is no dispute vis-à-vis the same. The learned Authorized Representative for the assessee also referred to form No.16A issued to Saraswati Transport Company placed at page 49 of Paper Book, under which the TDS was deducted only out of transport charges and not out of octroi charges, since it was reimbursement of expenses.

9. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

10. We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal is whether the assessee was in default in not deducting TDS out of payments made to Saraswati Transport Company on account of reimbursement of expenses of octroi charges. The assessee had utilized services of Saraswati Transport Company and had paid transport charges to the said concern. There is no default in deduction of tax at source out of aforesaid transport charges paid to said concern. However, the assessee was held to be in default in not deducting tax at source out of octroi payments. The assessee before us has filed necessary evidence in this regard that in each of the bills raised by the said concern Saraswati Transport Company, separately the octroi charges and transport charges were shown; in addition the assessee has filed supporting evidence, receipt of octroi charges paid by the assessee. In the totality of the above said facts and circumstances, where in addition to the transport charges, the assessee had reimbursed octroi charges, then it is not the requirement of law to deduct tax at source out of

reimbursement of expenses of octroi charges. The assessee having not deducted the same, cannot be held to be in default. Accordingly, we find no merit in the aforesaid disallowance made by invoking provisions of section 40(a)(ia) of the Act. We direct the Assessing Officer to delete disallowance of ₹ 1,97,738/-. Hence, the grounds of appeal No.1 and 2 raised by the assessee are thus, allowed.

11. The issue in ground of appeal No.3 raised by the assessee is against disallowance of expenses incurred on account of increase in share capital of the assessee company amounting to ₹ 23,300/-. The said expenses are capital in nature and hence, are not to be allowed in the hands of assessee. Accordingly, the ground of appeal No.3 raised by the assessee is dismissed. The grounds of appeal raised by the assessee are thus, partly allowed.

12. Now, coming to the appeal of assessee in ITA No.309/PUN/2017, relating to assessment year 2011-12. The grounds of appeal raised by the assessee are as under:-

1. *The learned AO erred in law and on facts in taxing and learned CIT(A) erred in law and on facts in confirming the taxation of "Industrial Promotion Subsidy" amounting to Rs.26,37,000/- on the analogy that the same is not a capital receipt, but a revenue receipt chargeable to tax.*
2. *The learned CIT(A) erred in law and on facts in drawing incorrect analogies and tests for deciding the nature and character of the Industrial Promotion subsidy. The learned CIT(A) ought to have appreciated that "mode of payment" of subsidy is different from "purpose of subsidy", and viewed from "purpose test", the industrial promotion subsidy received is capital in nature.*

13. The assessee is aggrieved by the orders of authorities below in holding that subsidy received by the assessee under the Industrial Promotion Subsidy Scheme is chargeable to tax in the hands of assessee as against the plea of assessee that it was a capital receipt. The learned Authorized Representative

for the assessee referred to the Package Scheme Incentive, 2007 of the Govt. of Maharashtra, which is placed at pages 44 to 72 of Paper Book. He also referred to the letter of provisional sanction of Industrial Promotion Subsidy Scheme dated 31.08.2012, placed at page 43 of Paper Book. He stressed that the assessee was eligible to get the said subsidy under PSI Scheme of 2007 and the said receipt in the hands of assessee was a capital receipt. He further stated that the issue stands covered by the order of Tribunal in the case of Innoventive Industries Ltd. Vs. DCIT in ITA Nos.601/PN/2013 and 215/PN/2014, relating to assessment years 2009-10 and 2010-11, order dated 24.03.2017. He also referred to the decision of the Hon'ble Supreme Court in CIT Vs. Shree Balaji Alloys (2017) 287 CTR 459 (SC).

14. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of authorities below.

15. We have heard the rival contentions and perused the record. The only issue which arises in the present appeal is the treatment of subsidy of ₹ 26,37,000/- received by the assessee from Govt. of Maharashtra. The assessee explained that under the Package Scheme of Incentive, 2007, the Govt. of Maharashtra had provided benefits for setting up of new projects, under which the incentive scheme was provided to the persons setting up the industries. This scheme was revised from time to time and one such revision was on 03.05.2006 during which, units set up during the period from 01.04.2007 to 01.03.2011 were held to be eligible to claim the subsidy. The assessee further pointed out that it was eligible for industrial promotion subsidy of 25% of fixed capital investment being Medium Manufacturing Enterprise for a period of six year. In this regard, eligibility certificate was issued under PSI

Scheme of 2007. The assessee has placed the copy of said certificate at pages 36 to 42 of Paper Book. As per said certificate, subsidy was granted only after setting up of industries and the same is claimed to be nothing but assistance given for the purpose of setting up of industries. The eligibility certificate states that electricity duty exemption for a period of 15 years from 01.03.2009 to 29.02.2024. It further states that Industrial Promotion Subsidy (IPS) equivalent to 40% of eligibility investment was ₹ 190.76 lakhs for the period of 96 months i.e. 01.03.2009 to 28.02.2017. The eligibility certificate further provides that in case unit is closed down or producing below normal production, incentive availed would be withdrawn. The case of assessee was that the said receipt was capital receipt in its hands. However, the case of Revenue is that the said receipt is revenue receipt chargeable to tax in the hands of assessee.

16. We find that the Tribunal in the case of Innoventive Industries Ltd. Vs. DCIT (supra) had considered the aforesaid scheme of PSI, 2007 and had relied on decision of the Hon'ble Supreme Court and on various decisions of Hon'ble High Courts and held as under:-

“15. We have heard the submissions made by the representatives of the rival sides and have perused the orders of authorities below. We have also considered various documents placed on record in the form of paper book and the judgments/decisions referred to by the representative of both sides during the course of making submissions.

Before we proceed to decide the nature of subsidy and the purpose for which the subsidy was received by the assessee, it would be relevant to first refer to the Preamble of Package Scheme Incentive, 2007 under which the assessee has received assistance from the State Government. The relevant extract of the Preamble of PSI, 2007 reads as under :

“PREAMBLE

*In order to encourage the dispersal of industries to the less developed areas of the State, Government has been giving a Package of Incentives to New / Expansion Units set up in the developing region of the State since 1964 under a Scheme popularly known as the **Package Schemes of Incentives.***

The Package Scheme of Incentives, introduced in 1964, was amended from time to time. The last amended Scheme, commonly known as the 2001 Scheme is operative from the 1st April, 2001 to 31st March, 2007.

The State has declared the new Industrial, Investment, Infrastructure Policy 2006 to ensure sustained industrial growth through innovative initiatives for development of key potential sectors and further improving the conducive industrial climate in the State, for providing the global competitive edge to the State's industry. The policy envisages grant of fiscal incentives to achieve higher and sustainable economic growth with emphasis on balanced Regional Development and Employment Generation through Greater Private and Public Investment in industrial development. The Package Scheme of Incentives 2007 outlines the eligibility criteria, quantum of incentives and monitoring mechanism for administering the incentives."

16. *A further perusal of the scheme reveal that the State of Maharashtra been classified into different areas marked as Group A to Group D+, depending upon the development in the specified areas. The Classification of Areas under the scheme is given below :*

"1.3 Classification of Areas :

For the purpose of the 2007 scheme, the classification of the areas of the State shall be as indicated below :

- (i) *Group A: comprising the developed areas, viz, Mumbai Metropolitan Regional (MMR) and Pune Metropolitan Region (PMR).*
- (ii) *Group B : comprising the areas where some development has taken place.*
- (iii) *Group C : comprising the areas, which are less developed than those covered under Group B.*
- (iv) *Group D : comprising the lesser developed areas of the State not covered under Group A/Group B/Group C.*
- (v) *Group D+ : comprising those least developed areas not covered under Group A/Group B/Group C/Group D.*
- (vi) *No industry District : not covered under Group A/B/C/D & D+."*

17. *The beneficiary of PSI, 2007 will be issued eligibility certificate by the implementing agency and the eligibility certificate will be issued with effect from the date of commencement of commercial production by the eligible unit. The assessee is classified as Mega Project. The Department of Industries, Government of Maharashtra vide letter dated 30-10-2007 has offered the status of Mega Project to the proposal of assessee on the basis of employment generation and has offered incentives subject to compliance of PSI, 2007.*

18. *The assessee has entered into Memorandum of Understanding with the Government of Maharashtra on 15-10-2008 (placed on record at page 119 of the paper book). The relevant extract of the terms and conditions specified in Memorandum of Understanding for claiming benefit under the scheme are as under :*

"1. ADAPL shall invest approximately Rs.117 crores in the new project at village Sanaswadi, Tal.Shirur, Distt. Pune & will offer employment to 510 persons.

2. GoM will offer following benefits / incentives granted hereunder available with regard to the eligible investments for expansion and shall be payable to ADAPL on ADAPL complying with the requirements under PSI 2007.

2.1 Electricity Duty exemption for the period of 7 years from the date of commencement of commercial production.

2.2 100% exemption from payment of Stamp Duty.

2.3 Industrial Promotion Subsidy (IPS) equivalent to 75% of "ELIGIBLE INVESTMENTS (as defined in PSI 2007)" made w.e.f 28th March, 2007 and made within such a period stipulated in the Package Scheme of Incentives 2007. The IPS will however be limited to 75% of ADAPL's eligible investments less the amount of benefits availed at Sr.No.2.1 & 2.2 as per the period prescribed therein or to the extent of taxes paid to the State Government within a period of 7 years whichever is lower.

3. The IPS mentioned at 2.3 will be admissible only after the company employs 500 number of persons on regular basis within one year from the date of commencement of commercial production at the proposed project and at least 75% of these employees are local persons."

19. A bare perusal of the Preamble to PSI, 2007 shows that the incentives are offered by the State Government to the entrepreneurs for making investment and setting up of new industries in the lesser developed areas of the State of Maharashtra. The scheme envisages grant of fiscal incentives to achieve higher and sustainable economic growth with emphasis on balanced regional development and employment generation through greater private and public investment in industrial development. In other words, through this scheme the State Government intends to attract investments in those area which are less developed so as to create a balanced development in the State and generate even employment opportunities throughout the State. Thus the prime motive behind PSI, 2007 is setting up of new industries.

20. A perusal of the terms and conditions of the Memorandum of Understanding reveal that the incentive/benefits under the scheme are offered to the assessee subject to the compliance of certain conditions. The benefits are in the form of exemption from payment of Electricity Duty, 100% exemption from payment of Stamp Duty on purchase of land etc., the Industrial Promotion Subsidy is given to the extent of 75% of eligible investment made during prescribed period (limit of 75% of the eligible investment shall be reduced by the amount of benefits offered in the form of electricity duty and exemption of stamp duty) or to the extent of taxes paid to the State Government within a period of 7 years, whichever is lower.

A close perusal of the above condition would make it unambiguously clear that it is not the choice of the beneficiary under the scheme to select the mode of subsidy. The beneficiary is entitled to subsidy subject to the limit of 75% of eligible investments as reduced by the amount of benefits availed on account of Electricity Duty and Stamp Duty exemption or the taxes paid to the State Government within a period of 7 years, whichever is lower. In the present case, the assessee has received Industrial Promotion Subsidy in the form of refund of sales tax paid to the State Government. The latter mode of payment of Industrial Promotion Subsidy is possible only when the beneficiary under the

scheme has commenced production and its products are available in the market for sale. Until and unless the production starts and the products are sold in the market, there cannot be refund of sales tax. In the background of the above narrated facts, it would be wrong to conclude that since the assessee has received subsidy as refund of sales tax, therefore, it is a trade receipt. The assessee has received subsidy in the form of refund of sales tax for setting up of Mega Project in classified Area C of the State of Maharashtra and upon providing employment to more than 500 persons, as specified under the scheme.

21. One of the objection raised by the CIT(A) in rejecting the claim of assessee is that the assessee has failed to comply with only one of the two criterias laid down under the PSI, 2007 for claiming benefit of Industrial Promotion Subsidy, i.e. employment criteria. The other condition of minimum investment is not fulfilled. According to Memorandum of Understanding, the assessee was required to invest approximately Rs.117 crores and offer employment to 510 persons. A perusal of the eligibility certificate dated 17-03-2009 at page 112 of the paper book shows that as against expected investment of Rs.117 crores the assessee had made investment of Rs.94.53 crores between 28-03-2007 to 05-12-2008. The assessee had started commercial production on 01-12-2008. The total period of investment available with the assessee is from 28-03-2007 to 27-03-2012. Thus, there was still time available with the assessee to make further investment. The assessee vide letters dated 28-03-2007 and 31-11-2011 had requested the Government to consider the level of investment at Rs.562 crores instead of Rs.117 crores and to provide employment to around 1937 persons instead of 510 persons at industrial unit set up by the assessee at Village Sanaswadi, Taluka Shirur, District Pune. The Department of Industries, Energy and Labour, Government of Maharashtra vide letter at page 132 of the paper book has agreed to apply the incentives on the additional investment of Rs.445 crores, i.e. investment upto Rs.562 crores. The period for granting Industrial Promotion Subsidy was also increased from 7 years to 9 years. Thus, it is unambiguously clear that the assessee had reached the level of investment and had even gone much beyond the initial level of investment of Rs.117 crores. Therefore, the said objection raised by the CIT(A) in rejecting the claim of the assessee is unwarranted.

22. To be eligible to claim the benefit of scheme the assessee was required to obtain eligibility certificate. In the present case, the eligibility certificate was issued with effect from the date of commencement of commercial production by the assessee. Thus, the assessee was eligible to claim the benefit of Industrial Promotion Subsidy for the period of 7 years starting from the date of production, i.e. 01-12-2008 to 30-12-2015. Accordingly, the period relevant to the assessment year 2009-10 was the first year in which the assessee could have claimed the benefit of subsidy. The relevant extract of the eligibility certificate is reproduced herein below :

6.	Capital cost (Rs.in lacs)	Particulars	Maximum Admissible Fixed Capital Investment	Actual accepted investment made from 28.03.2007 to 5.12.2008
		Land & Site Dev.	520.00	520.00
		Building	1984.00	1984.00
		Plant & Machinery	6913.00	6160.82

		<i>Electricals</i>	1282.00	139.14
		<i>Others</i>	1001.00	649.73
		Total	11700.00	9453.69
7.	<i>Date of start of Commercial Production</i>	01.12.2008		
8.	<i>Validity period of EC & Period for ED Exemption</i>	7 years : from 01.02.2008 to 30.11.2015		
9.	<i>Date of effect of the EC</i>	01.12.2008		
10.	<i>Period of investment</i>	From 28.03.2007 to 27.03.2012		

Entitlement of :

- (1) *Electricity Duty exemption for the period of 7 years from the date of commencement of commercial production (from 01.12.2008 to 30.11.2015).*
- (2) *100% exemption from payment of Stamp Duty.*
- (3) *Industrial Promotion Subsidy (IPS) equivalent to 75% of your Eligible Investments i.e.Rs.11700.00 lacs to be made w.e.f. 28.03.2007.*

1. *Limited to 75% of your eligible investments less the amount of benefits availed at Sr. 1 & 2 above as per the period prescribed therein*

OR

2. *To the extent of taxes paid to the State Government within a period of 7 years, whichever is lower.*

The afore stated incentives shall be sanctioned and released upon submission of land use conversion to industrial purpose permission and building plan approvals from competent authority on or before 02.03.2010."

It is evident from the eligibility certificate issued by Directorate of Industries, Government of Maharashtra that the assessee has received benefit of subsidy for Mega Project after qualifying all the conditions set out in PSI, 2007.

23. *The Hon'ble Supreme Court of India in the case of Ponni Sugars and Chemicals Ltd. (supra) has laid down certain principles to determine the nature of subsidy, they are :*

(a) *The object of subsidy scheme - If the scheme was to enable the assessee to run the business more profitably then the receipt is on Revenue account. If the object of the subsidy scheme is to enable the assessee to set up a new unit or to expand existing unit then the receipt of subsidy is on capital account.*

(b) *The form or mechanism through which the subsidy is given is irrelevant. The purpose for which the amount received as subsidy is utilized.*

(c) *The purpose for which the amount received as subsidy is utilized.*

The underlying factor which determines the nature of subsidy is the purpose for which the subsidy is given. The mode of payment of subsidy does not determine the nature of subsidy.

24. *In the case of Shree Balaji Alloys and Others Vs. CIT (supra), the Hon'ble High Court of Jammu & Kashmir had occasion to deal with the issue determining the nature of subsidy, i.e. whether Capital or Revenue. In the said case the subsidy was received by the assessee under the scheme with twin objects, viz., (i) acceleration of industrial development in the State of Jammu & Kashmir, and (ii) generation of Employment in the State. The subsidy was received by the assessee in the form of excise refund and interest, etc. The Tribunal decided the issue in favour of the Revenue by holding the subsidy received by the assessee as Revenue receipt on the following grounds :*

“(i) The excise refund and interest subsidy had not been given to the appellants to establish industrial units because the industry stood already established.

(ii) The incentives were not available unless and until commercial production had commenced.

(iii) The incentives were recurring in nature, in that, those were limited to a period of 10 years from the date of commencement of commercial production.

(iv) The incentives in the form of excise duty refund and interest subsidy were not given to the assessees for purchasing capital asset or for purpose of machinery.

(v) The incentives were given for easy market accessibility and to run the business more profitably.”

The Hon'ble High Court after thoroughly examining the salient features of the New Industrial Policy under which the subsidy was extended to the assessee and also the ratio of judgments rendered by the Hon'ble Apex Court in the case of Sahney Steel and Press Works Ltd. (supra) and approval thereof in Ponni Sugars and Chemicals Ltd.(supra) has held as under :

“16) Perusal of the judgments in Sahney Steel (supra) and Ponni Sugars (supra), therefore, reveals that the apex Court had applied the above quoted dictum to determine the purpose, which the two schemes had intended to achieve by the incentive subsidies, permissible under the schemes in question in those cases.

It was, therefore, in the context of respective subsidy incentive schemes in the two cases, that the subsidy in Sahney Steel (supra) was held to be revenue receipt whereas the subsidy in Ponni Sugars & Chemicals Ltd. (supra) was held as capital receipt.

17) We are supported in taking this view by the observations made by the Hon'ble Supreme Court of India in a later decision reported as Mepco Industries Ltd. vs. CIT & Anr. (2009) 227 CTR (SC) 313 : (2009) 31 DTR (SC) 305 : 2009 (7) SCC 564, where the above dictum was reiterated as follows:

".....Sahney Steel & Press Works Ltd. Etc. (supra) was a case which dealt with production subsidy, Ponni Sugars & Chemicals Ltd. (supra)

dealt with subsidy linked to loan repayment whereas the present case deals with a subsidy for setting up an industry in the backward area. Therefore, in each case, one has to examine the nature of the subsidy. The judgment of this Court in Sahney Steel & Press Works Ltd. Etc. (supra) was on its own facts; so also, the judgment of this Court in Ponni Sugars & Chemicals Ltd. (supra). The nature of the subsidies in each of the three cases is separate and distinct. There is no straightjacket principle of distinguishing a capital receipt from a revenue receipt,

It depends upon the circumstances of each case. As stated above, in Sahney Steel & Press Works Ltd. Etc. (supra), this Court has observed that the production incentive scheme is different from the scheme giving subsidy for setting up industries in backward areas.”

18) *Now coming to the findings of the Tribunal on the issue, we find that the Tribunal has referred to various paras appearing in the two judgments to support its view that the receipts in the hands of the assesseees were production incentives and thus revenue receipt and not capital receipt. This, however, appears to have been done without appreciating that the observations made in those paras were in the context of the schemes as such, which the apex Court was considering to find the intent and purpose of the incentives under those schemes, and not the law laid down as such;*

19) *The Tribunal has relied upon five factors to hold the incentives in question as Production Incentives but without dealing with that part of the Scheme, whereby unemployment in the State had been intended to be eradicated creating atmosphere for accelerated industrial development to provide employment opportunities to deal with the social problem of unemployment. This in our view is lop-sided interpretation of the New Industrial Policy and Concessions formulated by the Central Government for the State of Jammu and Kashmir vide Office Memorandum of June 14, 2002.*

20) *Therefore, in view of the clear legal position adumbrated by the Hon'ble Supreme Court of India on the issue in question, that to determine the nature and intent of the incentives as to whether those were Revenue Receipts or Capital Receipts, the purpose underlying the incentives was the determinative test, there may not be any necessity of referring to the judgments of other High Courts of the Country relied upon by the appellants' learned counsel, some of which had been considered by the Hon'ble Supreme Court of India in the above referred cases.*

21) *Thus, finding that the New Industrial Policy and other concessions for the State of Jammu and Kashmir has not been correctly appreciated by the Appellate Tribunal, we proceed to examine the true intent and purpose underlying the Policy and the Concessions contemplated by the Office Memorandum of June 14, 2002 and statutory notifications issued in this behalf.*

22) *Perusal of the Office Memorandum dated 14.06.2002 indicating New Industrial Policy and other concessions for the State of Jammu and Kashmir, makes it explicit that the concessions were issued to achieve twin objects viz. (i) Acceleration of industrial development in the State of Jammu and Kashmir, which had been found lagging behind in such development and (ii) Generation of employment in the State of Jammu*

and Kashmir. Amendment introduced to the Office Memorandum vide Notification of November 28, 2003 of the Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) eloquently demonstrates the Central Government's intention in extending the incentives. The Government's objective, as conveyed by Hon'ble the Prime Minister at Srinagar on April 19, 2003, was, for creation of one lac employment and self employment opportunities in Jammu and Kashmir State.

23) To achieve the purpose and objective referred to herein above, it was, *inter alia*, provided in the Central Excise Notifications that the exemptions contained in the Notifications would be available only on production of Certificate from General Manager of the concerned District Industry Centre to the Jurisdictional Deputy Commissioner of the Central Excise or the Assistant Commissioner of Central Excise, as the case may be, to the effect that the unit had created Required Additional Regular Employment, which would not, however, include employment provided by the industrial units to Daily wagers or Casual employees engaged in the Units.

24) A close reading the Office Memorandum and the amendment introduced thereto with para No.3 appearing in the Central Excise Notification Nos.56 and 57 of November 11, 2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu and Kashmir and the generation of employment, so contemplated, was not only casual or temporary; but was on the other hand, of permanent nature.

25) Considered thus, the paramount consideration of the Central Government in providing the incentives to the New Industrial Units and Substantial Expansion of the existing units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self employment, hence a purpose in Public Interest.

26) In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone.

27) Thus, looking to the purpose, of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the Public Interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellants-assesses, cannot be construed as mere Production and Trade Incentives, as held by the Tribunal.

28) Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bonafide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.

29) The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

30) For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence Revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel and Ponni Sugars cases (supra).

31) The finding of the Tribunal that the incentives were Revenue Receipt is, accordingly, set aside holding the incentives to be Capital Receipt in the hands of the assesses.”

In the instant case also the Government of Maharashtra through PSI, 2007 intends to achieve industrialization with twin objects of (1) Balanced Regional Development, and (b) Employment Generation. Thus, the ratio laid down in the case of Shree Balaji Alloys Vs. CIT (supra) would apply in the present case.

25. We find that the Special Bench of Tribunal in the case of DCIT Vs. Reliance Industries Ltd., in a case where the assessee had received the incentive/subsidy in the form of exemption from liability to payment of sales tax for setting up of industries in notified areas under 1979 scheme of Government of Maharashtra has held that sales tax incentives received by the assessee from the Government of Maharashtra is Capital receipt not chargeable to tax.

26. The Hon'ble Bombay High Court in the case of CIT Vs. Chaphalkar Brothers after considering the ratios laid down in the case of Sahney Steel and Press Works Ltd. (supra) and Ponni Sugars and Chemicals Ltd.(supra) has held that the purpose for which the subsidy was given is relevant factor to determine whether the same is capital or revenue receipt. If the object was to enable the assessee to set up a new unit then receipt of subsidy would be on capital account. In the aforesaid case, the State Government had granted subsidy in the form of exemption from Entertainment Duty on Construction of multiplex theatres. The Hon'ble High Court held that the fact that the subsidy was not meant for repayment of loan taken for construction of multiplexes cannot be a ground to hold that subsidy receipt was on revenue account. The relevant extract of the findings of the Hon'ble Jurisdictional High Court are as under :

“5. Since the object of subsidy was to promote construction of multiplex theatre complexes, in our opinion, receipt of subsidy would be

on capital account. The fact that the subsidy was not meant for repaying the loan taken for construction of multiplexes cannot be a ground to hold that subsidy receipt was on revenue account, because, if the object of the scheme was to promote cinema houses by constructing multiplex theatres, then irrespective of the fact that the multiplexes have been constructed out of own funds or borrowed funds, the receipt of subsidy would be on capital account. In the light of the aforesaid objects of the Scheme framed by the State Government, the decision of the Income Tax Appellate Tribunal that the amount of subsidy received by the assessee is on capital account cannot be faulted. Accordingly, both the appeals are dismissed with no order as to costs.”

27. *The Ld. Departmental Representative has placed reliance on the decision of Coordinate Bench of the Tribunal in the case of Rasiklal M. Dhariwal (HUF) Vs. DCIT (supra). In the said case, the State Government for the purpose of promotion of wind energy generation in the State of Maharashtra had granted certain benefits to the persons who had set up windmill. The policy to grant further incentives to windmill owners was formulated in the background of the fact that earlier policy of the State Government on generation through non-conventional sources did not achieve the desired results. In the subsequent policy the sales tax benefits were granted to the windmill operators to mitigate the problems faced by the promoters of wind energy generation. In the background of these facts the Tribunal held that the sales tax benefit was not intended to be granted for creation or bringing into existence a new asset. The Tribunal held that the object of the scheme was to promote generation of energy through non-conventional sources and the same is sought to be achieved by the Government in the form of supporting the units to perform more efficiently and profitably. Thus, in view of the above facts the Tribunal held that the incentives received by the assesseees in the form of sales tax benefits were Revenue receipt as it has nothing to do with setting up of the windmill.*

The facts of the aforesaid case are entirely at variance with that of the case in hand. In the present case, the incentive in the form of refund of sales tax is on account of setting up of new industrial unit with twin objective of balance development of regions and generation of employment. As per the scheme there are two modes of payment of Industrial Promotion Subsidy. The subsidy to the extent of 75% of the eligible investments as reduced by the benefit of electricity duty exemption and stamp duty exemption or to the extent of taxes paid to the State Government within a period of 7 years, whichever is lower. It is not the choice of the assessee to opt for either of the two modes. The beneficiary under the Scheme will receive the subsidy after comparative analysis of both the modes, whichever is lower.

The assessee is eligible to claim the incentive subject to the compliance of certain conditions mentioned in the PSI 2007 scheme, subject to the maximum limit as specified in the scheme. Since the assessee is eligible to qualify in the latter part of the scheme, the assessee is receiving incentive/subsidy in the form of refund of sales tax from the State Government. As far as the purpose of subsidy is concerned, it is quite evident that it is for setting up of new Mega Project in the classified area. Hence, the decision of Coordinate Bench of the Tribunal in the case of Rasiklal M. Dhariwal (HUF) Vs. DCIT (supra) would not apply in the facts and circumstances of the case.

28. *Thus, in the facts of the case and in the light of various decisions discussed above, we hold that the incentive received by the assessee under the PSI, 2007 scheme in the form of refund of sales tax is Capital receipt, not liable to tax.”*

17. The issue arising before us is identical to the issue before the Tribunal in Innoventive Industries Ltd. Vs. DCIT (supra) and the assessee had received incentive / subsidy from the State Government for setting up the project in the classified area. Hence, we hold that subsidy received by the assessee under PSI, 2007 is capital receipt in the hands of assessee. Accordingly, we delete the addition of ₹ 26,37,000/-. The grounds of appeal raised by the assessee are thus, allowed.

18. In the result, appeal of assessee relating to assessment year 2010-11 is partly allowed and the appeal relating to assessment year 2011-12 is allowed.

Order pronounced on this 27th day of April, 2018.

Sd/-
(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक Dated : 27th April, 2018.

GCVSR

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

आदेश की प्रतिलिपि अद्येषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-7, Pune;
4. The Pr.CIT-6, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य मामला / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune