IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.5370/Mum/2015
(**Assessment Year: 2007-08**)

M/s Welspun Corp Ltd. Welspun House 7th Floor, B-Wing Kamla Mills Compound Senapati Bapat Marg Lower Parel Mumbai-400 013	Vs.	DCIT,Central Circle-22 Room No.465, 4th Floor Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AAACW0744L		
(Appellant)	..	**(Respondent)**

&

ITA No.5722/Mum/2015
(**Assessment Year: 2007-08**)

DCIT,Central Circle-3(3) Room No.401, 4th Floor Aaykar Bhawan M.K.Road Mumbai-400 020	Vs.	M/s Welspun Corp Ltd. Welspun House 7th Floor, B-Wing Kamla Mills Compound Senapati Bapat Marg Lower Parel Mumbai-400 013
		PAN/GIR No.AAACW0744L
(Appellant)	..	**(Respondent)**

Assessee by	Shri Mitesh Shah, CA, AR
Revenue by	Shri Parag Vyas, Sr. Counsel, DR
Date of Hearing	**03/10/2019**
Date of Pronouncement	**13/12/2019**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

These cross appeals filed by the revenue, as well as the assessee are directed against order of the Ld. Commissioner of Income Tax (Appeals) -51, Mumbai, dated 11/09/2015 and they pertain to Assessment Year (AY) 2007-08. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off, by this consolidated order.

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

1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A} erred in holding mat backward area ıncentive consisting of Sales Tax Incentive and excise duty benefits as Capital Receipt."

2. "Alternatively and without prejudice the CIT(A) should have applied Explanation 10 to Sec.43(1) and should have directed that the backward area incentive should' have been reduced from the actual cost."
3. "On the facts and in the circumstances of the cases and in law, the Ld.CIT(A) erred in deleting the disallowance made u/s.14A without appreciating that Rule 8D is squarely applicable'
4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition on account pF depreciation on fixed assets u/s.40a(ia) read with section 37 in respect of capitalization of professional fees capitalized of certain expenses, FCCB Premium and FCCB Issue Expenses,"
5. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition by way of disallowing FCCB Premium."
6. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of by way of disallowing depreciation In respect of FCCB premium first debited to pre-operative expenses and thereafter capitalized in the fixed assets."
7. "On the facts and In the circumstances of the case and in law, the Ld.CIT(A) erred In deleting the addition by way of disallowance of foreign exchange loss incurred in issue of Foreign Currency Convertible Bonds."
8. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The assesse has raised the following grounds of appeal:-

The ground or grounds of appeal are without prejudice to out; another. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that-
(i) the order passed u/s.143(3) rws.153A by the AO is without

jurisdiction and bad in law as the jurisdiction u/s. 153A is vitiated, and
(ii)the additions made by the AO are beyond, the scope of provisions of section 153A.
2.a) On the fact and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition of 328467070/-made by the AO to the income of your Appellant by way of disallowing claim of additional depreciation on the cost of Plant &. Machinery of Rs. 1,64,23,35,348/- purchased in the preceding previous year. The addition made lo the income of the Appellant is incorrect and invalid.
b) The Ld. CIT(A) Tailed to appreciate that after the amendment of section 32(1)(iia)) by the Finance Act, 2005, the condition regarding the previous year which was present in the pre-amended provisions f section 32(i)(iia) has been deleted and therefore, the Appellant is eligible for additional depreciation for subsequent years also in absence of any reference to a specific previous year in the amended provisions of section
c) In reaching to the conclusion and disallowing the claim of additional depreciation, the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.
3.a) On the facts and in the circumstances of the case and in law the Ld.CIT(A) erred in confirming the addition to the extent of Rs.100000/- made by the AO to the income of the Appellant by way of disallowing certain expenditure claimed to have been incurred relating to exempt income invoking the provisions of section 14A.
b) The Id. CIT(A) failed to appreciate that:-
(i) having regard to the accounts there is no reason and basis in reaching to dis-satisfaction with the correctness of the claim of the Appellant that no expenditure was incurred in relation to dividend income which does not form part of the total income and
(ii) the investment in shares was made out of business strategy and there was no major change in such investment.
c) In reaching to the conclusion and confirming such addition the Id. CIT(A) omitted to consider relevant" factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.
4. On the facts arid in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of Rs.1,00,000/- made by the AO to the book profit of the Appellant by way of adding back disallowance made u/s.14A and thereby erred in enhancing the book profit artificially.
5. The Id. CIT(A) erred in holding that levy of interest u/s, 234B, 234C, 234D and 220(2) of the Income Tax Act, 1961 is consequential. The Appellant denies its liability for such interest.
6. The Id. C1T(A) erred in holding that ground raised disputing initial urn of the penalty proceedings u/s.271 (l)(c) of the Income Tax Act, 1961 is premature. The Appellant denies its liability for such penalty

4. The first issue that came up for our consideration from ground No.1 of assessee appeal is challenging the validity of assessment

order passed by the Ld. AO u/s 143(3) r.w.s. 153A of the I.T.Act, 1961. The facts with regard to impugned dispute are that a search and seizure action u/s 132 of the I.T.Act, 1961 was carried out by the department on 13/10/2010 at the business /residential premise of Welspun Group of Companies and its directors. Consequent to search notice u/s153A of the I.T.Act, 1961 was issued calling for return of income for the year under consideration. In response, the assessee has filed return of income on 09/09/2011 declaring total income of Rs. 1,17,91,196/-, representing short term capital gains with current year loss of Rs. 115,26,71,880/-, which is same as shown in the revised return of income filed on 15/09/2008 u/s 139 of the I.T.Act, 1961. The case was selected for scrutiny and the assessment has been completed u/s 143(3).r.w.s. 153A of the I.T.Act, 1961 on 26/03/2013.

5 The Ld. AR for the assessee submitted that the assessment order passed by the AO u/s 143(3).r.w.s. 153A of the I.T.Act, 1961 is without jurisdiction and bad in law, because the additions made by the Ld.AO consequent to invalid assessment are beyond the scope of provision of section 153A of the Act .The Ld. AR further submitted that the assessment for the impugned assessment year is unabated as on the date of search. Consequently, the Ld. AO is precluded from making any additions qua incriminating material found as a result of search. In this case, if you go through, the additions made by the Ld. AO in the assessment framed u/s153A, then nowhere, the Ld. AO has referred to incriminating material found as a result of search. Therefore, the assessment order passed by the Ld. AO making various additions is bad in law and liable to be quashed. In this regard, he relied upon the following judicial precedents.

1. *CIT vs Smt. Shaila Agarwal 204 Taxman 276 (All.)*

2. *All Cargo Global Logistics Ltd Vs. DCIT Mumbai ITAT Special Bench-137 ITD 287*
3. *CIT vs. Anil Kumar Bhatia 24 taxman.com 98 (Del.)*
4. *CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. 58 Taxmann.com 78(Bom.)*
5. *Jai Steel (India) Vs. ACIT 36 taxmann.com 523 (Raj)*
6. *Gurinder Singh Bawa Vs. DCI 28 taxmann.com 328 (Mumbai-Trib.)*

6. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that, the assessment for the impugned assessment year is abated as on the date of search because, the Ld. AO has reopened the assessment u/s 147 of the I.T.Act 1961, by issuing notice u/s 148 on 26/02/2010. The time limit for completion of re-assessment u/s 143(3) r.w.s. 147 ends on 31/03/2011. Further, search and seizure action was carried out in this case on 13/10/2010. Since, the date of search is well within date of completion of assessment u/s 143(3) r.w.s. 147of the Act, the assessment for the impugned year is abated and consequently, the Ld. AO is entitled to assess or re-assess total income, including undisclosed, if any found as a result of search. Therefore, there is no merit in the contention of the assessee and hence, the same needs to be rejected.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. It is a settled position of law that in case of search and seizure assessment, the assessment can be framed only qua incriminating material found as a result of search, where the assessments are unabated/concluded as on the date of search. Further, in case of

abated assessments, the Ld. AO is empowered to asses or re-assesses total income, including undisclosed income, if any found as a result of search. Similarly, the concept of abated and unabated assessment has been explained in the statue. As per the provision of section 153A, if any assessment proceedings are pending as on the date of search, then those assessments are abate and the Ld.AO shall have the powers to assess or re-assess total income of those assessment years. The concept of unabated assessment has been explained by the courts, as per which any assessment, which is not pending as on the date of search is considered as unabated assessment. In the light of above legal position, if you examine facts of the present case, it is abundantly clear that the assessment for the impugned assessment year is abated as on the date of search, because before search and seizure action conducted on 13/10/2010, the Ld. AO has reopened the assessment u/s 147 of the Act, by issuing notice u/s 148 on 26/22/010. Further, once, the assessment is reopened, then the Ld. AO shall have time limit for completion of assessment one year from the end of the relevant assessment year in which notice u/s 148 is issued. In this case, since notice u/s 148 was issued on 26/12/2010, the Ld. AO will have time limit for completion of reassessment up to 31/03/2011, which is much later than the date of search i.e on 13/10/2010. Consequently, the assessment for the impugned assessment year is abated and the Ld. AO shall have the power to assess or re-assess total income, including undisclosed, if any found as a result of search.

8. Coming back to case laws relied upon by the assessee. Although, the assessee has relied upon plethora of juridical precedents, including the decision of Hon'ble Bombay high Court, in the case of CIT vs Continental Warehousing Corporation (Nhava

Sheva) Ltd. 58 taxmann.com 78, but, on perusal of case laws relied up on by the assessee, we find that all case laws are applicable in a situation, where the assessments are unabated as on the date of search. In this case, since the assessment was abated as on the date of search, the case laws relied upon by the assessee are not applicable and hence are not considered.

9. In this view of the matter and considering facts and circumstances of this case, we are of the considered view that there is no merit in the ground taken by the assessee challenging validity of assessment proceedings passed u/s 143(3) r.w.s. 153A of the Act, and consequently, ground taken by the assessee is rejected.

10. The next issue that came up for our consideration from ground No.2 of assessee's appeal is disallowances of additional depreciation claimed on fixed assets of Rs. 32,84,67,070/-. The assessee has claimed additional depreciation of Rs.32,84,67,070/- u/s 32(1)(iia) @ 20% of the cost of plant and machinery of Rs. 164,23,35,348/-, which were purchased, installed and put to use in the proceeding previous year. The Ld. AO has disallowed the claim of additional depreciation in the second year, on the ground that said claim is allowable in the year in which said plant and machinery was purchased/installed and put to use and also, it is one time claim.

11. The Ld. AR for the assessee submitted that the Ld.CIT(A) was erred in confirming the additions made by the Ld. AO towards disallowances of depreciation, ignoring, the fact that after amendment to section 32(1)(iia) of the Act, by the Finance Act, 2005, the conditions regarding previous year, which was present in the pre amended provision of section 32(1)(iia) of the Act, has been

deleted and therefore, the assessee is eligible for additional depreciation for subsequent years, also in absence of any reference to a specific previous year in the amended provision of section 32(1)(iia) of the Act. The Ld. AR, further submitted that the Ld. CIT(A) in reaching to the conclusion and disallowed the claim of additional depreciation, omitted to consider relevant factors, considerations, principles and evidences furnished by the assessee. In this regard, he relied upon the decision of ITAT, Mumbai, in the case of Aneek Industries Ltd.Vs DCIT in ITA No.993/Mum/2016.

12. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that as per the provision of section 32(1)(iia) of the Act, which deals with additional depreciation, as per which in case of any new plant and machinery which has been acquired and installed after 31/03/2005, by an assesee engaged in the business of manufacturing or production of any article or thing, a further sum equal to 20% of the actual cost of such machinery or plant shall be allowed as deduction under clause (2) and such deprecaitions can be allowed only once, when said plant and machinery was purchased, installed and put to use. The CIT(A) after considering relevant submissions has rightly confirmed additions made by the Ld. AO and his order should be upheld.

13. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The provision of section 32(1)(iia) of the Act, deals with additional depreciations, as per which, in case of any new plant and machinery which has been acquired and installed after 31/03/2005, by assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to 20% of the actual cost of

such machinery or plant shall be allowed as deduction under clause(2) of section 32 of the Act. If you go through the provisions, it may be seen that normal and additional depreciation are two separate deductions available to the assesee and both are independent and cumulative. The expression further sum and shall be allowed in clause (iia) of section 32(1) are indicative of this propositions. The word further means something in addition to. Therefore, the additional depreciation as provided under section 32(1)(iia) is a onetime deduction provided to an assesee engaged in the business of manufacturing or production of any article or thing on any news plant and machinery, which has been acquired and installed in its business. In this legal background, the question that needs to be answered is whether, an assessee can claim additional in the subsequent years in absence of any reference to a specific previous year after amendment by the Finance Act, 2005 in section 32(1)(iia) of the Act. We noted that on a literal reading of section 32(1)(iia), the additional depreciation is restricted to one time deduction and there is no explicit provision entitling the assesee to claim additional depreciation in subsequent year or years, when the additional depreciation was allowed in the year, when plant and machinery has been put to use. Therefore, we are of the considered view that it is illogical and irrational to presume so, when the legislation intention is to allow one time additional depreciation u/s 32(1)(iia) in a previous year in which plant and machinery is installed and put to use. The Ld.CIT(A) after considering relevant facts has rightly noted that there is no error in the findings recorded by the ld. AO in disallowances of additional deprecation on plant and machinery for second year. Therefore, we are of the considered view that the findings recorded by the Ld.CIT(A), while confirming additions made by the Ld. AO towards of additional depreciation in

subsequent years is in accordance with law as enumerated under the provision of section 32(1)(iia) of the Act and hence, the findings of the ld. CIT(A) does not call for any interference from our side. Accordingly, the ground taken by the assessee is dismissed.

14. The next issue that came up for our consideration from ground No.3 of assessee appeal is disallowances of expenditure incurred in relation to exempt income u/s 14A of the I.T.Act, 1961. During the course of assessment proceedings, the Ld. AO noticed that the assessee has earned exempt income by way of dividend at Rs.4,17,31,419/- and claimed the same as exempt income u/s 10(34) of the I.T.Act, 1961. The Ld. AO further noted that the assessee has not made any suo-moto disallowances of expenditure incurred in relation to exempt income. Therefore, considering the amount of investments in shares and securities, which yield exempt income and also taken note of dividend income earned for the year, issued a show-cause notice and called upon the assessee to explain as to why disallowances of expenditure contemplated u/s 14A shall not be disallowed by invoking Rule 8D of I.T.Rules, 1962. In response, the assesee submitted that the investments made in shares and mutual funds are out of own funds and also, it has not incurred any specific expenditure for earning exempt income. Therefore, the question of disallowances of expenditure in relation to exempt income does not arise. The Ld. AO after considering relevant submission of the assessee and also taken note of the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co.Ltd. reported in 2010 328 ITR 81, held that disallowances contemplated u/s 14A shall be worked out in accordance with prescribed procedure provided under Rule 8D and accordingly, invoked said rules and determined total disallowances

of Rs.95,64,303/-. The assessee carried the matter in appeal before the Ld.CIT(A). The Ld.CIT(A) for the detailed reasons recorded in his appellate order and also, considering the decision of Hon'ble Bombay High Court, in the case of Godrej & Boyce Manufacturing Co.Ltd vs DCIT(supra) noted that the provision of Rule 8D does not apply prior to assessment year 2008-09 and accordingly, by considering the nature of investments and amount of dividend income earned for the year directed the Ld.AO to make an adhoc disallowances of Rs. 1 Lack to meet the expenditure incurred in relation to exempt income. Aggrieved by the Ld.CIT(A) order, the assessee, as well as the revenue are in appeal before us.

15. The Ld. DR submitted that the Ld.CIT(A) was erred in restricting disallowances of expenditure u/s 14A to an adhoc amount of Rs. 1 Lac without appreciating the fact that provisions of section 14A and Rule 8D are interconnected and hence, said disallowances needs to be worked out, as per the prescribed method provided under Rule 8D of Income Tax Rules 1962.

16. The Ld. AR for the assessee, on the other hand, submitted that this issue is squarely covered in favor of the assesse by the decision of Hon'ble Bombay High Court in assessee own case for AY 2009-10, where the Hon'ble High Court held that provisions of Rule 8D has no completion prior to assessment year 2008-09. Therefore, there is no reason for the Ld. AO, as well the Ld.CIT(A) to make an adhoc disallowance of expenditure.

17. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. No doubt, the Hon'ble Bombay High court, in the case of Godrej &

Boyce Manufacturing Co.Ltd vs DCIT(supra) has held that provision of Rule 8D of I.T.Rules, 1962 has no application prior to assessment year 2008-09. But, nowhere was it stated that expenditure related to exempt income shall not be disallowed, when the assesse has earned huge exempt income being dividend from shares and securities. Further, although provisions of Rule 8D has no strict application for the year under consideration, but a reasonable expenditure related exempt income needs to be estimated considering the nature of investments and the amount of exempt income earned by the assesee. In this case, the assessee has earned huge amount of exempt income in the form of dividend from shares amounting to Rs.4,17,31,419/-, but did not disallowed any expenditure on its own. Although, the Ld. AO has determined disallowances, as per Rule 8D and which is on higher side, when compare to nature of investments and amount of exempt income earned for the year, but adhoc disallowances of Rs. 1 Lac sustained by the Ld.CIT(A) cannot be accepted. Therefore, considering the totality of facts and circumstances of this case and also taken note of the decision of the Hon'ble Bombay High Court in assessee's own case for AY 2009-10, we are of the considered view that a reasonable amount of expenditure attributable to exempt income needs to be disallowed. Accordingly, we direct the Ld.AO to disallow 5% of total exempt income earned for the year towards expenditure incurred in relation to exempt income u/s 14A of the I.T.Act, 1961. We ordered accordingly.

18. The next issue that came up for our consideration from ground No.1 and 2 of revenue appeal is treatment of sales tax incentives and excise duty benefits received by the assessee as capital receipts. The Ld. AR for the assessee submitted that this issue is

squarely covered in favour of the assessee by the decision of ITAT, Mumbai Bench in the case of Welspun India Ltd. vs DCIT in ITA No. 5376/Mum/2015 for AY 2008-09, where under identical set of facts the Tribunal held that sales tax incentives and excise duty benefits received by the assesee are in the nature of capital receipts not liable to tax.

19. The Ld. DR, on the other hand, fairly accepted that the issue is squarely covered in favour of the assesee by the decision of ITAT, Mumbai Bench in assessee group company cases. However, he strongly supported order of the Ld. AO and also, referred AS-2 and AS-10 issued by the ICAI for valuation of inventory and accounting of fixed assets and submitted that as per the provision of section 43(1) and Explanation (10), the same needs to be reduced from actual cost of assets.

20. We have heard both the parties, perused the material available on record and gone though orders of the authorities below. We find that an identical issue has been considered by the co-ordinate bench of ITAT, in the case of Welspun India Ltd. Vs DCIT in ITA No. 5376/Mum/2015, where under identical set of facts, the Tribunal held that sales tax incentives and excise duty benefit received by the assessee is in the nature of capital receipts not liable to tax. The relevant findings of the Tribunal are as under:-

> *"5.2. This issue of chargeability to income-tax of incentives by way of refund of excise duty and exemption of sales tax incentive which were given post commencement of production after the new industrial unit was set up by entrepreneurs in Kutch District has now reached before the tribunal at the behest of the Revenue and both the parties have advanced detailed arguments including written submissions filed by Revenue. The contentions were raised by Revenue's Special Counsel to explain that there is a difference between subsidy and incentive. The learned Special Counsel for Revenue explained that subsidy involves cash flow while there is no cash flow in the case of incentives. The Special Counsel for*

Revenue relied upon the Accounting Standard AS-2 issued by ICAI , para 7 to contend that cost of purchases of the inventories will include purchase price including duties and taxes other than those duties and taxes subsequently recoverable by enterprise from the taxing authorities. Thus, it was submitted in alternative that even if the said incentives are treated as capital receipt by tribunal, the taxes recoverable from Government are not part of the cost of the asset and the refund of Excise duty and exemption of Sales tax incentives should be reduced from cost of the assets before allowing depreciation, while on the other hand Ld. Counsel for the assessee has submitted that the issue of said Kutch investment subsidy incentive by way of refund of Central Excise and Exemption of Sales Tax incentives have been gone through by the ITAT, Mumbai Benches in the case of group concern of the assessee in Welspun Steel Ltd., v. DCIT/ACIT, vide appellate order dated 18.12.2015 , in appeals in ITA no. 7630/Mum/2011 and 8294/M/2011 for AY 2007-08, ITA no. 6371/Mum/2014 for AY 2006- 07, ITA no. 6372/Mum/2014, 6304/Mum/2014 for AY 2007-08, ITA no. 6373/Mum/2014, 6305/Mum/2014 for AY 2008-09, ITA no. 6374/Mum/2014, 6306/Mum/2014 for AY 2009-10, ITA no. 6375/Mum/2014, 6307/Mum/2014 for AY 2010-11, ITA no. 6376/Mum/2014, 6308/Mum/2014 for AY 2011-12, vide common order dated 18.12.2015 , wherein the tribunal has held that the said incentives are capital receipt and further it has been held that the said amount of incentives received by the assesee shall not be reduced from the cost of the asset of the assessee despite provisions of Section 43(1), Explanation 10 , by holding as under:- —

> *5. The brief facts qua the issue involved is that, assessee is engaged in the business of manufacturing of sponge Iron, Steel Ingots and rolled product. In the wake of devastating earthquake in Kutch District, Gujarat, the Central Government, vide notification No. 39/2001 dated 7th August, 2001 issued an excise benefit incentive scheme and State Government of Gujarat also vide its Notification dated 9th November, 2001 announced an incentive scheme for Sales-tax exemption known as —Incentive Scheme, 2001 for Economic Development for Kutch Districtǁ. Both these schemes were for setting-up of a new industrial unit/s in Kutch District after complying with the terms and conditions as set out in the notifications and schemes of the Central and State Government respectively. The object of both the schemes was economic development of Kutch District after the earthquake and creation of new employment opportunities and attraction of large scale investments. During the previous year, the assessee had received following incentives by the State government and Central government:-*
>
> *(i) Sales-tax incentive - Rs. 12,95,99,499*
> *(ii) Central Excise benefit -Rs. 22,37,23,672*
>
> *---*
>
> *Total -Rs.35,33,23,171*
>
> *The amount of incentive received was credited to the profit and loss account, however, the assessee claimed that the said receipts are not taxable as they are capital receipts. The AO while making the assessment has rejected the claim of the assessee on the*

ground that in the assessment year 2006-07, the assessee's claim was rejected by the AO on the ground that the decision of Special Bench in the case of Reliance Industries is pending for disposal before the Hon'ble Bombay High Court.

6. The Ld. CIT(A) too following the decision of Bombay High Court in the case of Reliance Industries, allowed the assessee's appeal. However, later on, this decision of the Hon'ble Bombay High Court has been set aside to the Tribunal for fresh adjudication.

7. Before us, it has been stated that this issue of subsidy / incentive in the case of the assessee had reached to the stage of ITAT, whereby the Tribunal, vide order dated 28.12.2011 had set aside this issue to the file of the AO on the ground that authorities below have not analysed the scheme of subsidy / incentive granted by the respective governments. It has been informed that, till date no assessment order has been passed in pursuance of Tribunal order. Instead a fresh assessment order has been passed under section 143(3) r.w.s. 153A wherein this issue has been confirmed by the AO again without proper analyzing the "purpose test' of the scheme.

8. The Ld. Counsel for the assessee submitted that, now there is catena of decisions not only of the Tribunal but also of the various High Courts including that of the jurisdictional High Court, in favour of the assessee that if the subsidy is given for setting up for a new industrial unit or plant then it is on capital account. In support of this contention a separate compilation of case laws have been filed before us. Explaining the nature of scheme, he submitted that the fundamental object for both the schemes was to set up an industrial plant for economic development and creation of new employment opportunities. From the perusal of these schemes which have been placed in the paper book from pages 35 to 47, he submitted that it can be seen that they were purely for assisting the entrepreneur for setting-up new industrial units and not for running of any industry for profit. He refer to preamble as given in the —Incentive Scheme of 2001 for Economic Development of Kutch District‖ issued by Government of Gujarat dated 09.11.2001. Even in the Central Excise Notification, the same was issued in a public interest for setting up of a new industrial plant and the incentive of Excise Duty benefit was given for a period of five years. He further submitted that the nature of incentive under both the notifications and the accounting treatment by the assessee as stated by the assessee before the authorities below was as under:-

> *(a) The nature of incentives under the Notification and the Scheme and the present accounting treatment are summarized as under:-*
>
> *(a) Excise Duty (in view of the Notification) - Refund of the excise duty paid through PLA on finished goods cleared from the unit after taking Cenvat credit on the inputs. This amount is credited to the profit and loss account as 'Excise Benefit Received and inadvertently offered to tax. Presently, there is no limit for the quantum of such incentive.*

(b) Sales Tax/Value Added Tax (in view of the Scheme) - Purchase of inputs without sales tax and sales without charging of sales tax thus, claiming exemption. However, after the introduction of VAT, refund of VAT paid on inputs and remission of VAT collected on sales is available. Both these components are credited to the profit and loss account as 'Sales Tax Incentives Received' and inadvertently offered to tax. There is a monetary limit specified for the quantum of this incentive linked to investment that is eligible under the Scheme.

(c) The incentive can be availed of only after commencement of production. Further, in so far as it relates to the incentives under the Scheme, the unit has to invest at least 50% of the incentives in the State of Gujrat within a period of 10 years from the date of commercial productio".

Thus, he submitted that, looking to the objects and the purpose for which subsidy was given, the incentive receipts has to be treated as capital. In support of his contention, besides several decisions, he placed reliance on the following decisions:-

Sr.No	***Case Law***	***Citation***
1	*Sahney Steel & Press Works Ltd*	*228 ITR 253 (SC)*
2	*Ponni Sugars & Chemicals Ltd.*	*306 ITR 392 (SC)*
3	*Bougainvillea Multiplex Ent. Centre (P) Ltd*	*373 ITR 14 (Trib*
4	*Chaphalkar Brothers*	*351 ITR 309 (Bom)*
5	*Birla VXL Ltd.*	*32 taxmann.com 330(Guj)*
6	*M/s Ajanta Manufacturing Ltd.*	*ITA No. 793/Rjt/2010*
7	*M/s Mihir Packaging*	*ITA No. 5629/M/2011*
8	*M/s Nikomom Finance Pvt Ltd.*	*ITANo. 3580/M/2012*

9. Ld. Counsel further pointed out that in the case of the assessee, a search and seizure action had taken place on 30.10.2010 in Welspun Group of cases and in pursuance of that notice u/s 153A was issued for the impugned assessment years. The Ld. AO besides treating the said incentives as revenue receipts had taken an additional point by way of an alternative observation that in case, the said receipts are treated as capital receipts, then same shall be reduced from the costs of assets and depreciation claimed on the net cost of the assets will be allowed after reducing the amount of incentives in terms of Explanation 10 to section 43(1). He submitted that such a contention of the AO cannot be upheld, because the same is not applicable in the present case at all, because there is no direct acquisition of asset from the Government subsidy. The subsidy is received in the form of excise tax benefit and sales-tax incentive only when the assessee had set up the whole industrial unit and starts manufacturing and commenced its business of sale. Thus, the said provision is not applicable and in support of his contention, he relied upon the following Tribunal decisions:-

Sr.No.	*Case Name*	*Citation*
1	*Sasisri Extractions Limited*	*122 ITD 428 (Visakhapatnam)*
2	*M/s Harinagar Sugar Mills Ltd*	*ITA No. 772/Mum/2012*
3	*Rasoi Ltd.*	*46 taxman.com214 (Kolkata-Trib)*
4	*Universal Cables Ltd*	*57 taxman.com95(Kolkata –Trib)*
5	*Soham Electroplast Pvt*	*ITA No. 1578/PN/2008*

10. On the other hand Ld. DR strongly relied upon the assessment order especially passed by the AO under section 143(3) r.w.s. 153A dated 25.03.2013 and submitted that, if the incentive/ subsidy has been given in the form of sales-tax or exemption of excise duty then it directly leads to augmentation of profit of the assessee and hence, it is nothing but revenue receipts.

11. We have carefully considered the rival contentions and also perused the relevant material placed on record. The main issue involved is, whether the incentive / subsidy provided by the State Government in the form of sales-tax incentive and in the form of Central Excise benefit by the Central Government for sums aggregating to Rs. 35,33,23,171/- is to be treated as capital receipts or revenue receipts. The Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd vs CIT, reported in [2008] 306 ITR 392 after referring to the earlier decisions of the Supreme Court in the case of Sahney Steel Works Ltd v CIT, reported in [1999] 228 ITR 253, held that the —purpose for which subsidy is given is the crucial factor‖. The purpose is to be judged from the character of the receipts in the hands of the assessee which has to be determined with respect to the purpose for which the subsidy is given. The point of time is not relevant and also the source and the form of subsidy is immaterial. If the subsidy has been given to set-up new units or for substantial explanation of existing units, then it is a capital receipt. 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. The relevant observation of the Hon'ble apex Court in this regard given in para 14 reads as under:-

> *14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel & Press Works Ltd. (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent of the. capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of. refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis Of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new*

asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly, the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel & Press Works Ltd. 'S 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 is given. In other words, in such cases, one has to apply the purpose test. The point of time 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 setup 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 of the mechanism through which the subsidy is given is irrelevant‖.

12. Now, in the wake of the principle laid down by the Hon'ble Supreme Court, we shall examine the nature of subsidy provided to the assessee. The —Incentive Scheme 2001 for Economic Development of Kutch District of the Gujarat Government‖ gives the fundamental preamble which highlights the basic objective and the purpose for which the incentive by the State Government as well as Central Government is being given has been highlighted in the following manner:-

"The economic activities in the district of Kutch came to a standstill on account of the devastating

earthquake in the State on 26th January, 2001. New employment, opportunities could be created if new Investment takes place. The Government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India have announced excise duty exemption for new industries to promote large scale investment in the district, along with which the State Government has also decided to announce the scheme of sales tax incentives. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided to confine the same only to Kutch district.

13. From the perusal of the above, it is amply clear that the schemes launched was for setting up of new industries in the district of Kutch for the purpose of new employment opportunities and to make industrial and economic environment live. Thus, the scheme of incentives provided by the respective Governments was setting-up of a new unit and not for running of the business more profitably. As laid down by the Hon'ble Supreme Court, the form and the source of subsidy are immaterial and what is material is whether the subsidy is for setting up for a industrial unit or running it for profitability. Similarly, the Central Excise exemption was given in the public interest for setting up of a new industrial unit in the Kutch District. Accordingly on the facts of the present case, we conclude that the incentive given by the State Government and the Central Government is nothing but capital receipts, because applying the —purpose test‖ the incentive / subsidy was given only for setting up of new industrial unit and economic development and generation of new employment opportunities in the Kutch District and not for running the industry for augmenting the profit on day-to-day business. This proposition of law has been reiterated by the Hon'ble Bombay High Court in the case of CIT vs Chaphalkar Brothers, reported in 351 ITR 309, wherein the Hon'ble High Court relying upon the principles laid down by the Supreme Court in the case of Ponni Sugars & Chemicals Ltd has held that if the object of the subsidy was to promote construction of multiplexes, theater complexes then, it would be on capital account. Similarly, views have been taken by the various other High Courts and Tribunal in the decision as referred and relied upon by the Ld. Counsel as above. Thus, We hold that the amount of incentive received by the assessee cannot be taxed as revenue receipt as it is purely on capital account.

> *14. As regards the other plea raised by the AO in the order passed u/s 143(3) r.w.s. 153A, we agree with the contention of the Ld. Counsel that, none of the plant and machinery installed by the assessee for setting up of a new industrial unit has been funded by the Government subsidy. The subsidy here in this case is not specifically intended to subsidies the cost of capital or plant & machinery. The incentive in the form of subsidy by the government here in this case cannot be considered as payment directly or indirectly to meet any portion of the actual cost and hence it does not fall within the purview of Explanation 10 to section 43(1). Thus, this alternative plea as raised by Ld. AO is rejected. Accordingly, the ground raised by the revenue on this score stands dismissed.*

5.3. We have heard rival contentions and perused the material on record including cited case laws, orders of the authorities below and factual matrix of the case. We have also gone through the terms & condition of the said incentive scheme formulated by Central and State Government to grant Central Excise benefits by way of refund and exemption of Sales Tax Incentive as are extracted by learned CIT(A) in his appellate order which are reproduced above in the preceding para's of this order We have observed that the assessee is engaged in the business of manufacturing of Terry Towels. We have observed that there was a devastating earthquake in District Kutch in Gujarat on 26.01.2001. In order to redevelop and rehabilitate the said Kutch District of Gujarat , the Central and State Government formulated policy with a view to encourage setting up of new industry in said Kutch District wherein certain incentives by way of refund of excise duty as well exemption of Sales Tax incentives were given by Central and State Government to the entrepreneurs for setting up new industry in Kutch District ,as detailed below:-

> ***"NOTIFICATION NO 39 /2001 -CENTRAL EXCISE.***
>
> *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with subsection (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government being satisfied that it is necessary the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tariff Act,1985 (5 of 1986) other than goods specified in the Annexure appended to this notification and cleared from a unit located in Kutch district of Gujarat from so much of the duty of excise or the additional duty of excise, as the case may be, leviable. The exemption contained in this notification shall be subject to the following conditions, namely;-*
>
> *(i) It shall apply only to new industrial units, that is to say, units which are set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of December, 2004;*

(ii) In order to avail of this exemption, the manufacturer shall produce a certificate from a Committee consisting of the Chief Commissioner of Central Excise, Ahmedabad and the Principal Secretary to the Government of Gujarat, Department of Industry, to the jurisdictional Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, that the unit in respect of which exemption is claimed is a new unit and has been set up during the time period specified in condition (i) above.

(iii) Before effecting clearances under this notification, the manufacturer shall also furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on the date of commencement of commercial production, to the Assistant Commissioner the Deputy Commissioner of Central Excise, as the case may be.

(iv) The manufacturer shall also produce a certificate from the said Committee confirming the original value of investment and such a certificate shall be produced within a period of one month from the date of commencement of commercial production, or such extended period as the said Assistant Commissioner or Deputy Commissioner may allow.

(v) In case on the basis of such certification, or otherwise, the original value of investment in plant and machinery,

(a) is found to be less than rupees twenty crore but was declared to be rupees twenty crore or more, the manufacturer shall be liable to pay back the entire amount of duty exemption availed under the notification alongwith interest at the rate of twenty four per cent per annum as if no exemption were available; or

(b) is found to be less than the declared value and was declared to be below rupees twenty crore, the manufacture shall be liable to pay duty on the goods cleared ,if any, in excess of twice the actual value of original investment in each of the years during which exemption has been claimed under this notification alongwith interest at the rate of twenty four per cent per annum , as if no exemption were available to those clearances under this notification.

(vi) The exemption shall apply for a period not exceeding five years from the date of commencement of commercial production by the unit.

The sales tax incentive scheme formulated by State Government of Gujarat is detailed hereunder:

SALES TAX INCENTIVE SCHEME 2001 FOR KUTCH DISTRICT

The economic activities in the district of Kutch came to a standstill on account of devastating earthquake in the State on 26th January, 2001. New employment opportunities could be created if new investment takes place. The Government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India have announced excise duty

exemption to new industries to promote large scale investment in the district, along with which the State Government has also decided to announce the scheme of sales tax incentive. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided to confine the same only to Kutch district.

Conditions

Under this scheme, following conditions shall be applicable to sales tax incentives. In the case of violation of one or more conditions, the amount of sales tax incentives availed of shall be recovered as arrears of land revenue.

(a) The industrial unit shall have to give a clear undertaking that it shall not transfer or dispose of the assets in any manner, till the expiry of the eligibility period of incentives.

(b) The industrial unit availing of the incentives under the scheme, shall have to install, effectively use and maintain the pollution control equipments as per the standards prescribed and approved by the competent authority.

(c) The industrial unit shall have to continue production up to the period of eligibility. However, if the unit does not remain in continuous production on account of the reasons beyond the control of the management, the unit shall present its case before the State Level Committee as an individual case on which the committee can take decision to waive the period of discontinuation of production based on the representation made.

(d) The industrial unit shall have to furnish the details of production, employment and other information every year before 30th June or from time to time as sought by the State Government.

(e) As per the employment policy of the Government of Gujarat, the unit availing of the incentives, will have to recruit local persons for a minimum of 85% of the total posts and for a minimum of 60% of the managerial and supervisory posts. The unit shall have to submit the details of fulfilling the conditions of local employment to the concerned authority granting the incentives to his satisfaction. The percentage of the above mentioned employment will have to be maintained by the industrial unit during the eligibility period of the incentives. Otherwise, the amount of incentives availed by the unit can be recovered as arrears of land revenue

(f) Unit will have to invest the amount equivalent to 50% of the sales tax incentives availed in the new projects in the state within a period of 10 years from the date of commencement of commercial production.

(g) Unit opting for sales tax deferment scheme for the purpose of deferred amount shall have to give a personal undertaking in the form of security bond as prescribed vide Resolution No.INC-1087-2138-I dated the 1st August, 1990 or equitable charge, second charge.

h) The unit availing of incentives under any other scheme of the State Government will not be eligible to receive benefits under this scheme.

(i) Expansion, diversification or modernization of the existing industries will not be considered eligible for the benefits under this scheme

We have also observed that the Mumbai-tribunal has dealt with this incentive schemes of Central and State Government for giving incentives by Central Excise Benefits by way of refund and exemption of Sales Tax Incentives for setting up industrial units in District Kutch,Gujarat to redevelop the said Kutch District in the wake of devastating earth quakes on 26.01.2011 in the cases of group concern of the assessee in Welspun Steel Ltd. v. DCIT/ACIT, vide appellate order dated 18.12.2015 , in appeals in ITA no. 7630/Mum/2011 and 8294/M/2011 for AY 2007-08, ITA no. 6371/Mum/2014 for AY 2006-07, ITA no. 6372/Mum/2014, 6304/Mum/2014 for AY 2007-08, ITA no. 6373/Mum/2014, 6305/Mum/2014 for AY 2008-09, ITA no. 6374/Mum/2014, 6306/Mum/2014 for AY 2009-10, ITA no. 6375/Mum/2014, 6307/Mum/2014 for AY 2010-11, ITA no. 6376/Mum/2014, 6308/Mum/2014 for AY 2011-12, vide common order dated 18.12.2015 , wherein the Mumbai tribunal has held that the said incentives are capital receipt not exigible to income-tax and further it has been held that the said amount of incentives received by the asseseee shall not be reduced from the cost of the asset of the assessee despite explanation 10 to Section 43(1) , by holding as under

"5. The brief facts qua the issue involved is that, assessee is engaged in the business of manufacturing of sponge Iron, Steel Ingots and rolled product. In the wake of devastating earthquake in Kutch District, Gujarat, the Central Government, vide notification No. 39/2001 dated 7th August, 2001 issued an excise benefit incentive scheme and State Government of Gujarat also vide its Notification dated 9th November, 2001 announced an incentive scheme for Sales-tax exemption known as —Incentive Scheme, 2001 for Economic Development for Kutch District‖. Both these schemes were for setting-up of a new industrial unit/s in Kutch District after complying with the terms and conditions as set out in the notifications and schemes of the Central and State Government respectively. The object of both the schemes was economic development of Kutch District after the earthquake and creation of new employment opportunities and attraction of large scale investments. During the previous year, the assessee had received following incentives by the State government and Central government:-

(i) Sales-tax incentive -Rs. 12,95,99,499
(ii) Central Excise benefit -Rs. 22,37,23,672

Total -Rs.35,33,23,171

The amount of incentive received was credited to the profit and loss account, however, the assessee claimed that the said receipts are not taxable as they are capital receipts. The AO while making the assessment has rejected the claim of the assessee on the ground that in the assessment year 2006-07, the assessee's claim was rejected by the AO on the ground that the decision of Special Bench in the case of Reliance Industries is pending for disposal before the Hon'ble Bombay High Court.

6. The Ld. CIT(A) too following the decision of Bombay High Court in the case of Reliance Industries, allowed the assessee's appeal. However, later on, this decision of the Hon'ble Bombay High Court has been set aside to the Tribunal for fresh adjudication.

7. Before us, it has been stated that this issue of subsidy / incentive in the case of the assessee had reached to the stage of ITAT, whereby the Tribunal, vide I.T.A. No.5373 to 5376/Mum/2015 I.T.A. No.5718, 5721, 5723 and 5725/Mum/2015 28 order dated 28.12.2011 had set aside this issue to the file of the AO on the ground that authorities below have not analysed the scheme of subsidy / incentive granted by the respective governments. It has been informed that, till date no assessment order has been passed in pursuance of Tribunal order. Instead a fresh assessment order has been passed under section 143(3) r.w.s. 153A wherein this issue has been confirmed by the AO again without proper analyzing the _purpose test' of the scheme.

8. The Ld. Counsel for the assessee submitted that, now there is catena of decisions not only of the Tribunal but also of the various High Courts including that of the jurisdictional High Court, in favour of the assessee that if the subsidy is given for setting up for a new industrial unit or plant then it is on capital account. In support of this contention a separate compilation of case laws have been filed before us. Explaining the nature of scheme, he submitted that the fundamental object for both the schemes was to set up an industrial plant for economic development and creation of new employment opportunities. From the perusal of these schemes which have been placed in the paper book from pages 35 to 47, he submitted that it can be seen that they were purely for assisting the entrepreneur for setting-up new industrial units and not for running of any industry for profit. He refer to preamble as given in the —Incentive Scheme of 2001 for Economic Development of Kutch District‖ issued by Government of Gujarat dated 09.11.2001. Even in the Central Excise Notification, the same was issued in a public interest for setting up of a new industrial plant and the incentive of Excise Duty benefit was given for a period of five years. He further submitted that the nature of incentive under both the notifications and the

accounting treatment by the assessee as stated by the assessee before the authorities below was as under:-

(a) The nature of incentives under the Notification and the Scheme and the present accounting treatment are summarized as under:-

(a) Excise Duty (in view of the Notification) - Refund of the excise duty paid through PLA on finished goods cleared from the unit after taking Cenvat credit on the inputs. This amount is credited to the profit and loss account as 'Excise Benefit Received and inadvertently offered to tax. Presently, there is no limit for the quantum of such incentive.

(b) Sales Tax/Value Added Tax (in view of the Scheme) - Purchase of inputs without sales tax and sales without charging of sales tax thus, claiming exemption. However, after the introduction of VAT, refund of VAT paid on inputs and remission of VAT collected on sales is available. Both these components are credited to the profit and loss account as 'Sales Tax Incentives Received' and inadvertently offered to tax. There is a monetary limit specified for the quantum of this incentive linked to investment that is eligible under the Scheme.

(c) The incentive can be availed of only after commencement of production. Further, in so far as it relates to the incentives under the Scheme, the unit has to invest at least 50% of the incentives in the State of Gujrat within a period of 10 years from the date of commercial production.

Thus, he submitted that, looking to the objects and the purpose for which subsidy was given, the incentive receipts has to be treated as capital. In support of his contention, besides several decisions, he placed reliance on the following decisions:-

S.No	***Case Law***	***Citation***
1	*Sahney Steel & Press Works Ltd*	*228 ITR 253 (SC)2*
2	*Ponni Sugars & Chemicals Ltd.*	*306 ITR 392 (SC)*
3	*Bougainvillea Multiplex Ent. Centre (P) Ltd*	*373 ITR 14 (Trib*
4	*Chaphalkar Brothers*	*351 ITR 309 (Bom)*
5	*Birla VXL Ltd.*	*32 taxmann.com 330(Guj)*
6	*M/s Ajanta Manufactu ring Ltd.*	*ITA No. 793/Rjt/2010*

7	*M/s Mihir Packaging*	*ITA No. 5629/M/2011*
8	*M/s Nikomom Finance Pvt Ltd.*	*ITA No. 3580/M/2012*

9. Ld. Counsel further pointed out that in the case of the assessee, a search and seizure action had taken place on 30.10.2010 in Welspun Group of cases and in pursuance of that notice u/s 153A was issued for the impugned assessment years. The Ld. AO besides treating the said incentives as revenue receipts had taken an additional point by way of an alternative observation that in case, the said receipts are treated as capital receipts, then same shall be reduced from the costs of assets and depreciation claimed on the net cost of the assets will be allowed after reducing the amount of incentives in terms of Explanation 10 to section 43(1). He submitted that such a contention of the AO cannot be upheld, because the same is not applicable in the present case at all, because there is no direct acquisition of asset from the Government subsidy. The subsidy is received in the form of excise tax benefit and sales-tax incentive only when the assessee had set up the whole industrial unit and starts manufacturing and commenced its business of sale. Thus, the said provision is not applicable and in support of his contention, he relied upon the following Tribunal decisions:-

S.No	*Case Name*	*Citation*
1	*SasisriExtractis Limited*	*122 ITD 428 (Visakhapatnam)*
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10. On the other hand Ld. DR strongly relied upon the assessment order especially passed by the AO under section 143(3) r.w.s. 153A dated 25.03.2013 and submitted that, if the incentive/ subsidy has been given in the form of sales-tax or exemption of excise duty then it directly leads to augmentation of profit of the assessee and hence, it is nothing but revenue receipts.

11. We have carefully considered the rival contentions and also perused the relevant material placed on record. The main issue involved is, whether the incentive / subsidy provided by the State Government in the form of sales-tax incentive and in the form of Central Excise benefit by the Central Government for sums aggregating to Rs. 35,33,23,171/- is to be treated as capital

receipts or revenue receipts. The Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd vs CIT, reported in [2008] 306 ITR 392 after referring to the earlier decisions of the Supreme Court in the case of Sahney Steel Works Ltd v CIT, reported in [1999] 228 ITR 253, held that the —purpose for which subsidy is given is the crucial factor‖. The purpose is to be judged from the character of the receipts in the hands of the assessee which has to be determined with respect to the purpose for which the subsidy is given. The point of time is not relevant and also the source and the form of subsidy is immaterial. If the subsidy has been given to set-up new units or for substantial explanation of existing units, then it is a capital receipt. 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. The relevant observation of the Hon'ble apex Court in this regard given in para 14 reads as under:-

> *14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel & Press Works Ltd. (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent of the. capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of. refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis Of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly, the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel & Press Works Ltd. 'S 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 is given. In other words, in such cases, one has to apply the purpose test. The point of time 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 setup 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 of the mechanism through which the subsidy is given is irrelevant‖.

12. Now, in the wake of the principle laid down by the Hon'ble Supreme Court, we shall examine the nature of subsidy provided to the assessee. The ―Incentive Scheme 2001 for Economic Development of Kutch District of the Gujarat Government‖ gives the fundamental preamble which highlights the basic objective and the purpose for which the incentive by the State Government as well as Central Government is being given has been highlighted in the following manner:-

"The economic activities in the district of Kutch came to a standstill on account of the devastating earthquake in the State on 26th January, 2001. New employment, opportunities could be created if new Investment takes place. The Government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India have announced excise duty exemption for new industries to promote large scale investment in the district, along with which the State Government has also decided to announce the scheme of sales tax incentives. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided to confine the same only to Kutch district

13. From the perusal of the above, it is amply clear that the schemes launched was for setting up of new industries in the district of Kutch for the purpose of new employment opportunities and to make industrial and economic environment live. Thus, the scheme of

incentives provided by the respective Governments was setting-up of a new unit and not for running of the business more profitably. As laid down by the Hon'ble Supreme Court, the form and the source of subsidy are immaterial and what is material is whether the subsidy is for setting up for a industrial unit or running it for profitability. Similarly, the Central Excise exemption was given in the public interest for setting up of a new industrial unit in the Kutch District. Accordingly on the facts of the present case, we conclude that the incentive given by the State Government and the Central Government is nothing but capital receipts, because applying the —purpose test‖ the incentive / subsidy was given only for setting up of new industrial unit and economic development and generation of new employment opportunities in the Kutch District and not for running the industry for augmenting the profit on day-to-day business. This proposition of law has been reiterated by the Hon'ble Bombay High Court in the case of CIT vs Chaphalkar Brothers, reported in 351 ITR 309, wherein the Hon'ble High Court relying upon the principles laid down by the Supreme Court in the case of Ponni Sugars & Chemicals Ltd has held that if the object of the subsidy was to promote construction of multiplexes, theater complexes then, it would be on capital account. Similarly, views have been taken by the various other High Courts and Tribunal in the decision as referred and relied upon by the Ld. Counsel as above. Thus, We hold that the amount of incentive received by the assessee cannot be taxed as revenue receipt as it is purely on capital account.

14. As regards the other plea raised by the AO in the order passed u/s 143(3) r.w.s. 153A, we agree with the contention of the Ld. Counsel that, none of the plant and machinery installed by the assessee for setting up of a new industrial unit has been funded by the Government subsidy. The subsidy here in this case is not specifically intended to subsidies the cost of capital or plant & machinery. The incentive in the form of subsidy by the government here in this case cannot be considered as payment directly or indirectly to meet any portion of the actual cost and hence it does not fall within the purview of Explanation 10 to section 43(1). Thus, this alternative plea as raised by Ld. AO is rejected. Accordingly, the ground raised by the revenue on this score stands dismissed.

We are in agreement with the aforesaid decision of the tribunal dated 18.12.2015 in the case of Welspun Steel Ltd(supra) as the said incentives by way of excise duty refund and sales tax incentives were given to encourage setting up of new industrial unit in Kutch District to redevelop the Kutch District in the wake of devastating earthquake on 26.01.2001 albeit the said incentives are given post commencement of manufacturing and the said subsidy shall be capital in nature as it is for promoting setting up of

new industry in Kutch District which was devastated by earthquake even if the subsidy is given post commencement of commercial production by way of refund of Central Excise and Exemption of Sales Tax which is not material keeping in view purposive test and the fact that the said incentives were given to encourage making capital investments in Kutch District in setting up new industry to redevelop the Kutch District post devastating earthquakes on 26.01.2001. We also note that Special Bench decision of the Mumbai-tribunal in the case of Reliance Industries Limited(supra) was upheld by Hon'ble Bombay High Court in CIT v. Reliance Industries Limited (2011) 339 ITR 632(Bom.) by holding that no substantial question of law would arises as the object of the subsidy was to set up a new unit in a backward area to generate employment but aforesaid decision of Hon'ble Bombay High court has been set aside by Hon'ble Supreme Court in Civil Appeal Number 7769 of 2011 (arising out of SLP (C) No. 9860 of 2010) dated 09.09.2011 and the matter is remitted back to Hon'ble Bombay High court to decide the question of law framed thereon in accordance with law. This revives the Special Bench decision of the tribunal in the case of Reliance Industries Limited(supra) , which has already held that subsidy which is given for setting up or expansion of industry in a backward area , will be capital in nature, irrespective of modality or source of funds through or from which it is given. Thus, following the ratio of decision of co-ordinate Benches of the tribunal in the case of Welspun Steel Ltd(supra) , we hold that Central Excise benefit and Sales Tax incentive received by the assessee during the impugned assessment year under consideration, are capital receipts not exigible to income-tax and further we hold that the same shall not be deducted from cost of assets for computing depreciation. The ground number 1 and 2 raised by the Revenue in its memo of appeal filed with the tribunal are dismissed. We order accordingly."

21. In this view of the matter and consistent with view taken by the co-ordinate bench and also, considering the facts that the jurisdiction High Court of Bombay has upheld the findings of the Tribunal, in the case of M/s.Welspun Steel Ltd. vs CIT in ITA NO. 1743/2016, vide order dated 26/02/2019, we are of the considered view that there is no error in the findings recorded by the Ld.CIT(A), while deleting additions made by us Ld. AO towards sales tax incentives and excise duty benefits received by the assesee. Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

22. The next issue that came up for our consideration from ground No.4 of revenue appeal is disallowance of depreciation on fixed assets u/s 40(a)(ia) r.w.s 37(1) of the Act, under different categories on the plea that the deprecation was disallowed in the AY 2005-06. The Ld. AO has disallowed depreciation for non deduction of tax at source on certain payments, which are capitalized to fixed receipts, like, professional fees, FCCB premium and FCCB issue expenditure. The Ld.CIT(A) has deleted the additions made by the Ld.AO by following his predecessor appellate order for AY 2005-06.

23. The Ld. AO for the assessee, at the time of hearing submitted that this issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai in assessee own case for Asst. year 2005-06 in ITA.No.3375/Mum/2010 and also ITA No.5371/Mum/2015 for AY 2005-06, where the Tribunal under identical facts deleted addition made by the AO towards disallowance of depreciation on fixed assets.

24. We have heard both the parties and perused the material available on record. We find that the issue is with regard to disallowances of depreciation on fixed assets, in respect of certain expenditure capitalized for non deduction of tax at source was considered in AY 2005-06 in u/s 263 proceedings in ITA No. 3375/Mum/2010. We, further noted that although, the Tribunal has quashed 263 proceedings, but not discussed the issue on merits. Subsequently, in 153A assessments, the Ld. AO has made similar additions. But, the ITAT has deleted said additions in ITA No. 5371/Mum/2015, on technical ground without discussing the issues on merits. Therefore, it is necessary to examine the issue on merits,

whether the claim of the assessee with regard to depreciation on fixed assets, in respect of that expenditure for non deduction of tax at source is in accordance with law. The provisions of section 40(a)(ia) of the Act, is applicable, where any expenditure is debited into profit and loss account without deduction of tax at source, then to that extent, the expenditure on which TDS was not deducted is not allowable as deduction. Similarly, if any amount as capitalized to fixed assets and depreciation was claimed thereon, if no TDS is deducted, in respect of those capitalized fixed assets, then depreciation to that extent is not allowable. The Ld. AR for the assessee has failed to bring on record any evidence to prove that whether, the claim made, in respect of depreciation on fixed assets, in respect of those expenditure is in accordance with provision of section 40(a)(ia) of the Act. Therefore, we are of the considered view that the issue needs to go back to the file of Ld.AO for verification of facts with regard to applicability of provision of section 40(a)(ia) of the Income Tax Act,1961. Hence, we set aside the issue to file of the Ld. AO and direct him to reconsider the issue in accordance with law.

25. The next issue that came up for our consideration from ground No.6 and 7 of revenue appeal is disallowances of FCCB premium and depreciation on FCCB premium debited to pre-operative expenses. The Ld. AO has disallowed said expenditure, on the ground that the assessee has created only a provision, even though the bond holders have not exercised their option during the year under consideration. The Ld.CIT(A) has deleted additions by following his predecessor appellate order for AY 2005-06. Further, although the appeals for AY 2005-06 has been decided by the Tribunal in ITA No.5371/um/2015, but the issue has not been

discussed on merits, because the Tribunal has quashed assessment order on technical grounds. Therefore, it is necessary to discuss the issue on merits, in light of facts brought out by the Ld. AO during the year under consideration. It is the case of the Ld.AO that FCCB premium and FCCB issue expenditure are only a provision, which is not crystallized during the year under consideration, because the bond holders have not exercised their option. It s the claim of the assessee before the AO is that although, the expenditure has been debited to profit and loss account, when provision is created in respective years, but when the option was exercised, the same has been offered to tax in AY 2008-09. In this regard, the assessee has filed statement of total income relevant assessment year 2014-15 to prove that reversal of provision was offered to tax for Asst. year 2014-15.

26. We have heard rival contention of both parties and considered materials on record. We find that initially, the assesse has debited provision towards FCBB premium and FCBB issue expenditure, even though the bond holders have not exercised their option. Further, if any expenditure is debited to profit and loss account by creation of provision and such liability was not crystallized, then obviously, the same cannot be allowed as deduction, and therefore to that extent, the findings of Ld. AO is correct. However, the fact remains that assessee claims to have offered the same for taxation for AY 2014-15, when the bond holders have exercised their option. In this regard, he has filed a copy of statement of total income, where FCCB premium paid on conversion of bonds into equity shares have been disallowed in the statement of total income. But, the facts with regard to the availability of these evidences before the Ld. AO at the time of assessment proceedings are not clear. Hence,

we are of the considered view that the issue needs to go back to the file of the Ld. AO to ascertain the fact with regard to the claim of the assesee that said expenditure has been suffered to tax in AY 2014-15. Hence, we set aside the issue to the file of the Ld. AO and direct him to cause necessary enquiries and if he is found that the said amount has been offered to tax in AY 2014-15, then the additions made for the year under consideration needs to be deleted.

27. In the result, appeal filed by the assesee and appeal filed by the revenue are partly allowed for statistical purpose.

Order pronounced in the open court on this 13 /12/2019

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated: 13/12/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai