IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'B', CHANDIGARH

BEFORE SHRI SANJAY GARG,JUDICIAL MEMBER
AND SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No. 56/CHD/2017
Assessment year: 2009-10

M/s Superfine Knitters Ltd., 269, Industrial Area-A, Ludhiana. PAN No. AADCS4217P	Vs.	The ACIT, Circle-7, Ludhiana.
(Appellant)		(Respondent)

Appellant by : Shri Lalit Takyar
Respondent by : Dr. Gulshan Raj, CIT (DR)

Date of hearing : 19.04.2018
Date of Pronouncement : 17.07.2018

ORDER

PER ANNAPURNA GUPTA, AM

The present appeal has been filed by the assessee against the order of CIT(A)-4 Ludhiana dated 28.10.2016 pertaining to 2009-10 assessment year.

2. Briefly stated the assessee company is engaged in the business of manufacturing and export and trading in knitted cloth and garments. The return of income for the impugned assessment year was filed declaring income of Rs. 40,85,000/- and assessment u/s 143(3) was framed accepting the returned income. Thereafter the AO noticed that the assessee company ,during the year, had received subsidy to the extent of Rs. 26,87,000/- which according to him was required to be deducted from the WDV of plant and machinery, but the same had not been done by the assessee. The AO, therefore, was of the opinion that the assessee had

claimed excess depreciation on account of the same to the extent of Rs. 4,03,000/-. He, therefore, reopened the case of the assessee u/s 147 of the Act, issuing notice u/s 148 of the Act . During the course of re-assessment proceedings, the AO also noticed that the assessee company had claimed excess depreciation on plant and machinery (TUFS) and on tubewell. After giving due opportunity of hearing to the assessee, the AO made addition to the income of the assessee of Rs. 4,03,000/- on account of excess depreciation claimed with respect to the subsidy received which was not reduced from the WDV of plant and machinery and an addition of Rs. 1,65,000/- and Rs. 86,855/- on account of disallowance of excess depreciation claimed on plant and machinery (TUFS) and tubewell respectively.

Before the Ld.CIT(A) the assessee raised grounds challenging the validity of the assessment framed u/s 147 of the Act and also the addition/disallowance made on merits, which were all dismissed by the CIT(A).

3. Aggrieved by the same, the assessee has come up in appeal before us raising the following grounds:

> *"1. That the learned CIT (Appeal) has wrongly confirmed the order of the AO Passed under sec 147/143 (3) which is against law & facts of the case .*
>
> *2. That the Assessment framed under sec 143(3) & 147 has been wrongly re-opened it is a case of change of opinion only based on Audit Objection.*
>
> *3. That the subsidy received from the Govt of Punjab was a General Subsidy for boosting the Hosiery Industry and can not be confined only to machinery. As per judgments relied upon by the assesses and submitted before the CIT (A) it is a capital receipt and not deductable from any asset.*

4. That on the Tuff Machinery 40% Depreciation was not allowable but additional Depreciation claimed has not been allowed.

5. That Generator is also covered in Plant and Machinery on which Depreciation @ 15% is to be allowed and not 10% as Furniture and Fixture.

6. That the appellate craves leave to add, amend or alter any of the above grounds of appeal."

4. Ground No.1 raised by the assessee being general in nature needs no adjudication. Further Ground no.4 & 5 were not pressed before us, and are therefore treated as dismissed.

5. Ground No. 2 raised by the assessee is a legal ground challenging the validity of the assessment framed u/s 147 of the Act.

6. During the course of hearing before us, ld. counsel for the assessee raised the following contentions in respect of his plea that the assessment framed in the present case u/s 147 was invalid.

(i) That the issue in relation to which re-assessment proceedings were initiated had been examined during assessment proceedings and there were no new facts or material with the AO which could lead to the belief of escapement of income on account of the same. That it was a mere change of opinion which could not empower the AO to initiate re-assessment proceedings.

(ii) That the re-assessment was resorted to on the basis of audit objection which could not form a valid basis for reopening the case u/s 147 of the Act.

Vis-à-vis the first contention raised by the ld. counsel for the assessee, regarding reopening being resorted to on account of mere change of opinion on the same set of facts by the AO, ld. counsel for the assessee first drew our attention to the reasons recorded for re-opening the present case which were placed at Paper Book page No. 13 and which read as under :

Reasons for notice u/s 148 in the case of M/s Super Fine Knitters Ltd., Ludhiana, PAN: AADCS4217P For A.Y. 2009-10:

On the perusal of assessment record for the A.Y. 2009-10 revealed that the assessee has received subsidy of Rs.26,87,000/- from Directors of Industries & Commerce, Punjab which was sanctioned by the Punjab Government in May, 2008. However, the assessee instead of reducing the subsidy amount from the fixed assets, placed this amount as capital reserve. Non reduction of fixed assets has resulted in excess claim of depreciation in assets amounting to Rs.4,03,000/-. In the replies dated 30.10.2012 & 19.11.2012, in response to the remedial action being initiated by the AO, the assessee has mentioned that the block of machinery on which the subsidy was sanctioned in 2001 has become Nil in the relevant A.Y. even as the 15% block was still existing. That means the assessee was liable to reduce the subsidy amount from the block of assets as the subsidy was not given specially for machinery existing in the year 2001.

Thus in view of the discussion above, I have reasons to believe that the amount of Rs.4,03,000/- has escaped assessment within the meaning of provisions of section 147 for the A.Y. 2009-10.

Issue notice u/s 148.

(Sd/-)
(Dr. Rahul Sohu)
Asstt.Commissionerof Income Tax
Circle-VII, Ludhiana.

7. Drawing our attention to the same, ld. counsel for the assessee stated that the reason with the AO leading to the

belief of escapement of income was that, subsidy received by the assessee of Rs.26,87,000/- during the year was not reduced from the WDV of fixed assets and which had, thus, resulted in excess claim of depreciation by the assessee of Rs.4,03,000/-, resulting in escapement of income to this extent. Thereafter, ld. counsel for the assessee stated that this issue of subsidy received by the assessee had been enquired into during assessment proceedings wherein due reply had been filed by the assessee, after considering which, no addition or disallowance had been made by the AO. To substantiate the aforesaid, ld. counsel for the assessee drew our attention to the questionnaire issued to the assessee during regular assessment proceedings for the impugned year, dated 30.06.2011 and placed at Paper Book page No. 3 to 5. The ld. counsel for the assessee drew our attention to the specific query raised at point No. 19 regarding capital reserve shown by the assessee in its books of account at Rs. 26.87 lacs. The same reads as under :

> *"19. Capital reserve has been shown at Rs.26.87 lacs against the previous year figure of NIL. Give complete details."*

8. The ld. counsel for the assessee, thereafter, drew our attention to reply filed by the assessee vide letter addressed to the JCIT placed at Paper Book page No. 6 to 8 and pointed out therefrom that the detail of the capital reserve of Rs.26.87 lacs was filed. Drawing our attention to the details filed, it was pointed out that the said detail was in the form of copy of account of reserve and surplus in the books of the

assessee for the impugned year showing the receipts of subsidy from the Government of Punjab. Thereafter, ld. counsel for the assessee pointed out that after considering the above information, no addition vis-à-vis the impugned issue was made by the AO while passing his assessment order u/s 143(3) which was placed at Paper Book page No. 1 to 2. Thus, ld. counsel for the assessee contended that the issue of capital subsidy received by the assessee during the year had been raised during assessment proceedings and due reply filed by the assessee clearly showing that the said subsidy was received from the Government of Punjab and the AO, on the basis of this enquiry, had formed an opinion that no addition or disallowance was required to be made. The ld. counsel for the assessee, thereafter, proceeded to point out that on the basis of this very same information, the AO had now formed different opinion that the said subsidy was to be reduced from the WDV of fixed assets. Drawing our attention to the reasons recorded as reproduced above, ld. counsel for the assessee pointed out that no other information was in the possession of the AO except that which was already on record. The ld. counsel for the assessee, therefore, stated that it was the clear case of change of opinion of the AO on the same set of facts and in view of the settled position of law in this regard by the judgement of the Apex Court in the case of Kelvinator of India, the AO could not have assumed jurisdiction to reopen the case of the assessee.

9. Vis-à-vis the second contention raised by the ld. counsel for the assessee, it was stated that the re-assessment was prompted on the audit objection note in this regard by the Department. The ld. counsel for the assessee, to substantiate its above contention, drew attention to the audit objections relating to the assessee for the impugned year placed at Paper Book page No. 12 and pointed out that this issue of the assessee having not reduced the capital subsidy received by it from the WDV of its fixed assets and thus, having claimed excess depreciation to the extent of Rs.4,03,000/- had been pointed out in the same. The audit objection is reproduced hereunder :

Office of the Principal Director of Audit (General) Chandigarh
No. DT-I/AP-5/2012-13/11 Dated : 23.7.12

Name of Assessee :M/sSuperfine Knitters Ltd., Ludhiana

PAN : AADCS4217P : Status : Company A.Y. 2009-10
Return Income : Rs.40,85,500/- Annual Income : Rs. 40,85,500/-
Return Tax: Rs.12,94,028/- Annual Tax : Rs. NIL
Whether checked by IAP : Yes, checked
Assessed u/s 143(3) on 26.12.2011 by Addl. CIT, Range-VII, Ludhiana

- *Audit scrutiny of the above assessment record revealed that the assessee received subsidy of Rs.26,87,000/- on Investment Incentive from Director of Industries & Commerce, Punjab, Chandigarh. This subsidy was sanctioned by Punjab Govt. in May 2001 and was disbursed to the assessee in May 2008. The assessee, instead of reducing his fixed assets by this subsidy, took this amount to Capital Reserve. Non-reduction of fixed assets has resulted into excess claim of depreciation on assets and hence under assessment of income by Rs. 4,03,050/- with tax effect of Rs.1,36,997/- plus interest u/s 234B of Rs. 45209/-, total T.E. Rs. 1,82,206/-.*
- *Further scrutiny of depreciation chart of the assessee revealed that addition in plant and machinery was made (under TUFS) after 30.8.2008 and depreciation was claimed @ 50%. As the machinery was acquired and put to use which after 1.4.2004, depreciation was allowable at 15% only. This has resulted into excess depreciation of*

Rs. 1,65,000/- (5,50,000-3,85,000/-).Further, depreciation @ 15% has been charged at Tubewell which was allowable @ 10%. This has resulted into excess depreciation of Rs. 86,885/- (260656-173771). Thus, excess claim of depreciation has resulted into under assessment of income by Rs. 2,51,885/- with tax effect of Rs. 85,616/- plus interest u/s 234B of Rs. 28,253/-, total tax effect Rs. 1,13,869/-.

ACIT may please comment.

Sd/-
(DR. RISHI KUMAR)
ACIT

To
The ACIT,
Circle-VII, Ludhiana."

10. The ld. counsel for the assessee stated that it is settled law that reopening cannot be resorted to on the basis of audit objection. Reliance in this regard was placed on the decision of the Apex Court in the case of Indian & Eastern Newspaper Society Vs CIT 119 ITR 996. The ld. counsel for the assessee, therefore, stated that the jurisdiction assumed in the present case to reopen the case of the assessee, was invalid and the order passed by the AO, therefore, needed to be set aside.

11. The ld. DR, on the other hand, relied on the order of the CIT(A) and relied heavily on his findings in this regard at para 5.2 of the order which is reproduced hereunder :

"5.2 I have considered the observations of the Assessing Officer as made by her in the assessment order while reopening the assessment in this case. I have also considered written submissions filed by the assessee company through its Ld. AR vide letter dated 19.09.2016 on the issue under reference. I have further considered various judicial pronouncements relied upon by the assessee as well as other material placed by it on record. On careful consideration of the rival contentions, it has been noticed that the assessment in the case of the assessee company has been reopened within four years

from the end of relevant assessment year. Moreover, the Assessing Officer was having prima facie reason to believe that the assessee company has claimed excess depreciation. I am of the further opinion that the assessment has not been reopened on the basis of change of opinion as the Assessing Officer has not considered the claim of the assessee company with regard to treatment of subsidy while completing original assessment. I am again of the opinion that the assessment can also be reopened even on the basis of audit objection if the law provides for reopening of the case. I am again of the opinion that the judicial pronouncements relied upon by the assessee company have no application in the case of assessee company as the assessment in this case was reopened within four years from the end of the relevant assessment year. Under such circumstances, the action of the Assessing Officer in reopening the assessment in this case cannot be said to be unjustified."

12. We have heard the contentions of both the parties, perused the orders of the authorities below and have also gone through the documents referred to before us. The issue before us pertains to the validity of the assessment framed u/s 147 of the Act, which has been challenged by the assessee on the ground that it was resorted to merely on the basis of change of opinion on the same set of facts and merely on the basis of audit objection.

13. We find no infirmity in the order of the CIT(A). As is evident from the facts pointed out to us, no enquiry on the issue of subsidy received by the assessee had been made during assessment proceedings, so as to enable forming of an opinion by the AO on the treatment of subsidy received in the accounts of the assessee. The assessee had only been asked about the detail of Reserves and Surplus ,which had

been furnished by the assessee disclosing subsidy received from the Government of Punjab in the same. No further questions relating to the subsidy received was asked. This bare information that the assessee had received subsidy from the Government , and without any detail or information regarding the nature of the same, clearly was not sufficient for forming an opinion about the treatment of the subsidy in the accounts of the assessee. Therefore ,in the present case, it cannot be said that the AO had applied his mind on the issue of subsidy received and formed an opinion regarding its treatment in the accounts ,on it. The Hon'ble Delhi High Court , in the case of CIT-VI vs Usha International Ltd. reported in 348 ITR 485 (Del) has held that whether or not the AO had applied his mind and examined the subject matter, claim etc. depends upon the factual matrix of each case, and only if he has done so, could it be said that he had formed an opinion on it. The Hon'ble High Court held that the level of enquiry required for forming an opinion on a issue varied from case to case with there being cases in which the aspect or question may be too obvious and apparent requiring no inquiry/examination for forming an opinion, while others may require different degrees of enquiry. In view of the same, we hold that the Reopening therefore on the issue of subsidy received cannot be said to be change of opinion on the same set of facts by the AO. The reliance placed by the Ld.Counsel for the assessee on the decision of the apex court in the case of Kelvinator India

(supra) in support of its aforesaid contention is therefore also of no assistance to the assessee.

14. As for the assessees contention that the reopening was based on audit objection ,we find no merit in the same also. An audit objection pointing out a fact escaping the AO's notice and which leads to escapement of income, can very well be the basis for reopening u/s 147 of the Act. It is only information pertaining to position or interpretation of law that does not constitute" information" of escapment of income. This has been held so by the apex court in the case of Indian & Eastern Newspaper Society Vs CIT 119 ITR 996(SC) stating as under :

> *"In cases falling under s. 147(b), the expression "information" prescribed one of the conditions upon which a concluded assessment may be reopened under that provision. It is an indispensable ingredient which must exist before the section can be availed of. What does "information" in s. 147(b) cannote ? In Maharaj Kumar Kamal Singh vs. CIT (1959) 35 ITR 1 (SC) : TC51R.1317, this Court, construing the corresponding s. 34(1) (b) of the Indian IT Act, 1922, held the word "information" to mean not only facts or factual material but to include also information as to the true and correct state of the law and, therefore, information as to relevant judicial decisions. Thereafter, in CIT vs. A. Raman & Co. (1968) 67 ITR 11 (SC) : TC51R.423 the Court defined the expression "information" in s. 147(b) of the IT Act, 1961, as "instruction or knowledge derived from an external source concerning facts or particulars, or as to law, relating to a matter bearing on the assessment". That definition has been reaffirmed in subsequent cases, and with it as the point of departure we shall now proceed.*
>
> *3. In so far as the word "information" means instruction or knowledge concerning facts or particulars, there is little difficulty. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its relevance. It requires no further*

authority to make it significant. Its quintessential value lies in its definitive vitality.

But when "information" is regarded as meaning instruction or knowledge as to law the position is more complex. When we speak of "law", we ordinarily speak of norms or guiding principles having legal effect and legal consequences. To possess legal significance for that purpose, it must be enacted or declared by competent authority. The legal sanction vivifying it imparts to it its force and validity and binding nature. Law may be statutory law or, what is popularly described as, judge-made law. In the former case, it proceeds from enactment having its source in competent legislative authority. Judge-made law emanates from a declaration or exposition of the content of a legal principle or the interpretation of a statute, and may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a Court or the order of a tribunal. Such declaration or exposition in itself bears the character of law. In every case, therefore, to be law it must be a creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law. The suggested interpretation of enacted legislation and the elaboration of legal principles in text books and journals do not enjoy the status of law. They are merely opinions and, at best, evidence in regard to the state of the law and in themselves possess no binding effect as law. The forensic submissions of professional lawyers and the seminal activities of legal academics enjoy no higher status. Perhaps the only exception is provided by the writings of publicists in international law, for in the law of nations the distinction between formal and material sources is difficult to maintain.

4. In that view, therefore, when s. 147(b) of the IT Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source. It is law, we must remember, which, because it issues from a competent legislature or a competent judicial or quasi- judicial authority, influences the course of the assessment and decides any one or more of those matters which determine the assessee's tax liability.

5. In determining the status of an internal audit report, it is necessary to consider the nature and scope of the functions of an internal audit party. The internal audit organisation of the IT Department was set up primarily for imposing a check over the arithmetical accuracy of the computation of income and the determination of tax, and now, because of the audit of income-tax receipts being entrusted to the Comptroller and Auditor-General of India from 1960, it is intended as an exercise in removing mistakes and errors in income-tax records before they are submitted to the scrutiny of the Comptroller and Auditor-General. Consequently, the nature of its work and the scope of audit have assumed a dimension co-extensive with that of Receipt Audit. The nature and scope of Receipt Audit are defined by s. 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971.

Under that section, the audit by the Comptroller and Auditor- General is principally intended for the purposes of satisfying him with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of Revenue. He is entitled to examine the accounts in order to ascertain whether the rules and procedures are being duly observed, and he is required, upon such examination, to submit a report. His powers in respect of the audit of income-tax receipts and refunds are outlined in the Board's Circular No. 14/19/56-II dt. 28th July, 1960. Paragraph 2 of the circular repeats the provisions of s. 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. And para. 3 warns that "the audit Department should not in any way substitute itself for the Revenue authorities in the performance of their statutory duties". Paragraph 4 declares :

"4. Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure... It is, however, to forming a general judgment rather than to, the detection of individual errors of assessment, etc., that the audit enquiries should be directed. The detection of individual errors is an incident rather than the object of audit."

6. Other provisions stress that the primary function of audit in relation to assessments and refunds is

the consideration whether the internal procedures are adequate and sufficient. It is not intended that the purpose of audit should go any further. Our attention has been invited to certain provisions of the Internal Audit Manual more specifically defining the functions of internal audit in the IT Department. While they speak of the need to check all assessments and refunds in the light of the relevant tax laws, the orders of the CIT and the instructions of the CBDT, nothing contained therein can be construed as conferring on the contents of an internal audit report the status of a declaration of law binding on the ITO. Whether it is the internal audit party of the IT Department or an audit party of the Comptroller and Auditor- General, they perform essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi- judicial acts of IT authorities. The IT Act does not contemplate such power in any internal audit organisation of the IT Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions. Nor does s. 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971, envisage such a power for the attainment of the objectives incorporated therein. Neither statute supports the conclusion that an audit party can pronounce on the law, and that such pronouncement amounts to "information" within the meaning of s. 147(b) of the IT Act, 1961.

But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose.

7. In the present case, an internal audit party of the IT Department expressed the view that the receipts from the occupation of the conference hall and rooms did not attract s. 10 of the Act and that the assessment should have been made under s. 9. While ss. 9 and 10 can be described as law, the opinion of the audit party in regard to their application is not law. It is not a declaration by a body authorised to declare the law. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes

"information" within the meaning of s. 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO. In every case, the ITO must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO."

15. In the present case the error pointed out by the Audit Wing pertained to the treatment of subsidy received by the assessee whether to be reduced from the WDV of the asset or to be carried to Reserve and Surplus. It was clearly an error relating to facts which was pointed out by the Audit Wing. This clearly is relevant enough to empower the AO to form the belief of escapement of income so as to reopen the case of the assessee u/s 147 of the Act as held by the apex court in the case of Indian Newspaper Limited (supra). In view of the same, the assumption of jurisdiction u/s 147 to reopen the assessment in the present case on the basis of audit objection is held to be in consonance with law.

Considering the above, we are in agreement with the Ld.CIT(A) upholding the validity of the assessment framed u/s 147 of the Act. Ground No. 2, raised by the assessee therefore, stands dismissed.

16. Ground No.3 raised by the assessee reads as under:

> *"3. That the subsidy received from the Govt of Punjab was a General Subsidy for boosting the Hosiery Industry and can not be confined only to machinery. As per judgments relied upon by the assessee and submitted before the CIT (A) it is a capital receipt and not deductable from any asset."*

17. The assessee in the above ground has challenged the action of the Ld.CIT(Appeals) in upholding the order of the Assessing Officer reducing the value of subsidy received from the plant and machinery and thereby reducing the quantum of depreciation claimed on the same by the assessee.

18. Before us the Ld. counsel for assessee contended that the subsidy received from the Punjab Government was not only received on plant and machinery but for the overall development of the industry in which the assessee deals and, therefore, it would not go to reduce the figures of the plant and machinery as shown by the Assessing Officer. Our attention was drawn to the subsidy scheme of the Punjab Government by virtue of which the subsidy was received copy of which was placed before us. The Ld. counsel for assessee, therefore, contended that the subsidy being for the purpose of overall development of the industry it was capital in nature and was not liable to be taxed in the hands of the assessee at all. Our attention was drawn to various orders passed by the Tribunal in this regard:

1) M/s Lotus Integrated Taxpark Ltd. Vs. DCIT in ITA No.1138 & 1139/Chd/2014, dated 1.10.2015.

2) ACIT Vs. Harinagar Sugar Mills Ltd. in ITA No.772/Mum/2012 dated 30.1.2014.

19. Our attention was also drawn to the letter received by the assessee from the Directors of Industries & Commerce, Punjab, Chandigarh relating to the incentive received by the assessee and the Note of capital subsidy filed to the Assessing Officer stating that it was a capital receipt in the hands of the assessee.

20. The Ld. DR, on the other hand, relied upon the order of the CIT(Appeals) pointing out therefrom that the CIT(Appeals) had found that the assessee company itself had admitted that the subsidy had been received against investment in plant and machinery as well as other assets and, therefore, the same had been rightly reduced from the value of such asset and accordingly, depreciation allowed on the reduced balance value of the assets.

21. We have heard the contentions of both the parties. We find merit in the contention of the Ld. counsel for assessee that the value of subsidy can be reduced from the fixed assets only if it has been received specifically for the said purpose and if the same has been received to achieve purpose of overall purpose of industry or otherwise the treatment of subsidy is different i.e. it may be treated as revenue receipt in the hands of the assessee or capital receipts depending on the purpose for which the subsidy had been received. This proposition has been settled by the Hon'ble Apex Court in a number of decisions:

1) Sahney Steels & Press Works Ltd & Ors vs CIT (1997) 228 ITR 253(SC)

2) CIT vs Ponni Sugars & Chemicals Ltd.& Ors(2008) 306 ITR 392(SC)

3) CIT-1,Kolhapur vs M/s Chaphalkar Brothers,Pune, Civil Appeal No.6513-6514 of 2012 Dt.07-12-17(Supreme Cour

22. In the facts of the present case we find that though the assessee had placed the copy of the scheme of the Government by virtue of which it had received subsidy, the CIT(Appeals) has not discussed the nature of the subsidy vis-à-vis the nature of the scheme under which it had been received. Without so determining, the Ld.CIT(Appeals) could not have arrived at any finding regarding the nature of the subsidy, since as pointed out above it all depends upon the purpose for which the subsidy had been received. The Ld.CIT(Appeals), we find, has merely stated that the assessee had himself admitted the subsidy to have been received on account of plant and machinery. The nature of the subsidy cannot depend upon what the assessee states but would have to be determined on the basis of documents and other evidences regarding the same. In the absence of any examination of this fact by the lower authorities, we consider it fit to restore the issue back to the CIT(Appeals) to determine the nature of the subsidy received in the light of the scheme under which it was granted by the Government of Punjab and thereafter decide the issue in accordance with law. This ground of appeal No.3 raised by the assessee is, therefore, allowed for statistical purposes.

23. Ground of appeal Nos.4 and 5 raised by the assessee read as under:

"4. That on the Tuff Machinery 40% Depreciation was not allowable but additional Depreciation claimed has not been allowed.

5. That Generator is also covered in Plant and Machinery on which Depreciation @ 15% is to be allowed and not 10% as Furniture and Fixture."

24. Briefly stated, the Assessing Officer had noticed during assessment proceedings that the assessee company had claimed depreciation @ 15% on plant and machinery (TUFS) valuing Rs.22 lacs which had been purchased or installed by it after 30.9.2008 as against allowable rate of 7.5%. It had also been noticed that the assessee company itself asked the Assessing Officer to disallow excess depreciation claim on this plant and machinery. Accordingly, the Assessing Officer disallowed the excess depreciation claimed on the plant and machinery (TUFS) amounting to Rs.1,65,000/-. Further, the Assessing Officer also noticed that the assessee company had claimed depreciation @ 15% on tubewell as against the allowable rate of 10%. Therefore, another addition of Rs.86,855/- was made by the Assessing Officer on account of excess depreciation claimed on tubewell.

25. The Ld.CIT(Appeals) upheld the order of the Assessing Officer stating that the assessee company itself had requested the Assessing Officer to disallow the excess depreciation claimed on TUFS machinery and that the depreciation on tubewell, not being a machinery, was allowable @ 10% only. The assessee had also raised a ground before the CIT(Appeals) that the additional depreciation on account of investment in plant and machinery (TUFS) be

granted to it which was also disallowed by the CIT(Appeals) stating that no such claim had been made during re-assessment proceedings.

26. Before us, the Ld. counsel for assessee contended that the additional depreciation claimed on TUFS machinery be allowed to it and also that the tubewell being a machinery depreciation @ 15% be allowed to it as against 10% granted by the lower authorities.

27. The Ld. DR, on the other hand, relied upon the order of the CIT(Appeals).

28. We have heard the contentions of both the parties. Vis-à-vis the claim of assessee of depreciation on the tubewell @ 15% as prescribed for plant and machinery we find merit in the same. The Privy Council in the case of Corporation of Calcutta vs. Chairman, Cossipore and Chitpore Municipality (1922) ILR 49 Cal 190 (PC) provided the following definition of "machinery":

> *"The word 'machinery' when used in ordinary language prima facie means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and inter-dependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces, with the object in each case of effecting so definite and specific a result."*

29. The same found approval with the Supreme Court in CIT vs. Mir Mohd. Ali (1964) 53 ITR 165 (SC). The tubewell clearly qualifies as a machinery as per the above definition, being a mechanical contrivance capable of generating force

effecting a definite result on the object so effected and, therefore, the depreciation rate applicable for plant and machinery is to be given. The rate of 10% held applicable by the Revenue, we find, is applicable on furniture and fittings including electrical fittings, which clearly the tubewell is not. No basis otherwise was given for applying depreciation rate of 10% by the Revenue. Therefore we hold that the assessee is entitled to depreciation @ 15% on tubewell and the disallowance made on account of excess depreciation claimed by applying rate of 10% amounting to Rs. 85,855/- is therefore deleted.

30. As for the assessee's claim for additional depreciation, the denial of the same by the CIT(Appeals) for the reason that it was made during re-assessment proceedings, does not prevent us from entertaining the same. The Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs CIT 229 ITR 383 held that the powers of the Tribunal are very wide and can therefore entertain grounds not raised earlier so as to achieve the purpose of assessment being to assess the correct tax liability in accordance with law.

The relevant observations in National Thermal Power Co. Ltd.'s case (supra) are extracted below :

> *"Under s. 254 of the IT Act, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial*

decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under s. 254 only to decide the grounds which arise from the order of the CIT(A). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

31. Before us it was pointed out that as per the provisions of section 32(1)(iia),the assessee was entitled to claim additional depreciation on plant and machinery and having failed to claim the same ,it was requested that the AO be directed to grant the same in accordance with law.

32. We find the merit in the contention of the Ld.Counsel for the assessee. We find the plea for admitting the additional ground to be reasonable since the assessee has demonstrated that it was entitled to claim additional depreciation on plant and machinery during the impugned year as per law and the Revenue we find has not controverted this assertion of the assessee. Therefore, we admit this ground raised before us and restore the issue of claim of additional depreciation on plant and machinery, also to the CIT(Appeals) to decide the same afresh in accordance with law. Ground of appeal No.4 is allowed for statistical purposes, while ground of appeal No.5 stands allowed.

33. The appeal of the assessee is, therefore partly allowed for statistical purposes.

Order pronounced in the Open Court.

Sd/-	Sd/-
(SANJAY GARG)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 17th July, 2018
'Poonam'
Copy to:

- The Appellant
- The Respondent
- The CIT

4. The CIT(A)
5. The DR

Asstt. Registrar
ITAT,Chandigarh.