IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

Before Sh. Bhavnesh Saini, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1539/Del./2016 : Asstt. Year : 2011-12

M/s Crystal Crop Protection (P) Ltd. GI-17, G.T. Karnal Road, Azadpur, Delhi-110033	Vs	DCIT, Circle-6(2) New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCJ3574E		

Assessee by : Sh. S. S. Nagar, CA
Revenue by : Ms. Ashima Neb, Sr. DR

Date of Hearing: 02.12.2019		**Date of Pronouncement: 19.12.2019**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal by the assessee is directed against the order of ld. CIT (A)-2, New Delhi dated 29.12.2015.

2. Following grounds have been raised by the assessee:

"1. Because the Learned Commissioner of Income Tax(Appeals) erred in law as well as facts while confirming the following additions:

Details	*Additions made by the Assessing Officer and confirmed by the CIT(Appeals)*
	Amount in Rs.
(i) Disallowance u/s 14A read with Rule 8D	*2,50,000.00*
Total	*2,50,000.00*

2. That the CIT(A) has erred on facts and in law in overlooking and in summarily rejecting the detailed statement of facts submitted alongwith various documents and evidence placed in and paper book filed and produced, while accepting the lop-sided, factually incorrect and presumptive version of the Learned Assessing Officer with respect to the disallowance under section 14A of the Income Tax Act, 1961 ("Act").

3. That the subsidy received by the appellant under the 'New Industrial Policy and Other Concessions Scheme' from the state of Jammu & Kashmir is to treated as "Capital Receipt" in view of the decision of the Hon'ble Jammu & Kashmir High Court in Shree Balaji Alloys V CIT (239 CTR 70), though wrongly treated as "revenue receipt" in the return of income."

3. Ground Nos. 1 & 2 are inter-related. The assessee company is engaged in the business if manufacturing of pesticides, insecticides, herbicides and fertilizers. The Assessing Officer observed that during the year under consideration, the assessee company had made an investment of Rs.10,00,00,000/- in SBI Mutual Funds, the income from which is exempt in the form of dividend but the assessee did not make any disallowance u/s 14A of the Income Tax Act, 1961. The assessee submitted before the Assessing Officer that the investments in SBI Mutual Fund were made out of own surplus funds and no funds were borrowed for this purpose. Thus, no expenses were liable to be disallowed u/s 14A of the Act read with Rules 8D of the I.T. Rules, 1962. However, the Assessing Officer after recording reasons and following CBDT Circular No. 5/2014 dated 11.02.2014 disallowed Rs.2,50,000/-u/s 14A of the Act read with Rules 8D(2)(iii).

4. During the arguments before us, the ld. AR submitted that the company has not earned any exempt income and hence the disallowance made by the assessee following the CBDT Circular No. 5/2014 dated 11.02.2014 is legally not valid. The ld. DR relied on the orders of the authorities below. The revenue has not disputed the factual position. Hence, keeping in view the judgment of Hon'ble Delhi High Court in the case Cheminvest Ltd. Vs CIT in ITA No. 749/2014 dated 02.09.2015, judgment of Hon'ble Supreme Court in the case of Chitti Logistics wherein the SLP filed by the revenue in the similar matter, we hold that no disallowance is called for. Further, in the case of IL&FS Energy Development Company Ltd., the Hon'ble High Court of Delhi dated 16.08.2017 held that the Circular of the CBDT cannot override the

provisions of the Section 14A. Hence, we hereby hold that the order of the ld. CIT (A) is not legally valid in confirming the disallowance made by the Assessing Officer.

5. The assessee has taken additional ground pertaining to claim of Excise Duty subsidy and interest subsidy as capital receipt which was wrongly treated as revenue receipt. Admission of the additional ground has been opposed in principle by the ld. DR. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs Commissioner Of Income Tax on 4 December, 1996, (229 ITR 383), the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

> "*Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*
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> *6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify*

curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a 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 an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

6. Brief facts of the ground is that the assessee has set up one unit in Jammu & Kashmir and by virtue of New Industrial Policy received interest subsidy and Excise Duty subsidy amounting to Rs.5,28,316/- and Rs.10,17,09,529/-. In computing the total tax liability, the same was claimed as revenue receipt under normal provisions of the Act. It was argued by the ld. AR that the interest and Excise duty subsidy has been granted with the objective of development of industries and generation o employment and considering the purpose test and spirit, Hon'ble High

Court of Jammu & Kashmir in the case of Shree Balaji Alloys Vs CIT (2011) 333 ITR 335 (J&K) held that Excise Duty subsidy, Interest Subsidy and insurance subsidy received with the object of creating avenues for perpetual employment, to eradicate the social problem of unemployment in the state by accelerated industrial development is capital receipt. It was also submitted that the Civil Appeal No. 10061 of 2011 dated 19.04.2016 filed by department has been dismissed by the Hon'ble Apex Court. It was reiterated that the facts of Shree Balaji Alloys is akin to the facts of the instant case.

7. The ld. AR also argued placing reliance is also placed on the decision of Co-ordinate Bench of ITAT in the case of Montage Enterprises Pvt. Ltd. in ITA No. 5124/Del/2011 dated 29.06.2018 wherein it was held that Excise Duty subsidy to be treated as capital in nature stands upheld from the stage of the Hon'ble Supreme Court. Once receipt itself has been treated as capital in nature it cannot be bought to tax, then same cannot be held to be includable in the book profit. The ld. DR relied on the judgment of Co-ordinate Bench of Delhi in the case of Modern Homecare Products Ltd. in ITA No. 2595/Del/2002 holding that it is not the appropriate forum to raise the issue at this juncture.

8. Heard the arguments of both the parties and perused the material available on record.

9. In the case of Jute Corporation of India Ltd. Vs CIT vide order dated 04.09.1990, 1991 AIR 241 held that the Hon'ble Apex Court while adjudicating on the issue of additional ground held that the declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer. If that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate

power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitation if any prescribed by the statutory provisions. In the absence of any statutory provisions to the contrary the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter.

10. The Hon'ble Apex Court has also held that if the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rules can be laid down for this purpose.

11. The similar proposition has reiterated by the Hon'ble Apex Court while dealing with the similar issue in the case National Thermal Power Co. Ltd. Vs CIT 229 ITR 383. The Apex Court reiterated that

> "6. *In the case of Jute Corporation of India Ltd. v. C.I.T. this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The*

Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."

12. While dealing with the case of NTPC, the Hon'ble Apex Court enunciated that it would not be proper if the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) and it amounts to taking too narrow a view of the powers of the Appellate Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a 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 an assessee. Thus, we find that the Courts have always upheld the powers of the Tribunal or rather directed the Tribunals to assess the correct tax liability of the assessees. In case the assessee has wrongly or owing to lack of knowledge pays tax on an item of amount which is not taxable in accordance with the provisions of the Income Tax Act, the assessee would have every right to pray for right taxation of his taxable income.

13. Thus, it can be said that the claim of the assessee has to be considered based on the fact that whether the amounts in question or taxable or not, notwithstanding the fact that the assessee has suo-moto offered the amounts to taxation already. For determination of the issue whether the Assessing Officer or the Tribunal empowered to consider the plea of the assessee, the provisions of the Act are examined.

14. Year-1989 -- The provision sub-section (3) was substituted by the following provision by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1st April 1989, which read as follows "(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points,

and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him on the basis of such assessment."

15. On perusal of the above provision, it is noted the Legislature specifically excluded the A.O.'s power to determine sum 'refundable' to the assessee on completion of assessment under sub-section (3) of Section 143 of the Act. The intention of the Legislature in introducing amended Section 143(3) was explained by the CBDT in Circular No. 549 dated 31.10.1989 wherein the Board stated that under the amended provisions, the ITA No.679/Kol/2016 Smt. Sharmila Kumar, AY- 2011-12 Assessing Officer in an assessment order passed under section 143(3) cannot assess income at a figure lower than the returned income, nor can loss be assessed at a figure higher than the returned, and therefore no tax paid with reference to the returned income can now be refunded to the assessee on completion of regular assessment.

16. Year 1998 -- The above provision was later on substituted by the Finance (No.2) Act of 1998 and the power to determine 'sum refundable' to the assessee by the Assessing Officers in the proceedings u/s 143(3) was re-instated by the Legislature. The relevant provision, as it stands now reads as under:

> *"(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment."*

17. The CBDT Circular No. 772 dtd. 23.12.1998-- explaining the above substituted provision of Section 143(3) explicitly stated that under the erstwhile provisions, there was no provision to issue refund and the

Assessing Officer was only empowered to determine the sum payable by the assessee, but under the amended provisions the A.O. is empowered to provide for determination of sum payable by the assessee as well as the refund of any amount due to him.

18. On harmonious reading of these provisions & after giving due consideration of the legislative history of Section 143(3) and the judgment of the Hon'ble Calcutta High Court in the case of CIT Vs Britannia Industries Ltd in ITA No. 03/2013 vide order dated 13.07.2017 held that even if it (accepting the fresh claim of the assessee) results in an assessment below the returned income and consequently refund arises, it is valid as per law.

19. The Hon'ble High Court has also held that there is no conflict between the Gurjargravures Private Ltd. and Goetze (India) Ltd. In the former a claim for exemption was for the first time put up before the Appellate Assistant Commissioner who rejected the claim as not made before the I.T.O. This rejection was set aside by the Tribunal with direction upon the Appellate Assistant Commissioner to entertain the question of relief under section 84, claimed by the assessee in that case. The Supreme Court held that it was not competent for the Tribunal to have done so. The distinction between the two authorities eliminating any conflict is that in Gurjargravures Private Ltd. the competence of the Tribunal to direct the Appellate Assistant Commissioner to entertain a claim not made before the I.T.O was found to be lacking. In Goetze (India) Ltd. the Supreme Court held that the assessing Authority's power was limited but not that of the Tribunal in the context of dealing with a claim of the assessee therein not put forward before the Assessing Officer. In Gurjargravures Private Ltd. (supra) the Tribunal itself did not consider to allow the claim for relief.

20. Further, the CBDT Circular No. 14(XL-35 dated 11.04.1955) wherein it is held as under:

> "*3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the ITA No.679/Kol/2016 Smt. Sharmila Kumar, AY- 2011-12 department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessees on whom it is imposed by law, officers should*"

21. Further, we also note that the relief sought cannot be refused merely because the assessee has omitted to claim the relief as held by the Hon'ble Supreme Court in Anchor Pressings P. ltd. Vs. CIT 161 ITR 159. Hence, keeping in view the entire facts on record, the judicial pronouncements of the Hon'ble Apex Court on the issue of allowability of the claim, we hereby hold that the assessee is eligible to raise the issue at appellate levels.

22. Having said so, the issue whether the Excise Duty subsidy and interest subsidy can be treated as capital receipt is examined. The similar subsidy has been allowed as capital receipt and also the issue of computation of profits u/s 115JB has been examined by the Co-ordinate Bench of Tribunal in ITA No. 3837/Del/2016 in the case of M/s Dhanuka Agritech Ltd. wherein the appeal of the assessee is allowed. The same is squarely applicable to the facts of the instant case. Further, the matter stands squarely covered by the order of the Hon'ble Jammu & Kashmir High Court in the case of Shri Balaji Alloys Vs CIT 333 ITR 335. The snippets of the order of the Hon'ble High Court and the decision of the Hon'ble Apex Court on the issue is as under:

> "*The assessee, pursuant to the New Industrial Policy announced for the State of J&K, received excise refund and interest subsidy, etc which it claimed to be a capital receipt. In the alternative, it was claimed that the same was eligible for deduction u/s 80-IB. The AO, CIT (A) and Tribunal rejected*

the claim and held the receipts to be revenue on the ground that the subsidy (i) was for established industry and not to set up a new one, (ii) it was available after commercial production, (iii) it was recurring in nature, (iv) it was not for purchasing capital assets and (v) it was for running the business profitably. On appeal by the assessee, the High Court (333 ITR 335) reversed the lower authorities and held as follows:

(i) The ratio of Sahney Steel 228 ITR 253 (SC), Ponni Sugars 306 ITR 392 (SC) and Mepco Industries 319 ITR 208 (SC) is that to determine whether incentives & subsidies are revenue or capital receipts, the purpose underlying the incentives is the determinative test. If the object of the subsidy scheme is 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 subsidy scheme is 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. 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 is irrelevant;

ii) On facts, the object of the subsidy scheme was (a) to accelerate industrial development in J&K and (b) generate employment in J&K. Such incentives, designed to achieve a public purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone. It cannot be construed as mere production and trade Incentives;

(iii) The fact that the incentives were available only after commencement of commercial production cannot be viewed in isolation. The other factors which weighed with the Tribunal are also not decisive to determine the character of the incentive subsidies in view of the stated objects of the subsidy scheme;

(iv) Question whether the subsidy receipts are eligible u/s 80-IB not decided."

23. On appeal by the department to the Supreme Court held dismissing the appeal:

"The issue raised in these appeals is covered against the Revenue by the decision of this Court in "Commissioner of Income Tax, Madras Vs. Ponni Sugars and Chemicals Ltd.",

reported in (2008) 9 SCC 337, or in the alternate, in "Commissioner of Income Tax Vs. M/s Meghalaya Steels Ltd.", reported in (2016) 3 SCALE 192 (383 ITR 217 (SC)). Therefore, for the aforesaid reasons given above, the revenue's ground of appeal is dismissed."

24. The appeal of the assessee on the ground of Excise Duty subsidy and interest subsidy as capital receipt is hereby allowed.

25. Regarding the claim of education cess as an allowable expenditure, we find that the CBDT vide Circular No. 91/58/66 – ITJ(19) clarified as under:

"Interpretation of provisions of Section 40(a)(ii) of the I.T Act – clarification regarding.

Section 40(a)(ii) – Recently a case has come to the notice of the Board where the ITO has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of Section 10(4) of the old Act and Section 40(a)(ii) of the new Act.

2. The view of the ITO is not correct. Clause 40(a)(ii) of the IT Bill, 1961 as introduced in the Parliament stood as under:
"(a) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the ITOs so that further litigation on this account may be avoided."

26. The similar issue of allowability of cess u/s 37 has been examined by the Co-ordinate Bench of ITAT in ITA No. 685/Cal./2014 wherein the amount of the cess paid has been held to be an allowable deduction.

27. Further, we find that the Hon'ble High Court of Judicature for Rajasthan at Jaipur in ITA No. 52/2018 in the case of Chambal Fertilizers

and Chemicals Ltd. held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is acceptable. In that case, the Hon'ble High Court held that there is difference between the cess and tax and cess cannot be equated with the cess. Hence, keeping in view the provisions of the Act, Circular of the CBDT and judicial pronouncements, we hereby hold that the assessee is eligible to claim the deduction of the 'cess' as per the provisions of Section 37 of the Income Tax Act.

28. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 19/12/2019.

Sd/-	**Sd/-**
(Bhavnesh Saini)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 19/12/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR