IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F', NEW DELHI

BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA Nos. 2462 & 2463/Del/2015
Assessment Years: 2006-07 & 2007-08

M/s. Minda Industries Ltd., B-64/1, Wazirpur Industrial Area, Delhi	**Vs.**	DCIT, Central Circle -03, New Delhi
PAN :AAACM1152C		
(Appellant)		**(Respondent)**

Appellant by	Sh. R.K. Kapoor, CA
Respondent by	Sh. Sanjeet Singh, CIT(DR)

Date of hearing	04.07.2018
Date of pronouncement	05.07.2018

ORDER

PER BENCH:

These two appeals by the assessee are directed against two separate orders both dated 26/02/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-25, New Delhi [in short 'the Ld. CIT(A)'] for assessment years 2006-07 and 2007-08 respectively. Both appeals, being related to the same assessee and common issue-in-dispute involved, these were heard together and disposed of by way of this consolidated order for convenience. The grounds of appeal raised in both appeals are reproduced as under:

(i) Grounds of appeal for AY 2006-07 are as under:

1) That the learned CIT(A) has grossly erred in law and on facts and circumstances of the assessee

confirming an addition of Rs.28,17,360/- on account of alleged unverified purchases of software items.

2) That the learned CIT(A) has grossly erred in law and in confirming the addition of the software purchases merely on doubts and surmises.
3) That the learned CIT(A) ought to have appreciated that the identity of the supplier of software stood established when part of the purchases from the same supplier had been allowed by the Assessing officer himself.
4) That the addition made by the Assessing Officer and confirmed by the CIT(A) is illegal, bad in law and is prayed to be deleted.

(ii) Grounds of appeal for AY 2007-08 are as under:

1) That the learned CIT(A) has grossly erred in law and on facts and circumstances of the assessee holding that the sales tax subsidy of Rs.60,70,404/- received by the assessee is on revenue account.
2) That the order passed by the Assessing Officer and upheld by the CIT(A) holding that subsidy received is on revenue account is bad in law.
3) That the CIT(A) has grossly erred in law in concurring with his predecessor without applying his mind independently on the issue.
4) That the Ld. CIT(A) ought to have appreciated that accounting treatment given to the subsidy remain the same since beginning and the treatment given by the assessee to the sales tax subsidy received was the only legal permissible treatment.
5) That without prejudice the CIT(A) ought to have held that the sales tax subsidy received by the assessee was on capital account not to liable to tax at all either through depreciation or as revenue receipt.

2. At the outset, we may like to mention that the Ld. counsel of the assessee filed a request for adjournment of the case, however, same was rejected in view of the fact that issue involved in these appeals was already decided by the Tribunal in appellate

proceedings while dealing with regular assessments, and accordingly, the Ld. counsel was directed to argue the cases.

3. Briefly stated facts of the case are that in assessment year 2006-07 and 2007-08, the assessee filed regular return of income on 28/11/2006 and 29/10/2007, declaring total income of Rs.19,16,52,125/- and Rs.23,18,59,140/- respectively and regular assessments under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') were completed on 29/12/2008 and 30/12/2009 respectively after making certain additions/disallowances. In assessment year 2006-07 one of the disallowance of Rs.1,08,17,360/- was made in respect of software purchase from two parties namely M/s. AM Software Global Private Limited (Rs.80,00,000/-) and M/s Exim Trading Company (Rs.28,17,360/-). On further appeal, the Ld. CIT(A) deleted addition in respect of M/s AM Software global Private Limited. In assessment year 2007-08, one of the additions was on the issue of sales tax subsidy of Rs.60,70,404/- received by the assessee. The assessee in the return of income declared the said subsidy as capital receipt and accordingly, reduced the amount of subsidy from the cost of fixed assets. According to the Assessing Officer, the subsidy received was in the nature of revenue receipt. On further appeal, the Ld. CIT(A) upheld the finding of the Assessing Officer and held the subsidy received as revenue in nature.

3.1 Subsequent to the completion of the regular assessments, a search and seizure action under section 132 of the Act was carried out on 10/01/2012 in the case of the assessee and consequently, notices under section 153A of the Act were issued in respect of both the assessment years 2006-07 and 2007-08.

The assessments under section 153A were completed in respect of these two assessment years on 30/03/2014, wherein the Assessing Officer repeated the additions/disallowances in respect of software purchase and subsidy respectively. The Ld. CIT(A) also sustained the additions of Rs.28,17,360/-in assessment year 2006-07 and addition of Rs.60,7404 in assessment year 2007-08 on the issue of software purchase and subsidy respectively. Aggreived with these additions/disallowances, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

4. Before us, the Ld. counsel submitted that the Tribunal while deciding the appeal against the regular assessment proceeding in ITA No. 1505/del/2011 for assessment year 2006-07 and ITA No. 1506/Del/2011 for assessment year 2007-08 has already deleted the said additions/disallowances and in the present assessment proceedings under section 153A of the Act, the Assessing Officer has merely repeated those additions/disallowances. According to him, when the Tribunal has already deleted the said additions in regular proceedings, same cannot be sustained in the assessment proceedings under section 153A of the Act. The Ld. counsel provided the copies of the above referred orders of the Tribunal with a copy to the Ld. DR (Departmental Representative)

5. The Ld. DR also could not controvert the fact that Tribunal has deleted addition of both software purchase and subsidy.

6. We have heard the rival submissions and perused the relevant material on record, including the order of the Tribunal cited by the Ld. Counsel. We find that in assessment year 2006-07, in the grounds raised the assessee has challenged issue of

addition of Rs.28,17,360/- on account of alleged unverified purchases of software items. We find from the impugned order that in regular assessment proceedings under section 143(3) of the Act, in order dated 29/12/2008, the Assessing Officer made disallowance in respect of the software purchase from two parties, namely, M/s AM Software Global Private Limited (Rs.80,00,000/-) and M/s. Exim Trading Company (Rs.28,17,360/-) and the Ld. CIT(A) in appeal against the said regular assessment, deleted the addition of Rs.80,00,000/- in respect of purchase from M/s. AM Software Global Private Limited, but upheld the addition of Rs.28,17,360/- in respect of the purchase from M/s. Exim Trading Company.

7. The Ld. CIT(A) in the impugned order has followed the order of the Ld. CIT(A) against the regular assessment order. The relevant findings of the Ld. CIT(A) are reproduced as under:

> {6} Ground no. 2 is taken against the disallowance u/s 35 of the I T Act. In this regard original order dated 29/12/2008 disallowance of Rs. 18120360/- was made against which appeal has been filed before CIT (A) - IX. The CIT (A) - IX has given relief of Rs 80 lacs, vide order dated 15/12/20101. Thus, confirming the addition of Rs.2817307 u/s 35 of the I.T. Act. In this regard, department and assessee both are in the appeal before Hon
> through the finding of the CIT(A)- IX, wherein vide paragraph no. 5.8 of the order he has discussed the issue as under:-
>
> > Trading Company
> > of Mumbai, it is observed that apart from filing the copy of invoices and store receipts, the assessee has not filed any other evidence and no evidence confirming the transaction is available in respect of the same. It is seen that despite repeated opportunities granted by the AO, he failed to produce any evidence indicating purchase of the software. No such evidence

> was either filed before me, the only document in supper of the purchase of software submitted is a copy of the bill. A perusal of the bill indicates that the concern was a supplier of hardware and not of software, which has been shown to have been purchased by the appellant from such concern. Under these circumstances, the finding recorded by the AO are valid and I, therefore, hold that the purchases amounting to Rs.28,17,360/- remain unproved and the action of the AO on that account is confirmed. The ground no. 4 is partly allowed to the appellant.

I do not find any reason to deviate from the finding of the CIT (A) - IX in this regard thus ground no. 2 of the appeal cannot be fully allowed. Therefore, this ground is treated as partly allowed.

8. We also note that while disposing of the appeal related to regular assessment proceedings, the Tribunal in ITA No. 1505/Del/2011 for assessment year 2006-07 has deleted the addition of Rs.28,17,360/- observing as under:

> On careful consideration of the above rival submissions, firstly we observe that the ld. Departmental Representative has not disputed this contention of the ld. AR that the AO allowed and accepted purchase amounting to Rs.14.85 from M/s. Exim Trading Company. From the assessee
> that per accounts confirmation given by the supplier/vendor M/s. Exim Trading Co. from 03.10.2005 to 31.03.2006 [FY 2005-06/2006-07] there was total purchases of Rs.43,31,864/- whereas the AO disputed only two purchases of 12.01.2006 Bill No. 330 and 14.01.2006 Bill No.539 totalling to Rs.28,17,360/- and made disallowance and addition by holding that no summons could be served upon the said supplier M/s. Exim and the assessee did not make any efforts for producing the party. The ld. CIT(A) in para 5.8 of the impugned order noted that except copy of invoices and store receipts the assessee has not filed any other evidence confirming the transaction.

9. We find that in the proceedings under section 153A of the Act, the Assessing Officer has simply added the amount on

account of alleged unverified software purchases for the purpose of computation of total income only and the said addition is not based on any incriminating material. In view of the above facts and circumstances, when addition made in regular assessment proceedings already stands deleted, no addition can be sustained on the same item in the proceedings under section 153A of the Act. Thus, relying on the decision of the Tribunal (supra), we set aside the order of the Ld. CIT(A) and direct the Assessing Officer to delete the said addition of Rs.28,17,360/- on account of software purchases from M/s Exim Trading Company. The grounds of the appeal of the assessee in ITA No. 2462/Del/2015 for assessment a 2006-07 are accordingly allowed.

10. In appeal having ITA No. 2463/Del/2015 for assessment year 2007-08, the grounds raised are related to sales tax subsidy of Rs.60,70,404/-received by the assessee, which has been held by the Ld. CIT(A) as revenue in nature. In the impugned order, the Ld. CIT(A) has mentioned that same addition was made in regular assessment order u/s 143(3) of the Act dated 30/12/2009 and which was upheld by the Ld. CIT(A) in his order dated 14/12/2010. The Ld. CIT(A) in the impugned order following the finding of Ld. CIT(A) against regular assessment order upheld the addition observing as under:

> {7} Ground no. 2 is against the disallowance of sales tax subsidy amounting to Rs 6070404/-. In this regard, similar issue was pertaining in the original assessment order- dated 30/12/2009 which has been decided by CIT (A) - IX vide order dated 14/12/2010 wherein vide paragraph no. 5.5.1 of the order CIT (A) - IX CIT (A) has decided the issue by observing as under:-

> that the subsidy was granted by the Government of Haryana after the plant was set up. Hence the nature of subsidy clearly becomes on the revenue account as the same was utilized for meeting revenue expenditure on day to day basis to run the business more profitably. Therefore, the treatment given by the AO to the subsidy as per the assessment order has been found to be correct. The same is accordingly confirmed However, I am inclined to accept the alternate argument of the Ld AR that in case .the subsidy is treated on the revenue account, depreciation on the same may be allowed as the appellant had reduced the same from the cost of assets. Accordingly, the AO is directed to allow depreciation as per law after due verification. The ground no. 3 is accordingly dismissed subject to the allowance of depreciation
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> Against the same order appeal is pending before the Tribunal. I do not find any reason to deviate from the finding of CIT (A) - IX in this regard. Therefore, subsidy is being treated as revenue receipt. However, AO is directed to allow depreciation as per law after due verification. Thus, this ground of appeal is partly allowed.

11. We note that the Tribunal, while disposing of the appeals related to addition made in regular assessment proceedings, in ITA No. 1506/Del/2011 for assessment year 2007-08, allowed the appeal of the assessee on the issue of subsidy received, holding the same as capital receipt. The relevant finding of the Tribunal is reproduced as under:

> 11. Admittedly and undisputedly, the assessee was held entitled for sales tax subsidy under the Haryana General Sales Tax Act, 1973 and Rule 28C of the Haryana General Sales Tax Rules, 1975, As per the relevant rules, the assessee was entitled to defer 50% payment of sales tax and to retain the same as capital subsidy from the state.

Relevant part of Haryana Government General Sales Tax Act, 1973 Rule 28C reads as under:

> entitled to deter the payment of Rs. 60[50% of Rs. 120] and retain the same as capital subsidy from the State. He is required to pay Rs. 30 as purchase tax [same as in a normal case] and Rs. 10 as sales tax [total sales tax Rs. 120 minus capital subsidy. Rs. 60 minus rebate admissible Rs. 50] in the Government treasury.
>
> Provided that new industrial units falling in the category B and category C can opt for the scale of tax concession on fixed slab scale as applicable to units category A.

12. At this juncture, we respectfully take cognizance of the dicta laid down by the Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals [supra] wherein their Lordships explicitly held that the purpose test need to be applied to determine the true character of a subsidy. In the case of Birla CXL Ltd [supra], the Hon'ble High Court of Gujarat held that the main purpose of the resolution was to modernize industries which ordinarily would come at a considerable cost, particularly when such industries were located n underdeveloped areas. Their Lordships further held that for this purpose, that the said scheme was to promote giving benefit of sales tax waiver/ deferment at the option of the industry concerned and such had to be computed in terms of percentage of fixed capital investment and benefits were to last for specified periods and upto exhausting minimum limit computed in terms of the percentage of the fixed capital investment.

13. In the present case, as per Table 2 of Rule 28C of the Rules applicable to the industrial unit, tax concession for medium/ large scale industrial units have been linked with fixed capital investment and also in Table 2 applicable to industrial unties the tax concession has been linked with additional investment in plant and machinery which clearly shows that the purpose of sales tax subsidy by the Haryana Government by way of tax concession/ subsidy was to contribute towards the capital investment made by entrepreneurs and the amount of subsidy has been clearly

defined as capital subsidy. In view of the above, in the instant case while we apply the purpose test laid down by the Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd [supra], it is clear that the purpose of the Haryana Government to grant sales tax subsidy to the unit was capital contribution and therefore. the assessee reduced the amount of sales tax subsidy from the opening amount of fixed assets and claim depreciation on reduced value of fixed assets.

14. When we analyze the facts and circumstances of the case, in the light of the proposition laid down by the Hon'ble High Court of Gujarat in case of Birla CXL [supra] we are convinced that in the present case, the main purpose of sales tax subsidy/ concession given by the Haryana Government to the assessee unit was to give benefit on Sales Tax waiver/ deferment at the option of the industry concerned. From the tables given in Rule 28C, it is also clear that the tax concession/ subsidy have been linked with the amount of fixed capital investment and percentage and period of subsidy has also been linked and fixed with the fixed capital investment in the case of new industrial unit and additional investment in plant and machinery for expansion and diversify units. The Sales Tax subsidy/ concession benefit were to last for five years and the amount of subsidy was also fixed to Rs. 451.30 lakhs as maximum limit which was computed in terms of percentage of fixed capital investment. Therefore, the assessee rightly treated the assessee sales tax subsidy as

period that was A.Y 2005- 06 and 2006-07 which was accepted by the department.

15. Admittedly and undisputedly, the issue of sales tax subsidy was not agitated by the authorities below in the earlier A.Y from 2005-06 to 2006-07 and the assessee consistently treated the sales tax subsidy as capital receipt and treatment was accepted by the Revenue authorities. Further, A.Y 2007-08 was first year when the AO treated sales tax subsidy as revenue receipt instead of capital receipt as claimed and treated by the assessee in his books of account. However, we may point out that the

principle of res judicate does not apply to tax proceedings. At the same time, we note that the principle of consistency should be respected by Revenue authorities which says that a system of accounting regularly followed by the assessee and accepted by the Revenue should not be disturbed substantially unless the AO finds that such system does not reflect the true factual income of the assessee.

16. In the present case, undisputedly and admittedly the AO accepted the treatment given by the assessee to the sales tax subsidy as capital receipt in A.Ys 2005-06 and 2006-07 and for A.Ys 2007-08 and 2008-09. The AO has not brought out any allegation or facts to allege that that the income does not reflect true factual income of the assessee. In this situation, we are inclined to hold that the authorities below flaunted the Rule of consistency without any justified cause or basis and in view of the proposition laid down by the Hon'ble Supreme Court in the case of CIT Vs. Woodward [supra] and CIT Vs. Realist Builders [supra] a system of accounting following by the assessee and accepted by the Revenue during the earlier years, consistency cannot be disturbed without any reasonable cause or justified reasoning.

17. On the basis of foregoing discussion, we have no hesitation to hold that in the present facts and circumstances of the case wherein the provisions of Rule 28C of the Haryana Government General Sales Tax Rules, as reproduced hereinabove, are self speaking and clearly mandates that the sales tax subsidy given to the industrial unit for promotion of industry for a specified period of item as per specified percentage to the limited amount, the same has to be treated a capital subsidy as per the purpose test laid down by the Hon'ble Supreme Court in the case Ponni Sugar Mills [supra]. Finally, we hold 14 ITA Nos. 1506 & 5251, 1715/ Del/ 2011 that the AO as well as the ld. CIT(A) were not correct and justified in treating the amount of sales tax subsidy as revenue receipt instead of capital receipt as claimed by the assessee. Therefore, the conclusion of the authorities below is not sustainable and thus we dismiss and demolish the same. Accordingly,

> Ground No. 1 to 1.2 of the assessee for A.Y 2007-08 and 2008-09 are allowed and the AO is directed to treat the amount of sales tax subsidy as capital receipt and to grant depreciation on the reduced value of fixed assets.

12. In view of the above, it is evident that addition in dispute made in regular assessment proceeding has already been deleted by the Tribunal. The Assessing Officer has made addition in proceedings under section 153A of the Act for the purpose of computing of the total income only and no incriminating material related to the addition in dispute was found during the course of the search proceedings.

13. In view of the above facts and circumstances, respectfully following the decision of the Tribunal (supra), we set aside the order of the Ld. CIT(A) and direct the Assessing Officer to delete the addition in dispute. All the grounds of the appeal are accordingly allowed.

15. In the result, both the appeals of the assessee are allowed.

The decision is pronounced in the open court on 5th July, 2018.

Sd/-	Sd/-
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 5th July, 2018.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi