IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA NO. 3921/MUM/2016 : **A.Y : 2011-12**

M/s. Pioneer Food and Agro Industries 552, Krishna Kunj, 3B, 1st floor, 8th Road, Pali Hill, Khar (W), Mumbai 400 052. **PAN : AAJFP0506D** (Appellant)	Vs.	ITO-18(3)(2), Mumbai (Respondent)

Appellant by : Ms. Mrugakshi Joshi
Respondent by : Shri M.C. Omi Ningshen

Date of Hearing : 28/05/2018
Date of Pronouncement : 08/06/2018

O R D E R

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order of CIT(A)-33, Mumbai dated 14.03.2016 pertaining to Assessment Years 2011-12, which in turn have arisen from the order passed by the Assessing Officer, Mumbai, dated 14.02.2014 u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, assessee has raised the following Grounds of appeal :-

*"**Ground No. 1 : Disallowance of deduction u/s. 80-IB***

1. The learned CIT(A) erred in confirming deduction u/s. 80 IB, in respect to the receipts from Duty Drawback and VKUY license

2. The learned CIT(A) failed to take into consideration that that the duty draw back and VKUY receipts are part of the eligible profits and have direct nexus with the essential and vital activities required to be carried out for running of the industrial undertaking and are since they form part of the profits, it is entitled for deduction under section 80IB.

Ground No. 2 : Cash subsidy of Rs. 25,00,000/-

1. The learned CIT(A) erred in treating the first installment of the cash subsidy of Rs. 25 lakhs received from the Government of India under the Scheme of Technology Upgradation/Modernization/Establishment of Food Processing Industries for setting up of honey, as "Revenue receipt", as against "Capital receipt", as claimed by the Appellant in its return of income.

2. The learned CIT(A) failed to take into consideration that the subsidy as provided in the said scheme was granted to acquire a new capital asset (being plant and machinery) and for setting up a new undertaking and is therefore in the nature of capital receipt.

3. Without prejudice, the learned CIT(A) erred in not allowing deduction u/s. 80IB in respect to the cash subsidy of Rs. 25,00,000/- which has been treated as revenue receipt."

3. In this appeal, as the aforestated Grounds of appeal show, two issues have been raised, which we shall deal in seriatim. Insofar as issue by way of Ground of appeal no. 1 is concerned, the same relates to denial of deduction u/s 80IB of the Act on incomes by way of Duty Drawback and VKUY licence. The Assessing Officer as well as the CIT(A) have denied the benefit of Sec. 80IB of the Act on the aforesaid incomes as according to them the same do

not have a nexus with the eligible industrial undertaking. On this aspect, at the time of hearing, it was a common ground between the parties that for Assessment Years 2009-10 and 2010-11, the Tribunal vide its order in ITA Nos. 6088 & 6089/Mum/2013 dated 20.07.2016, following the judgment of the Hon'ble Bombay High Court in ITA No. 2394 of 2009 in the case of *CIT vs Rachna Udhog* upheld the denial of deduction u/s 80IB of the Act. Since the said precedent continues to hold the field, as it has not been altered by any higher authority, the instant claim of the assessee for deduction u/s 80IB of the Act *qua* the incomes by way of Duty Drawback and VKUY licence proceeds is denied and the action of the lower authorities is hereby affirmed. Thus, on this aspect, assessee fails.

4. The second issue raised is with regard to the nature of cash subsidy received by the assessee from the Government of India under the Scheme of Technology Upgradation/Modernisation/Establishment of food processing industries. Notably, the Assessing Officer as well as the CIT(A) have treated such receipt as revenue in nature as against the claim of assessee that it was in the nature of a capital receipt.

5. In this context, the relevant facts are that the appellant is a partnership firm which is engaged in the business of manufacturing of honey, including collection, extraction, refining, packaging of honey and export thereof. The assessee-firm is carrying on its activity of manufacturing honey at its premises located at Kosi Kalan Industrial area, Kosi Kalan District, Mathura, Uttar Pradesh. During the year under consideration, assessee was found to have received a sum of Rs.25,00,000/- as 'cash subsidy' from the Government, which was credited in the Balance-sheet as

'Cash Subsidy Reserve'. On being show-caused, assessee explained that the total subsidy eligible to be received by the assessee was Rs.50,00,000/-, out of which Rs.25,00,000/- was received in the instant year on 20.08.2010 and the balance of Rs.25,00,000/- was received in the subsequent assessment year on 16.03.2012. Assessee also explained that as the full amount was received in the subsequent assessment year of 2012-13, the same was reduced from the cost of plant & machinery and the depreciation was claimed on the reduced value. It was, therefore, explained that in the instant year since only a part of the subsidy amounting to Rs.25,00,000/- was received, the same was lying credited in the 'Cash Subsidy Reserve' and no adjustment was made in the cost of plant & machinery. The Assessing Officer held that assessee had not utilised the cash subsidy for making purchase of new machinery during the previous year under consideration and, therefore, it is a case where assessee had not utilised the cash subsidy for the purpose of business. For the said reason, he treated the sum of Rs.25,00,000/- as a revenue receipt and added it to the returned income.

6. The assessee carried the matter in appeal before the CIT(A) and reiterated that the nature of subsidy was capital and not revenue and also referred to the Scheme of Subsidy issued by the Government of India, Ministry of Food Processing Industries dated 20.04.2007. The detailed submissions put forth by the assessee have been verbatim reproduced by the CIT(A) in his order, however, CIT(A) was also not satisfied with the submissions of the assessee that the subsidy received was capital in nature. The CIT(A) noted that the manufacturing unit of the assessee was set-up in financial year 2007-08 relevant to Assessment Year 2008-09 itself and that instant assessment year was the fourth year of operations. Therefore, the

CIT(A) inferred that in "*actual reality*" assessee had already set-up its business of manufacturing of honey and, therefore, the said amount of subsidy could not have been said to have been used for acquiring any capital asset for setting-up of the industry as required by the Scheme. Thus, the aforesaid understanding of the fact-situation by the CIT(A) led him to conclude that the subsidy was not used for its stated purpose and, thus it was to be assessed as a revenue receipt. Against such a decision, assessee is in further appeal before us.

7. Before us, the learned representative for the assessee vehemently pointed out that the objection by the Assessing Officer as well as the CIT(A) that the subsidy was not put to use in terms of the purposes defined in the Scheme is erroneous and contrary to the contents of the Scheme. In this connection, the learned representative pointed out to the Scheme contained in the notification dated 20.04.2017 issued by the Government of India, Ministry of Food Processing Industries clearly brings out that the objective of the Scheme was for setting-up, technology upgradation, expansion and modernisation of food processing industries, a copy of which is placed in the Paper Book. Reference was made to the Scheme to say that it, *inter-alia*, included grant of financial assistance and monitoring through banks/financial institutions. It was pointed out that the eligible applicants were required to submit their proposal to the Ministry of Food Processing Industries, Government of India through the respective State Government Corporations and, in this case, the assessee has sought the subsidy through the Government of Uttar Pradesh. By referring to the terms & conditions of the Scheme, it was pointed out that it also covered industries which had raised term loans for setting-up of the industry. It was pointed out that the

unit of the assessee was sanctioned term loan as well as other loans by the Canara Bank vide sanction letter dated 20.03.2007, a copy of which has also been placed in the Paper Book. It was pointed out that in case of term loan funded units, the application was required to be made through the bank through whom the term loan was availed and, in compliance, assessee had made its application through its bank on 19.12.2007 and the subsidy has been granted vide communication dated 31.10.2008, a copy of which has also been placed in the Paper Book. It was pointed out that as per the terms of the Scheme, the amount of subsidy or grant-in-aid was required to be kept as a security in the form of fixed deposit with the bank during the duration of the full term loan. It was further mandated that the fixed deposit created with the bank was to be held for a minimum period of three years from the date of commercial production of the unit which, in the instant case, was from 09.01.2008. Further condition was that the term loan taken from the bank was to be utilised for the purpose of the Scheme for which Utilization Certificate was prescribed, which was to be issued by the concerned bank. It is on the basis of such Utilization Certificate issued by assessee's bank that the subsidy amount has been released to the assessee. Our attention was specifically invited to the conditions of the Scheme which prescribe that the grant so released was allowable to be adjusted against the last loan instalment due on the term loan and such adjustment could be made only after lapse of three years from the date of commercial production of the unit. In this background, the learned representative pointed out that the observations of the Assessing Officer as well as the CIT(A) that the amount of subsidy was not utilised for the purpose stated in the Scheme is wrong and misplaced. The assessee also referred to an Affidavit dated 04.04.2008 of the partner of the assessee-firm, which brings out the entire

facts in their proper perspective. It has been, therefore, contended that the lower authorities have proceeded to evaluate the nature of subsidy on a wrong footing. It was also submitted that assessee would be satisfied if the matter is restored back to the file of the Assessing Officer to evaluate the nature of subsidy afresh having regard to the applicable conditions contained in the Scheme under which the subsidy has been granted to the assessee.

8. On the other hand, though the ld. DR appearing for the Revenue has reiterated the stand of the Revenue, but had no objection if the matter was restored back to the file of the Assessing Officer for a *de novo* consideration.

9. We have carefully considered the rival submissions. The aforesaid discussion reveals that the sum and substance of the dispute is with regard to the nature and character of the cash subsidy received by the assessee in terms of the Scheme of Government of India relating to technology upgradation/establishment/modernisation of food processing industries. Insofar as assessee's eligibility to avail the benefits of the Scheme is concerned, there can be no dispute inasmuch as the competent authorities under the Scheme have found assessee to be eligible and the disbursal of the subsidy to the assessee demonstrates the same. The dispute before us is limited to the nature of receipt of subsidy in the hands of the assessee. The CIT(A), no doubt, referred to the 'purpose test' laid down by the Hon'ble Supreme Court in the case of *CIT vs Ponni Sugars & Chemicals Ltd. [2008] 174 Taxman 87 (SC)* in order to understand the nature of subsidy; so however, what is sought to be brought out by the appellant is that the conditions of the Scheme have not been appreciated by the lower

authorities in its proper perspective so as to determine the nature of receipt correctly. At the time of hearing, it has also been brought out that some of the documents placed before us, namely, copy of the Scheme, application of the assessee seeking benefits of the Scheme, Utilisation Certificate issued by the bank, etc. were not *per se* before the lower authorities though the averments made by the assessee before the lower authorities were in conformity to such documents. Be that as it may, the case sought to be made out by the Assessing Officer as well as the CIT(A) is that after the receipt of subsidy by the assessee, it has not been utilised towards purchase of any fixed assets and, therefore, it could not be said that assessee has utilised it for the purpose canvassed on the basis of the Scheme. In our view, in coming to such a conclusion, the lower authorities have missed out the mechanics of the Scheme, which clearly point out that where the unit has been set-up on the basis of term loan raised from bank/financial institution, the subsidy shall be utilised for the purpose of repayment of such term loan subject, of course, to issuance of prescribed Utilisation Certificate by the concerned bank/financial institution. It has been asserted before us that in compliance to such condition, assessee has utilised the subsidy for the purposes outlined in the Scheme and, therefore, it is not a case where the subsidy has been utilised for a purpose contrary to that stated in the Scheme. On a *prima facie* perusal of the documents, we find that the fact-situation canvassed by the assessee is borne out of record, so however, without dwelling deeper into this aspect and considering that full documents were not before the lower authorities, we deem it fit and proper to accept assessee's plea for admission of such material, which evidently supports the pleas of the assessee and, ostensibly the same are germane to adjudicate the controversy in an appropriate manner. Accordingly, the matter is

restored back to the file of the Assessing Officer for *de novo* consideration of the issue. In the ensuing proceedings, the Assessing Officer shall allow the assessee a reasonable opportunity of being heard and to produce the relevant material in support of its stand and only thereafter he shall adjudicate the issue afresh as per law. Thus, on this aspect, assessee succeeds for statistical purpose only.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 8th June, 2018.

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 8th June, 2018

SSL

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "H" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai