

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 1915/KOL/2017
Assessment Year: 2011-2012**

***Deputy Commissioner of Income Tax,.....Appellant
Circle-11(1), Kolkata,
P-7, Chowringhee Square,
Aayakar Bhawan, Kolkata-700 069***

-Vs.-

***M/s. Emami Biotech Limited,.....Respondent
687, Anandapur, E.M. Bypass Road,
Kolkata-700 107
[PAN:AABCN 7953 M]***

Appearances by:

Shri A.K. Nayak, CIT (D.R.), for the Appellant

Shri D.S. Damle, FCA and Shri Akkal Dudhwewala, FCA, for the Respondent

Date of concluding the hearing : January 03, 2019

Date of pronouncing the order : March 29, 2019

O R D E R

Per Shri P.M. Jagtap, Vice-President (KZ):-

This appeal is preferred by the Revenue against the order of ld. Commissioner of Income Tax (Appeals)-22, Kolkata dated 23.06.2017.

2. In Ground No. 1, the Revenue has challenged the action of the ld CIT(Appeals) in deleting the addition of Rs.29,53,995/- made by the Assessing Officer on account of the alleged undisclosed profit from Dhairya Commodities Pvt. Limited.

3. The assessee in the present case is a Company, which is engaged in the business of Processing and Sale of Edible Oil and Cultivation and Sale of Medicinal Plants and Herbal Products. The return of income for the year under consideration was filed by it on 30.09.2011 declaring a total

income of Rs.1,39,00,760/-. As per the information received by the Assessing Officer from DDIT (I&CI), Kolkata, the assessee during the year under consideration had made transactions with National Multi Commodity Exchange, Ahmedabad and had booked a profit of Rs.8,85,36,587/- on such transactions made through Broker Dhairya Commodities Pvt. Limited. As found by the Assessing Officer during the course of assessment proceedings, a profit only Rs.8,55,82,593/- was declared by the assessee-company in its return of income. When the assessee was called upon by the Assessing Officer to explain the difference of Rs.29,53,995/-, a copy of ledger account showing the transactions with Dhairya Commodities Pvt. Limited was submitted by the assessee to show that the Net Profit of Rs.8,55,82,593/- only as shown was earned by it. This explanation of the assessee was not found acceptable by the Assessing Officer and relying on the information received by him from DDIT (I&CI), Kolkata, he added the difference amount of Rs.29,53,995/- to the total income of the assessee by treating the same as the undisclosed profit of the assessee.

4. The addition of Rs.29,53,995/- made by the Assessing Officer on account of the alleged undisclosed profit received from the broker Dhairya Commodities Pvt. Limited was challenged by the assessee in the appeal filed before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record including the remand report submitted by the Assessing Officer, the Id. CIT(Appeals) deleted the addition of Rs.29,53,995/- made by the Assessing Officer on this issue for the following reasons given in paragraphs no. 3 & 4 of his impugned order:-

"3. I have carefully examined the submissions made by the Ld. AO during the assessment as well as in the Remand Report. The brief facts are that Ld. AO had received certain information from DDIT [I & CI], Kolkata wherein it was stated the appellant has evaded tax on transactions with National Multi Commodity Exchange [NCMEX], Ahmedabad. Further, figures of profit amounting to Rs.8,85,36,587/- was also reported in the said information received. However, from the

documents submitted before the Ld.AO as well as in appeal, it is observed that the appellant-company had duly recorded the above transactions in its regular books of Accounts. The only issue now remains to be seen is that as per the Report from DDIT, profit of Rs.8,85,36,587/- is being reflected whereas as per the books of Accounts of the appellant, profit of Rs.8,55,82,593/- is being reflected. The appellant in order to substantiate its transactions has duly offered copy of ledger of broker i.e. M/s Dhairya Commodities Pvt. Ltd. in the books of appellant, which shows profit earned during the financial year was Rs.8,55,82,593/- only. Further, appellant has also submitted copy of ledger of the appellant company maintained in the books of Dhairya Commodities Pvt. Ltd. On perusal of both the ledgers, it is seen that income earned by appellant is Rs.8,55,82,593/- only, and not the impugned figure as reported in the Report of the Ld. DDIT, which has been relied upon by the Ld.AO.

4. It is further observed that all the transactions were duly settled by bank and duly recorded in the books of Accounts of the appellant as is evident from the details as submitted by appellant. Thus, I am not able to agree with the contention of the Ld. AO that that merely because the DDIT report states that the amount of undisclosed income of Rs.8,55,82,593/-, the same needs to be taken without further verification. In any case, the Ld. AO has not added the entire figure on the basis of the allegation; he has merely added back the impugned difference of the figures. I find that this has been done rather mechanically and the appellant's submissions during the appeal proceedings have not been specifically commented upon by the Ld.AO. On the other hand, the appellant has been able to document and support its transactions for the amounts stated, and the same have not been disputed by the Ld. AO. As such, in a situation where the Ld. AO has made any addition, the reasons for such addition [based on a mere difference of figures as supplied to him by the Ld. DDIT were to be evidenced on records, and mere dependence on the figure of the DDIT would not be adequate in my considered opinion, to warrant any addition, especially in a situation where the entire transactions has been found acceptable. The Ld. A.O's addition in assessment stage and submissions in remand are not supported by any of the surrounding and relevant factors and considerations or the principles of evidence and law. Quite on the contrary, I find that as the details of transactions as disclosed by the appellant-company are supported by sufficient direct evidence and warrant no addition based on unsubstantiated figures.

Thus, in my considered view of the matter I find merit in the submission of the appellant. The appellant is eligible to be relieved of the addition, and accordingly this ground of appeal stands allowed”.

5. The ld. D.R. submitted that as per the specific information received by the Assessing Officer, profit on the relevant transactions made with National Multi Commodity Exchange through broker Dhairya Commodities Pvt. Limited was more by Rs.29,53,995/- than the profit declared by the assessee company in its return of income and since the assessee could not offer any satisfactory explanation in respect of the said difference, the Assessing Officer rightly treated the same as the undisclosed profit of the assessee. He submitted that even during the course of remand proceedings before the Assessing Officer, the assessee could not explain the said difference inspite of sufficient opportunity afforded by the Assessing Officer. He contended that the ld. CIT(Appeals), however, did not appreciate this position and deleted the addition made by the Assessing Officer on this issue by putting the onus on the Department whereas the onus to explain the difference was actually on the assessee.

6. The ld. Counsel for the assessee, on the other hand, submitted that the allegation was levelled against the assessee regarding evasion of tax on the profit booked in the transactions with National Multi Commodity Exchange in the information received by the Assessing Officer from DDIT (I&CI), Kolkata. He submitted that the said report of Investigation Wing was never given by the assessee and the assessee was only required to explain the difference, which was allegedly there in the profit declared by the assessee. He invited our attention to the relevant details furnished by the assessee before the Assessing Officer during the course of assessment proceedings at page no. 20 of the paper book to show that the Net Profit of Rs.8,55,82,593/- was actually earned by the assessee through Dhairya Commodities Pvt. Limited. He also invited our attention to the copy of relevant ledger account placed at page no.25 to show that the profit earned by the assessee from the transactions made through Dhairya Commodities Pvt. Limited was only Rs.655.82 lakhs and not Rs.885.36 lakhs as stated to be reported by the Investigation Wing. He contended

that the assessee is not aware as to how the figure of Rs.885.36 lakhs was arrived at either by the Assessing Officer or by the Investigation Wing. He contended that the relevant details of the said figure were never given to the assessee and no enquiry whatsoever was made by the Assessing Officer from Dhairya Commodities Pvt. Limited to find out the exact amount of profit. He contended that the addition made by the Assessing Officer on this issue was thus not well founded and the Id. CIT(Appeals) was fully justified in deleting the same.

7. We have considered the rival submissions and also perused the relevant material available on record. It is observed that certain information was received by the Assessing Officer from the Investigation Wing relating to the alleged tax evasion by the assessee on the profits booked on the transactions with National Multi Commodity Exchange. The amount of such profit was reported at Rs.8,85,36,588/-. The Assessing Officer during the course of assessment proceedings, however, found that the profit on the relevant transactions was duly declared by the assessee in the return of income at Rs.8,55,82,593/-. There was thus a difference of Rs.29,53,995/- in the profit reported by the Investigation Wing and the profit declared by the assessee and when the assessee was required to explain this difference, complete details of the relevant transactions were furnished by the assessee to show that the profit actually earned by him was only Rs.8,55,82,593/-. A copy of relevant ledger account was also filed by the assessee to show that the actual profit only Rs.8,55,82,593/- was earned on the relevant transactions booked through broker Dhairya Commodities Pvt. Limited. This relevant information furnished by the assessee-company in support of its claim, however, was brushed aside by the Assessing Officer and the difference of Rs.29,53,995/- was added by him by treating the same as undisclosed profit of the assessee without giving any basis as to how the profit of Rs.8,85,36,587/- was arrived at as reported by the Investigation Wing. He also did not make any enquiry from the National Multi Commodity Exchange, Ahmedabad or even from

the concerned broker Dhairya Commodities Pvt. Limited to find out the factual position. Keeping in view all these facts and circumstances of the case, we are of the view that the addition made by the Assessing Officer on this issue was not sustainable and the Id. CIT(Appeals) was fully justified in deleting the same. In that view of the matter, we uphold the impugned order of the Id. CIT(Appeals) on this issue and dismiss Ground No. 1.

8. In Grounds No. 2 to 5, the Revenue has challenged the action of the Id. CIT(Appeals) in accepting the claim of the assessee of sales tax incentives of Rs.24,94,66,520/- as capital receipt although the same was declared by the assessee as revenue receipt in the return of income.

9. During the year under consideration, the assesee-company had received incentives of Rs.24,94,66,520/- in the form of sales tax assistance as Industrial Promotional Assistance (IPA) under the West Bengal Incentive Scheme, 2004. The said incentive was set off by the assessee against the sales tax liability payable to the Government and net amount was credited to the Profit & Loss Account in the books of account. In the computation of total income filed along with the return of income, the said amount was not excluded by the assessee while computing the total income under the normal provisions of the Act as well as the book profit under section 115JB of the Act. Even during the course of assessment proceedings, no such claim was made by the assessee for the exclusion of incentive amount being capital receipt. After realising this inadvertent and bonafide mistake, a claim was made by the assesee for the first time before the Id. CIT(Appeals) that the incentive in the form of sales tax assistance received as Industrial Promotional Assistance was for expansion of existing Industrial Undertaking involving huge capital outlays and the same being capital receipt was liable to be excluded while computing the total income under the normal provisions of the Act as well as the book profit under section 115JB of the Act. It was contended

on behalf of the assessee before the Id. CIT(Appeals) that it was permissible to make such fresh claim for the first time during the course of appellate proceedings before the Id. CIT(Appeals) and in support of this contention, reliance was place on behalf of the assesese on the following judicial pronouncements:-

"2.1. In Jute Corporation of India Ltd. - vs. - CIT (1991) 187 ITR 688 (SC)- three judge bench of the Apex Court relied upon the earlier three judge bench decision in the case of CIT -vs.- Kanpur Coal Syndicate (1964) 53 ITR 225 (SC) (in the context of Section 31(3)(a) of the 1922 Act which corresponds to Sec. 251(1)(a) of the 1961 Act), where it has been held that the appellate commissioner has plenary power in disposing off an appeal.

The Apex Court in Jute Corporation (Supra), based on the above, further held, in the context of section 251(1)(a) of the 1961 Act, that there is no reason as to why the appellate commissioner cannot modify the assessment order or admit an additional ground even if not raised before the ITO. According to the Apex Court, no exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Similar views have been held in CIT v. Nirbheram Daluram [1997] 224 ITR 610 (SC).

2.2 In Addl. CIT -VS.- Gurjargravures P. Ltd. (1978) 111 ITR 1 (SC). a two judge bench of the Apex Court had taken a different view holding that, In absence of any claim made by the assessee before the A.O., he is not entitled to raise the claim before the appellate commissioner, when no material were on record. However, the three judge bench of the Apex Court in the case of Jute Corporation (Supra) took note of the above view and observed that the said view is in conflict with the view taken by the three judge bench of the Apex Court in the case of Kanpur Coal (Supra). It is also noted that the decision of Kanpur Coal (Supra) was not brought to the notice of the two judge bench in Gurjargravures (Supra). Hence, it was further held that the view of the larger bench in Kanpur Coal (Supra) would hold the field and the decision of the Gurjargravures (Supra) is to be understood in the context of the special facts of the said case. The Apex Court further held that there could be several factors justifying a new plea before the appellate commissioner. If the appellate commissioner is settsnea, he would be acting within his jurisdiction in considering the new claim in all its aspects. While permitting the additional ground he must be satisfied that the ground raised was bonafide and that the same could not have been raised earlier for good reasons.

2.3 The above decision of the Apex Court in the Jute Corporation (Supra) has been followed in the subsequent decision of National Thermal Power Co. Ltd. -VS.- CIT (1998) 229 ITR 383(SC), to hold that, where a tribunal is only required to consider a question of law arising from the facts, which are on records, there is no reason why such question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of the assessee.

2.4 The latest decision of the Apex Court in the case of Goetze India) Ltd. -VS.- CIT (2006) 284 ITR 323 (sC). the Apex Court dealt with the power of the A O. to entertain a claim made before the A.O., otherwise than through revised return filed on time and held that such claim cannot be entertained by AO. However, while concluding, the Apex Court made It abundantly clear that the said decision doesn't affect the power of the Tribunal to admit additional ground. Same is the case as regards appeal before Commissioner Appeals.

2.5. Appellate Commissioner has power wider than those of an appellate court under the code of civil procedure - Bipln Lal Kuthiala -vs,- CIT (1957) 32 ITR 361 (Pune). His competence is not restricted to dealing with subject matter of appeal.

2.6. Power of Appellate Assistant Commissioner is wider than that of Tribunal. The powers of the Tribunal are confined to the subject matter of appeal. However, the powers of appellate commissioner are not confined to the subject matter of appeal but extend to the entire subject matter of assessment as held in case of Hukumchand Mills Ltd. -vs,- CIT (1967) 63 ITR 232 (SC).

2.7. The principles laid down in the Apex Court decision have been relied upon by Hon'ble Guj. He in the case of CIT -vs.- Sayajj Mills Ltd. (1974) 94 ITR 26 - wherein it has been held that all questions, whether of law or of fact, which relates to the assessment of the assessee, may ordinarily be allowed to be raised by the assessee in appeal, even though they may not have been raised before the ITO, If grant of relief would be available to him on determination of such question. Similar principle also approved in the case of CIT -vs,- Cellulose Products Indja Ltd. (1985) 151 ITR 499 (Guj - HC - FB),

2.8. Supreme Court in Jute Corporation Ltd. (Supra) specifically approved the decision of Jurisdictional Calcutta High Court In Rajkumar Srjmal -vs.- CIT (1976) 102 ITR 525 (Cal.), where it has been held that, the appellate commissioner was entitled to admit new ground or evidence either suo moto or at the invitation of the appellant.

2.9. In this regards Central Board of Revenue (now CBDT) vide Circular No. 14 (XL - 35) of 1955 dated 11-04-1955, states that,

officers of the department must not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every way particularly in the matter of claiming and securing relief. Although therefore the responsibility for claiming refunds and relief rests with the assessee on whom it is imposed by law, officers should draw their attention to any refunds or relief to which they appear to be clearly entitled but which they have omitted to claim for some reason or other.

2.10. In this regard reliance can also be placed on the decision in case of Pruthvj Brokers & Shareholders Pvt. Ltd. 349 ITB 336 (Born HC1. wherein it has been held by Hon'ble High Court that it is a well settled principle that assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them".

10. The Id. CIT(Appeals) found merit in the contention raised on behalf of the assessee-company and admitted the new claim of the assessee for adjudication on merit by observing as under:-

"15. The submissions of the appellant were duly considered and found to be acceptable. The various judicial pronouncements referred to by the appellant / Ld. A.R in my considered opinion are directly applicable to its case. Moreover, I find that the decision of the Hon'ble Bombay High Court in the case of Pruthvi Brokers & Shareholders Ltd in ITA No. 3908 of 2010 is also relevant, wherein it was held that the taxpayer is entitled to claim the deduction before the Appellate Authorities which was not claimed in the original or revised income-tax return. The aforesaid decision was rendered after considering the Apex Court's decision in the case of Goetze India. The Hon'ble Court observed that Apex Court had made it clear that issue in the case was limited to the power of the assessing authority and the judgment does not impinge on the power of the appellate authorities to entertain and allow additional claim. The appellant is entitled to make a fresh claim which has not been made in the return of income or filed before Assessing Officer as appellate commissioner has the power to modify the assessment order or admit an additional ground even if not raised before the Income Tax Officer. Thus, the fresh claim was found to be admissible to be adjudicated on merits".

11. In support of its claim that the amount in question received as sales tax incentive was in the nature of capital receipt not chargeable to tax, it was submitted by the assessee before the Id. CIT(Appeals) on merit that

the said amount was received under the West Bengal Incentive Scheme, 2004 issued vide Notification No. 134-CI/O/Incentive/17/03/I dated 24.03.2004. It was submitted that the said Scheme was introduced with the objective to encourage setting up of new industries or expansion of the existing industries in the backward areas of the State of West Bengal. It was submitted on behalf of the assessee-company that its Haldia Manufacturing Unit was situated in the Midnapore District in the State of West Bengal, which was categorised as backward area in the Scheme. It was submitted that in line with and to achieve the objectives stated in the said Scheme, the assessee-company had made expansion of its existing Unit at Haldia involving a huge capital outlay of Rs.168 crores. It was submitted that the assessee-company was entitled to IPA of 75% of sales tax paid subject to the maximum limit of 100% of the fixed capital investment. It was submitted that the assessee-company thus was entitled for such subsidy in the form of sales tax incentive to the extent of Rs.168 crores and during the year under consideration, it had availed the said benefit to the extent of Rs.24,96,64,520/- as per the eligibility certificate issued by the WBIDC Limited. It was contended that the incentive in the form of sales tax subsidy thus was granted under the Scheme for the expansion of assessee's Manufacturing Unit situated in the backward areas and since the said incentive was granted to encourage the industrial growth of industrially backward areas, it was in the nature of a capital receipt not chargeable to tax.

12. Reliance was placed on behalf of the assessee on the decision of the Hon'ble Supreme Court in the case of Sahney Steel Works Limited -vs.- CIT [228 ITR 253], wherein it was held that if the object of the assistance under the Subsidy Scheme was to enable the assessee to set up a new unit or expand the existing unit, then the receipt was on capital account. Reliance was also placed by the assessee on the decision of the Hon'ble Calcutta High Court in the case of CIT -vs.- Rasoi Limited [335 ITR 438], wherein it was held that the incentive granted to enable the specified

industry to set up new units, expand their capacities, modernise their business, etc. was a capital receipt and merely because incentive was paid by way of refund of sales tax, it did not amount to revenue receipt. Various other case laws were also cited on behalf of the assessee in support of its contention that for determining the nature of subsidy in the hands of the assessee, the purpose and objective of the Scheme under which the subsidy was given is of fundamental importance and it is alone the ultimate deciding factor. It was contended that since the incentive in question in the form of sales tax subsidy was granted for expansion of capacities in backward areas of the State, the same was capital in nature not chargeable to tax.

13. As regards the treatment to be given to the sales tax subsidy while computing the book profit under section 115JB of the Act, it was contended on behalf of the assessee that the sales tax subsidy being a pure capital receipt not having any element of "income" or "profit" embedded therein was not chargeable to tax under the Income Tax Act, 1961 and the same, therefore, was liable to be excluded even while computing the book profit under section 115JB of the Act. In support of this contention, reliance was placed by the assessee on the decision of the Kolkata Bench of the ITAT in the case of Benani Industries Limited -vs.- DIT [178 TTJ 658], wherein it was held that capital receipt in the form of sales tax incentive was required to be excluded while computing the book profit under section 115JB of the Act. Reliance was also placed on behalf of the assessee on the decision of the Mumbai Bench of ITAT in the case of ITO -vs.- Frigsales (India) Limited [4 SOT 376], wherein it was held that the amounts which are not taxable in the normal computation cannot be included while computing book profit because such amounts did not really reflect a receipt in the nature of income and cannot form part of the book profit.

14. The entire submissions made on behalf of the assessee in support of its new claim made for the first time before him were forwarded by the Id. CIT(Appeals) to the Assessing Officer for his examination. After examining the details and documents furnished by the assessee, a remand report dated 12.06.2017 was submitted by the Assessing Officer to the Id. CIT(Appeals). In the said remand report, reasons were given by the Assessing Officer elaborately in support of his stand that the claim of the assessee that the incentive received in the form of subsidy was a capital receipt was not acceptable. The said reasons as summarized by the Assessing Officer in his remand report were as under:-

"The assessee itself has treated such receipt as a revenue receipt in the audited profit & loss account and return of income for the AY 2011-12.

(ii) This Accounting treatment of the subsidy has been certified by the Auditors of the Company (M/s. S.K. Agrawal & Co., Chartered Accountants) and has commented in Note 20 of "SIGNIFICANT ACCOUNTING POLICIES & NOTES ON ACCOUNTS" that the subsidy has been accounted for in the books for the purpose of payment of Excise duty on Electricity of Rs. 67.73 lakhs and Sales Tax Incentives of Rs. 2494.67 lakhs.

(iii) As per the Accounting Standard 12, Paragraph 5.1, if the grant/subsidy is of capital nature the same is to be treated as a part of shareholders fund and if it is of income nature, the same is to be taken as income over one or more period. Here treatment of the subsidy received as income by the assessee itself debars it from claiming the same as a capital receipt in the computation of income".

15. When the remand report submitted by the Assessing Officer was confronted by the Id. CIT(Appeals) to the assessee, a rejoinder was filed by the assessee and after taking into consideration the entire material available on record as well as the submissions made by the assessee as well as the Assessing Officer, the Id. CIT(Appeals) allowed the claim of the assessee that the incentive received in the form of sales tax subsidy was a capital receipt not chargeable to tax for the following reasons given in paragraph no. 5 of his impugned order:-

"5. All the facts and submission of the appellant as well as findings of the Ld. AO in the remand report have been carefully

considered. The appellant obtained incentive in the form of Sales Tax assistance of Rs.24,94,66,520/- in A.Y. 2011-12 as Industrial Promotional Assistance (IPA) under "The West Bengal Incentive Scheme (WBIS) 2004". The above incentive was set off against sales tax liability payable to Government. On perusal of the scheme it is seen that the object of the scheme was to promote the new industries in the backward areas in the state of West Bengal. The impugned incentive was not connected with the operations of the business and it was solely provided for setting up of new industrial project or undertaking for major expansion in the existing industrial undertaking. The incentive was granted by the government of the West Bengal in the form of deferment / remission of sales tax. The incentive was linked with the capital investment and subject to the maximum ceiling of incentive. The Hon'ble jurisdictional High Court in the case of Rasoji Limited (supra) has held that the Sales Tax Incentive granted by the West Bengal Government to the assessee with the object to a provide incentive to set up new industrial undertaking or substantial expansion of the existing undertakings was capital receipt and not revenue in nature. The High Court applying the rationale of Supreme Court in Ponny Sugars (supra) observed that if the object of the subsidy is to enable the assessee to run the business more profitably, the receipt is revenue receipt. On the other hand, if the object of the assistance is to enable the assessee to set up a new unit or to expand an existing unit, the receipt would be a capital receipt. Therefore, the object for which subsidy is given determines the nature of the subsidy and not the form of the mechanism through which the subsidy is given. In the instant case, the Ld. AO's contention that since the subsidy in the form of sales tax remission has been granted, the same is revenue in nature is misplaced. The main eligibility condition as per the Scheme was to set up a new unit or carry out substantial expansion of an existing unit in a backward area. Thus, I find merit in the submission of the appellant that sales tax Incentive enjoyed by the appellant for setting up industry in the backward region of the State of West Bengal, constitutes capital receipts in the hand of the appellant as it has been granted for carrying out capital investments in backward areas of the State and hence not taxable under normal provision of the Act".

16. The ld. CIT(Appeals) also held that the amount of sales tax subsidy was liable to be excluded while computing the book profit under section 115JB of the Act for the following reasons given in para no. 6 of his impugned order:-

"6. Further, since the subsidy in question is not in the nature of income, the same, in my considered view cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss

account and have to be excluded for arriving at the book profits u/s.115JB of the Act. The decision of Hon'ble Apex Court in case of Padmaraje R. Kadambande (supra) also supports the view that capital receipts are not income within the definition of sec 2(24) of the Act and are not at all chargeable under the Income Tax Act, 1961. Thus, in view of the above discussion, and by placing reliance on the decision of ACIT -vs.- Shree Cement Ltd (supra). jurisdictional Hon'ble Tribunal in case of Krishj Rasayan Exports (supra). Sicpa India Private Limited (supra), in my considered view of the matter the sales tax subsidy not having any character of income cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss account, and the same have to be excluded for arriving at the book profits u/s.1151B of the Act.

The appellant is accordingly eligible for relief in the matter, and this ground of appeal stands allowed”.

17. The ld. D.R. submitted that the amount in dispute received on account of sales tax incentive was offered by the assessee-company itself as its income in the return of income filed for the year under consideration and even during the course of assessment proceedings before the Assessing Officer, no claim was made by the assessee that the said amount being capital receipt was not chargeable to tax. He submitted that this new claim was made by the assessee for the first time during the course of appellate proceedings before the ld. CIT(Appeals) and inspite of strong objection taken by the Assessing Officer in the remand report for admitting the said new claim, the ld. CIT(Appeals) entertained the said new claim and allowed the same on merit. He contended that the ld. CIT(Appeals) as a first appellate authority cannot entertain such new claim made by the assessee for the first time before him, especially when the same was not made by the assessee before the Assessing Officer.

18. On merit, the ld. D.R. invited our attention to the relevant Scheme of the State Government published in the Official Gazette and pointed out that various incentives were offered under the said Scheme. He submitted the said incentives were provided not only for setting up of new industries but also to the existing industries. He also pointed out that the

incentives under the Scheme were to be paid after the commencement of the commercial production and the object thus was to promote the production. He contended that the incentive in the form of sales tax subsidy was linked to payment of sales tax, which clearly shows that the incentives were meant for an operational unit. Relying on the decision of the Hon'ble Calcutta High Court in the case of CIT -vs.-Chhindwara Fuels [114 Taxman 707], he contended that any Government subsidy received after the commencement of production is a revenue receipt. He also relied on the decision of the Hon'ble Delhi High Court in the case of CIT -vs.- Bhushan Steel Pvt. Limited [398 ITR 216] to contend that similar subsidy received by the assessee under U.P. State Subsidy Scheme to achieve larger goal of industrialisation was held to be revenue in nature chargeable to tax on the ground that the assessee had flexibility of using amount of subsidy for any purpose, not necessarily capital. He also relied on the decision of the Hon'ble Madras High Court in the case of CIT -vs.- Keracol Chlorides Limited [33 taxmann.com 628], wherein it was held that where subsidy was granted for production and not for setting up of industry, the same should be treated as a revenue receipt. He also relied on the decision of the Hon'ble Allahabad High Court in the case of K.M. Sugar Mills Limited -vs.- CIT [47 taxmann.com 367], wherein it was held that the subsidy given to compensate the assessee in running his business was revenue in nature. He contended that even the decision of the Hon'ble Supreme Court in the case of Sahney Steel Works Limited (supra) relied upon by the assessee in support of its case before the Id. CIT(Appeals) is actually in favour of the assessee, wherein it was held that production incentive in the form of refund of sales tax being available to the assessee only after the commencement of production, the same was a revenue receipt.

19. As regards the treatment to be given to the incentive received by the assessee in the form of sales tax subsidy for computing book profit under section 115JB, the Id. D.R. contended that the amount of subsidy

was credited by the assessee-company itself to the Profit & Loss Account. Relying on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Limited -vs.- CIT (255 ITR 273), he contended that nobody can tinker with the Profit & Loss Account and the only adjustments permissible to the profit reflected in the Profit & Loss Account of the assessee are to the extent as provided in Explanation to Section 115JB. He contended that the Id. CIT(Appeals), therefore, was not justified in allowing the claim of the assessee for deduction on account of sales tax subsidy while computing the book profit under section 115JB as the same was beyond the scope of the adjustments specified in Explanation to Section 115JB.

20. The Id. Counsel for the assessee, on the other hand, contended that the new claim made by the assessee for exemption on account of sales tax subsidy being capital receipt as made by the assessee for the first time before the Id. CIT(Appeals) was rightly admitted by the Id. CIT(Appeals) by relying on the various judicial pronouncements cited on behalf of the assessee in support and referred to and discussed by him in the impugned order. Besides the said judicial pronouncements, the Id. Counsel for the assessee also relied on the decision of this Bench rendered in the case of DCIT -vs.- Indian Oil Pvt. Limited rendered vide its order dated 31.01.2018 passed in ITA No. 1468/KOL/2015, wherein the decision of the CIT(Appeals) in admitting the similar claim made by the assessee for exclusion of sales tax subsidy for the first time was upheld by the Tribunal.

21. In support of the assessee's case on merit of the issue, the Id. Counsel for the assessee relied on the decision of the Hon'ble Calcutta High Court in the case of CIT -vs.- Rasoi Limited (supra) and contended that the subsidy received by the assessee from Government of West Bengal under a similar scheme of industrial promotion for expansion of capacities, modernisation and improving the marketing capabilities was

held to be a capital receipt. He contended that as held by the Hon'ble Calcutta High Court in the case of Rasoi Limited (supra), it is the object for which the subsidy/assistance is given that determines the nature of the incentive subsidy and the form on the mechanism through which the subsidy was given is irrelevant. He contended that since the object of the subsidy in the said case was for expansion of the capacities, modernisation and improving the marketing capabilities, it was held by the Hon'ble Calcutta High Court that it was a capital receipt and merely because the amount of subsidy was equivalent to 90% of the sales tax paid by the beneficiary did not imply with the same was in the form of refund of sales tax paid.

22. The Id. Counsel for the assessee invited our attention to the West Bengal Incentive Scheme, 2004 as published in the Official Gazette to point out that the object of the said Scheme was to extend incentive for promotion of the industry in the State. He also pointed out that the said Scheme was applicable to all large/small scale projects and tourism units in large/small sector to be set up and also expansion project of existing Units on or after 1st April, 2004. He contended that even the earlier Incentive Scheme of 2000 of the West Bengal Government was having the same object of promoting industries and the incentive received under the said Scheme in the form of sales tax subsidy was held to be capital receipt not chargeable to tax in the various cases decided by the Tribunal. He cited one of such decisions rendered by the Tribunal in the case of DCIT - vs.- Shyam Steel Industries Limited vide order dated 03.02.2017 passed in ITA No. 602/KOL/2014.

23. The Id. Counsel for the assessee submitted that the sales tax incentive received by the assessee under the 2004 Scheme has been finally linked to capital cost of project and thus the said incentive is limited to capital investment made by the assessee in the expansion of its existing Unit in the backward areas. He relied on the decision of the Delhi Bench of this Tribunal in the case of Pepsico India Holdings Pvt. Limited -

vs.- Additional CIT (ITA Nos. 1334/Chandigarh/2010 & Others dated 19.11.2018) and submitted that similar subsidy received under West Bengal Incentive Scheme of 2004 was held to be capital in nature by the Tribunal after taking into consideration the objective of the said Scheme as well as the decisions of the Hon'ble Supreme Court in the case of CIT - vs.- Ponny Sugar & Chemicals Limited [306 ITR 392] and CIT -vs.- Chaphalker Brothers [88 taxmann.com 178].

24. As regards the decision of the Hon'ble Supreme Court in the case of Sahany Steel & Press Works Limited (supra) cited by the ld. D.R., the ld. Counsel for the assessee submitted that the said decision supports the assessee's case on the issue under consideration as rightly held by the ld. CIT(Appeals) and not the revenue's case as sought to be contended by the ld. D.R. He invited our attention to paragraph no. 19 of the order of the Hon'ble Supreme Court, wherein it was observed by the Hon'ble Apex Court that if the Scheme was that the assessee will be given refund of sales tax on purchase of machinery as well on raw materials to enable the assessee to acquire new plants and to encourage expansion of its manufacturing capacity in a backward area, the entire subsidy must be held to be a capital receipt in the hands of the assessee and it will not be open to the Revenue to contend that the refund of sales tax paid on raw materials or finished products must be treated as revenue receipt in the hands of the assessee. He also relied on the decision of the Hon'ble Supreme Court in the case of CIT -vs.- Chaphalkar Brothers [400 ITR 279] and submitted that the purpose test applied in the case of Sahany Steels & Press Works Limited has been reiterated by the Hon'ble Supreme Court while determining the nature of incentive/assistance. As regards the decision of the Hon'ble Delhi High Court in the case of Bhusan Steels & Strips Limited (supra) relied upon by the ld. D.R. in support of the revenue's case, he submitted that the operation of the said decision has already been stayed by the Hon'ble Supreme Court as per the Interim Order passed on 20.11.2017 in SLP No. 30728 to 30732/ 2017.

25. As regards the treatment to be given to the subsidy in question while computing the book profit of the assessee-company under section 115JB of the Act, the Id. Counsel for the assessee contended that even though the said amount was credited by the assessee-company to its Profit & Loss Account, the same being capital in nature not chargeable to tax under the Income Tax Act, 1961 cannot be included while computing the book profit under section 115JB of the Act. He has contended that this issue is squarely covered in favour of the assessee by the various decisions of the Tribunal and the Id. CIT(Appeals) is fully justified in deciding this issue in favour of the assessee by following the various decisions of the Tribunal. He contended that various Benches of the Tribunal including the Kolkata Benches have taken a consistent view in favour of the assessee on this issue and cited some more decisions of the Tribunal, which have been rendered recently after passing of the impugned order by the Id. CIT(Appeals).

26. In the rejoinder, the Id. D.R. submitted that the amount of subsidy in dispute was credited by the assessee-company to its Profit & Loss Account and it is, therefore, not permissible to reduce the same while computing the book profit under section 115JB of the Act as the same is beyond the scope of adjustments permissible as per Explanation to section 115JB. He contended that it is not clear as to whether in the cases cited on behalf of the assesses, the amount was credited by the assesseees to their Profit & Loss Account. He contended that no doubt the Notes on Accounts and accounting policies are required to be taken into consideration while computing the book profit under section 115JB, but no such Note on Accounts on the issue of sales tax subsidy was given by the assessee-company in the present case. He also contended that the object of 2004 Scheme is not very clear and in such a case, the subsidy is to be treated as revenue receipt as held by the Hon'ble Punjab & Haryana High Court in the case of CIT -vs.- Abhishek Industries Limited [156

taxman 257]. He contended that there is a change in the Incentive Scheme of 2004 as compared to the Incentive Scheme of 2000 and, therefore, the cases cited by the Id. Counsel for the assessee involving 2000 Scheme cannot be relied upon to decide the issue involved in the present case where the incentive/subsidy is received under 2004 Scheme. He contended that the 2004 Scheme is applicable even to the existing Units and not only for setting up of new Units and this is the vital aspect, which is required to be taken into consideration for determining and deciding the nature of subsidy received under 2004 Scheme.

27. We have considered the rival submissions and also perused the relevant material available on record. As regards the preliminary objection raised on behalf of the Revenue challenging the action of the Id. CIT(Appeals) in entertaining the new claim made by the assessee for treating the subsidy in question received during the year under consideration as capital receipt not chargeable to tax, it is observed that this issue is squarely covered in favour of the assessee, besides the various judicial pronouncements cited on behalf of the assessee and relied upon by the Id. CIT(Appeals) in his impugned order, by the decision of the Coordinate Bench of this Tribunal in the case of DCIT -vs.- Indian Oil Petronas Pvt. Limited rendered vide its order dated 31.05.2018 in ITA No. 157/KOL/2017, wherein it was held by the Tribunal by relying on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Limited -vs.- CIT (229 ITR 383) as well as the decision of the Hon'ble Calcutta High Court in the case of Maynak Poddar (HUF) -vs.- WTO (262 ITR 633) that his jurisdiction was rightly exercised by the Id. CIT(Appeals) in entertaining the additional ground raised by the assessee claiming exclusion of capital subsidy received by way of sales tax remission under the West Bengal Incentive Scheme. We, therefore, find the objection raised on behalf of the revenue in this regard to be unsustainable and overruling the same, we now proceed to decide the issue on merit.

28. During the year under consideration, the assessee had received incentive of Rs.24,94,66,520/- under the West Bengal Incentive Scheme, 2004 in the form of refund of sales tax paid and the question that has arisen is regarding the taxability of the said amount under the Income Tax Act, 1961, which depends on the determination of the character of the amount, whether it is capital receipt or revenue receipt. There are various judicial pronouncements wherein guidelines or criteria have been laid down to determine the character of such amounts received as incentives/subsidies. As observed by the Hon'ble Supreme Court in the case of K.C.P. Limited -vs.- CIT [245 ITR 431], it is not the name given by the assessee or even by the revenue or anyone else that matters, but it is true character of the receipt that determines its taxability and being regarded as falling within the capital field or out of it. As held by the Hon'ble Supreme Court in the case of Ponny Sugar & Chemicals Limited (supra), the nature of the receipt of the incentive has to be examined in the light of the object for which such incentive was paid and if the true character of the incentive is to enable the assessee to meet the capital cost, then that true character must be given full recognition and the fact that the receipt was subsequent to the commencement of production is not to be allowed to stand in the way in its proper treatment as a receipt in the capital field meant to meet a capital cost. Hon'ble Supreme Court held that it, therefore, cannot be said that the incentive given being post production, though meant exclusively for meeting the capital cost, the amount of incentive would be a trading receipt in the hands of the recipient.

29. In the case of Sahany Steel & Press Works Limited (supra), which has been relied upon by the ld. Representatives of both the sides in support of their respective stand on the issue under consideration, payments had been made post production and since it was in no way linked to the steps that had been taken by the assessee in setting up the

industry, Hon'ble Supreme Court held that the incentive received was revenue in nature chargeable to tax. It was, however, clarified by the Hon'ble Supreme Court that the subsidy in that case had not been granted for bringing into existence any new asset. It was further clarified by the Hon'ble Supreme Court that the character of the subsidy in the hands of the recipient, whether revenue or capital, will have to be determined by having regard to the purpose for which the subsidy is given. Explaining further with illustration, it was observed by the Hon'ble Supreme Court that if the Scheme was that the assessee will be given refund of sales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacities in backward areas, the entire subsidy must be held to be a capital receipt in the hands of the assessee. After taking note of both these decisions of the Hon'ble Supreme Court in the case of Sahany Steel & Press Works Limited (supra) and Ponny Sugar & Chemicals Limited (supra), Hon'ble Calcutta High Court has held in the case of Rasoi Limited (supra) that the subsidy received by the assessee from the Government of West Bengal under the Scheme of Industrial Promotion for expansion of capacities, modernisation and improving its marketing capabilities was a capital receipt not chargeable to tax.

30. In the case of K.M. Sugar Mills Limited (supra) cited by the Id. D.R., subsidy was given to the assessee by the Central Government to compensate burden on account of interest, storage and insurance etc. for holding buffer stock of sugar and the object thus being to compensate the assessee in running his business, it was held by the Hon'ble Allahabad High Court that the subsidy given was clearly revenue in nature. In the case of Keracol Chlorides Limited (supra) cited by the Id. D.R., subsidy was granted for production and not for setting up an industry and the same, therefore, was treated as revenue receipt. In the case of Chhindwara Fuels (supra) cited by the Id. D.R., there was no representation made on behalf of the assessee and in the very brief order

passed ex-parte, subsidy received by the assessee from the Government in the form of sales tax refund was held to be a revenue receipt by the Hon'ble Calcutta High Court mainly on the ground that the same was received by the assessee after production. In support of this conclusion, reliance was placed by the Hon'ble Calcutta High Court on the decision of the Hon'ble Supreme Court in the case of Sahany Steel & Press Works Limited (supra). As already noted by us, Hon'ble Supreme Court in the subsequent decision rendered in the case of Ponny Sugar & Chemicals Limited (supra) has held, after taking note of their earlier decision rendered in the case of Sahany Steel & Press Works Limited (supra), that if the true character of the incentive is to enable the assessee to meet the capital cost, then that true character must be given full recognition and the fact that the receipt was subsequent to the commencement of production is not to be allowed to stand in the way of its proper treatment as a receipt in the capital field meant to meet a capital cost. As regards the decision of the Hon'ble Delhi High Court in the case of Bhusan Steels & Strips Limited (supra) relied upon by the Id. D.R., it is observed that the operation of the judgment passed by the Hon'ble Delhi High Court in the said case has been stayed by the Hon'ble Supreme Court by the interim order passed in SLP No. 30728 to 30732/2017.

31. The position that clearly emerges from the various judicial pronouncements cited by the Id. Representatives of both the sides, as discussed above, is that the character of subsidy in the hands of the recipient, whether capital or revenue, is required to be determined after having regard to the purpose for which the subsidy was given and the mode and source of payment as well as the point of time when the subsidy was paid is not relevant. Keeping this position in mind, let us now see the purpose for which the subsidy in question was given to the assessee in the form of sales tax refund under the West Bengal Incentive Scheme, 2004. As per the West Bengal Incentive Scheme, 2004 notified in the Official Gazette, it was meant to extend incentive for promotion of

industries in the State of West Bengal and the same was applicable to all Large/Small Scale Projects and Tourism Units in Large/Small Scale Sector to be set up and also expansion project of existing Units on or after 1st April, 2004. The object of the said Scheme thus was to promote setting up and expansion of industries and the subsidy was made available to the existing industries for undertaking substantial expansion. Under the said Scheme, "Mega Projects" were not eligible for the interest subsidy and in lieu thereof IPA was made available to them @ 75% of the sales tax, which incentive was not to exceed 100% of the fixed capital investment. The subsidy thus was linked to the fixed capital investment made by the industry and it was in the form of refund of sales tax paid. In line with this Scheme, the assessee-company made expansion of its existing Haldia Manufacturing Unit situated in Midnapore District in the State of West Bengal involving huge capital outlay of Rs.168 crores and was entitled to IPA of 75% of sales tax paid for a period of 15 years subject to a maximum amount to the extent of 100% of the fixed capital investment i.e. Rs.168 crores. During the year under consideration, the assessee-company was eligible for the said incentive to the extent of Rs.24,94,66,520/- and the benefit to that extent was availed by it.

32. At the time of hearing before us, the ld. D.R. has submitted that the object of the West Bengal Incentive Scheme, 2004 was altogether different from the object of the West Bengal Incentive Scheme of 2000. He has contended that the various decisions rendered by the Tribunal and cited by the ld. Counsel for the assessee treating the subsidy under the 2000 Scheme as capital receipt thus are not applicable. He has also contended that the object of the 2004 Scheme not being very clear, the incentive/subsidy received under the said Scheme should be treated as revenue in nature. We are unable to accept these contentions of the ld. D.R. As already noticed from the relevant Scheme, the object of the Scheme was very clear to promote setting up and expansion of industries and it cannot be said that the said object was not clear as sought to be

contended by the Id. D.R. Even the object of the Scheme of 2004 cannot be said to be entirely different from the Scheme of 2000, inasmuch as, the intention of the 2000 Scheme was also to extend incentive for promotion of industries in the State of West Bengal and the subsidy was meant for expansion of the capacities of the eligible industry, their modernisation and improving the marketing capabilities, which cannot be said to be materially different from the Scheme of 2004. On the other hand, there is similarity in the objects of both these Schemes, inasmuch as, it was to provide incentive for the purpose of setting up of new Units as well as for the expansion of the existing Units.

33. It is pertinent to note that the similar issue had come up for consideration before the Delhi Bench of this Tribunal in the case of Pepsico India Holdings Pvt. Limited (supra) cited by the Id. Counsel for the assessee. In the said case, industrial promotional assistance in the form of subsidy by way of refund of sales tax paid was received by the assessee under the same Scheme, i.e. West Bengal Incentive Scheme, 2004 and the issue raised was relating to the taxability of the subsidy received by the assessee. While deciding the said issue, the Tribunal took note of the object of the West Bengal Incentive Scheme, 2004, which was found to be to promote setting up and expansion of projects/industry and keeping in view the said object and the ratio laid down by the Hon'ble Supreme Court in the case of CIT -vs.- Ponny Sugar & Chemicals Limited (supra) as well as in the case of CIT -vs.- Chaphalker Brothers (supra), it was held by the Tribunal that the subsidy received by the assessee under the West Bengal Incentive Scheme of 2004 was capital in nature and the same could not be taxed as revenue receipt.

34. Having regard to all the relevant facts of the case and keeping in view the legal position emanating from the various judicial pronouncements discussed above, we are of the view that the subsidy in question received by the assessee in the form of refund of sales tax under

the West Bengal Incentive Scheme, 2004 was capital in nature as the purpose of the same was for the expansion of the existing industry of the assessee. We also hold that merely because the said subsidy was to be received by the assessee only after the commencement of production would not change its character, which otherwise was capital in nature. We accordingly uphold the impugned order of the Id. CIT(Appeals) giving relief to the assessee on this issue.

35. As regards the issue relating to the treatment to be given to the sales tax subsidy while computing the book profit under section 115JB of the Act, it is observed that this issue is squarely covered in favour of the assessee and against the revenue by the various decisions of the Tribunal. In one of such decisions rendered in the case of Benani Industries Limited (supra), the Coordinate Bench of this Tribunal has held that the capital receipt in the form of sales tax incentive is required to be excluded while computing the book profit under section 115JB of the Act. In another decision rendered in the case of Bricksale India Limited (supra), it was held by the Mumbai Bench of this Tribunal that the amounts which are not taxable in the normal computation cannot be included while computing the book profit because such amounts do not really reflect a receipt in the nature of income and cannot form part of the book profit.

36. At the time of hearing before us, the only contention raised by the Id. D.R. is that it is not very clear as to whether in the cases decided by the Tribunal and relied upon by the Id. Counsel for the assessee, the amount in dispute was credited to the Profit & Loss Account of the assessee as in the present case. However, as pointed out by the Id. Counsel for the assessee from the relevant portion of the orders of the Tribunal, the amounts in dispute were credited by the assessee in the Profit & Loss Account and the factual position in the said cases thus was similar to that of the assessee. As further pointed out by the Id. Counsel for the assessee, a Note No. 20 was given by the assessee-company as

Notes to Accounts forming part of its annual accounts pointing out specifically that it was entitled for sales tax incentive of Rs.2494.67 lakhs under the West Bengal Incentive Scheme, 2004. We, therefore, find no infirmity in the impugned order of the Id. CIT(Appeals) allowing the claim of the assessee for exclusion of the amount of subsidy in question while computing the book profit under section 115JB of the Act. Grounds No. 2 to 5 of the Revenue's appeal are accordingly dismissed.

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

Order pronounced in the open Court on March 29, 2019.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 29th day of March, 2019

Copies to : (1) ***Deputy Commissioner of Income Tax,
Circle-11(1), Kolkata,
P-7, Chowringhee Square,
Aayakar Bhawan, Kolkata-700 069***

(2) ***M/s. Emami Biotech Limited,
687, Anandapur, E.M. Bypass Road,
Kolkata-700 107***

(3) ***Commissioner of Income Tax (Appeals)-22, Kolkata***

(4) ***Commissioner of Income Tax- , Kolkata***

(5) ***The Departmental Representative***

(6) ***Guard File***

By order

***Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata***

Laha/Sr. P.S.