

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 544/(Asr)/2016

Assessment Year: 2006-07

Kashmir Steel Rolling Mills
Lane-II, Sidco Industrial
Complex Bari Brahmna,
Jammu

[PAN: AABFK 4948A]

(Appellant)

Vs. DCIT
Central Circle,
Jammu

(Respondent)

I.T.A. No. 571/(Asr)/2017

Assessment Year: 2005-06

Assistant Commissioner of
Income-Tax, Circle-1, Jammu

(Appellant)

Vs. Kashmir Steel Rolling Mills,
Bari Brahmna, Jammu for the
AY 2005-06

[PAN: AABFK 4948A]

(Respondent)

Appellant by : Sh. R. K. Gupta (C.A.)

Respondent by: Sh. Bhawani Shankar (D.R.)

Date of Hearing: 23.05.2018

Date of Pronouncement: 12.07.2018

ORDER

Per Sanjay Arora, AM:

This is a set of two Appeals by the Assessee and the Revenue for two consecutive years, being Assessment Years (AYs.) 2005-06 and 2006-07. The issue on merits of the assessee's claim, i.e., the exclusion of the excise duty refund

and interest subsidy in computing its business income, being common, the appeals were posted for hearing and, accordingly, heard together, and are being disposed of per a common, consolidated order.

2. The principal issue, on merits, arising in these appeals, is the character of excise duty refund, i.e., capital on revenue, arising to the assessee. In fact, the assessee had itself considered it as a revenue receipt for the earlier years, claiming deduction u/s. 80-IB of the Act on the profits and, thus, the refund amount credited to its profit and loss account. The same was denied by the Revenue (for AY 2005-06), and confirmed by the Tribunal following the decision in *Liberty India v. CIT* [2009] 317 ITR 218 (SC). The matter traveled to the Hon'ble High Court which, accepting the assessee's alternate plea, held it to be a capital receipt, per its decision reported at *Shree Balaji Alloys & Ors. v. CIT* [2011] 333 ITR 335 (J&K). The assessee, accordingly, raised an additional ground toward the same in its appeal for AY 2006-07 pending before the Id. CIT(A). The same stands denied by him following *Goteze (India) Ltd. v. CIT* [2006] 284 ITR 323 (SC). For AY 2005-06, the second year under appeal before us, the assessee moved the Assessing Officer (AO) u/s. 154, i.e., in view of the decision by the Hon'ble jurisdictional High Court. The same was, again, denied on the ground that there was nothing on record to show that the excise-duty refund stands credited to its operating statement by the assessee. The assessee before the Id. CIT(A) showed the same to form part of the record. Further, the decision by the Hon'ble jurisdictional High Court would, irrespective of it having filed a SLP before the Hon'ble Supreme Court, prevail. The AO was accordingly directed by him to allow the interest subsidy and excise-duty refund as capital receipts, treating its non-allowance in assessment as a mistake rectifiable u/s. 154. Aggrieved, both the parties are in appeal for the respective years.

3. It was at the outset clarified by the Id. counsel for the assessee, Shri R.K. Gupta, CA, that the issue in principle stands since settled by the Apex Court, producing a copy of its' decision dated 19/4/2016 (in Civil Appeal No. 10061 of 2011/copy on record at PB pgs. 23-24) upholding the decision by the Hon'ble jurisdictional High Court in *Shree Balaji Alloys* (supra). The matter being legal, with the primary facts on record and not disputed, the additional ground ought to have been accepted by the Id. CIT(A) in view of the decisions, *inter alia*, by the Apex Court in *National Thermal Power Co. Ltd. v. CIT* [1998] 229 ITR 383 (SC). Similarly, it is well settled that a decision by the Apex Court settles the law, so that any decision contrary thereto or inconsistent therewith would be, to that extent, a mistake apparent from record, rectifiable u/s. 154, even as clarified by the CBDT itself as far back as in 1971 vide its Circular No. 68 dated 17/11/1971 (PB pg. 22).

4. We have heard the parties, and perused the material on record.

4.1 The Id. Departmental Representative (DR), though relying on the orders by the authorities below, was however unable to meet any of the arguments advanced by the Id. AR during hearing. Sure, the assessee had not made any claim as to the excise-duty refund being a capital receipt per its return or even the revised return of income, pressing, in fact, its' claim for deduction u/s. 80IB thereon for the preceding years, so that the same was without doubt regarded by it (assessee) as a revenue receipt. Why, nevertheless, we are unable to understand, could it not raise this issue in appeal; the mandate of an appellate authority being the correct determination of the assessee's taxable income, and thus tax liability (refer: *Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 199 ITR 351 (Bom)(FB)). A legal issue could be raised for the first time before any appellate authority where the relevant facts are available on record and not disputed. The limitation on the power of the assessing authority – where the claim is not pressed through his return by an

assessee, in this regard is not applicable to an appellate authority, as explained in *Goteze (India) Ltd.* (supra) itself. Similarly, for AY 2005-06, once there is a binding decision by the Apex Court, any order by any court subordinate to it inconsistent therewith would constitute a mistake rectifiable u/s. 154. This is as a mistake u/s. 154 includes a mistake of law, and a decision by the Apex Court declares the law under Art. 141 of the Constitution of India. The fact of excise-duty refund forming part of the assessee's operating statement (P&L account), as in the past, is apparent from the said statement filed along with the return of income. Two, the decision by the Apex Court in *Shree Balaji Alloys* (supra), in unambiguous terms, upholds the decision by the Hon'ble jurisdictional High Court holding excise-duty refund in pursuance to a scheme by the Government of India for the state of J&K to be a capital receipt in-as-much as it is for the overall development of the industry in and economy of the state.

4.2 We may at this stage also consider some aspects of the matter. The Apex Court has in *CIT v. Shree Balaji Alloys* (supra) based its decision on its earlier decisions in *CIT v. Ponni Sugars & Chemicals Ltd.* [2008] 306 ITR 392 (SC) and *CIT v. Meghalaya Steels Ltd.* [2016] 3 SCALE 192, stating it to be squarely covering the issue arising out of the decision by the Hon'ble High Court in *Shree Balaji Alloys* (supra). The decision in *Ponni Sugars & Chemicals Ltd.* (supra), as its reading shows, in line with several others by the Apex Court, lays down the principles on which an incentive or subsidy is to be regarded as either revenue or capital. The second aspect deemed relevant is that the decision in its application results in a double benefit to the assessee routing the excise-duty refund through the operating statement (profit and loss account), i.e., as against those that, regarding the excise-duty paid as a receivable, do not do so, taking it directly to the balance-sheet, an accounting treatment in agreement with the applicable

Accounting Standard (AS). *In either case, the excise-duty refund is not subject to tax.* However, where routed through the profit and loss account, the profit of the unit would get depressed by the amount of excise-duty on the inputs consumed in the output sold, so that it gets tax deduction on this duty. The pertinent question to therefore ask is: The whole purport of the excise-duty refund scheme being not to levy and, thus, burden the target manufacturing units with excise-duty, should not the same result in profit and, resultantly, tax neutrality across different units, i.e., irrespective of the accounting treatment adopted? This is as accounting only seeks to present a true and fair view of the operating results for the accounting period, as well as the financial position at its end. The answer could only be an emphatic yes. Or, alternatively, could the excise-duty, in view of it being refundable, have any income implication; its receipt back on refund being a receipt on capital account, i.e., by definition. The answer to which again could only be in the negative. The Id. counsel, Shri Gupta, upon this being observed by the Bench during hearing, would explain that though the scheme envisages a refund of excise-duty, the same (refund) stands regarded as arising by virtue of the scheme. That is, the refund is delinked from the payment of excise-duty, as it arises due to a scheme for the concerned, excise-exempt units. In fact, it has been so regarded by the Revenue and even by the tribunal, which endorsed the denial of the benefit u/s. 80-IB thereon. The Hon'ble High Court therefore proceeded on that footing. In fact, he would explain further, some assessees had, following the relevant AS, not included the excise-duty in the operating statement, whose profit and loss account was, however, recast by the Revenue by including the excise-duty therein, presumably in compliance with s. 145A of the Act. Further, he added, the assessee, in *Shree Balaji Alloys* (supra), had itself raised a plea before the Hon'ble High Court with

reference to the accounting treatment, which was declined to be entertained by it as it had decided the principal question in favour of the assessee.

The moot question however is if a tax, duty, cess, etc. could be called an imposition proper where its deposit is subject to it being refunded, in full, and from the same entity – the Central Government, to whom it stands paid earlier. Could it, in any case, be called an expenditure, implying an amount lost irretrievably. The scheme only provides the legal basis for the refund. These, and other ancillary questions, remain unaddressed in the decisions cited. The questions were however not raised and the matter proceeded with on the basis of the excise-duty refund being a separate source of income, and which was, on examination, held to be in the nature of a capital receipt in view of the larger objectives for which the refund stands granted. Implicit therein is the treatment of the refund as a separate and independent source of receipt, an issue which is largely factual. Even though the Apex Court in *CIT v. Walchand and Co. (P.) Ltd.* [1967] 65 ITR 381 (SC) explained that the tribunal is to deal with and determine all the questions which arise out of the subject matter of appeal, in light of the evidence and consistently with the justice of the case, we do not, for that reason, consider it proper to raise this aspect of the matter. We, accordingly, have no hesitation in accepting the assessee's pleas for both the years.

5. We, accordingly, admit the additional ground for AY 2006-07, as well as of it being a mistake apparent from record for AY 2005-06; and answer the question on merits in favour of the assessee. That is, that the excise-duty refund and interest subsidy are capital receipts and, therefore, are to be excluded in the computation of the assessee's business income u/s. 28 for these years. We decide accordingly.

6. In the result, the assessee's appeal for AY 2006-07 is allowed, while that of the Revenue for AY 2005-06, dismissed.

Order pronounced in the open court on July 12, 2018

Sd/-
(Sanjay Arora)
Accountant Member

7. I have gone through the order passed by the Hon'ble Accountant Member, whereby the appeal of the assessee is allowed and that of the Revenue is dismissed.

The issue involved in the appeals under consideration relates to the excise duty refund and interest subsidy as capital receipt or revenue receipt, has already been decided by the Hon'ble Jurisdictional High Court in the case of Sh. Balaji Alloys & Ors. vs. CIT (2011) 333 ITR 335 (J&K) by holding the Excise Duty Refund and interest subsidy as '**capital receipt**'. The aforesaid High Court Judgment was further challenged in the Apex Court and the Apex Court vide its judgment dated 19.04.2016 passed in Civil Appeal No.10061 of 2011 affirmed the view of the High Court, hence, in view of the judgments of Apex Court and Jurisdictional High Court, I do not have any option except to respectfully follow the ratio laid down by superior courts, in its true spirit, therefore, I feel it appropriate not to travel to other aspects but to follow the proposition settled by the Apex Court and Hon'ble High Court. Hence, I am inclined to allow the appeal of the assessee and to dismiss the appeal of the Revenue in view of the observation made above.

8. In the result, the assessee's appeal for A.Y.2006-07 is allowed and of the Revenue for A.Y. 2005-06 stands dismissed.

Sd/-
N. K. Choudhry
(Judicial Member)

Date: 12.07.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Kashmir Steel Rolling Mills Lane-II, Sidco Industrial Complex Bari Brahmana, Jammu
- (2) The Respondent: DCIT Central Circle, Jammu
- (3) The CIT(Appeals)-5, Ludhiana
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

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By Order