IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)
(Through Virtual Court)

ITA. No: 2316/AHD/2018 **(Assessment Year: 2014-15)**

M/s Jindal World Wide Ltd. Jindal Corporate House, Opp. D Mart, Shyamal Shivranjini Cross Road, Satellite, Ahmedabad	**V/S**	**ACIT, Circle-2(1)(2), Ahmedabad**
(Appellant)		**(Respondent)**

PAN: AAACJ3816G

Appellant by	**: Shri Vartik Choksi, AR**
Respondent by	**: Shri Lalit P. Jain, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 23 -10-2020
Date of Pronouncement : 24 -11-2020

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Assessee is directed against the order of the Commissioner of Income Tax ('hereinafter called CIT(A)') order no. CIT(A)-

2/10210/AC. Cir. (2)(1)(2)/2017-18 order dated 19/09/2018 arising out of assessment order dated 15/11/2017. Assessee has taken following grounds of appeal:

1. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in not admitting the additional grounds raised by the appellant during the course of appellate proceedings and not reducing taxable income by interest subsidy of Rs. 5,77,14,810/- and Rs. 20,39,344/- received by the appellant under Technology Upgradation Fund Scheme (TUFS) for Textile and Jute Industries.

1.1 In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A), while not admitting the additional grounds raised by appellant, has erred in stating that decision of Supreme Court in case of NTPC [229 ITR 383] is not applicable in its case when the same is duly applicable in case of appellant. The Ld. CIT(A) ought to have appreciated that appellant is eligible to raise any additional ground before appellate authorities in view of decision of Hon'ble Gujarat High Court in case of Mitesh Impex reported in 46 taxmann.com 30 and Kush Proteins (P.) Ltd. v/s. Principal Commissioner of Income-tax [2018] 93 taxmann.com 42 (Gujarat).

1.2 In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) ought to have appreciated that interest subsidy of Rs.5,77,14,810/- offered as income during the year and Rs.20,39,3447- reduced from capital work in progress should instead be treated as capital receipt in view of decision of Hon'ble Supreme Court in case of Shree Balaji Alloys reported in 80 taxmann.com 239 which is duly applicable on facts of appellant's case.

1.3 In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has erred in stating that decisions relied by appellant for reducing interest subsidy from taxable income are not applicable to its case. The Ld. CIT(A) ought to have appreciated that decision of Hon'ble Supreme Court in case of Shree Balaji Alloys reported in 80 taxmann.com 239 is on similar facts and is duly applicable in case of appellant. Similarly, the decision relied by appellant in case of Sham Lal Bansal 11 taxmann.com 369 (P&H) and Gloster Jute Mills Ltd. 51 taxmann.com 547 (Kol ITAT) duly support the view of the appellant and alleged interest income is required to be reduced from taxable income.

2. Apart from above said, assessee has taken additional ground as follows:

1. In law and in the facts and circumstances of the appellant's case, the Ld. Assessing officer and Ld. CIT(Appeal) has erred in not allowing deduction for

education cess and higher education cess as allowable expenditure u/s 40(a)(ii) of the I.T.Act,1961 in view of the CIRCULAR F. NO. 91/58/66-ITJ(19) DT. 18TH MAY, 1967; while assessing the total income of the appellant. Hon'ble ITAT may direct for allowing deduction for education cess and higher education cess as allowable expenditure in view of the binding CBDT circular and in view of decision of Hon'ble Rajasthan HC in the case of Income Tax Appeal No. 52/2018 Pr. Commissioner Of Income Tax Vs. M/s. Chambal Fertilizers And Chemicals Ltd.

2. In law and in the facts and circumstances of the appellant's case, Hon'ble ITAT may direct the Ld. Assessing officer to reduce the book profitas computed u/s 115JB by capital receipt inform of interest subsidy in total for Rs. 5,97,54,154/- (Rs.5,77,14,810 and Rs. 20,39,344)received by the appellant under Technology Upgradation Fund Scheme (TUFS).

3. The fact in brief is that return of income was filed by the assesse on 28the November, 2014 declaring total income of Rs. 209885380/-. The assessment u/s 143(3) r.w.s. 144C of the Act was finalized on 15.11.2017 assessing the book profit of the assesse at Rs. 323552032/-. Assessee is engaged in the business of Exporter of Cotton made UPS, Fabrics, Yarns etc. manufacturing of Denim Fabrics, Textile Material & Garments.

4. The assesse has raised additional ground of appeal that the interest subsidy of Rs. 5,77,14,810/- received by the assesse under Technology Upgradation Fund Scheme for Textile and Jute Industries and interest subsidy of Rs. 20,39,344/- received under the Technology Upgradation Fund Scheme for Textile and Jute Industries should be treated as capital receipt in view of the decision of Hon'ble Supreme Court in the case of Shree Balaji Alloys reported in 80 taxmann.com 239.

5. With regard to above referred grounds of appeal (which are connected with each other), the appellant has raised additional ground of appeal before the Ld. CIT(A) which is reproduced as at page No. 17 of the appellate order wherein

appellant has claimed interest subsidy of Rs. 5,77,14,810/- received under Technology Upgradation Fund Scheme (TUFs) for textile and Jute Industries and offered as income should be treated as capital receipt. The appellant has also claimed that similar interest subsidy which is reduced from capital work in progress should also be held as capital receipts. Such additional grounds of appeal were not admitted by Ld. CIT(A) stating that as per the case of Goetze (India) Ltd. 284 ITR 323 (SC) has held that the Assessing Officer does not have power to entertain the claim for deduction otherwise than filing a revised return.

6. During the course of appellate proceeding, Ld. Counsel has submitted that the issue of admitting additional ground of appeal was adjudicated in favour of the assessee by Hon'ble Jurisdictional High Court in the case of Mitesh Impex (2014) 46 Taxmann.com 30.

7. Ld. Counsel has also submitted that the additional ground of appeal are required to be adjudicated in view of the decision of Hon'ble Ahmedabad ITAT in DCIT vs. Adani Gas Ltd. in ITA No. 775/Ahd/2014 & Ors. Vide order dated 17/10/2018.

8. The ld. Counsel has further submitted that the Hon'ble Supreme Court in the case of NTPC vs. CIT (1998) 229 ITR 383 (SC) held that it was open assesse to raise the points of law even before the Tribunal.

9. He has further submitted that the Hon'ble ITAT Ahmedabad in assessee's own case in assessment year 2012-13 vide ITA No. 1843/Ahd/2016 vide order dated 20/02/2019 has admitted similar additional ground of appeal.

10. Ld. Counsel has also submitted that the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT (2006) 284 ITR 323 has only negated the jurisdiction of the Assessing Officer and the judgment does not impinge on the power of the Tribunal u/s. 254 of the Act.

11. After referring the aforesaid judicial pronouncement, the ld. Counsel has submitted that claim of the assesse that book profit u/s. 115JB is required to be reduced by capital receipt in the form of interest subsidy to the amount of Rs. 59754154/- and submitted that an identical issue has been adjudicated in favour of the assesse by Hon'ble Calcutta High Court in the case of PCIT vs. Ankit Metal & Power Ltd. (2019) 109 Taxmann.com 93.

12. On the other hand, Ld. Departmental Representative has submitted that in view of the decision of Hon'ble Supreme Court in the Case of Goetze Idnia Ltd. (supra), the additional claim of the assesse without filing revised return of Income should not be entertained.

13. Heard both sides those issues and perused the material available on record. With the assistance of Ld. Representatives, we have gone through the various judicial pronouncements as refereed by the Ld. Counsel.

14. At the outset, we have gone through the decision of the Hon'ble Jurisdictional High Court in the case of Mitesh Impex (2014) 46 Taxmann.com 30. The relevant operative para of the order of Hon'ble High Court is reproduced here under:

> *"26. Brief facts are that in the return filed, the assessees did not raise any claims under section 80-IB or 80HHC of the Act. (In the case of Mitesh Implex Tax Appeal No.2562 of 2009, such claim was though initially made but later on dropped by*

filing revised return). In appeal before CIT(Appeals) such claims were made. In the case of Mitesh Implex, CIT(Appeals) entertained both the claims ignoring Revenue's objection. The assessing officer was granted opportunity to oppose the claims on merits. After examination of facts on record, he disallowed the assessee's claim under section 80-IB on the ground that the manufacturing activity had not commenced during the year under consideration to enable the assessee to make such a claim. He however, accepted the assessee's claim on merits under section 80HHC of the Act, In appeal, the Tribunal rejected the Revenue's contention that in view of the judgment of the Supreme Court in the case of Goetze (India) Ltd. v. CIT [2Q06] 284 ITR 323/157 Taxman 1, such claims could not have been made without filing revised return. There is some ambiguity whether the Tribunal had allowed the assessee's claim under section 80-IB of the Act on merits also or not. Counsel for the assessees, however, clarified that in the case of Mitesh Implex since CIT(Appeals) had rejected the claim on merits, the assessee would not contend that the judgment should be read as also granting such claim on merits.

27. In the case of all other assessees similar facts emerge. The claims under section 80-IB/80HHC were made for the first time before CIT(A) and from facts on record granted to the extent found allowable. The Tribunal had confirmed the view of CIT(A). We may record the Tribunal's discussion on this aspect.

'36. We have heard the rival contention of both the parties We relied upon the decision of Hon'ble Punjab and Haryana High Court in the case of Ramco Industries reported in 17 DTR 241, wherein it is heid as under—

"When the assessee having fully furnished the documents and submitted form No. 10CCB during the assessment proceedings, claiming the deduction under section 80-IB which was not claimed in the return, the deduction is admissible even in absence of revised return. The Hon'ble High Court held that there was no requirement for filing of any revised return. Hon. High Court has further considered the decision of the Hon'ble Goetz (India) Ltd. v. CIT (284 ITR 323) (SC) and after considering the decision of SC the High Court has held that when the assessee has filed form No.l0CCB during the assessment proceedings, the claim is admissible and CIT(A) has rightly allowed the claim of the assessee and we find that there is no requirement of filing any revised return." ,

28. Learned counsel for the department submitted that in view of the decision of the Supreme Court in the case of Goetze (India) Ltd (supra), the assessee could

not have maintained additional claim that too at an appellate stage without revising the return.

29. On the other hand learned counsel Mr. B.S. Soparkar for the assessees referring to various decisions of High Courts and Supreme Court contended that the Tribunal committed no error. We would refer to his citations at an appropriate stage

30. In what manner and to what extent, a ground, a legal contention or a fresh claim can be made at an appellate stage are vexed questions and have occupied the minds of the Courts in numerous occasions.

31. In the case of Jute Corpn. of India Ltd. v. CIT (1991) 187 ITR 688 the Supreme Court noted with approval observation of the Court in the case of CIT v Kanpur Coal Syndicate [1964] 53 ITR 225 to the effect that "The Appellate Assistant Commissioner, therefore, has plenary powers in disposing of appeal. The scope of his power is co-terminus with that of the Income-tax Officer He can do what the Income-tax Officer can do and also direct him to do what he has failed to do. " It was observed that there was no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income-tax Officer. The Act does not place any restriction or limitation on the exercise of appellate power. It was observed that:-

"The above observations are squarely applicable to the interpretation of section 251(1)(a) of the Act. 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 tne 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 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 appears to be no good reason and none was placed before us 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."

32. In case of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC) when the question of law was raised for the first time before the Tribunal though facts were already on record, the Supreme Court observed that there is no reason why the assessee should be prevented from raising such a question before the Tribunal for the first time so long as the relevant facts are on record in respect of the item concerned. There is no reason to restrict the power of the Tribunal in such appeal only to decide the grounds which arise from the order of Commissioner (Appeals). The Tribunal should not be prevented from considering the questions of law arising in assessment proceedings although not raised earlier.

33. In case of Goetze (India) Ltd. (supra) the Supreme Court distinguished the judgment in the case of National Thermal Power Co. Ltd. (supra) on the ground that the same pertained to the power of the Tribunal under section 254 of the Act to entertain a point of law for the first time and commented that such decision does not relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the process the Supreme Court recognized that a new claim could not be entertained by the assessing officer without the assessee revising the return. While doing so it was clarified that:—

"4. . . However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."

34. In the case of CIT v. Jai Parabolic Springs Ltd. [2008] 306 ITR 42/172 Taxman 258 (Delhi), the Delhi High Court held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to the Tribunal arose in the matter and for just decision of the case.

35. In case of CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. [20121 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.) the Bombay High Court considered the issue at considerable length and held that Commissioner (Appeals) as well as the Tribunal have the jurisdiction to consider the additional claim and not merely additional legal submissions. The appellate authorities have discretion to permit such additional claims. Such claims need not be those which became available on account of change of circumstances of law but which were even available when the return was filed.

36. The Delhi High Court once again in recent judgment in the case of CIT v. Sam Global Securities Ltd. [20141 360 ITR 682/F2013] 38 taxmann.com 129 observed that the Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. With these observations Court confirmed the view of the Tribunal reversing the decision of the assessing officer rejecting the claim of the assessee on the ground that no revised return was filed.

37. In case of CIT v. Cellulose Products of India Ltd. M9851 151 ITR 499 (Gui.), Full Bench of this Court held that merely because a ground has not been raised though it could have been raised in support of the relief sought in the appeal, it cannot be said that such ground cannot be raised before the Tribunal. Such ground can be raised provided it falls within the contours of the subject matter of the appeal.

38. It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the judgment in the case of National Thermal Power Co. Ltd.(supra) and that is how various High Courts have viewed the dictum of the decision in the case of Goetze (India) Ltd.(supra). When it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a question of law or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income-tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income.

39. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer.

40. Therefore, any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. In such a case the situation would be akin to allowing a pure question of

law to be raised at any stage of the proceedings. This is precisely what has happened in the present case. The Appellate Commissioner and the Tribunal did not need to nor did they travel beyond the materials already on record, in order to examine the claims of the assessees for deductions under sections 80-IB and 8OHHCofthe Act.

41. In the decisions that we have noted above, the Courts have considered such questions when a legal contention or a claim was based on material already on record but raised at an appellate stage. On such premise we wholeheartedly agree that the appellate authority and the Tribunal would have the power to entertain any such new ground, legal contention or claim. However, it is only the Bombay High Court in the case of CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. (supra), which has travelled a little beyond this preposition and come to the conclusion that even if facts necessary to examine such a claim are not placed before the assessing officer and, therefore, not on record, there would be no impediment in the Commissioner (Appeals) entertaining such a claim. Such an issue does not arise in these appeals. We would, therefore, reserve our opinion on this limited aspect of the matter if and when in future the question presents before us in such form. For the present, we answer Questions (3) and (4) against the Revenue and in favour of the assssssees in manner described above.

42. In the result all appeals are dismissed."

15. Further we have also through the decision of Hon'ble Ahmedabad ITAT in DCIT vs. Adani Gas Ltd. in ITA No. 775/Ahd/2014 & Ors. Vide order dated 17/10/2018. The relevant operative para of the order is reproduced here under:

"21.4 A legal issue also cropped up in the course of hearing as to whether additional ground could be raised in a cross objection filed by the assessee under s.253(4) of the Act. On being enquired on this aspect of the matter, it was submitted on behalf of the assessee that there is no perceptible distinction between the position of law qua cross objection in the matter of filing additional ground. It was submitted that a cross objection has all the trappings of a regular appeal more so in the light of language employed under s.253(4) of the Act.

21.5 We find ourselves in agreement with the propositions made on behalf of the assessee that in a cross objection, there is no bar to raise legal issues for the first time before ITAT. A cross objection is like an appeal. It has all the trappings of an

appeal. It is filed in the form of memorandum and it is required to be disposed in same manner as an appeal. Even where the appeal is withdrawn or dismissed for default, cross objection may nevertheless be heard and determined. Cross objection is nothing but an appeal, a cross appeal at that. This apart, raising of additional ground would only enable the authority concern to correctly assess the tax liability of the assessee. Similar view has been expressed by the co-ordinate bench in the case of ITO vs. Jasjit Singh (Del) in cross objection Nos. 138 to 142/Del/2014 interim order dated 23.09.2014. We thus do not see any impediment in entertaining the additional grounds. The relevant facts are available on record.

21.6 In so far as the merits of the claim made in additional ground is concerned, we observe that where the AO has readjusted the quantum of depreciation in the subsequent assessment year, the assessee is within its legitimate rights to be granted depreciation in AY 2009-10 as per the figures worked by the AO himself. We do not see any perceptible reason for not admitting such claim of the assessee. We also find bonafides in the plea of the assessee for raising new claim on account of depreciation by way of additional ground at this belated stage. The order for the AY 2012-13 was passed on 29.03.2015. By virtue of this order, the assessee came to know about the revision in the claim of depreciation concerning AY 2012-13. By that time, the order of the CIT(A) dated 13.12.2013 was already passed. Therefore, the assessee was incapacitated to put forward such new claim towards depreciation on goodwill amounting to Rs.5,57,63,315/- for which relevant facts are duly available on record in the light of the decision of Hon'ble Supreme court in the case of Goetze (India) Ltd. vs. CIT [2006] 284 ITR 323 (SC) & NTPC vs. CIT 229 ITR 383 (SC).

22. In the result, additional ground raised by the assessee is allowed."

16. Further we have also through the decision of Hon'ble ITAT Ahmedabad in assessee's own case in assessment year 2012-13 vide ITA No. 1843/Ahd/2016 vide order dated 20/02/2019. The relevant operative para of the order is reproduced here under:

"1.2 Having admitted the additional ground for adjudication as noted above we now turn to the relevant facts touching the issue. As pointed out on behalf of the assessee, a Technology Upgradation Fund Scheme (TUFS) was introduced in 1999 to catalyze investments in textile industries. The purpose of scheme under which the subsidy was given was stated to be to sustain and prove the competitiveness and for long term viability of textile industry The concerned ministry of textile

adopted TUFS scheme envisaging technology upgradation of the industry as per the scheme The object of the scheme was to enhance sustainable growth in value chain for overall growth of textile industry. Pursuant to TUFS, certain subsidy benefits by way of interest on reimbursement of loans taken from authorized agencies for investment in plant and machinery for spinning units and other machineries in textile industry was availed by textile sector.

11.3 In this background, it was contended on behalf of the assessee that the assessee herein was obtained subsidy by way of reimbursement of interest under the scheme. The assessee has treated the aforesaid interest reimbursement subsidy mistakenly as revenue receipt in the P&L account and disclosed the same by way of net off from interest expenses. The taxable income was thus stated to be overstated to this extent. It was contended that the character of such subsidy in the hands of recipient assessee is capital in nature having regard to the purpose for which the subsidy was given i.e. acceleration of development of textile industry

11.4 Reference was made to the notes forming part of the financial account detailing the interest subsidy aggregating to Rs.2,16,45,161/- as reduced from the interest costs Our attention was also adverted to Notes to the Financial Statement wherein suitable disclosure was made towards claim of interest subsidy.

11.5 In the circumstances, it is the case of the assessee that where such subsidy is intended and bestowed not with the object of running the business but with a solemn object of attracting industrial investment or expansion, such interest subsidy is in the nature of capital receipt and therefore cannot be reduced from the interest costs It is thus contended that such capital receipt is not chargeable to tax in the relevant AY 2012-13 in question being a capital receipt.

12. We find that the issue is squarely covered in favour of the asseessee by the decision of the Hon'ble Supreme Court in CIT vs. Chaphalkar Brothers Pune [2017] 88 taxmann.com 178 (SC); Meghalaya Steels Ltd. [2016] 67 taxmann com 158 (SC) and CIT vs. Sham Lal Bansal [2011] 11 taxmann.com 369 (P&H). In the light of aforesaid judgments, we find merit in the plea of the assessee that having regard to the object and purposes of the scheme, the interest subsidy is required to be treated as capital receipt of non-taxable nature having regard to the propositions laid down in the judicial proceedings noted above.

13. The aforesaid view is also fortified by the legislature in view of amendment as per sub clause {xviii) to Section 2(24) of the IT Act as inserted by the Finance Act, 2015 which reads as under:

"[(xviii) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee [other than,--

(a) the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43; or
(b) ...,.„..„.,.,....."

A claim on behalf of the assessee, as a corollary to said amendment, such a capital receipt may become chargeable to tax which is otherwise a capital receipt w.e.f. 01 04.2016. The aforesaid amendment has thus come into force w.e.f. AY 2016-17 which reinforces the impression of such capital receipt being out of tax net for the assessment year in question.

14. Thus, on first principles, we find ourselves in total agreement with the contentions on behalf of the assessee for non chargeability of such capital receipts regardless of its treatment in books as revenue receipts. We are however conscious in same vain that the issue has I T been raised for the first time before the Tribunal. The Revenue authorities had no occasion to look into the relevant facts. We accordingly consider it expedient to restore the issue to the file of the AO for verification of relevant factual aspects towards quantum of receipt of interest subsidy and relevant documentation in this regard, if so considered necessary in the opinion of the AO The AO shall accordingly grant relief to the assessee in accordance with law in the light of our observations and shall exclude the subsidy from the ambit of taxation on being satisfied about the factual correctness on quantum of such subsidy.

17. Further we have also gone through the decision of Hon'ble Calcutta High Court in the case of PCIT vs. Ankit Metal & Power Ltd. (2019) 109 Taxmann.com 93. The relevant operative para of the order is reproduced here under:

"5. The assessee had filed original return of income treating the interest subsidy as revenue receipt but during the assessment proceedings the assessee had rectified its mistake and claimed the aforesaid subsidies as capital receipt by filing a Revised Computation of Income since the time limit for filing Revised Return had lapsed. The Assessing Officer however treated the interest subsidy and power subsidy as a revenue receipt and brought the same to tax. The assessee treated the Interest Subsidy of Rs. 4,52,33,330/- and Power Subsidy of Rs. 4,81,63,649/- as Capital Receipt in the revised computation filed before the Assessing Officer during the course of assessment proceedings.
6. The assessee had made investment in Sponge Iron Plant and Mega Project (Induction manufacturing units Sponge Iron, Power, Billet) which made the assessee uiyftiic for subsidy under the Scheme taken out by the Government of

West Bengal, commerce & Industries Department for making capital investments in backward area, namely, 'Bankura'.

7. The West Bengal Incentive Scheme, 2000 was expressly for the purpose of attracting private investment in the State of West Bengal in the specified areas which are industrially backward. To promote industrialization, the Government offered various incentives/ subsidies including 'State Capital Subsidy' and 'Interest subsidy' when a 'unit' was set up in any area specified in Group C i.e. backward area as defined under the Scheme. At page 9 Para No.7 of the Scheme, the areas of West Bengal have been segregated into 'Development Areas and Backward Areas' by grouping them into three Groups A, B & C. Maximum Benefits in the form of Subsidy has been given to areas under 'Group C'. The assessee had received both the subsidies for setting up industry in 'Bankura1, which falls under 'Group C' i.e. backward area. The aforesaid subsidies were not in the nature of general assistance to the assessee to carry on his business or trade more profitable but were for industrial development which clearly falls under the category of fixed capital incentive. The assessee received an eligibility Certificate from the Government of West Bengal wherein it received approval for Interest Subsidy.

8. The object of the West Bengal Incentive Scheme, 2000 would be apparent from the following extracts:—

"West Bengal Incentive Scheme 1999 Scheme had an attractive provision of Sales Tax related by way of 'remission" of "deferment". But in pursuance of the National Policy, the State Govt. had to discontinue the Sales Tax related Incentives from 1st January, 2000. However, as there is a strong need for fiscal support for the promotion of industry in the State, the State Government decided to introduce the West Bengal incentive Scheme, 2000, with different and new features, quite attractive for industries in large medium, small scale and tourism sectors."

"4. APPLICABILITY OF THE 2000- SCHEME:

The 2000 Scheme shall generally be applicable to all large, medium, cottage and small scale projects and to large/medium sector tourism units to be set up and also to expansion projects of existing units on or after the 1st January, 2000.
The units may be in the private sector, co-operative sector, joint sector as also companies/undertakings owned or managed by the State Government."

9. It would thus be seen that the purpose/object of the West Bengal Incentive Scheme, 2000 was to encourage the setting up of new industrial units and expansion of existing industrial units. The receipt of interest subsidy was clearly on capital account.

Similar is the position with regard to the West Bengal Incentive to Power Intensive Industries Scheme, 2005 as would be apparent from the following extracts:—.

"And whereas, there has been robust growth and resurgence in the industrial scenario/investment in the State and the State Government is desirous of continuing all efforts to attract entrepreneurs for setting up industries in the State especially in the backward areas "

"And whereas the State Government has decided to provide incentives to power intensive industries to new and expanding industries in certain designated areas by way of reimbursement of part of the net energy charges for a certain period by the State government as per details formulated in Part B of the Scheme".

9.1 The learned Tribunal on consideration of factual and legal position and scope of the schemes in question, has held the 'interest subsidy' and 'power subsides' as capital receipts and also held that the same would be excluded while computing 'Book profit' under Section 115JB of the Income Tax Act, 1961.

10. Aggrieved by the aforesaid order of the Tribunal, revenue has preferred this appeal.

…….

20, On this issue decision in the case of Sahney Steel and Press Works Ltd. (supra) relied upon by the revenue is a leading decision on the test or determining the nature and character of a subsidy under any scheme as to when it is to be treated as 'capital receipt' or 'revenue receipt' in the hands of the assessee and considering this decision of Sahney Steel & Press Works Ltd. (supra) another leading decision on this proposition of law is Ponni Sugars and Chemicals Ltd. (supra). Law laid down in these two decisions have been uniformly followed in series of decisions of the Hon'ble Supreme Court, our High Court and other High Courts which assessee has relied as referred above on this issue. The following paragraph of the judgment delivered by the Hon'ble Supreme Court in Ponni Sugars & Chemicals Ltd. (supra) case reads thus (page 400):

"The importance of the judgment of this court in Sahney Steel case 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 at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. It the object of the subsidy scheme was to enable the assessee to run the business more profitable then the receipt is on revenue

account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy is given are irrelevant."

21. A perusal of the judgments in Sahney Steel & Press Works Ltd. (supra] and Ponni Sugars & Chemicals Ltd. (supra) therefore, reveals that the apex court had applied the above quoted dictum to determine the purpose, which the two schemes had intended to achieve by the incentive subsidies, permissible under the schemes in question in those cases.
22. It was, therefore, in the context of respective subsidy incentive schemes in the two cases, that the subsidy in Sahney Steel & Press Works Ltd. (supra) was held to be revenue receipt whereas the subsidy in Ponni Sugars & Chemicals Ltd. (supra) was held as capital receipts."

23. On a careful look into these decisions it appears that the law is settled that the nature of incentives/subsidies granted by the Government under any Scheme to any enterprise would totally depend upon the salient features of the said Scheme. The purpose for which the incentive/subsidy is given under the Scheme is the determining factor to lay down the nature of the incentive/subsidy. If an incentive/subsidy is given as a general assistance to the assessee to carry on his business or trade, it would be an operational incentive and thus a trading receipt in the hands of the assessee. However if the object of the subsidy, irrespective of its source, is to enable the assessee to acquire new plant and machinery or for further expansion of its manufacturing capacity or for setting up a new unit, the entire subsidy must be held to be a capital receipt. The incentives/subsidies, depending upon the purpose for which they are granted, fall under two categories namely :
(i) Operational incentives/subsidies which are given to the assessee to carry on his business or trade and;
(ii) Fixed capital incentives/subsidies which are given to the assessee to set up a new unit or to expand its existing unit.

24. On perusal of the contents of the relevant portion under the incentive subsidy schemes in question we found that in the case of the assessee, the State Government under the West Bengal Incentive Scheme, 2000, and West Bengal Incentive to Power Intensive Industries Scheme, 2005', had actually granted the subsidy with the sole intention of setting up new industry and attracting private investment in the state of West Bengal in the specified areas in the present case Bankura which is industrially backward hence the same was of the nature of non-taxable Capital receipt. Thus according to the 'purpose test' laid out by the Hon'ble Supreme Court, various and High Courts including our Court the

aforesaid subsidy should be treated as capital receipt in spite of the fact that computation of 'Power subsidy' is based on the power consumed by the assessee. It is well established from submission of the assessee as enunciated above that once the purpose of a subsidy is established; the mode of computation is not relevant as held in the decisions of the Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. (supra), CIT v. Ponni sugars & Chemicals Ltd. (supra) and the decision of our High Court in case of Rasoi Ltd. (supra) against which SLP has been dismissed. The mode of computation/form of subsidy is irrelevant. The mode of giving incentive is reimbursement of energy charges. The nature of subsidy depends on the purpose for which it is given. Hence the assessee draws support from the decisions already discussed earlier as the same principle will apply here. Thus, the entire reason behind receiving the subsidy is setting up of plant in the backward region of West Bengal, namely, Bankura.

25. Accordingly we hold the aforesaid incentive subsidies are 'capital receipts' and is not an 'income' liable to be taxed in relevant assessment year 2010-11 on the basis of discussion made above and further taking into consideration the definition of Income under Section 2(24) of the Income Tax Act, 1961, where sub-clause (xviii) has been inserted including 'subsidy' for the first time by Finance Act. 2015 w.e.f. April, 2016 i.e assessment year 2016-17. The amendment has prospective effect and had no effect on the law on the subject discussed above applicable to the subject assessment years.

26. Now the second issue which requires adjudication is as to whether the aforesaid received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit under Section 115 JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Appollo Tyres Ltd. (supra).

27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy1 is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961. "

18. In the light of the aforesaid judicial finding as elaborated (supra) in this order, the additional ground of appeal on the issue to reduce the book profit computed u/s 115 JB by capital receipt inform of interest subsidy in total for Rs. 5,97,54,154/- (Rs. 5,77,14,810/- and Rs. 20,39,344/-) is admitted.

19. Further after considering the finding of the judicial pronouncement on this issue, the assessing officer is directed to treat the aforesaid amount of subsidy as capital receipt under Technology Upgradation Fund Scheme for Textile and Jute Industries.

20. Since the additional ground of appeal of the assesse is allowed therefore, there is no need to consider the other grounds of appeal filed by the assesse on merit. Therefore such ground of appeal 1 to 1.3 can dismiss.

21. The assesse has also filed first additional ground of appeal stating that Ld. A.O. and CIT(A) has erred in not allowing deduction for education cess is allowable expenditure u/s 40(a)(ii) of the I.T. Act

22. During the course of appellate proceeding before us, the Ld. Counsel has referred CBDT Circular No. 91/58/66-ITJ(19) DT. 18th May, 1967. The Ld. Counsel has also submitted that identical issue was decided in favour of the assesse by Hon'ble Bombay High Court in the case of Sesa Goa Ltd. Vs. JCIT 117 Taxmann.com 96 (2020). It was further submitted by the ld. Counsel that identical claim was also allowed by Hon'ble Mumbai ITAT in the case of Voltas Ltd. Vs. ACIT in ITA No. 6612/Mum/2018 vide order dated 30.06. 2020 and Delhi ITAT in the case of Mufg Bank Ltd. Vs. ACIT (International Taxation) in ITA No. 7895/Del/2019dated 16/10/2020.

23. On the other hand, Ld. D.R. has supported the order of lower authorities. Heard both the sides and perused the material on record. It is noticed that the claim of the assesse regarding deduction for education cess and her education cess as allowable expenditure u/s 40(a)(i) of the Act 1961 has not been discussed in the order of assessing officer and Ld. CIT(A).

24. After considering the judicial pronouncement referred by the Ld. Counsel in the case of Hon'ble Bombay High Court in the case of Sesa Goa Ltd. Vs. JCIT 117 Taxmann.com 96 (2020). And Circular of the CBDT Circular No. 91/58/66-ITJ(19) DT. 18th May, 1967. This issue is restored to the file of the Assessing Officer for deciding afresh after considering the direction laid down in the above referred judicial pronouncement and Circular of the CBDT. Therefore, this ground of appeal of the assesse is allowed for statistical purposes.

25. In the result, appeal filed by the Assessee is partly allowed.

Order pronounced in Open Court on 24- 11- 2020

Sd/- Sd/-

(AMARJIT SINGH) **(MAHAVIR PRASAD)**
ACCOUNTANT MEMBER **True Copy** **JUDICIAL MEMBER**

Ahmedabad: Dated 24/11/2020

Rajesh

Copy of the Order forwarded to:-
1. The Appellant.