

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA.No.3837/Del./2016
Assessment Year 2011-2012

The ACIT, Central Circle-2, Room No.363, 3 rd Floor, E-2, ARA Centre, Jhandewalan Extension, New Delhi – 110 055.	vs.,	M/s. Dhanuka Agritech Ltd., 861-862, Dhanuka House, Joshi Road, Karol Bagh, Delhi – 110 005. PAN AAACD0105G
		(Respondent)

For Revenue :	Ms. Rakhi Bimal, Sr. D.R.
For Assessee :	Shri S.S. Nager, C.A.

Date of Hearing :	07.11.2019
Date of Pronouncement :	13.11.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Revenue has been directed against the Order of the Ld. CIT(A)-3, Delhi, Dated 01.04.2016, for the A.Y. 2011-2012.

2. We have heard the Learned Representatives of both the parties and perused the material on record.

3. Ground No.1 is general and needs no adjudication.

4. On Ground No.2, Revenue challenged the Order of the Ld. CIT(A) in deleting the addition of Rs.5,14,383/- made on account of repairs and maintenance.

4.1. The A.O. disallowed the above amount holding it to be capital in nature. The Ld. CIT(A) on examination and verification of bills and vouchers of these expenses produced on record noted that no new asset has come into existence by making such expenditure. The expenditure has been expended on the repairs and maintenance of the factory in Udhampur Unit. The A.O. was, therefore, directed to allow the claim and modify the assessment order.

5. The Ld. D.R. relied upon the Order of the A.O.

6. Learned Counsel for the Assessee submitted that expenditure has been incurred towards flooring of the Udhampur Unit which was an old unit and does not bring any asset for enduring nature. The expenditure contains stone dust, cement, M.S. Gate, Kota Stone, fittings etc., the

details of which were filed before A.O. He has relied upon decision in the case of Commissioner of Income Tax vs., ICI India Pvt. Ltd., 139 ITR 105 (Cal.) (HC) wherein it was held that repairs carried out by the assessee to building to prevent further deterioration was revenue expenditure.

7. After considering the rival submissions, we do not find any infirmity to interfere with the Orders of the Ld. CIT(A) in deleting the addition. Since the existing unit of assessee have been repaired and no new asset has come into existence, therefore, the Ld. CIT(A) on verification of bills and vouchers, correctly held that same are revenue expenditure in nature. This Ground of appeal of Revenue is dismissed.

8. On Ground No.3, Revenue challenged the Order of the Ld. CIT(A) in allowing the claim of assessee amounting to Rs.4,81,11,120/- being in the nature of capital receipt. The assessee has raised this ground regarding non-execution of excise subsidy from the total income under the normal provisions of the Act as well as computation of book profits under section 155JB. The

submissions of the assessee are reproduced in the appellate order in which the assessee explained that assessee is a manufacturer of pesticides and chemicals. The assessee due to industrial unit in Udhampur enjoyed subsidy in the form of excise duty refund. In the revised computation submitted before A.O, the assessee claimed refund of excise duty as capital receipt. The A.O. however, stated that claim of assessee for exclusion of excise subsidy from total income under normal provisions of the Act as well as book profit computation under section 115JB of the I.T. Act, is not allowable since it is in the nature of fresh claim. It can only be raised through revised return. The A.O. relied upon Judgment of Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Goetze (India) Ltd., [2006] 204 CTR 182 (SC) and made the addition. The assessee submitted before the Ld. CIT(A) that assessee has availed incentive in the form of excise duty refund in terms of Office Memorandum Dated 14.06.2002 [Excise Notification No.56/2002, Dated 14.11.2002]. The said incentive has been granted for development of industries and generation

of employment for new unit or making substantial expansion. Hence, from the scheme it can be said that the purpose of subsidy is to development of industries. The assessee further submitted that the Hon'ble Supreme Court in the case of Pooni Sugars & Chemicals Ltd., [2008] 306 ITR 392 (SC) held that *"if the object of the assistance under the subsidy scheme was to enable the assessee to set-up a new unit or to expand the existing unit, then the receipt of the subsidy was on capital account."* The assessee also relied upon decision of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys vs., Commissioner of Income Tax [2011] 333 ITR 335 (J&K) wherein it was clearly held that *"excise duty refund as per the Office Memorandum Dated 14.06.2002 is capital receipt and not chargeable to tax."* The assessee relied upon several decisions also in support of the same contention. It was also submitted that appellate authorities have power to consider the claim of assessee which was not raised in revised return. The assessee relied upon Judgment of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs., Jai Parabolic

Springs Ltd., [2008] 172 Taxman 258 (Del.) wherein it was held that *“Tribunal had power to allow a relief to assessee to which it was otherwise entitled even though no claim was made by assessee in the return.”* Similarly, the assessee relied upon Judgment of Hon’ble Bombay High Court in the case of Pruthvi Brokers & Shareholders [2012] 349 ITR 336 (Bom.). The Ld. CIT(A) considering the Judgments of the Hon’ble Supreme Court and Hon’ble Jammu & Kashmir High Court above and in the light of material on record, allowed the claim of assessee. His findings in paras 3.1 and 3.2 of the Order is reproduced as under :

“3.1. Having gone through the detailed submissions of the appellant, the order of assessment passed by the Assessing Officer and the material facts placed on the record, it emerges from the facts that the Assessing Officer has not allowed the exclusion of subsidy received from the Excise Department under the normal provisions of the Act by holding that the appellant had not made the claim in the revised return of income relying on the decision of

Hon'ble Apex Court in the case of CIT vs. Goetze India Ltd. reported in 284 ITR 323. The counsel of the appellant relied on the decision of Hon'ble Apex Court in the case of CIT vs. Ponni Sugars & Chemcials Ltd. reported in 306 ITR 392 and decision of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys vs.CIT reported in 333 ITR 335.

The Hon'ble Jammu & Kashmir High Court following the decision of Hon'ble Apex Court in the case of Ponni Sugar & Chemicals Ltd. held:-

"We, therefore, proceed to find the ratio in the two Supreme Court judgments relied upon by both the parties to support their respective viewpoints, to examine as to whether the Tribunal had followed the ratio or was influenced by the orders passed in the two cases on the basis of the facts and circumstances of those cases.

15. After going through the two judgments, we find the ratio in *Sahney Steel case (supra)* and approval thereof in *Ponni Sugars & Chemicals Ltd. (supra)*, to have been spelt out, in the following para of the judgment delivered by the Hon'ble Supreme Court of India in *Ponni Sugars & Chemicals Ltd. case (supra)*. It reads thus :

"The importance of the judgment of this Court in Sahney Steel case (supra) lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is

immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/ assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy is given are irrelevant."

16. *Perusal of the judgments in Sahney Steel (supra) and Ponni Sugars (supra), therefore, reveals that the apex Court had applied the above quoted dictum to determine the purpose, which the two schemes had intended to achieve by the incentive subsidies, permissible under the schemes in question in those cases.*

It was, therefore, in the context of respective subsidy incentive schemes in the two cases, that the subsidy in Sahney Steel (supra) was held to be revenue receipt whereas the subsidy in Ponni Sugars & Chemicals Ltd. (supra) was held as capital receipt.

17. *We are supported in taking this view by the observations made by the Hon'ble Supreme Court of India in a later decision reported as Mepco Industries Ltd. vs. CIT & Anr. (2009) 227 CTR (SC) 313 : (2009) 31 DTR (SC) 305 :2009 (7) SCC 564, where the above dictum was reiterated as follows :*

“Sahney Steel & Press Works Ltd. Etc. (supra) was a case which dealt with production subsidy, Ponni Sugars & Chemicals Ltd. (supra) dealt with subsidy linked to loan repayment whereas the present case deals with a subsidy for setting up an industry in the backward area. Therefore, in each case, one has to examine the nature of the subsidy. The judgment of this Court in Sahney Steel & Press Works Ltd. Etc. (supra) was on its own facts; so also, the judgment of this Court in Ponni Sugars & Chemicals Ltd. (supra). The nature of the subsidies in each of the three cases is separate and distinct. There is no straightjacket principle of distinguishing o capital receipt from a revenue receipt.

It depends upon the circumstances of each case. As stated above, in Sahney Steel

& Press Works Ltd. Etc. (supra), this Court has observed that the production incentive scheme is different from the scheme giving subsidy for setting up industries in backward areas."

18. *Now coming to the findings of the Tribunal on the issue, we find that the Tribunal has referred to various paras appearing in the two judgments to support its view that the receipts in the hands of the assesseees were production incentives and thus revenue receipt and not capital receipt. This, however, appears to have been done without appreciating that the observations made in those paras were in the context of the schemes as such, which the apex Court was considering to find the intent and purpose of the incentives under those schemes, and not the law laid down as such.*

19. *The Tribunal has relied upon five factors to hold the incentives in question as production incentives but without dealing with that part of the scheme, whereby unemployment in the State had been intended to be eradicated creating atmosphere for accelerated industrial development to provide employment opportunities to deal with the social problem of unemployment.*

This in our view was a lopsided interpretation of the New Industrial Policy and concessions formulated by the Central Government for the State of Jammu & Kashmir vide Office Memorandum of 14th June, 2002.

20. *Therefore, in view of the clear legal position adumbrated by the Hon'ble Supreme Court of India on the issue in*

question, that to determine the nature and intent of the incentives as to whether those were revenue receipts or capital receipts, the purpose underlying the incentives was the determinative test, there may not be any necessity of referring to the judgments of other High Courts of the country referred to by the appellants' learned counsel, some of which had been considered by Hon'ble Supreme Court of India in the above-referred cases.

21. Thus, *finding that the New Industrial Policy and other concessions for the State of Jammu & Kashmir have not been correctly appreciated by the Tribunal, we proceed to examine the true intent and purpose underlying the Policy and concessions contemplated by the Office Memorandum of 14th June, 2002 and the statutory notifications issued in this behalf.*

22. *Perusal of the Office Memorandum dt. 14th June, 2002 indicating New Industrial Policy and other concessions for the State of Jammu & Kashmir, makes it explicit that the concessions were issued to achieve twin objects viz. (i) Acceleration of industrial development in the State of Jammu & Kashmir, which had been found lagging behind in such development and (ii) Generation of employment in the State of Jammu & Kashmir.*

Amendment introduced to the Office Memorandum vide notification of 28th Nov., 2003 of the Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) eloquently demonstrates the Central Government's intention in extending the incentives. The Government's objective, as conveyed by Hon'ble the Prime Minister at Srinagar on

19th April, 2003, was, for creation of one lac employment and self-employment opportunities in Jammu & Kashmir State.

23. To achieve the purpose and objective referred to hereinabove, it was, inter alia, provided in the Central excise notifications that the exemptions contained in the notifications would be available only on production of certificate from general manager of the concerned District Industry Centre to the jurisdictional Dy. CCE or the Asstt. CCE, as the case may be, to the effect that the unit had created required additional regular employment, which would not, however, include employment provided by the industrial units to daily wagers or casual employees engaged in the units.

24. A close reading of the Office Memorandum and the amendment introduced thereto with para No. 3 appearing

in the Central Excise Notification Nos. 56 and 57 of 11th Nov., 2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu & Kashmir and the generation of employment, so contemplated, was not only casual or temporary, but was on the other hand, of permanent nature.

25. *Considered thus, the paramount consideration of the Central Government in providing the incentives to the new industrial units and substantial expansion of the existing units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self-employment, hence a purpose in public interest.*

26. *In this view of the matter, the incentives provided to the industrial units, in terms of the New Industrial Policy, for accelerated industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional permanent source of employment to the unemployed in the State of Jammu & Kashmir were in fact, in the nature of creation of new assets of industrial atmosphere and environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve public purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assessees alone.*

27. *Thus, looking to the purpose of eradication of the social problem of unemployment in the State by acceleration of*

the industrial development and removing backwardness of the area that lagged behind in industrial development, which is certainly a purpose in the public interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellant-assessees cannot be construed as mere production and trade incentives, as held by the Tribunal.

28. *Making of additional provision in the scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of new assets cannot be viewed in isolation to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that*

the incentives were made available only to the bona fide industrial units so that larger public interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum was achieved.

29. *The other factors, which had weighed with the Tribunal in determining the incentives as production incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for perpetual employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.*

30. *For all what has been said above, the finding of the Tribunal on the first issue*

that the excise duty refund, interest subsidy and insurance subsidy were production incentives, hence revenue receipt cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel (supra) and Ponni Sugars case (supra).

31. *The finding of the Tribunal that the incentives were revenue receipt is, accordingly, set aside holding the incentives to be capital receipt in the hands of the assesseees.”*

3.2. *In view of the aforesaid judicial precedents, it is held that the incentive allowed to the appellant is in the nature of capital receipt and the Assessing Officer is directed to allow the claim accordingly.”*

9. The Ld. D.R. relied upon Order of the A.O.

10. On the other hand, Learned Counsel for the Assessee reiterated the submissions made before the

authorities below. He has submitted that the assessee due to industrial unit in Udhampur enjoyed subsidy in the form of excise duty refund. The assessee has availed the incentive for setting-up new unit and has been granted for development of industries and generation of employment for new units for making substantial expansion. Copy of the Scheme is filed. He has submitted that at the stage of granting benefit, purpose test is to be applied as is held by the Hon'ble Supreme Court in the case of Pooni Sugars & Chemicals Ltd., (supra). He has submitted that the issue is covered by the Judgment of Hon'ble Jammu & Kashmir High Court in the case of Shree Balaji Alloys vs., Commissioner of Income Tax (supra).

11. After considering the rival submissions, we do not find any merit in the departmental appeal. The assessee has referred to Notification issued for New Industrial Policy in which the Government of Jammu & Kashmir has requested for special package for development of industries in the State. On the lines the industrial policy of the State Government was also notified by the Central Government.

Thus, the assessee received the subsidy in the form of excise duty refund for development of industry and generation of employment for new units or making substantial expansion. Therefore, purpose test is satisfied in the case of the assessee for the purpose of grant of subsidy for setting-up industrial unit in the State of Jammu and Kashmir. The Ld. CIT(A) correctly followed the decision of Hon'ble Supreme Court in the case of Pooni Sugars & Chemicals Ltd., (supra) and Judgment of Hon'ble High Court of Jammu and Kashmir in the case of Shree Balaji Alloys vs., Commissioner of Income Tax (supra) in which similar Notification have been considered and the Hon'ble High Court held as under :

“Excise refund and interest subsidy received by the assesseees in pursuance of the incentives announced and sanctioned vide Government of India, Ministry of Commerce and Industry's Office Memorandum dt. 14th June, 2002 and Central Excise Notification Nos. 56 and 57 dt. 14th Nov.,

2002 and other notifications issued on the subject, pertaining to the Industrial Policy for the State of Jammu & Kashmir, is capital receipt.”

11. In view of the above, we dismiss the departmental appeal.

12. In the result, appeal of the Revenue dismissed.

Order pronounced in the open Court.

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 13th November, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT “E” Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches : Delhi.