आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", 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 No.1994/PUN/2017
निर्धारण वर्ष / Assessment Year : 2014-15

The Assistant Commissioner of Income Tax,
Circle – 12, Pune .... अपीलार्थी/Appellant

Vs.

Universal Construction Machinery and
Equipment Limited,
Sr. No. 17/1B, Universal House,
N.D.A. Road, Old Warje Jakat Naka,
Kothrud, Pune - 411038 .... प्रत्यर्थी / Respondent

PAN: AAACU7808B

अपीलार्थी की ओर से / Appellant by : Shri Sudhendu Das
प्रत्यर्थी की ओर से / Respondent by : None

सुनवाई की तारीख / **Date of Hearing : 11.12.2018**		घोषणा की तारीख / **Date of Pronouncement: 18.12.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by Revenue is against order of CIT(A)-5, Pune, dated 12.05.2017 relating to assessment year 2014-15 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised the following grounds of appeal:-

"1. The Ld. CIT(A) erred in directing the AO to treat the subsidy received of Rs.1,26,09,361/- as capital receipt in contradiction to the assessee's own claim or revenue receipts made in the income-tax return.

2. The Ld. CIT(A) erred in appreciating the fact that the assessee himself had acknowledged the fact that the incentive received was of revenue nature while offering part of the operational incentive received by it under the scheme in its return of income and hence erred in directing the AO to consider the sum of Rs.1,26,09,361/- offered in the return of income by the assessee as revenue receipt to be treated as capital receipt and hence not taxable.

3. The Ld. CIT(A) erred in appreciating the decision of the Hon'ble Supreme Court in the case of Sahney Steel and Press Works Limited and Ors (228 ITR 253) (SC) wherein essential conditions to be examined to determine as to whether any incentive received is to be treated as capital receipt or revenue receipt have been comprehensively laid down and the fact that the assessee had its own investments made from its own sources to become eligible for the Incentive Scheme of the state government and the incentive received was not for the purpose of setting up of any new unit or industry. In light of the above said judgement and facts, the incentive received by the assessee company under the Package Scheme of Incentives, 2007 of the state government need to be treated as revenue receipt.

4. The Ld. CIT(A) also erred in appreciating the decision of the Hon 'ble Kerala High Court in the case of CIT Vs. Ruby Rubber Works Limited (178 ITR 181) (Ker) wherein the Hon 'ble Court observed that "the expenditure in the acquisition of the concern will be capital expenditure and the expenditure in carrying on the concern is revenue expenditure." The said judgement makes the incentive received by the assessee company clearly of the nature of revenue receipt.

5. The Ld. CIT(A) erred in deleting the disallowance made on account of delayed payments of employee's contribution to PF and ESIC amounting to Rs.24,67,486/- which is covered by the provisions of section 36(1)(va) r.w.s. 2(24)(x) and the provisions of section 43B are not at all applicable to the employee's contribution.

6. The Ld. CIT(A) erred in not appreciating the decision of Hon'ble Gujarat High Court in the case of CIT II Vs Gujarat State Road Transport Corporation (366 ITR 170) (Guj) wherein identical issue has been dealt with and decided in favour of the revenue.

7. The Ld. CIT(A) erred in not appreciating the CBDT Circular No. 22/2015 dated 17.12.2015 on the issue of allowability of employer's contribution to funds for welfare of employees in terms of section 43B(b) wherein it has been specifically clarified in para 5 viz. "It is clarified that this Circular does not apply to claim of deduction relating to employee's contribution to welfare funds which are governed by section 36 (1)(va) of the IT Act."

8. The appellant craves to leave, add, amend or alter the grounds of appeal."

3. Despite service of notice, none appeared on behalf of assessee. The matter was adjourned from the previous date wherein the Ld. DR for the Revenue was asked to verify whether the issue stands covered by the orders of Tribunal in earlier years. The Ld. DR for the Revenue has furnished on record the copy of Tribunal order for the assessment year 2012-13, wherein similar issue has been decided in the case of assessee. Accordingly, we proceed to decide the present appeal ex-parte the assessee and after hearing the Ld. DR for the Revenue.

4. The issue raised in the grounds of appeal No. 1 to 4 is against the order of Commissioner of Income Tax (Appeals) in directing the Assessing Officer to treat the subsidy received of Rs.1,26,09,361/- as capital receipt.

5. Briefly, in the facts of the case, the assessee had filed return of income declaring total income at Nil. The assessee was engaged in the business of manufacturing of construction machinery and equipment. The assessee was also engaged in trading of spares and machinery. The Assessing Officer had made disallowance under section 36(1)(va) of the Act on account of employee's contribution to PF and ESIC, being delayed payments. Further, disallowance was made under section 40(a)(ia) of the Act for non-deduction of tax out of Director's Sitting Fees. Further, the Assessing Officer vide para 6 of assessment order noted the submissions of the assessee that it had inadvertently offered to tax, income of Rs.1.26 crores which was part of the Capital Subsidy and the same be removed from the income offered by the assessee. The Assessing Officer relied on the decision of Hon'ble Supreme Court of India in the case of Goetze (India) Ltd. Vs. Commissioner of Income

Tax reported in 284 ITR 323 (SC) and rejected the claim of assessee. No other addition was made by the Assessing Officer.

6. Before the Commissioner of Income Tax (Appeals) the first issue which was raised by the assessee was in respect of subsidy received from Government of Maharashtra for setting up a mega unit under the Industrial Promotional Scheme, 2007 and claim of the assessee that the said subsidy was the capital receipt. The assessee pointed that though in the return of income it had offered the amount of subsidy as a revenue receipt, but the same was by an inadvertent mistake and since the subsidy received was a capital receipt, the same should have been excluded while computing the income of the assessee. The Commissioner of Income Tax (Appeals) observed that where the assessee had offered the income in its return of income which was not revised, then in view of the Hon'ble Supreme Court of India in Goetze (India) Ltd. Vs. Commissioner of Income Tax (supra), the Assessing Officer had not accepted the plea of assessee. However, after considering the written submissions filed by the assessee and the utilization of subsidy received under the Package Scheme of Incentives, 2007 and in view of the provisions of section 43 Explanation 10 of the Act, the Commissioner of Income Tax (Appeals) in turn relying on the order for preceding year i.e. assessment year 2013-14 held that the subsidy received by the assessee was a capital subsidy. In this regard reliance was placed on the decision of Pune Bench of the Tribunal in the case of M/s. John Deere Equipments Pvt. Ltd. Vs. Dy. Commissioner of Income Tax in ITA No. 30/PN/2012 and ITA No. 275/PN/2012. The relevant para of the Tribunal is reproduced in para 10 and 11 of the appellate order. The Commissioner of Income Tax (Appeals) thus,

directed the Assessing Officer to treat the said income already offered in the return of income as capital receipt.

7. The Revenue is in appeal against the aforesaid directions of Commissioner of Income Tax (Appeals).

8. We find that similar issue arose before the Tribunal in assessee's own case in ITA No. 2312/PUN/2016 relating to assessment year 2012-13, vide order dated 03.08.2018 and the Tribunal has allowed the plea of the assessee that the subsidy sanctioned to the assessee under the Package Scheme of Incentives, 2007 of the State Government to the tune of Rs.13.37 crores was against the investment of Rs.26.77 crores in land, factory building, plant and machinery, electrical installation etc. The Tribunal vide para 5 also noted that balance sum of Rs.2.36 crores was receivable as on 31.03.2012. The Tribunal in turn placed reliance on the decision in the case of M/s. John Deere Equipments Pvt. Ltd. Vs. Dy. Commissioner of Income Tax (supra) and held that the subsidy received by the assessee was capital in nature. During the year under consideration out of the balance due of Rs.2.36 crores, the assessee has received Rs.1.26 crores during the year under consideration and in view of the decision of Tribunal in assessee's own case in hand in the earlier year the said subsidy is to be treated as capital receipt in the hands of the assessee. Though, the assessee is in the original return of income had included the same in its hand, but the same is to be excluded being not taxable. Accordingly, we uphold the order of Commissioner of Income Tax (Appeals) and dismiss the grounds of appeal No. 1 to 4 raised by the Revenue.

9. Now, coming to the ground of appeal Nos. 5 to 7 raised by the Revenue which are against the order of Commissioner of Income Tax (Appeals) in allowing the deduction on account of belated payments of employee's contribution to PF and ESIC amounting to Rs.24,67,486/-. The Revenue is aggrieved since, the Commissioner of Income Tax (Appeals) has not followed the decision of Hon'ble Gujarat High Court.

10. We find that the issue stands settled by judgment of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. M/s. Hindustan Organics Chemicals Ltd. vide Income Tax Appeal No. 399 of 2012, dated 11th July, 2014. The Hon'ble High Court has held that the amount towards employee's contribution to PF and ESIC is to be allowed, in case the same is paid before the due date of filing of return of income. The Commissioner of Income Tax (Appeals) has referred to the aforesaid decision in para 5.4.1 at page 17 of the appellate order. In view of the issue being settled by the Jurisdictional High Court and where the assessee has paid the said amount due on account of employee's contribution to PF and ESIC before due date of filing of return of income, which is mentioned in the assessment order itself, there is no merit in the grounds of raised by the Revenue in this regard. Being the decision of Jurisdictional High Court, the same is binding upon the assessee and all the other parties working within the jurisdiction of Hon'ble Bombay High Court and hence there is no merit in the plea of Revenue that the Commissioner of Income Tax (Appeals) has not applied the ratio laid down by the Hon'ble Gujarat High Court. Once, the issue stands settled by the Jurisdictional High Court, then judicial proprietary demands that the decision of Jurisdictional High Court be applied in deciding similar issues. Accordingly, we

do not find any merit in the grounds of appeal raised by the Revenue in this regard and the same are dismissed.

11. In the result, the appeal of Revenue is dismissed.

Order pronounced on this 18th day of December, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 18th December, 2018.
RK/GCVSR

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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