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

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA no.7008/Mum./2019
(Assessment Year : 2015–16)

Asstt. Commissioner of Income Tax
Circle–11(2)(1), Mumbai ……………. Appellant

v/s

M/s. Shree Pushkar Chemicals
and Fertilizers Ltd., 301, 302, 3rd Floor
Atlanta Centre, Sonawala Road ……………. Respondent
Goregaon, Mumbai 400 063
PAN – AAACS9372E

Revenue by : Shri Manoj Mishra
Assessee by : Shri S.S. Nagar

Date of Hearing – 01.07.2021	Date of Order – 09.08.2021

O R D E R

PER S. RIFAUR RAHMAN, A.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 28th August 2019, passed by the learned CIT(A)–18, Mumbai, for the assessment year 2015–16.

2. The Revenue has filed this appeal on the following grounds:–

"1. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that Education cess is allowable expenditure without appreciating that even though Section 115JB of the Act (MAT Provision) is a complete code by itself, the term 'Income tax' under explanation 2 to Section II5JB(2) includes 'education Cess' thereby establishing the fact that Education Cess is not a fee but is a tax?

2. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that Fertilizer Subsidy received by the Assessee being Capital in nature and is not chargeable to tax without appreciating–

(a) That, as per NBS Policy, the basic purpose/Objective of the Concession Schemes for P & K Fertilizers has been to provide P & K Fertilizers to the farmers at affordable rates, to increase food productivity; and,

(b) That, the concession Scheme was also aimed at ensuring reasonable rate of return on investments made by the entrepreneurs in the fertilizer sector and to encourage competition among fertilizers companies;

thereby establishing the fact that the Fertilizer Subsidy received by the Assessee is Revenue in nature and is chargeable to tax."

2. Insofar as ground no.1 is concerned, the dispute is with regard to the direction of the first appellate authority in allowing the assessee's claim of education cess.

3. The assessee at the time of filing return of income has debited an amount of ₹ 14,17,072, to Profit & Loss Account on account of Education Cess in view of the provisions of section 40(a)(ii) of the Income Tax Act, 1961 (for short *"the Act"*). The Assessing Officer, however, disallowed the claim of Education Cess made by the assessee. Aggrieved, the assessee filed appeal before the first appellate authority.

4. During the course of first appellate proceedings, the assessee submitted that the claim of Education Cess is allowable as per the

CBDT Circular no.91/58/66–ITJ(19), dated 18th May 1967, and is also covered by the decision of the Hon'ble Rajasthan High Court in Chambal Fertilizers and Chemicals Ltd. v/s JCIT, ITA no.52 of 2018, dated 31st July 2018. The learned CIT(A) held the education cess as allowable expenditure by observing as under:–

> *"8.2.3. I have carefully considered the submission made by the appellant, it is observed from the section 40(a)(ii) of the Income-tax 1961 that, any rates and tax has to be disallowed in computing the total income. The said section was introduced in Finance Bill 1961 as "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.'. However, subsequently it was decided to omit the word 'cess' from the section 40(a)(11). The said fact has been clearly mentioned in the CBDT Circular No. 91/58/66-ITJ(19), Dated 18-5-1967. Thus, the contention of the appellant is since the word cess is omitted from the section 40(a)(11), the cess portion should be treated as allowable in computing the total income.*
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> *8.2.4. In this regard, the appellant drawn attention on the recent decisions of the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd. v. JCIT (Tax Appeal No. 52/2018, date of order 31-072018) and Hon'ble Kolkata Tribunal in case of DCIT v. ITC Limited (ITA No. 1267/Kol/2014, date of order 27-11-2018) wherein also the education cess was allowed as expenses in computing the total income considering the CBDT circular and intension of the legislature.*
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> *9.5 Reliance placed by the assessing officer on the decision of Smith Kline & French [India] and Lubrizol India Ltd. are not applicable to the present facts of the Appellant since the above case pertains to the Surtax and not Education cess. Further, the reliance placed by assessing officer on the decision of Sesa Goa Ltd also may not be relevant being the Tribunal in 2013 has not considered the CBDT Circular also, the other favaourable decision of the Court as per the present position of law.*
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> *8.2.5 I have gone through the CBDT Circular and the above recent decisions on the said issue. On-going through the same, it is observed that, the impugned issue of allowability of education*

> *cess is covered by the recent decisions in the case of Chambal Fertilisers and Chemicals (supra) and ITC Ltd. (supra) and respectfully following the said decisions, CBDT Circular and the binding precedent, the claim of the education cess is allowed in computing the total income of the assessee. This additional ground of appeal is thus allowed."*

5. The Revenue being aggrieved by the aforesaid order of the learned CIT(A), filed appeal before the Tribunal.

6. Before us, the learned Departmental Representative has filed the following written submissions in connection with the assessee's claim of Education Cess.

> *"The assessee has relied upon the Hon'ble Bombay High Court's (Goa Bench) judgement in Sesa Goa Ltd. (2020) 117 taxmann.corn 96 (Bombay). A careful perusal of the Sesa Goa case (supra) reveals that the Hon'ble High Court relied upon the Hon'ble Rajasthan High Court judgement in the case of Chambal Fertilisers & Chemicals - DB ITA 52/2018 and 68/2018 which in turn relied upon the CBDT circular no. 91 of 1967, bearing number 91/58/64-ITJ(19), dated 18.05.1967 and the judgement of Hon'ble Supreme Court in the case of Jaipuria Samla Amalgamated Collieries Ltd v/s CIT 82 ITR 580 (SC).*
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> *As a matter of fact, the Hon'ble Bombay High Court was not informed whether the Revenue had instituted appeal against the Chambal Fertilisers judgement (supra). In para 30 and 32 of the judgement the Hon'ble HC specifically mentioned that the id. Standing Counsel for the Revenue could not state whether the Revenue had instituted the appeals in the aforesaid matter. In this regard, it is humbly submitted that the Revenue had not accepted the decision of the Hon'ble Rajasthan High Court in Chambal Fertilisers case (supra) and filed SLP before the Hon'ble Supreme Court vide diary no. 4414/2019 dated 01.02.2019.*
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> *With regard to deduction of education cess under consideration, it is most respectfully and humbly submitted that there are certain facts, provision of law and judgement of the Hon'ble Supreme Court in favour of the Revenue raising favourable questions remained unanswered. These are discussed as under:*

(i) The assessee had claimed this deduction before the id. CIT (A) for the first time and did not claim the same in its return of income or revised return of income. The provisions of section 139(1)/ (5) of the Income tax Act, 1961 (the Act) provide that any claim of deduction need to be claimed in the return of income/ or the revised return of income.

(ii) The meaning of 'cess' as per the 'Black's Law Dictionary is 'an assessment or tax'. The 'education cess' is levied in the Finance Act under the chapter 'Rates of income tax'. The relevant section of the Finance Act provides that amount of income tax shall be further increased by an additional surcharge to be called as 'education cess', for the purposes of the Union and to fulfil the commitment of the Government. Therefore, the 'education cess', being additional surcharge, is a tax for specific purpose, which is related to income and computed on income tax and, therefore, covered under the expression 'rate or tax levied on the profits and gains of any business' u/s 40(a)(ii) of the Act. The expression 'rate or tax levied on the profits and gains of any business' was interpreted by the Hon'ble Supreme Court in the case of Smith Kline & French (India) Ltd. vs. CIT [1996] 85 Taxman 683 (SC). The education cess under consideration would be squarely covered by the interpretation of section 40(a)(ii) of the Act by the Hon'ble Supreme.

(iii) The operative part of the judgment of the Hon'ble Rajasthan High Court in the Chambal Fertilisers case (supra) is reproduced as under:

"12. We have heard counsel for the parties.

13. On the third issue in appeal no. 5212018, in view of the circular of CBDT where word "Cess" is deleted, in our considered opinion, the tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the Cess is not tax in that view of the matter, we are of the considered opinion that the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee.

It is most respectfully and humbly submitted that a careful perusal of the judgement reveals that the Hon'ble High Court relied upon the judgment of the Hon'ble Supreme Court in the case of Jaipuria Samla Amalgamated Collieries Ltd v/s CIT 82 ITR 580 (SC) and the CBDT circular no. 91 of 1967, bearing number

91/58/64-ITJ(19), dated 18.05.1967.

It is most respectfully and humbly submitted that the Hon'ble Supreme Court in the Jaipuria case (supra) was dealing with a matter pertaining to AYs 1954-55 and 1955-56 which related to the question whether section 10(4) of the 1922 Act meant to exclude allowability of road and public works cess levied under the Bengal Cess Act, 1880 as deduction for determination of profits/ gains of business.

It is most respectfully and humbly submitted the ratio in the case of Smith Kline & French (India) Ltd. vs. CIT [1996] 85 Taxman 683 (SC) was before the Hon'ble Rajasthan High Court in the Chambal Fertilisers case (supra), but the ratio/ ruling of the same was not distinguished/ discussed in the judgment. The Hon'ble Supreme Court in the Smith case (supra), which was delivered much later in year 1996 as compared to the Jaipuria case in year 1971, discussed in detail applicability/ operation of section 40(a)(ii) of the Act. The Hon'ble Supreme Court made it amply clear that any surtax would be hit by the mischief of the provisions of section 40(a)(ii). The ratio/ operative part of the judgment is as under:

"Held

Section 40 opens with a non obstante clause 'notwithstanding anything to the contrary in sections 30 to 39', which means that even if any amount is entitled to deduction under any of the provisions contained in sections 30 to 39, it will be disallowed if it falls, inter alia, within sub-clause (ii) of clause (a) of section 40. The question, therefore, is whether the tax levied under the Companies Profits (Surtax) Act, 1964 falls within the mischief of said sub- clause. It does sofa/i.

The preamble to the Surtax Act says that it is 'an Act to impose a surtax on the profits of certain companies'. Indeed, the statement of objects and reasons appended to the Bill makes the said intention clear. It says: 'the object of this Bill is to impose a special tax on companies (other than those which have no share capital) on their excess profits, namely, the amount by which the total income of a company as reduced by certain types of income and certain sums and the income-tax and super-tax payable by it exceeds a sum often per cent of the capital reserves and certain borrowed moneys or a sum of Rs. 2 lakhs, whichever is higher......

Section 4 is the charging section. It says: 'subject to the provisions contained in this Act, there shall be charged on every

company for every assessment year commencing on and from the first day of April, 1964, a tax (in this Act referred to as the surtax) in respect of so much of its chargeable profits of the previous year or previous years, as the case may be, as exceed the statutory deduction, at the rate or rates specified in the Third Schedule'. The expression 'chargeable profits' is defined in clause (5) of section 2. It reads: 'chargeable profits' means the total income of an assessee computed under the Act, for any previous year or years, as the case may be, and adjusted in accordance with the provisions of the First Schedule. It is thus clear beyond any doubt that the surtax is levied on the profits of a company, i.e., on the profits above the prescribed limit. The mere fact that the tax is levied upon 'chargeable profits' (which means the total income of the assessee computed under the Act, adjusted in accordance with the provisions of the First Schedule) does not mean that the tax is not levied on the profits of business. In other words, the mere fact that the First Schedule provides for certain further deductions out of the total income computed in accordance with the provisions of the Act, it cannot be said that amount on which the surtax is levied ceases to be the profits of the business. For this reason, it must be held that the surtax-levied under the Surtax Act squarely falls within the mischief Of sub-clause (ii) qf clause (a) of section 40 and cannot be allowed as a deduction while computing the business income of the assessee under the provisions of the Act. The assessee contention that in view of section 15 qf the Surtax Act, surtax does not fall within section 40(a) ('ii) could not be accepted, for a reading of section 15 of Surtax Act makes it evident that its operation is confined to the computation of the distributable income of a company for the purposes of Chapter XI-D of the Income-tax Act. It cannot be extended to any other chapter or provision in the Act."

It is most respectfully and humbly submitted that the Hon'ble Supreme Court in the Smith case (supra) elaborately discussed the judgment in the Jaipuria case (supra) and held that the character of cesses in the Jaipuria case was levied on immovable property which was different from cess on profits/ income as levied under the Act! Finance Act. As a matter of fact, the Hon'ble Supreme Court went on to hold that the cesses considered in the Jaipuria case (supra) judgment were not taxes 'levied on the profits or gains of any business or profession or assessed at a proportion of or otherwise on the basis of any such profits or gains' within the meaning of section 40(a)(ii) as explained in the Smith case judgment (supra). The relevant portion of the Smith case judgment is reproduced as under:

"6. The learned counsel for the appellants placed strong reliance upon the decision of this Court in Jaipuria Samla Amalgamated

Collieries Ltd. v. CIT [1971] 82 ITR 580 to contend that a tax has to be computed in accordance with the provisions of the Act to fall within the mischief of section 40(a) (ii). Inasmuch as the surtax is computed on a basis different from the basis prescribed in the Act, it is contended, it cannot fall within the four corners of section 40(a) ('ii). It is not possible to agree with this contention either. The said decision was rendered with reference to sub-section (4) of section 10 of the Indian Income-tax Act, 1922 which corresponds to sub-clause ('ii) of clause (a) of section 40 of the present Act. The question therein was whether the amount payable as () road and public works cess levied under the Bengal Cess Act, 1880 and (1i) the education cess levied under the Bengal (Rural) Primary Education Act, 1930 falls within the mischief of section 10(4). This Court held that they do not. A perusal of the decision shows that the road and public works cess was levied on immovable property to provide for construction and maintenance of roads and other works of public utility.

Under section 5 of the Bengal Cess Act, 1880 all immovable property, with certain exceptions, was subjected to payment of road cess and public works cess. Section 6 of the Bengal Cess Act provided that the said cesses shall be assessed on the annual value of lands and, until provision to the contrary was made by Parliament, on the annual net profits from mines, quarries, tramways, railways and other immovable property at such rates as were to be determined in the manner prescribed Similarly, the education cess was also levied under section 29 of the Bengal (Rural) Primary Education Act, 1930, on immovable property on which the road and public works cesses were assessed. The rate at which the education cess was to be levied depended upon the character of the property; in respect of mines and quarries, it was leviable at the rate of three and a half pice on each rupee of annual net profits. It is thus abundantly clear that the levy of aforesaid cesses was upon the immovable properties and not on profits. It is no doubt true that the tax was measured with reference to the net profits of business but it is well- settled by a series of decisions of this Court that the measure by which a tax is computed does not determine the character of the tax vide Union of India v. Bombay Tyre International AIR 1984 SC 420 and Goodricke Tea Co. v. State of West Bengal 1995 (1) Suppl. SCC 707. It is, therefore, idle to contend that the said decision helps the assessee's case in any manner. The cesses considered in the said decision were not taxes 'levied on the profits or gains Of any business or profession or assessed at a proportion of or otherwise on the basis of any such profits or gains' within the meaning of section 40(a) (Vii) as explained hereinabove. The learned counsel, however, relied upon the following observations in the said decision: "the words rofits and gains of any business, profession

or vocation' which are employed in section 10(4) can, in the context, have reference only to profits or gains as determined under section 10 and cannot cover the net profits or gains arrived at or determined in a manner other than that provided by section 10. The whole purpose of enacting sub-section (4) of section 10 appears to be to exclude from the permissible deductions under clauses (ix) and (xv) of sub-section (2) such cess, rate or tax which is levied on the profits or gains of any business, profession or vocation or is assessed at a proportion or on the basis of such profits or gains. In other words, sub-section ('4) was meant to exclude a tax or a cess or rate the assessment of which would follow the determination or assessment of profits or gains of any business, profession or vocation in accordance with the provisions of section 10 of the Act ...... These profits arrived at according to the provisions of the two Cess Acts can by no stretch of reasoning be equated to the profits which are determined under section 10 of the Act. It is not possible to see, therefore, how section 10(4) could be applicable at all in the present case". The learned counsel pointed out that this Court has in the said decision approved the decision of the Privy Council in CIT v. Gurupada Dutta [1946] 14 JTR 100 and has further observed that the Parliament must be deemed to have accepted the view taken by the Privy Council by not changing the language of the relevant provision in the Act [section 40(a)(ii)."

It is most respectfully and humbly submitted that the Hon'ble Supreme Court judgment in the Smith case (supra) specifically laid down the scope for operation of the provisions of section 40(a)(ii) of the Act in detail and the nature of cess/ surcharge to which it would apply and covers the field in this regard. The CBDT circular no. 91 of 1967, bearing number 91/58/64-ITJ(19), dated 18.05.1967, being an old circular which came into existence much before introduction of the education cess, and, apparently, is not meant for the education cess under consideration (being tax for specific objective) computed/ levied @ 3% on the income tax and surcharge for computation of income chargeable to tax. Therefore, it is most respectfully and humbly requested that the ground of appeal may kindly be allowed and order of the id. CIT (A) may please be set aside in this regard."

7. The learned Counsel for the assessee on the other hand relied upon the contents of the CBDT Circular no.91/58/66–ITJ(19), dated 18th May 1967, and also submitted that the issue is covered by the

decision of the Hon'ble Rajasthan High Court in Chambal Fertilizers and Chemicals Ltd. v/s JCIT, ITA no.52 of 2018, dated 31st July 2018.

8. Considered the rival submissions and perused the material on record in the light of the case laws relied upon by either party. In the instant case, the Revenue has challenged the order passed by the CIT(A) in inter–alia allowing the assessee's claim of education cess as an allowable business expenditure. We find that provisions of Section 40(a)(ii) of the Act, the education cess paid on Income Tax doesn't come under the purview of the definition as it is levied on the amount of Income Tax, but not on profits of business. We also find that the assessee also relied on the CBDT Circular no.91/58/66-ITJ(19) dated 18th May 1967, which states that the effect of the omission of the words *"cess"* from section 40(a)(ii) of the Act is that, only taxes paid are to be disallowed in the assessment for the assessment years 1962-63 onwards. The assessee also relied on the judgment of Hon'ble Rajasthan High Court wherein identical issue was decided in favour of the assessee and particularly held that education cess is an allowable expenditure. We also note that the learned CIT(A) has also allowed the claim by referring to the contents of the CBDT Circular (supra) as while relying upon the judgment of the Hon'ble Rajasthan High Court. We further notice that the Hon'ble Jurisdictional High Court in the case of Sesa Goa Ltd. v/s JCIT, [2007] 294 ITR 101 (Bom.), held the similar

view. In view of the aforesaid, we see no legal infirmity in the impugned decision of the learned CIT(A) and do not warrant us to interfere with the order passed by the learned CIT(A) at the instance of the Revenue. Thus, the Revenue fails on this ground.

9. The issue arose out of ground no.2 is, whether or not the learned CIT(A) was justified in holding that Fertilizer Subsidy received by the assessee being capital in nature and is chargeable to tax.

10. The assessee during the year under consideration was engaged in the business of manufacturing of chemicals and fertilizers. The assessee also involved in manufacturing various fertilizers for which the Government was providing certain subsidies under Nutrient Based Subsidy (NBS) Policy for P&K fertilizers w.e.f. 1st April 2010. During the year, the assessee received fertilizer subsidy for an amount of ₹ 14,79,86,182, which has been credited to Profit & Loss Account. The Assessing Officer treated the subsidy as incentive which has been added to the income of the assessee which was charged to tax. Being aggrieved, the assessee carried the matter before the first appellate authority and submitted detailed information before the learned CIT(A).

11. The learned CIT(A) relying upon various judicial pronouncements held that once the subsidy are treated as capital receipt and not

chargeable to tax has also to be excluded from computing the book profit under section 115JB of the Act. For better appreciation of facts, it is necessary to note the observations of the learned CIT(A) while granting the relief:–

> *"8.3.10 I have carefully gone through the submissions made on behalf of the appellant and also perused the relevant schemes filed alongwith the submissions. From the perusal of the schemes and various facts and judicial precedents placed before me, I found that the salient features and the objective of NBS Policy under which the Appellant company is getting the fertilizer subsidy is overall growth of fertilizer industry by increasing the investment, modernization, balanced fertilization and growth of indigenous fertilizer industry, competitiveness amongst the fertilizer companies, Thus, it is seen that, the 'purpose' of the introduction of the scheme was to encourage and industrial growth of the fertilizer industry as a whole and thus it fulfils the purpose test as laid down by the Apex Court.*
>
> *8.3.1 1 in view of the objectives of the scheme as above, I find that the appellant's case is covered by the above judicial precedents and also by the principle laid down by the Apex Court in the case of Ponni Sugars & Chemicals, Shree Balaji Alloys and Chaphalkar Brothers (supra) which has been consistently followed in by various High Court including Jurisdictional High Court. In all the decision it has been held that 'purpose' of the incentive will decide the nature of the incentive. The said criteria have been fulfilled in the case of the appellant. Thus, respectfully following the principle laid down by the Apex Court, decision of various High Court including jurisdictional and Mumbai ITAT, thus the said subsidy is to be treated as capital receipt and should be excluded in computing the total income as per normal provisions of the Income-tax.*
>
> *8.3.12 The appellant has also contended that said subsidy being capital receipt is not chargeable to tax under Income-tax Act should also not to be included in computing the Book Profit u/s 115JB of the Income-tax. In this regard, the appellant submitted that, as per the Article 265 of the Constitution of India state that, taxes shall be levied or collect except without the authority of law. In this regard, the appellant has relied on the decision of Apex Court in case of Padmaraje R. Kadambande vs. CIT (1992) 195 ITR 877 (SC), Hon'ble Rajasthan High Court in the case of Shri Cement*

Ltd. (Appeal No. 85/2014 and 204/2010 dated 22-08-2017, Hori'hle Bombay High Court in the case of CIT v. Harinagar Sugar Mills Ltd. (ITA No. 1132 of 2014, dated 04-01-2017) and Hon'ble Mumbai Tribunal in the case of Alok Industries Ltd v. DCIT (ITA No 1017/Mum/2017, dated 21-05-2018) and Shivalik Venture Pvt. Ltd. v. DCLT (ITA No. 2008/Mum! 2012, dated 19-08-2015).

8.3. 13 Attention is drawn on the following decisions of the Tribunal / High Courts / Apex Court in the submission filed, wherein it has been held that subsidy treated as capital receipt shall not taxable even in book profit u/s. 115JB:

i. In CIT v. Harinagar Sugar Mills Ltd (ITA No. 1132 of 2014, dated 04-01- 20 17) (Born) (HC) wherein it has been held that,

a) The issue raised in this question is consequential to question no.(i). We have already held that the subsidy received by the respondent assessee from the State of Bihar was in the nature of capital receipt. Hence the same cannot be added to arrive at book profits of the respondent assessee under Section 1151 of the Act.

(b) Thus, the question as proposed herein does not give rise to any substantial question of law as it also stands concluded against the Revenue.

ii. Recently in PCIT v. Ankit Metal & Power Ltd. (ITA 155 of 2018, dated 0907-20 19) it has been held that,

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 115JB of the Income Tax Act, 1961.

In Alok Industries Ltd v. DCIT (ITA No 1017/Murn/2017, dated 21-0520 18) it has been held that,

…..Once the subsidy received cannot be taxed under section 4, there cannot arise any taxability under section 11 53B of the Act, which merely provides for an alternate mechanism for computation of income and tax thereon.

29. More importantly, the decision of the Jaipur Tribunal in the case of Shree Cement Ltd. (ITA No. 614 / JP /_2010) has exhaustively discussed the issue under consideration and also referred to the order of Rajasthan High Court wherein the ground taken u b^{y} the revenue on this issue was not admitted as not having a substantial

question of law. Thus, it can be concluded that this issue is now being settled by a judgment of the Rajas than High Court. It also distinguished the decision of Apollo Tyres Ltd. vs. CIT 255 ITR 273 and Rain Commodities Ltd. vs. DCIT 41 DTR 449. Also very recently, Madras HC in the case of Metal & Chromium Plater (P) Ltd. (ITA No. 359 of 2008) has also decided the said issue in the favour of the assessee. The case of Krishi Rasayan Exports Put. Ltd. us. ACIT (ITA No. 883 /Kol./2014 is on the similar interest subsidy which was required to be excluded from Book profit. We accordingly direct AO to exclude the the subsidy while computing book profit u/s. 115JB.

iv. In Shivalik Venture Pvt. Ltd. v. DCIT (ITA No. 2008/Mum/2012, dated 19-08-2015) it has been held that,

26…. it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "book profit" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point.

28. In view of the foregoing discussions, we find merit in the contention of the assessee that the profit arising on transfer of capital asset to its wholly owned Indian subsidiary company is liable to be excluded from the Net profit.... since the said profit does not fall under the definition of "income" at all and since it does not enter into the computation provisions at all, there is no question of including the same in the Book Profit as per the scheme of the provisions of sec. 115JB of the Act.

8.3.14 I have considered the submission and the contention of the appellant carefully, since the subsidy received is capital in nature and not chargeable to tax in computing the total income as per the normal provisions of the Act, the said subsidy is not termed as Income to be fall under the section 4 of the Income-tax Act being the charging section. As stated by the Apex Court Padmaraje R. Kadambande (supra) wherein it has been held that Capital Receipts are not income within the definition of section 2(24) of the Act and hence are not at all chargeable under the entire Income-tax Act. Further, recently Hon'ble Calcutta High Court in the case of Ankit Metals (supra), Hon'ble Rajasthan High Court in the case of Shri Cement Ltd (supra) and Jurisdictional High Court in the case of Harinagar Sugar Mills Ltd (supra) and Jurisdictional Tribunal in the case of Alok Industries Limited (supra) considering the various decisions on the said issue has specifically held that, once the

subsidy are treated as capital receipt and, not chargeable to tax has also to be excluded from computing the book profit u/s 115JB of the Income-tax. Respectfully following the said decisions, it is held that subsidy in nature of capital receipt should also be excluded from computing the Book Profit u/s 115JB of the Income-tax. This ground of appeal is thus allowed."

12. The Revenue being aggrieved by the aforesaid order of the learned CIT(A), is in appeal before the Tribunal.

13. Before us the learned Departmental Representative filed written submissions the contents of which are reproduced below:–

"3. The second ground of appeal is:

"Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that Fertilizer Subsidy received by the Assessee being Capital in nature and is not chargeable to tax without appreciating-

(a) That, as per NBS Policy the basic purpose/Objective of the Concession Schemes for P & K Fertilizers has been to provide P & K Fertilizers to the farmers at affordable rates, to increase food productivity; and,

(b) That, the concession Scheme was also aimed at ensuring reasonable rate of return on investments made by the entrepreneurs in the fertilizer sector and to encourage competition among fertilizers companies:

Thereby establishing the fact that the Fertilizer Subsidy received by the Assessee is Revenue in nature and is chargeable to tax."

In this regard, the Hon'ble Bench is requested to consider the written submission while giving the judgement. The same is as under:

"The Id. CIT (A) held that that the salient features and the objective of the NBS policy under which the assessee was getting the fertilizer subsidy was overall growth of' fertilizer industry by increasing the investment, modernization, balanced fertilization and growth of indigenous fertilizer industry, competitiveness

amongst the fertilizer companies. He held that the 'purpose' of the introduction of the scheme was to encourage and industrial growth of the fertilizer industry as a whole and thus it fulfils the purpose test as laid down by the Apex Court.

It is most respectfully and humbly submitted that the assessee is availing subsidy under the NBS policy meant for all Phosphatic and Potassic (P&K) fertilizers (page no. 218 of the assessee's paper book). The Id. CIT (A) failed to comprehend the 'purpose' of the NBS policy, which is an integral part of the organically evolving fertilizer policy. The underlying main purpose is to make the fertilizer available to farmers at reasonable price so that consumption of the same does not come down affecting the food production. It is evident from the 'fertilizer policy' which contained NBS (Nutrient Based Subsidy) policy. The relevant part of the same, which is part of the paper book submitted by the assessee at page nos. 208 to 217, is reproduced below:

Fertilizer Subsidy Policy for Phosphatic & Potassic (P&IQ Fertilizers:

I. Historical Background:

1.1 Since independence, Government of India has been regulating sale, price and quality of fertilizers. For this purpose, Government of India has passed Fertilizer,' control Order ('FCO) under Essential commodity Act ('EC Act.) in the year 1957. In order to regulate the distribution of Fertilizer, Movement Control Order was passed in 1973. No subsidy was paid on Fertilizers till 1977 except Potash for which subsidy was paid only for a year in 1977.

1.2 On the recommendation of the Maratha Committee, the Government had introduced Retention Price Scheme (RPS) for nitrogenous fertilizers in November 1977. Subsequently, RPS was extended to phosphatic and other complex fertilizers from February 1979 and to Single Super Phosphate from May 1982, which continued up to 1991. Later on, subsidy was also extended to imported phosphatic and potassic (P&K) fertilizers.

In early 1990s, the country was facing mounting fiscal deficit and there was an impending danger of foreign exchange crisis. In order to contain the subsidy burden, Government announced an increase of 40% in the priice of fertilizers in July, 1991. The Fertilizers which were under the subsidy scheme were decontrolled. Subsequently, apprehending low consumption of fertilizer click to increase in prices and consequently, low agriculture productivity. Government rolled back 10% of increase

in Urea price.

1.3 In December 1991, Government set up a Joint Parliamentary Committee ("JPC") on Fertilizer Pricing to review the existing methods of computation of retention prices or different manufactures of fertilizers and to suggest measures for reducing fertilizers prices without straining the exchequer. JPC submitted its report on 20th August 1992. The main conclusions and recommendations of the Committee were that the rise in subsidy was mainly due to increase in the cost of imported fertilizers, devaluation of rupee in July 1991 and the stagnant farm gate prices from 1980 to 1991. The committee did not favor total decontrolled of fertilizers but recommended decontrol of import based phosphatic and Potassic fertilizers along with a marginal 10% reduction in the consumer price of urea.

2. Concession Scheme for P&K Fertilizers:

2.1 Based on the recommendations of Joint Parliamentary Committee, Government of India decontrolled all Phosphatic ad Potassic (P&K) fertilizers namely DAP, MOP, NPK conzplex fertilizer and SSP with effect from 25th August, 1992 which were under Retention Price Scheme ('RIS") since 1977 except Urea which continued to remain under RPS. Since subsidy was retained on the Nitrogenous fertilizers (Urea) while phosphatic fertilizers were decontrolled, the prices of phosphatic Fertilizers in the market became comparatively high. As a result, production and consumption of nitrogenous fertilizer increased and consumption of P&K fertilizer decreased. This led to severe imbalance in consumption of nitrogenous, phosphatic and Potassic fertilizers. Fearing imbalance fertilization of the soil, un affordability by farmers due to increase in phosphatic and potassic fertilizer prices, Government of India announced ad hoc concession Scheme ,for phosphatic and potassic fertilizers from Rabi 1992 to cushion the impact of price hike with a view to encourage balanced fertilizers consumption.

2.2 The basic purpose / objective of the Concession Scheme for P&K fertilizers to the farmers at affordable prices so as to increase the food productivity in the country though balanced use of fertilizers. The concession scheme was also aimed at ensuring reasonable rate of return on the investments made by the entrepreneurs in the fertilizer sector.

2.3 Initially, the ad-hoc Concession Scheme was applicable on DAP, MOP, NPK complex fertilizers. This scheme was also extended to SSP from 1993-94. Concession was disbursed to the manufacturers/importers by the State Governments during

1992-93 and 1993-94 based on the grants provided by Department of Agriculture & Cooperation (DAC).

2.4 During 1997-98, Department of Agriculture & cooperation also started indicating an all India uniform Maximum Retail Price (MRP) for DAP/NPK/MOP. The responsibility of indicating MRP in respect of SSP rested with the State Governments. The Special Freight Subsidy Reimbursement Scheme was also introduced in 1997 for supply of fertilizers in the difficult areas of MK and North-eastern States, which continued upto 31.3.2000. The total delivered cost of fertilizers being invariably higher than the MRP indicated by the Government, the difference in the delivered price of fetiilizers at the farm gate and the MRP was compensated by the Government as subsidy to the manufacturers/importers.

2.5 Till 30th September 2000, the issues relating to fertilizer subsidy was being looked after by DAC and thereafter it was continued by Department of Fertilizers with changed parameters from time to time. The MRP of P&K fertilizers were revised on 28.2.2002, which continued upto 31.3.2010 in case of DAP and MOP. However, in case of complex fertilizers, the MRP was revised on 18.6.2008.

2.6 The MRP of SSP. which was used to be declared by the respective State Governments upto 30th 2008, was announced by DOE at Rs.3400 MT uniformly all over the country w.e.f. 1.5.2008 to 30.9.2009 and subsidy on SSP was decided by DOE on monthly basis based the report of Cost Account Branch, MRP of SSP was left open w.e.f. 1.10.2009 to 30.4.2010 and affixed of Rs.2000 PMT was paid on SSP as subsidy.

3. Consumption of Subsidy on P&K fertilizers and Concession Scheme:

3.1 The computation of subsidy on P&K fertilizers was based oil Price Study on DAP and MOP conducted by Bureau of Industrial Costs and Prices ('BIG') now called Tariff Commission (TC). The subsidy rates were decided oil cost plus approach on quarterly basis w.e.f 1.4.1999. The total delivered cost of the fertilizers being invariably higher than MRP indicated by the Government, the difference between delivered price of fertilizers at farm gate level and the MRP was compensated by Government in the form of subsidy.

3.2 The Government introduced a new methodology for working out subsidy on complex fertilizers w.e.f 1.4.2002 based on the recommendation of TC. The complex manufacturers were divided

into two groups based on feed stock for sourcing nitrogen i.e. GAS and Naphtha. With passage of time, DAP industry started using different raw materials such as Rock Phosphate for producing phosphoric acid. DOE framed a proposal suggesting methodology to link phosphoric acid and price with international DAP price. The matter was referred to Expert Group under chairmanship of Prof Abhijit Sen. The report of this Group was submitted in October 2005 and considered by Inter-Ministerial group. TC conducted fresh cost price study of DAP/MOP and NPK complexes and submitted its report in December 2007. Based oil TC report, the subsidy was calculated on monthly basis till 31.3.2010.

4. MRP of P&K fertilizers under concession Scheme:

The MRP was fixed by the Government with effect from 1.4.1997 and the details of' MRI' fixed by the Government from 1997 to 31.3.2010 are mentioned in the table below.

5. Impact of concession Scheme:

5.1 The MRP of P & K fertilizers were much lower than its delivered cost. This led to increase in consumption of fertilizers during the last three decades and consequently increase in food grain production within the county. However, it was observed in last few years that the marginal response of agricultural productivity of additional fertilizer usage in the country had fallen sharply, leading to near stagnation in agricultural productivity and consequently agricultural production. The disproportionate NPK application, rising multi-nutrient deficiency and lack of application of organic manures leading to reduction in carbon content of the soil, was attributed to the stagnating agricultural productivity. The fertilizer sector worked in a highly regulated environment with cost of production and selling prices being determined by the Government of India. Due to this fertilizer sector also suffered as very few products were introduced by fertilizer industry had no incentive to invest on modernization and for increasing efficiency. The innovation in fertilizer sector also suffered as net few products were introduced by fertilizer companies, since they get out priced by subsidized fertilizers. The industry had no incentive to focus on farmers leading to poor farm extension services, which were necessary to educate farmers about the modern fertilizer application techniques, soil health and promote soil test based application of soil and crop specific fertilizers.

5.2 The subsidy outgo of Government also increased exponentially by 500% during the past five years (2005-06 ti

2009-10) under the concession Scheme with about 94% of the increase caused by increase in international prices of fertilizers and fertilizers and fertilizer inputs, and only 6% attributable to increase in consumption.

5.3 It was, thus, observed that over the last few years the product based subsidy regime erstwhile concession scheme) had been proving to be a losing proposing for all the stake holders viz farmers, industry, competitiveness amongst the fertilizer companies and to overcome the deficiency of concession scheme, the Government introduced Nutrient Based Subsidy (NBS) Policy for P & K fertilizers w.e.f. 1.4.2010.

6. Nutrient Based Subsidy ('NBS') Policy (w.e.f. 1.4.2010):

6.1 The Department is implementing NBS Policy for P & K fertilizers w.e.f 1.4.2010. Under the NBS Policy, a fixed rate of subsidy (in Rs. Per Kg basis) is announced on nutrients namely Nitrogen (N), Phosphate (P), Potash (K) and Sulphur (S) by the Government on annual basis. The salient features of NBS Policy are as under:

- *An Inter-Ministerial Committee (IMC) has been constituted with Secretary (Fertilizers) as Chairperson and Joint Secretary Level representatives of Department of Agriculture & cooperation (DA C), Department of Expenditure (DOE), Planning commission and Department of Agriculture Research and Education ('DARE). This Committee recommends per nutrient subsidy for 'N', 'P', 'K and '5' before the start of the financial year for decision by the government (Department of Fertilizers). The IMC recommends a per tonne additional subsidy on fortified subsidized fertilizers carrying secondary (other than 'S') and micro-nutrients. The Committee also recommends inclusion of new fertilizers under the subsidy regime based on application of manufactures / importers and its need appraisal by the Indian Council for Agricultural Research (JcAR), for decision by the Government.*

- *The per Kg subsidy rates on the nutrient N, P, K, S is converted into per Tonne subsidy on the various P & K fertilizes covered under NBS Policy.*

- *Any variant of the fertilizers covered under the subsidy scheme with micronutrients namely Boron and Zinc, is eligible for a separate per tone subsidy to encourage their application along with primary nutrients.*

- *At present 22 grades of P&K fertilizers namely DAP, MAP, TST, MOP, Ammonium Sulphate, SSP and 16 grades of NPKS complex*

fertilizers are covered under the NBS Policy.

• Under the NBS regime, MRP of P & K fertilizers has been left open and fertilizer, manufacturers / markets are allowed to fix the MRP at reasonable rates.

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• The distribution and movement of fertilizers along with import of finished fertilizers, fertilizers inputs and production by indigenous units is monitored through the online web based "Fertilizer Monitoring System (FMS)" as was being done under the Concession Scheme for P & K fertilizers.

• 20% of the decontrolled fertilizers produced/imported in India has been placed in the movement control under the Essential Commodities Act 1955 (ECA). Department of Fertilizers regulates the movement of these fertilizers to bridge the supplies in under serve areas.

• In addition to NBS, freight for the movement and distribution of the decontrolled fertilizers by rail and road is being provided to enable wider availability of fertilizers even in the remotest places in the country.

• Import of all the subsidized P & K fertilizers, including complex fertilizers has been placed under Open General License ('OGL). NBS is available for imported complex fertilizers also except Ammonium Sulphate. However, in case of Ammonium Sulphate (AS) the NBS is applicable only to domestic production by M/s FACT.

• Though the market price of subsidized fertilizers, except Urea, is determined based on demand-supply dynamics, the fertilizer companies are required to print Retail Price (RP) along with applicable subsidiary on the fertilizer bags clearly. Any sale above the printed MRP is punishable under the EC Act.

• Manufacture of customized fertilizers and mixture fertilizers have been permitted to source subsidized fertilizers from the manufactures/importers after their receipt in the districts as inputs for manufacturing customized fertilizers and mixture fertilizers for agricultural purpose. However, no separate subsidy is provided on sale of customized fertilizers and mixture fertilizers.

• A separate additional subsidy is also provided to the indigenous manufacturers producing complex fertilizers using Naphtha based captive Ammonia to compensate for the higher cost of production of 'N' for maximum period of two years w.e.f 1.4.2010 to 31.3.2012 during which the units are required to convert to gas or use imported Ammonia as feedstock. The quantum of additional subsidy is finalized by Department of Fertilizers in consultation with DOE, based on study and recommendations by the Tariff Commission.

• The NBS is passed on to the farmers through the fertilizer industry. The payment of NBS to the manufactures/importer of P & K fertilizers is released as per the procedure notified by the Department.

6.5 Reasonableness of MRP:

Under NBS policy companies are allowed to fix the MRP on their own. The intention behind introduction of NBS was to increase competition among the fertilizer companies to facilitate availability of diversified products in the market at reasonable prices. However, the prices of P&K fertilizers have gone up substantially and doubts have been raised about reasonableness of the prices fixed by the companies. The prices have gone up substantially on the account of increase in prices of raw materials / finished fertilizers- in international market, depreciation of Indian rupee w. r. t US Dollar and also due perhaps to larger profit margins by the companies. This has lead to lot of hue and cry from the various quarters and has also lead to imbalance in use of fertilizers. Accordingly, in order to check the prices fixed by P&K companies, the Government vide notification dated 8.7.2011 directed the fertilizer companies to fix the prices of P&K fertilizers at reasonable level under the NBS regime.

65.1 In order to ensure reasonableness of prices fixed by fertilizer companies, while announcing the NBS Policy and rates for the year 201314, the following clauses have been incorporated in NBS Policy applicable with effect from 1.4.2012.

('i) It shall be mandatory for all the fertilizer companies to submit, along with their claims of subsidy, certified cost data in the prescribed format and as per the requirement for the purpose of monitoring of MRPs of P&K fertilizers fixed by the fertilizer companies.

(ii) In cases, where after scrutiny, unreasonableness of MRP is established or where there is no correlation between the cost of production or acquisition and the MRP printed on the bags, the

subsidy may be restricted or denied even if the product is otherwise eligible for subsidy under NBS. In proven case of abuse of subsidy mechanism, DOF, on the recommendation of IMC may exclude any grade/grades of fertilizers of a particular company or the fertilizer company itself from the NBS scheme.

(iii) The reasonableness of MRP will be determined with reference to the MRP printed on the bags.

(iv) The companies shall continue to submit the certified cost data as per the requirement and direction of DOF from time to time. The companies shall also report MRPs ofF & K fertilizers regularly to DOF.

(v) The P&K companies should have the same MRP printed on the bags as applicable for each State in FMS. In other words, there should not be any difference in MRP printed on the fertilizer bags and that reported in the FMS for a particular state.

(vi) The fertilizer companies henceforth will certify the correctness of MRPs of their products entered in FMS while claiming 'On Account' claims for a particular month and also ensure that the MRPs are updated in the FMS upto the date of submission of bill.

It is most respectfully and humbly submitted that after a careful perusal of the fertilizer policy including NBS policy, it can be safely stated that the ld. CIT(A) erred in appreciating the 'purpose' of the NBS policy. The NBS policy is part of the evolving fertilizer policy. The underlying main purpose, as stated above, is to make the fertilizer available to farmers at reasonable price so that consumption of the same does not come down affecting the food production. It is evident from the details/ contents narrated under the heading 'Fertilizer Subsidy Policy for Phosphatic & Potassic (P&K) Fertilizers'. It provides clear and emphatic perspective/ context of the policy, which lucidly laid down the purpose of the policy. The entire policy including NBS policy is focussed on protecting the interest of farmers and food production. The Id. CIT (A) failed to appreciate the NBS policy narrated at item no. 6 of the document above. At the last 'bullet point' under the NBS policy at item no. 6.1, it is clearly stated that 'The NBS is passed on to the farmers through the fertilizer industry. The payment ofNBS to the manufacturer/ importers of P&K fertilizers is released as per the procedure notified by the Department'. It establishes the purpose of the NBS (subsidy), which is to pass on the subsidy to the farmers through the assessee. It is not meant for the assessee. It is to provide cushion to the farmers against the market price. It is further

corroborated/ supported by the contents under the heading 'Reasonableness of MRP' at the item no. 65, which is part of NBS policy, of the document above. It states that 'Under NBS policy companies are allowed to fix the MRP on their own. The intention behind introduction of NBS was to increase competition among the fertilizer companies to facilitate availability of diversified products in the market at reasonable prices. However, the prices of P&K fertilizers have gone up substantially and doubts have been raised about reasonableness of the prices fixed by the companies. The prices have gone up substantially on the account of increase in prices of raw materials/finished fertilizers in international market, depreciation of Indian rupee w.r.t US Dollar and also due perhaps to larger profit margins by the companies. This has led to lot of hue and cry from the various quarters and has also led to imbalance in use of fertilizers. Accordingly, in order to check the prices fixed by P&K companies, the Government vide notification dated 8.7.2011 directed the fertilizer companies to fix the prices of P&K fertilizers at reasonable level under the NBS regime.

Therefore, the ld. CIT (A) clearly missed out on the points stated above in deciding the purpose of the NBS policy. Apparently, he only dwelled upon item no. 5 'Impact of Concession Scheme', which is nothing but prelude to the NIBS policy stated at subsequent item no. 6. 'Impact of Concession Scheme' alone cannot conclusively decide the purpose of the NBS policy. Hence, it is requested that the second ground of appeal be allowed in favour of the Revenue and the decision of the ld. CIT (A) on this count may please be cancelled."

14. The learned Counsel for the assessee on the other hand relied upon the order of the first appellate authority and brought to our notice the 'NBS' policy documents and scheme.

15. Considered the rival submissions and perused the material on record in the light of the decisions relied upon by the parties. We notice that the learned Departmental Representative tried to submit before us that the subsidy given to the manufacturers under NBS Scheme was to give concession to the farmers and reduce the MRP in order to bring down the manufacturing cost. Whole scheme was

designed to increase the fertilizer production and utilization among the farmers by making available at the affordable price to the farmers. Since it is linked to reduction of price in manufacturing, this subsidy can only be classified under revenue not capital. However, we notice that the purpose of introduction of NBS scheme and modification of various Govt. schemes over the period is due to the fact that (refer impact of concession scheme) the growth of fertilizer industry was stagnated with virtually no investments over the years in urea sector, this industry had no incentive to invest on modernization and for increasing efficiency. The industry had no incentive to focus on farmers leading to poor farm extension services. The policy was introduced to reduce the burden on subsidy outgo in the hands of the Government which increased exponentially over the years. This policy is introduced considering all the issues relating to agriculture productivity, balanced fertilization and growth of indigenous fertilizer industry, competitiveness among the fertilizer companies and to overcome the deficiency of concession scheme. Therefore, it is clear that this scheme is introduced with the object of passing the benefit to the farmers at the same time, there is no fresh investment and innovations were not coming to the industry due to low profitability in this industry. In order to attract the new investments, to increase the productivity and to reduce the manufacturing cost by bringing new

innovation in the industry in order to achieve ultimate reduction in the price of the fertilizers. Therefore, the scheme was mainly to attract the investment in the industry and the purpose test is that the attraction of new players in the industry and also attracts the existing players to bring new investment. How the benefit of scheme is passed on to the industry matters. Sometime, Govt. introduces direct concession in the investments or introduces mechanism in relation to the ultimate achievement of the objects of the scheme. In this scheme, the ultimate object is to make available the required fertilizers and at appropriate price to the farmers, this can be achieved only by bringing new investments in the industry. It is only the mechanism to paass on the capital subsidy to the companies, who bring in new investments and innovation. The subsidy calculated and MRP are under constant monitoring of the Ministry. Therefore, we are inclined to accept the adoption of purpose test by the learned CIT(A) in this case and the subsidy can be classified as capital in nature. In our considered opinion, a receipt that is held to be a capital in nature and not chargeable to tax under the normal provisions of the Act. Hence the same lies outside the purview of Act. When a receipt is not in the nature of income, it cannot form part of taxable profit. Consequently, in view of the aforesaid discussion as enumerated by the learned CIT(A) in detail, in our opinion, the order of the learned CIT(A) on the

issue in dispute is well reasoned and we do not find any legal infirmity in the order passed by him which is hereby upheld. Thus, the ground of the appeal no.2, raised by the Revenue is also dismissed.

16. In the result, Revenue's appeal is dismissed.
Order pronounced in the open court on 09.08.2021

Sd/- **RAVISH SOOD** **JUDICIAL MEMBER**	Sd/- **S. RIFAUR RAHMAN** **ACCOUNTANT MEMBER**

MUMBAI, DATED: 09.08.2021

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai