आयकर अपीलीय अधीकरण, न्यायपीठ –"C" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri P. M. Jagtap, Vice President & Shri A. T. Varkey, Judicial Member]

I.T.A. No. 132/Kol/2020
Assessment Year: 2013-14

Assistant Commissioner of Income-tax, Circle-1(1), Kolkata.	Vs.	M/s. Kamarhatty Company Ltd. (PAN: AABCK2916K)
Appellant		Respondent

Date of Hearing (Virtual)	11.08.2021
Date of Pronouncement	19.08.2021
For the Appellant	Shri Supriyo Pal, Addl. CIT
For the Respondent	Shri Manish Tiwari, FCA

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal preferred by the revenue against the order of the Ld. CIT(A)-1, Kolkata dated 30.10.2019 for AY 2013-14.

2. The first ground of appeal of the revenue is against the action of the Ld. CIT(A) allowing the employees' Provident Fund (PF) and ESI to the tune of Rs.1,15,09,316/- and Rs.22,35,069/- respectively.

3. Brief facts of the case as noted by the AO are that the assessee company is engaged in the business of manufacturing and trading of jute goods and Kraft paper. On examination of accounts, the AO observed that there has been a delay in depositing employees' contribution to PF and ESI. And since there was a delay in depositing the employees' contribution to PF & ESI accounts as per the respective Acts/enactments [i.e. PF Act & ESI Act], the AO disallowed the same and added back Rs.1,37,44,385/-. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same. Aggrieved the Revenue is in appeal before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Ld. CIT(A) has taken note that the payments in respect of PF & ESI accounts (i.e. *both the employees and employers' contribution*) has been made by the assessee within the due date of filing of return of income (ROI) u/s. 139(1) of the Income-tax Act (*hereinafter referred to as the* "Act") i.e. before 30.09.2013. This fact has been taken note by the Ld. CIT(A) from perusal of Annexure 5A and 5B of the Tax Audit Report dated 26.09.2013. And since the assessee has deposited the PF & ESI deposits before the due date of filing of ROI, the assessee relied upon the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. M/s. Vijayshree Ltd., ITAT No. 245 of 2011 dated 16.09.2011 and the Hon'ble Apex Court's decision in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in (2009) 390 ITR 306 and contended that since both the contributions as per the PF & ESI Act has been made on or before the filing of return of income u/s. 139(1) of the Act, so no disallowance to be made u/s. 36(1)(va) of the Act which has been accepted by the Ld. CIT(A). Moreover, it has been brought to our notice that in assessee's own case for AYs 2008-09 and 2011-12 this Tribunal has allowed identical claim of the assessee. We note that in assessee's own case (ITA No. 947/Kol/2012 dated 05.02.2014, AY 2008-09) at para 7 to 9 this Tribunal has held as under:

> "7. Vide its Ground No. 3, grievance of the revenue is that ld.CIT(Appeals) deleted the addition made by the Assessing Officer for belated payments of Employees' contribution to Provident Fund and ESI.
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> 8. Ld. Counsel for the assessee submitted that Hon'ble jurisdictional High Court in the case of CIT – vs.-Vijay Shree Ltd. [ITA No. 245 of 2011 dated 16.09.2011] had held that amendment to second proviso to section 43B of the Act, as introduced by Finance Act, 2003 was curative and retrospectively applied from 1s t April, 1988, relying on the decision of the Hon'ble Apex Court in the case of CIT –vs.- Alom Extrusions Limited [390 ITR 306]. Their Lordships held that Employees' contribution paid beyond due date prescribed under Provident Fund Act and Rules were also deductible if the amounts were remitted prior to the due date of filing of the return.
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> 9. We find that the aforesaid issue is covered by the decision of Hon'ble jurisdictional High Court. There is no dispute that the payments were affected by the assessee before the due date of filing the return. Ground No. 3, therefore, stands dismissed. "

And that decision (supra) was followed in ITA No. 2080/Kol/2016 for AY 2011-12 dated 28.03.2018. We also note that recently the Hyderabad Bench of this Tribunal in AY 2015-16 by its order dated 01.07.2021 in ITA No.

1592/Hyd/2018, AY 2015-16 wherein a similar issue came up before the Tribunal took note of the recent amendment by Finance Act, 2021 in section 36(1)(va) of the Act as well as in section 43B of the Act and held that amendment is prospective in nature and will be effective from 01.04.2021 and held as under:

> "2. Coming to the sole substantive issue of ESI/PF disallowance of Rs. 3,27,332/-, the assessee's and Revenue's plea that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. We notice in this factual backdrop that the legislature has not only incorporated necessary amendment in Sections 36(1)(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers' contribution/ disallowance u/s 43B as against employee's contribution u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, we hold that the impugned disallowance is not sustainable in view of all these latest developments."

5. From the aforesaid decision of the Hyderabad bench of this Tribunal this amendment made by Finance Act, 2021 applies prospectively w.e.f. 01.04.2021, so it does not help the case of the Revenue to sustain the disallowance. Therefore, we note that the impugned action of the Ld. CIT(A) is in consonance with the decision of the Hon'ble jurisdictional High court in the case of CIT Vs. M/s. Vijayshree Ltd. (supra) and this Tribunal's order in assessee's own case is, therefore, upheld. This ground of appeal of revenue is dismissed.

6. Second ground of appeal of the revenue is against the action of the Ld. CIT(A) in granting relief to the assessee on account of disallowance u/s. 14A of the Act amounting to Rs.8,67,503/-.

7. At the outset, the Ld. AR of the assessee brought our notice that the assessee has not received any exempt income. This fact has been confirmed by the Ld. CIT(A). The Ld. CIT(A) after taking note of this fact that the assessee has not received any exempt income during the year under consideration has given relief by relying on the decision of this Tribunal in assessee's own case for AY 2011-12 (supra). We do not find any infirmity in the order of the Ld. CIT(A) on this issue and for that we rely on the ratio of the decision of the Hon'ble Delhi

High Court in the case of Cheminvest Ltd. Vs. CIT 317 ITD 33 (Del.) and CIT Vs. Hero Cycles, ITA No. 331 of 2009 (P&H).

8. The third ground of appeal of the revenue is against the action of the Ld. CIT(A) in granting relief to the assessee on account of disallowance of interest on borrowed fund of Rs.96,61,517/- which was advanced to the subsidiary company free of cost.

9. Brief facts as noted by the AO are as under:

> "6. Interest on borrowed fund advanced interest free to Subsidiary Company:-
>
> The Audited Accounts of assessee company shows that the interest free advance to subsidiary company at the beginning and at the close of the year was Rs.7,19,54,550/- and Rs.8,90,70,726/- respectively. It also revealed that no interest has been charged on aforesaid advances. The assessee company borrowed huge fund on interest by way of Secured and Unsecured loan on which Interest amounting to RS.1,65,09,890/- was claimed as deduction out of income earned. The assessee company relied on decision of S.A. Builders Ltd v CIT (A) and another (2007) 288 ITR 1 (SC) for not charging interest on sum advanced to Subsidiary. But the aforesaid argument and decision cited by the assessee company & A/R is not acceptable.
>
> The Hon'ble Apex Court in the case of Addl. Commissioner of Income Tax vs M/s. Tulip Star Hotels Limited has observed that the decision given by the Apex Court in the case of S.A. Builders Limited needs reconsideration.
>
> Therefore, the ratio of the judgment of the Apex Court in the case of S.A. Builders is not binding. The assessee borrowed fund by way of Unsecured loan from related parties and paying interest. From the said fact it is clear that assessee company is taking interest bearing loan from related parties and interest free advance given to subsidiary. The assessee company mat under business compulsion for arranging loan for subsidiary. But paying interest on borrowed fund to related party and after borrowing said fund advanced interest free to subsidiary is nothing but a colourable device to evade tax as held in the case of Mc Dowell & Co. Limited. The assessee borrowed fund at average rate of interest @ 12%. The interest payment on borrowed fund equivalent to 12% utilized for interest free advances to subsidiary not for purpose of business and earning income. The interest @ 12% works out by averaging amount further advanced during the year at Rs.96,61,517/- (Rs.86,34,546/- + Rs.10,26,971/-) is being disallowed out of interest payment, claim by assessee company from borrowed fund utilized for interest free advances to subsidiary company and added back into total income of assessee company."

10. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to delete the same by holding as under:

> "6.8 In the case of the appellant, the fund advanced by Parent Company to subsidiary was used by the subsidiary for meeting working capital requirement viz, for making payment of Electricity bill, wage payment, raw material purchase. Kamarhatty Power Ltd. is a 6 MW Biomass based Power Plant at Raina, Burdwan which is into generation of power for

supply to WBSEDCL. The Subsidiary Company was getting a tariff of Rs.3.35 per unit by virtue of Power Purchase Agreement entered into in 2006 by the Company with West Bengal State Electricity Board i.e. WBSEDCL. However the average Cost of generation of power right from the beginning of commercial generation was more than Rs.4.00 per unit which has gone to Rs.5.00 per unit in 2011, reason being increase in cost of major raw material namely rice husk. The non-recovery of cost has been communicated to various Government departments including Ministry of Power and Ministry of Commerce. In view of non recovery of the actual cost of generation, the Company has constantly suffered huge financial constraints right from the beginning and its viability has been put to severe threat. To meet the deficit in realization from WBSEDCL, the subsidiary Company has been borrowing fund from its holding Company for making payment of its day to day expenses. The power generation business is also included in clause No 19 of the Memorandum and article of association of M/s. Kamarhatty Co Ltd, the Parent Company as its object clause. Hence, the investment of appellant in subsidiary company should not be viewed in line with other interest free advances and that the same should be treated for the purpose of business for the reason that the profit of subsidiary eventually forms part of the holding Company. Advances made to its subsidiary is thus only for business consideration and that the Company had sufficient non-interest bearing funds, at the time of making advances to its subsidiaries.

6.9 The appellant has got relief on the same issue for earlier years as under from Hon'ble ITAT Kolkata

a) ITAT order dated 05.02.2014 No. 947/Ko/12 in case of Kamarhatty Co. Ltd. vs DCIT , for the A.Y - 2008-09 , Para 10 of the Order

b) ITAT order dt 28.03.2018 No.2080/Kol/2016 in case of Kamarhatty Co. Ltd. v DCIT for the AY - 2011-2012 .Para 5 of the Order

6.10. After careful consideration of the submission of the appellant, perusal of assessment records and decision of various judicial authorities including the decision of Hon'ble SC in case of S A Builders, the investment made is out of own funds and in the interest of its own business and out of commercial expediency. Therefore, the disallowance of Rs.96,61,517/- is deleted. The ground no. 4 of appeal succeeds and, therefore, allowed.*"*

11. Aggrieved, the revenue is in appeal before us.

12. We have heard rival submissions and gone through the facts and circumstances of the case. We note that similar issue cropped up in assessee's own case in AYs 2008-09 and 2011-12 and the Tribunal has held in AY 2008-09 as under:

"10. Vide it's ground no. 4, grievance of the revenue is that interest of Rs.19,63,017/- added by the Assessing Officer was deleted by ld. CIT(Appeals).

11. Facts apropos are that assessee had given a sum of Rs.2.91 crores to one of its subsidiary company called Kamarthatty Power Ltd. Assessing Officer required the assessee to explain the source of loans given. Assessee thereupon submitted that the loans given to the subsidiary company came to Rs.1,27,68,000/- as on 31.03.2007, which increased to Rs.2,91,26,483/- by the end of the relevant previous year. Additional loan Rs.1,63,58,483/- was, as per the assessee, given out of the cash profits earned by it. Assessee pointed out that it had profits of Rs.3,57,63,728/- before tax. It had a depreciation claim of Rs.1,55,41,935/- as well. Assessee

also submitted copies of its Bank account with M/s. Allahabad Bank which gave details of payments to Kamarthatty Power Ltd. As per the assessee, cash credit amount had reduced from Rs.2,99,79,485/- to Rs.2,30,20,326/- by the end of the relevant previous year. Hence, no interest bearing funds were used for giving the advance to the subsidiary company.

12. However, Assessing Officer was not impressed. According to him, advance given to the subsidiary originated from the cash credit account. When cheques were issued by assessee to the subsidiary company, bank account was in debit balance and such debit balance had gone up on account of the cheque cleared by the subsidiary. Hence, as per the Assessing Officer, the amounts were given out of borrowed funds only. He, therefore, applied a rate of 12% on the additional loan of Rs.1,63,58,483/- given during the relevant previous year and made an addition of Rs.19,63,070/-.

13. In its appeal before ld. CIT(Appeals), assessee primarily relying on the decision of the Hon'ble Apex Court in the case of S.A. Builders Ltd. – vs.- CIT [288 ITR 1] submitted that the amounts were given to the subsidiary based on commercial expediency. As per the assessee, sources of funds were explained. Reliance was also placed on the decision of the Hon'ble Apex Court in the case of Madhab Prasad Jatia -vs.- CIT [118 ITR 200].

14. Ld. CIT(Appeals) was appreciative of these contentions. According to him, assessee had sufficient interest-free fund available with it and Assessing Officer could not establish the nexus between borrowed fund and the amount given as advance to the subsidiary. He, therefore, deleted the addition made.

15. Now before us, ld. DR strongly assailing the order of ld. CIT(Appeals) submitted that the money was given out of assessee's cash credit account with Allahabad Bank. Each time the cheque was cleared, the dues to the Bank increased. Therefore, according to him, one to one nexus was established. Assessing Officer was, therefore, justified in considering the advance of money as going out of interest bearing funds and making the disallowance

16. Per contra, ld. AR supported the order of ld. CIT(Appeals).

17. We have heard the rival submissions. Whenever a cheque issued by a party is cleared through a Bank loan account, the dues to the Bank will increase. If the cheque is cleared out of a deposit account, the dues from the Bank will be decreased. This arithmetics by itself will not show that money had gone out of interest bearing funds. Assessee has clearly pointed out that the cash credit balance had gone down over the relevant previous year. In other words, the cash credit account stood replenished by more than what was given out as advance, through deposits made by the assessee during the relevant previous year. Assessee had substantial profits during the relevant previous year and, therefore, there is much strength in its arguments that loans did not go out of any interest bearing funds. In any case, the loans were given only to a subsidiary of the assessee and Assessing Officer has not doubted the commercial expediency of such loans. We are, therefore, of the opinion that ld. CIT(Appeals) was justified in deleting this addition. Ground No. 4 of the Revenue stands dismissed.*"*

13. Further, it has been brought to our notice that the assessee was having sufficient interest free fund and the AO was unable to establish any nexus between the borrowed fund and the loan fund advanced to the subsidiary company (*refer the Financial placed at pages 11 to 13 of paper book*) and we note that the assessee has earned Rs.8,49,06,434/-. And the profit before tax is Rs.6,64,53,380/-. And the rental income is to the tune of Rs.1.40 cr. Moreover, it is noted that the subsidiary has refunded the advance given by assessee company to tide over the deficit (*due to low tariff rate of electricity*) and pursuant to the

order of the Hon'ble Supreme Court dated 23.03.2015 upholding the order of Hon'ble Calcutta High Court, the subsidiary received Rs. 7.88 cr. So the subsidiary company has refunded to the assessee/holding company the advance/loan given to it. From the facts discussed, the assessee company which is the holding company had advanced loan interest free due to business exigency to tide over the deficit (*due to low tariff rate of electricity*), so even if interest free advances are given to subsidiary/sister concern, interest expenditure could not have been disallowed and for such a proposition we rely on the ratio of the decision of Hon'ble Supreme Court in the case of S A Builders Ltd. Vs. CIT 288 ITR 1 (SC) which is also applicable to the facts of this case. Therefore, we are of the opinion that the disallowance of interest on loan to subsidiary u/s. 36(1)(iii) of the Act by the AO has been rightly held to be unjustified. Further we note that the issue is squarely covered in favour of the assessee by order of the Coordinate bench of this Tribunal in assessee's own case (supra) and there is no change in facts and law and the Ld. DR was unable to controvert the same by producing any cogent material, therefore, we find no reason to interfere in the impugned order of the Ld. CIT(A) and the same is hereby upheld. Therefore, we uphold the action of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

14. Ground no.4 is against the action of the Ld. CIT(A) in allowing the claim of the assessee in respect of the subsidy received from National Jute Board amounting to Rs.60,16,264/-.

15. Brief facts of the case are that the assessee had received Rs.60,16,264/- from National Jute Board as subsidy. The AO added the said amount to the total income of the assessee on the ground that it is a revenue receipt. The AO did not accept the assessee's explanation that the subsidy received from the National Jute Board is for the purpose of acquisition of plant and machinery. According to the AO, the assessee failed to deduct from the cost of plant and machinery the said sum of Rs.60,16,264/- and has claimed depreciation on the machinery also and therefore, made the addition. Aggrieved, the assessee preferred an appeal before

the Ld. CIT(A) who was pleased to delete the addition. Aggrieved, the revenue is in appeal before us.

16. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has made the addition mainly on the reason that assessee failed to deduct from the cost of plant and machinery the sum of Rs.60,16,264/- and has also claimed the depreciation on this amount of machinery. However, we note that the Ld. CIT(A) has found this allegation of the AO as erroneous and has in para 8.3 of the impugned order has held that the subsidy received towards plant and machinery has been very much deducted from the plant and machinery and depreciation on the balance amount only has been claimed which fact is evident from the online tax audit report. The Ld. CIT(A) has given a finding that the assessee has deducted a total amount of Rs.1,33,63,759/- from plant and machinery out of which deduction includes that of capital subsidy of Rs.60,16,264/-. Thus, the Ld. CIT(A) has given a finding that sum of Rs.1,33,63,759/- has been deducted under the head 'plant and machinery' and depreciation has been charged on the balance amount. The Ld. CIT(A) has taken note of the chart at page 34 of his order, which is as under:

Towards	Amount (Rs.)	Enclosure
SALE VALUE OF PLANT AND MACHINERY	73,47,495/-	AS PER TAR – SCHEDULE OF SALE OF FIXED ASSETS
CAPITAL SUBSIDY RECEIVED	60,16,264/-	AS PER SCHEDULE – 2 OF THE BALANCE SHEET AS ON 31.3.13

17. Thus, we note that the reason for the AO to disallow the claim of the assessee was on wrong assumption of facts. Before us also the Ld. AR demonstrated by drawing our attention to page 50 of the paper book wherein we note that the aforesaid finding of the Ld. CIT(A) is correct and we note that the assessee had deducted the said sum of Rs.60,16,264/- from the head 'plant and machinery' and depreciation has not been claimed on the said plant and machinery. Further, we note that the Ld. CIT(A) has given a finding that the object of the subsidy scheme of National Jute Board was for expansion of business capacities, modernization and improving the market capabilities which is evident

from the page no. 47 to 50 of the paper book which are the copy of the ledger account and capital subsidy and the copies of the letter of the National Jute Board wherein it is spelled out that subsidy has been given to the assessee for acquisition of plant and machinery (capital subsidy) as per scheme no. 6.4 i.e. under Jute Technology Mission; Mini Mission-IV (scheme No. 6.4) Phase-II. The Ld. CIT(A) has clearly given a finding that subsidy was on capital account and this finding of the Ld. CIT(A) has not been assailed by the department by raising specific ground of appeal. Therefore, this finding of the Ld. CIT(A) crystallizes and become final. Therefore, we endorse the finding of the Ld. CIT(A) that the assistance given by the National Jute Board as per this scheme No. 6.4 Mini Mission-IV, Phase II, was on capital account and the same is confirmed. And in the light of the aforesaid finding of fact, the Ld. CIT(A) has rightly relied on the decision of the Hon'ble Supreme Court Sawhney Steel and Press Works Ltd. v. CIT (1997) 228 ITR 253 (SC) and CIT Vs. Pony Sugars & Chemicals Ltd. 306 ITR 392 wherein the Hon'ble Supreme Court held the principle of examining the nature of subsidy receipt in the hands of the assessee. The Hon'ble Supreme Court held that the under lying principle in such cases is to examine "purpose" for which the subsidy is granted. The taxability of the subsidy needs to be determined by analyzing whether the subsidy is a capital receipt or revenue receipt in the hands of the assessee. It is settled that revenue receipt are chargeable to tax on the other hand capital receipts are not unless specifically made taxable under the Act. If subsidies are given for various purpose like for promoting, construction of new industries, expansion of existing industries etc. then it is on capital account. On the other hand, the object of the subsidy scheme was to enable the assessee to run the business more profitably or to meet day to day business expenses, then the receipt shall be of revenue nature. So, if the object of this assistance/subsidy was to enable the assessee to set up a new unit or to expand the existing unit then the receipt shall be capital receipt not chargeable to tax. Therefore, the taxability of subsidies has to be determined by looking into the purpose for which it is given. Taking into consideration the judicial precedents cited (supra) and the scheme for which this subsidy was given to the assessee (supra) the Ld. CIT(A) has rightly

decided in favour of the assessee. Therefore, we are inclined not to interfere in this impugned order on this issue and the same is hereby upheld. Therefore, this ground of appeal of revenue is dismissed.

18. In the result, the appeal of revenue is dismissed.

Order is pronounced in the open court on 19th August, 2021.

Sd/- Sd/-

(P. M. Jagtap) (A. T. Varkey)
Vice President Judicial Member

Dated: 19th August, 2021

Jd, Sr. PS

Copy of the order forwarded to:

1. Appellant- ACIT, Circle-1(1), Kolkata.
2. Respondent – M/s. Kamarhatty Company Ltd., 16A, Brabourne road, 8th floor, Kolkata-700 001.
3. CIT(A)-1, Kolkata (sent through e-mail)
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata