

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D": NEW DELHI]

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No. 1329/Del/2015
(Assessment Year: 2010-11)

Uflex Limited, 305, 3 rd Floor, Bhanot Corner, Pamposh Enclave, Gr. Kailash-I, New Delhi – 110 048. PAN: AAACF0109J	Vs.	ACIT, Central Circle :27, New Delhi.
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AND

ITA. No. 1855/Del/2015
(Assessment Year: 2010-11)

DCIT, Central Circle : 18, New Delhi.	Vs.	Uflex Limited, 305, 3 rd Floor, Bhanot Corner, Pamposh Enclave, Gr.Kailash-I New Delhi – 110 048. PAN: AAACF0109J
(Appellants)		(Respondents)

Assessee by :	Shri M. P. Rastogi, Advocate; & Shri Rajiv Kumar, C. A.;
Department by:	Shri S. Najmi [CIT] – D. R.;
Date of Hearing :	02/09/2021
Date of pronouncement :	30/11/2021

ORDER

PER AMIT SHUKLA, J. M.

1. The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against the order dated 21.01.2015, passed by the Id. Commissioner of Income Tax (Appeals)-29, New Delhi, for assessment year 2010-11.
2. The assessee has raised the following grounds of appeal:-

ITA. No. 1329/Del/2015 :

“1. That on the facts and in the circumstances of the case, the lower authorities erred in law in disallowing administrative expenses of Rs 29,26,185/- under Section 14A of Income Tax act ,1961 read with rule 8D(2) (iii) of income tax rules 1962.

2. That on the facts and in the circumstances of the case, the lower authorities erred in law in disallowing administrative expenses under rule 8D without recording satisfaction as required under Section 14A of Income Tax act 1961 and rule 8D(1) (a) & (b) of Income tax rules 1962.

3. That on the facts and in the circumstances of the case, the lower

authorities erred in disallowing expenses without examining the direct and immediate connection with dividend income. There was no expenditure incurred “in relation to” dividend exempt income.

4. That on the facts and in the circumstances of the case, the lower authorities erred by including such investments under rule 8D(2)(iii) from which no exempt dividend is received or not likely to be exempted.

5. That on the facts and in the circumstances of the case, the lower authorities erred in law in not appreciating the difference between a “simple investment” to earn income from dividend or interest or a “Business investments” made as a promoter with a motive to hold a controlling stake with a view to manage the company.

6. It is contended that on the facts and circumstances of the case and in law, refund of Excise duty (Self Cenvat Credit) amounting to Rs 3,29,12,376/- is a capital receipt not liable to tax under the provisions of Income Tax Act, 1961.

7. It is contended that on the facts and circumstances of the case and in law, refund of Excise duty (Self Cenvat Credit) amounting to Rs 3,29,12,376/- is a capital receipt not includible in the determination of total income u/s 115JB of Income Tax Act, 1961.

8. The appellant craves leave to add to, alter, delete, modify or vary the above grounds of appeal at or before the time of the hearing. “

3. Whereas, the Revenue has raised the following grounds of appeal:-

ITA. No. 1855/Del/2015 :

“1. On the facts and in the circumstance of the case, the Ld. CIT(A) has erred in law and on facts in giving a relief of Rs. 1,56,07,634/- made by the AO in accordance with the provisions of section 14A of the Income Tax Rules.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the disallowance of claim for deduction of Rs. 3,19,12,376/- u/s 80IB on account of Self Cenvat Credit availment.

3. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

4. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal. “

4. In so far as the issue relating to ground Nos. 1 – 5 of the assessee’s appeal and ground No. 1 in the Revenue’s appeal, the facts are that the ld. Assessing Officer noted that assessee has earned dividend income of Rs.1,46,20,852/- and pointed out that during the year under appeal, the appellant had received dividend amounting to Rs. 1,46,70,852/-, the details whereof are as under:-

(i) Flex Foods Ltd.	Rs.1,
(ii) Reliance Infrastructure Ltd.	Rs. 4,20,000/-
(hi) Ansals Properties & Infrastructures	Rs.
(iv) Kothari Products Ltd.	Rs. 7,62,000/-
(v) Reliance Liquid Fund	Rs. 5,099/-
(Vi) Reliance Industries Ltd.	Rs. 14,48,798
	<u>Rs.1,46,70,852/-</u>

4.1 Before the Assessing Officer, the appellant stated that it is from the holding and promoter company, M/s Flex Foods Ltd., wherefrom dividend amounting to Rs. 1,17,14,000/- was received out of the total dividend of Rs. 1,46,70,852/-. The appellant contended that for earning the dividend from M/s Flex Foods Ltd., the appellant has not incurred any expenditure at all as dividend warrant were directly credited in the account. On such facts, the appellant stated that while computing the disallowance, if any, u/s 14A (2) of the Act, the disallowance has to be restricted in relation to the other companies from whom the dividend has been received and that too, to the extent of actual expenditure so incurred. For this purpose, the appellant relied upon the judgment of Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. vs. CIT in 347 ITR 272.

4.2 However, the ld. Assessing Officer denying the assessee's claim having regard to the nature of expenses claimed and the exempt income earned, proceeded to apply Rule 8D and worked out the disallowance at Rs.1,95,33,819/-. The ld. CIT (Appeals) gave relief to the extent of Rs.1,66,07,634/- on the ground that in so far as the interest expenditure is concerned, the assessee had not utilized any borrowed funds for acquisition of investments but were made from assessee's own surplus funds. However, he confirmed the

computation of administrative expenses @ 0.5% under Rule 8D(2)(iii) on the total average investments and confirmed the disallowance of Rs.29,26,185/-.

5. After hearing both the parties and on perusal of the material placed on record, we find that the Assessing Officer has nowhere recorded his satisfaction as to why the assessee's claim that no expenditure has been incurred for earning of exempt income especially when majority of dividend income has come from holding company and has mechanically proceeded to make the disallowance under Rule 8D(2)(iii). Now it is well settled proposition that recording of satisfaction as contemplated in Section 14A(2) of the Act is a condition precedent for determination of the amount of expenditure for earning the exempt income as formulated. This has been held so by the Hon'ble jurisdictional High Court in the case of **HT Media Ltd. 399 ITR 576 (Del)**. Hon'ble Supreme Court in the case of **Maxopp Investment Ltd. Vs. CIT 402 ITR 640 (SC)** has clarified this aspect in the following manner:-

“Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by

the Assessing Officer.”

5.1 Since no satisfaction has been recorded by the Assessing Officer as per the mandate of section 14A (2), then no disallowance under Section 14A can be made and accordingly, disallowance worked out by the Assessing Officer under Rule 8D is deleted. In the result, grounds Nos. 1–5 in the assessee’s appeal are allowed and ground No. 1 raised by the Revenue is dismissed.

6. The brief facts qua the issue raised in ground Nos. 6 & 7 are that, the appellant is a manufacturing concern and manufactures flexible packaging films having its manufacturing facility at Jammu, Noida (UP) and Malanpur (MP). The Jammu unit was established in the year 2007-08 and is eligible for deduction u/s 80-IB of the Act. The appellant stated that the Jammu unit was established on 20th September 2007 under the incentive scheme framed by the Central Government for the purpose to boost industrialization in order to improve employment opportunities in the State. For such purposes, the Central Government has announced a new Industrial Policy and allowed various concessions for the State of Jammu & Kashmir floated by Office Memorandum dated 14th June 2002 on the request of the Government of Jammu & Kashmir for a special package for development of the industries in the State.

6.1 The Government of India, Ministry of Commerce & Industry (Department of Industrial Policy and Promotion) issued its Office Memo dated 14th June 2002 - copy thereof has been placed at page 281 of the paper book wherein it was provided that keeping in view the fact that the State of Jammu & Kashmir lagged behind in industrial development, there was need for structured interventionist strategies to accelerate the industrial development of the State and boost

investors' confidence. These fiscal incentives were to be provided to the new industrial units as well as to the industrial units who have made substantial expansion. The fiscal incentive provided under the scheme is discussed in paragraph 3.1 of the Memorandum as under:

(i) The new industrial units and existing industrial units on their substantial expansion, as defined, set up growth centres, industrial infrastructure development centres and other locations like industrial estates, parks, export processing industries, commercial estate etc. as notified by the Central Government will be entitled to 100% excise duty exemption for a period of ten years from the date of commencement of the commercial production.

(ii) All new industries in the notified locations were eligible for Capital Investment Subsidy at the rate of 15 per cent of their investment in Plant and Machinery, subject to a ceiling of Rs. 30 lakhs whereas the existing units will be entitled to subsidy on substantial expansion, as defined.

6.2 Besides these and other concessions, interest subsidy of 3% on the working capital and insurance premium to the extent of 100 per cent on capital investment too was permissible to the new and existing units on their substantial expansion for a period of 10 years. Office Memorandum dated 14th June 2002 referred to herein above was later amended vide Notification of 28th November 2003 issued by the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy & Promotion, which reads thus:

"No. 1(1 1)/2002-NER - In pursuance of the announcement by the Prime Minister on 19-4-2003 at Srinagar for creation of one lakh employment and self-employment opportunities in Jammu & Kashmir, the Government of India had set up a Task Force under

Cabinet Secretary. The recommendations of Task Force were submitted to the Cabinet. To achieve this object of employment generation, the Cabinet has, inter alia, approved following definition of the term 'substantial expansion' for the purpose of incentives/ subsidies notified as per O.M. No. 1(13)/2000-NER, dated 14-6-2002.

2. The Central Government, therefore, hereby makes amendment in the Central Interest Subsidy Scheme, 2002 notified in the Notification of the Government of India in the Ministry of Commerce & Industry, Department of Industrial Policy & Promotion No. 1(1 1)/2002-NER* dated 22-10-2002. The definition of the term 'Substantial Expansion' appearing under para 5(d) of the Scheme may be substituted by the following:

"Concessions for substantial expansion should extend to include all new investments by entrepreneurs, which leads to substantial additional employment creation by an existing entrepreneur without insisting on major expansion. However, credit under the Industrial Policy Package should not be merely for paying off old debts or for equipment already in place."

6.3 All these notifications, as issued by the Central Excise for the refund of central excise paid by the new industrial undertakings or who have taken substantial expansion were considered by the Hon'ble **J&K High Court in the case of Shree Balaji Alloys vs. CIT in 333 ITR 335** and after considering the aims and objects of the scheme formulated by the Central Government for the refund of central excise (generally called CENVAT), held that the purpose of the scheme was to boost the industrialization of J&K to create employment opportunities in the State.

7. The ld. Assessing Officer however, held that refund of Excise credit in the form of subsidy received by the industrial undertaking though has been decided in favour of the assessee in the group concern by the ld. CIT (Appeals), however, the Revenue is in appeal before the Tribunal therefore, he held that its revenue receipt and hence taxable. Moreover, the assessee itself has shown revenue receipt and credited in the profit and loss account and consistently treated as profit of the undertaking and the deduction under Section 80IB claim. He thus rejected the assessee's claim and that same is not part of profit derived from industrial undertaking. Consequently, he disallowed the claim of excise refund as capital receipt. The ld. CIT (Appeals) however endorsed the view of the Assessing Officer and held that it is revenue in nature.
8. Before us Ld. Counsel stated that the incentive provided under scheme are capital receipt and are not liable to tax in view of series of judgments the copies of which were placed before us.
9. The ld. DR, on the other hand, strongly relied upon the order of the Assessing Officer and the ld. CIT (Appeals).
10. Admittedly, the above issue is squarely covered by the decision of the Hon'ble J & K High Court in the case of Shree Balaji Alloys Vs. CIT (supra) and it has also been brought on record that the Revenue's SLP before the Hon'ble Supreme Court has been dismissed vide Civil Appeal No. 10061/2011 vide order dated 19th April, 2016. Further, the Hon'ble apex court in the case of CIT Vs. Chaphalkar Brothers in 400 ITR 279 have reiterated this proposition after observing as under:-

“ After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial

development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars & Chemicals Ltd. case (supra) and the appeals were, therefore, dismissed.

We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.”

11. Before us, the appellant has further, placed on record that even the Coordinate Delhi Bench in the following group concerns of the assessee, after considering the judgment in the case of Shree Balaji Alloys (supra) in exactly similar set of facts and nature of subsidy has treated the incentive by way of central excise refund (generally called CENVAT credits) in relation to the Jammu unit as capital receipts not liable to tax.

- (i) ITA No. 5124/Del/2011 dated 29th June 2018 Montage Enterprises Pvt. Ltd. vs. DCIT (Paras 9 to 60)
- (ii) ITA No. 2199/Del/2009 dated 20th March 2019 Ultimate Flexipack Ltd. vs. DCIT.

12. Thus, we hold that the refund of CENVAT credit on the facts of the present case is capital subsidy in view of the principle laid down by the Hon'ble apex court and also the judgement of the Tribunal in the group concern of the assessee as cited above.

13. Consequently, ground No. 2 as raised by the Revenue is dismissed as infructuous as we have already held that it is a capital receipt and not exigible to tax.

14. Regarding issue raised vide Ground No. 7, that the aforesaid subsidy being capital in nature it will also not form part of the book profit u/s 115JB. Before us the Ld. Counsel for the assessee submitted that the CENVAT credit as received by the appellant under the incentive scheme for J&K as formulated by the Central Government and treated the same as a capital receipt not liable to tax by the J&K High Court in the case of Shree Balaji Alloys (supra) and also affirmed by the Hon'ble Supreme Court, that it will not form part of the income chargeable to tax u/s 4 of the Act and once the same is treated as capital receipt not chargeable to tax under the Income-tax Act, then same has to be excluded while computing the income under the MAT provisions in terms of Section 115-JB of the Act. Because Section 115-JB is also meant for the purpose of levy of tax on income and the basic things will have to be kept in mind that receipts which have to be included in the profit should be having the characteristic of income. There is a fundamental difference between the income and capital that the income is liable to tax, whereas capital is not liable to tax. In the case of Padmaraje R. Kadambande vs. CIT in 195 ITR 877, the Hon'ble Supreme Court held that the capital receipts are not income within the definition of Section 2(24) of the Act and hence are not chargeable under the Income Tax Act. The learned counsel further stated that the provision of Section 115-JB of the Act is alternative

mechanism for computation of income based on book profit without claiming any deduction or incentive allowable under the Act, but the fact remains that taxability has to be restricted to the income and once a receipt is considered as capital, it should be excluded even while computing book profit u/s. 115-JB of the Act. He relied upon the following judgements:

- (i) ITA No. 923/Bang/2009 dated 13th January 2017
JSW Steels Ltd. vs. ACIT
- (ii) ITA No. 5124/Del/2011 dated 29th June 2018 Montage Enterprises Pvt. Ltd. vs. DCIT
- (iii) ITA No. 2199/Del/2009 dated 20th March 2019 Ultimate Flexipack Ltd. vs. DCIT
- (iv) 416 ITR 591 (Cal) Pr. CIT vs. Ankit Metal 85 Power Ltd.
- (v) Appeal No. 1132 of 2014 dated 4th January 2017
CIT vs. Harinagar Sugar Mills Ltd. (Bombay)
- (vi) ITA Nos. 614, 615 & 635/JP/2010 dated 9th September 2011 - Shree Cement - Appeal by Revenue, the Hon'ble Rajasthan High Court in Appeal Nos. 204 of 2010 and 85 of 2014 vide order dated 22nd August 2017 has not admitted any question of law in appeal filed by Revenue.

15. Since we have already held that the CENVAT credit, as received by the appellant, in accordance with the incentive scheme for J & K as formulated by the Central Government is a capital receipt not liable to tax, accordingly the same cannot be part of book profit under Section 115JB also. Consequently, ground No. 7 is also allowed.

16. Before us, the assessee has raised additional grounds in respect of Sales Tax subsidy amounting to Rs.19,22,32,000/- by way of

refund of Uttar Pradesh VAT under the Uttar Pradesh Industrial Policy, 1994 as capital receipt and also to be excluded from the computation of book profit under Section 115-JB of the Act. The additional grounds raised by the appellant for the sake of ready reference are reproduced hereunder:-

“(1) It is contended that the sum of Rs.19,13,32,000/- being VAT refund claimed under Uttar Pradesh VAT Act 2008 is a capital receipt being the amount of identical amount paid by the appellant and thus not exigible to tax.

(2) It is contended that sum of Rs.19,12,32,000/- being VAT refund under Uttar Pradesh VAT Act 2008 being the nature of capital receipt is not includible in the determination of book profits under Section 115-JB of the Income Tax Act, 1961.”

17. Before us, the Ld. Counsel stated that the similar additional grounds were also raised by the appellant before the CIT (Appeals) in Assessment Years 2004-05 to 2009-10 and the CIT (Appeals), after considering the remand report and the judgments of the Hon’ble Delhi High Court and J&K High Court and the Hon’ble Supreme Court, accepted the claim of the assessee. However, the year under appeal was decided much before the appeals for Assessment Years 2004-05 to 2009-10. Hence the additional grounds have been raised before the Hon’ble ITAT and it is being legal grounds therefore deserves to be admitted.

18. The ld. DR on the other hand had objected for admission of additional ground.

19. Since it is purely a legal ground and legal claim about taxability of receipts and the facts are borne out from the material placed on

record, which were there before the Assessing Officer and the Id. CIT (Appeals) therefore, we are admit the additional ground.

20. On merits the brief facts qua the issue raised are that the appellant's manufacturing unit at Noida was established in the year 1994 and was eligible for exemption from payment of sales-tax/VAT for a period of 15 years from the date of initial year under the Uttar Pradesh State Industrial Policy, 1994 framed by the Uttar Pradesh State Government for the purpose to boost industrialization and employment opportunities in the State of Uttar Pradesh and the benefits are linked with the capital investment. Accordingly, the benefits accrued under the Incentive Scheme formulated by UP State Government are capital in nature and not liable to tax.

20.1 To understand the basic scheme and the object of the scheme in order to decide whether it was for the purpose of promotion of industry and whether it is in the nature of capital receipt or revenue receipt, the entire purpose of the scheme and the salient features and various Government notifications, the same are reproduced hereunder:-

The purpose of the scheme has been described under the preamble in the following words:

Preamble (Preface)

“Uttar Pradesh has an agro-based economy with more than 70 per cent of the total work force engaged in it. The Primary sector contributes around 45 per cent of the state's income. Unemployment and poverty are the major problems of the state. In the year 1994-95, the total number of unemployed stands at 26 lacs and that of semi-employed at 78 lacs. U.P. lags behind other states of the

country in per-capita income. Infrastructural facilities, industrial activity, human development index etc. However the state has shown remarkable progress in the agricultural sector and it contributes 21 per cent of the total fertilizer produced in the country. Owing to the lack of adequate infrastructure facilities, investment in the industrial sector remains lower than the expected level. However, new industry is undergoing a rapid transformation. ”

20.2 The purpose and object of managing the incentive scheme have been described in the heading ‘Preface’ in following words:

“The underlying principal of the new industrial policy is that industrial development is an integral component of agricultural and rural progress. The prime objective of this policy is to ensure creation of maximum employment opportunities and eradication of poverty.”

20.3 The objective of the scheme has also been described under the head ‘Objectives’ and the relevant extract is as under:

- Creation of employment opportunities.
- Provision of special incentives to facilitate creation of employment opportunities in the private sector for scheduled castes/scheduled tribes, other weaker sections and the minority communities.
- Speedy industrial development by making optimum utilization of available natural resources and favourable circumstances.
- Encouragement to entrepreneur development.
- Development of local technology.

20.4 To achieve the aforesaid objectives, a strategy has been framed which has been described in the Scheme in following words:

- Ensuring availability of top class physical and social infrastructure facilities.
- Development of model industrial areas.
- Encouragement to private sector participation in the development of infrastructure facilities.
- Encouragement to NRIs and foreign capital investment in partnership with Indian industrialists for setting up of industries and for developing infrastructure facilities.
- Positive changes in the attitude of administration.
- Time bound sanctions, quick decisions and effective co-ordination for immediate disposal of problems for setting up of industries and smooth operation.
- Rationalization of procedures by changing the existing rules and regulations.
- Abolition of inspector Raj.
- Easy availability of institutional finance for setting up of an industry and their expansion.
- Rational and competitive trade tax structure.
- Identification of priority sector for industrial development and an incentive policy to promote such industries.
- Continuous dialogue with industrialists and industrial associations.

20.5 The other salient features of the scheme are as under:

PRIORITY TO INFRASTRUCTURAL DEVELOPMENT

“Special emphasis would be laid on the provision grade infrastructural facilities for industrial development. Efforts shall be made to set up model industrial areas which provide in a complete package social infrastructural facilities along with the basic

facilities. The following infrastructural facilities shall be made available in industrial areas.

Basic Facilities

Land
Water
Energy
Road
Drainage and Sewerage
Telecommunication
Transport
Other facilities like Bank,
Post Office, Police Station etc

Social infrastructural
facilities

Housing

Education

Medical

Commercial Centre

Entertainment

Community Welfare

INFRASTRUCTURE MAPPING

Considering the importance of infrastructural facilities, the state Government is undertaking the exercise for the mapping of existing facilities for ascertaining the position regarding their availability in industrial areas. This would also enable identification of infrastructural gaps as well as assessment of requirement for the future.

PRIVATE SECTOR PARTICIPATION IN THE DEVELOPMENT OF INFRASTRUCTURAL FACILITIES

A policy for encouraging private sector participation in providing top class infrastructural facilities has been adopted. Special emphasis will be laid on providing following infrastructural facilities with the help of private sector.

- Development of Model Industrial Area

- Power generation and distribution
- Development of Telecommunication facilities
- Development of Air transport
- Express highways , By-pass and bridge construction
- Setting up of inland Container depot/Container freight station
- Development of technology park

DEVELOPMENT OF MODEL INDUSTRIAL AREA AT FOLLOWING PLACES IN THE FIRST PHASE.

It is proposed to take up the development of large model industrial Area at following places in the first place:

1. Ghaziabad
2. Akbarpur (Kanpur Dehat)
3. Gorakhpur

The following places are also proposed to provide facilities for industrial development with the help of private sector.

1. Ghaziabad
2. Bulandshahr
3. Meerut
4. Muzaffarnagar
5. Saharanpur
6. Mathura
7. Aligarh
8. Moradabad
9. Bareilly
10. Shahhahanpur
11. Akbarpur (Kanpur Dehat)
12. Etawah
13. Gorakhpur

14. Mirzapur
15. Sonbhadra,
16. Jaunpur,
17. Jhansi,
18. Pauri Garhwal.

UPSIDC/ PICUP/ NOIDA/ GREATER NOIDA/ GIDA/ SIDA will provide assistance in the joint sector with private parties. These corporations/authorities will arrange land and will provide equity to the extent of value of land. A separate company will be set up in the Joint sector for the development of industrial areas. This company will undertake the task of development of land and for providing other infrastructural facilities. This company will also allot the land to the industrialists and will look after the maintenance of the industrial area.

A committee under the chairmanship of Principal Secretary (Industry) has been constituted to consider the proposals for developing industrial areas in the joint sector.

The following facilities shall be made available for the development of industrial areas in the joint sector:

- (a) Construction of the external drainage and the road connecting the industrial area with main road shall be undertaken as far as possible with the help of the Government.
- (b) The State Government will provide all possible support to seek assistance from Government of India for development of infrastructural facilities in such industrial area.

(c) Offices of concerned Government Departments shall be set up in the industrial area as per the requirement.

(d) Special incentive would be considered in such industrial areas. Decisions in this regard will be taken by the Empowered Committee under the chairmanship of the Chief Secretary.

ESTABLISHMENT OF INFRASTRUCTURE FUND

The State Government has proposed to set up an infrastructure fund. This fund would be used to develop top class infrastructural facilities. This fund is proposed to be financed by the state level corporations/institutions, national financial institutions and other such organizations apart from State Government. Attempts shall be made to procure contribution from Central Government as well.

ARRANGEMENT OF LAND

Rationalization of procedure for procuring land above 12.5 acres

Procedure for obtaining land for industrial projects has been considerably streamlined. Divisional Commissioners have been authorized in place of State Government to grant permission for obtaining land above 12.5 acres.

SETTING UP OF AN AUTHORITY FOR MAINTENANCE OF INDUSTRIAL AREAS

Maintenance of industrial areas is also important apart from the development of such area. To fulfil this objective, industrial area maintenance authority will be constituted in each Industrial area. UPSIDC and Industries department shall provide assistance as members of the authority. This authority shall be self-financed and will be generating income by levying tax and fees. The Authority shall

also undertake the task of development of facilities and the expansion of the area. Sanction of maps, control of housing activity and prevention of unauthorized construction and its removal shall be within the purview of the Authority.

The authority will also be authorized to undertake the task of distribution of electricity.

POSITIVE CHANGE IN FUNCTIONING OF THE ADMINISTRATION

The State Government is committed to develop new work culture for the purpose of industrial development in the changing economic scenario. In this context, special emphasis will be laid on the following:

- Positive Outlook
- Friendly and Cooperative attitude
- Transparency in administration
- Quick decision
- Rationalization of procedures
- Timely sanctions
- Effective coordination
- Time bound disposal of problems
- Information dissemination and guidance

Empowered Committee

The Empowered Committee has been constituted under the chairmanship of Chief Secretary to ensure timely release of sanctions for putting up an industry. This committee has also been authorized to consider special concessions to industrial units which have an investment of more than Rs. 50 crore on a case to case basis.

The Empowered Committee has been authorized to take decisions on the following issues:

Such matters referred to the Government pertaining to sanction of electricity.

- Sanctions to industrial units under the Urban Land Ceiling Act and acquisition of such land.
- Sanctions pertaining to land acquisition for industrial purposes.
- Interdepartmental co-ordination for the purpose of making infrastructural facilities available.
- Allocation of Raw material to industrial units by various departments.
- Rationalization of trade tax structure and procedure for the purpose of industrial development.
- Decisions pertaining to department of environment for the purpose of industrialization.
- Special concessions to industrial units which have an investment of more than Rs. 50 Crore on a case to case basis.
- Water allocation from rivers and canals to industrial units.
- Government guarantee for loans to be taken by State level financial institution, Industrial authorities and Public sector Authorities.
- Analyses and improvements of the existing policies , rules and regulations.
- Any other matter pertaining to industrialization of the state.

IMPROVEMENT IN THE DECISION MAKING PROCESS

Strengthening of 'single window* system

The 'Single Window' System is being made operational through the 'Udyog Bandhu' at the district level under the chairmanship of District Magistrate, at the divisional level under the chairmanship of Divisional

Commissioner and at the state level under the chairmanship of Chief Minister. Prescribed Committees of the Industrial Development authorities have been authorized to issue most of the sanctions at their own level.

Efforts shall be made to make the system of Single window clearance even more effective.

High Level Joint Committee

A High Level Joint Committee has been constituted under the chairmanship of Principal Secretary (Heavy Industry) which will have representations from various industrial organizations and the Government. This High Level Committee will deliberate upon the issue pertaining to industrial policy and the problems faced by industrialists. It will make recommendations on the basis of such deliberations.

TRADE TAX FACILITIES/INCENTIVES Trade Tax in place of Sales Tax

After the initiative taken to abolish octroi in 1990 in keeping with the commitments, the State Government has done away with the exploitative and complicated character of the Sales Tax and in its place has introduced a practical and convenient Trade Tax. Consequently, approximately 95 percent of the traders would be benefitted. A variety of relaxations in registration, tax assessment and submission of returns have been introduced and the number of forms has also been reduced from nine to four. An arrangement has also been made to ensure that all the forms are made available for the entire year to the traders at one time. The definition of capital Investment has also been rationalized under the Trade Tax Exemption

Scheme. Fundamental changes have been brought about in the working of check posts and mobile squads.

Rationalization of Trade Tax Structure

Trade Tax structure shall be examined from time to time for the purpose of its rationalization to promote industrialization in the state. In this context, a working Group on Trade Tax will submit its recommendation from time to time so as to make the tax structure competitive for the purpose of fostering industrialization.

Trade Tax Exemption

The new industrial units shall be allowed tax exemption in the following manner:

Location of the Unit	Duration of Tax Exemption	Exemption from Tax up to 5% of the sale price	Financial limit Admissible for Exemption
'A' category Districts and Growth Centres	12 Years	1st Year 100% 2nd Year 100% 3rd Year 100% 4th Year 100% 5th Year 75% 6th Year 75% 7th Year 75% 8th Year 50% 9th Year 50% 10th Year 25% 11th Year 25% 12th Year 25%	250% of Fixed Capital Investment.
'B' category Districts	10 Years	1st Year 100% 2nd Year 100% 3rd Year 100% 4th Year 75% 5th Year 75% 6th Year 75% 7th Year 50% 8th Year 50% 9th Year 25%	200% of Fixed Capital Investment.

		10th Year 25%	
'C' category Districts	8 Years	1st Year 100% 2nd Year 100% 3rd Year 75% 4th Year 75% 5th Year 50% 6th Year 50% 7th Year 25% 8th Year 25%	150% of Fixed Capital Investment 175% in case of Small Scale Units)

SPECIAL INCENTIVE TO LARGE INDUSTRIAL UNITS

In order to attract large industrial units to the State, it is proposed to provide special incentive to such units. This Incentive shall be in addition to the ones listed in the policy. This attraction would be in the form of concessions/incentive with reference to land or its value, trade tax etc. This facility shall be given on a case to case basis to the units which have an investment of more than Rs.50 crores. It shall be dependent on the benefit that will accrue to the State as a consequence of setting up of such a unit. Decisions shall be taken on the basis of location of the unit employment potential and the possibilities of down-stream projects apart from the contributed to the general economic development of that area. This facility shall include declaration of functions of such units as essential service in the interest of production. In all such cases, decision shall be taken by the Cabinet on the basis of recommendation of Empowered committee under the chairmanship of the Chief Secretary.

20.6 Therefore, keeping into consideration the purpose for which the Uttar Pradesh Industrial Development Scheme was launched as well the promises made under the Scheme, the provision of Section 4A of the Act was introduced in the Trade Tax Act and the relevant extract of Section 4A of the Trade Tax Act is as under:

“Section 4-A - Exemption from trade tax in certain cases

(1) *Notwithstanding anything contained in this Act, where the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State generally or in any district or parts of district in particular, it may on application or otherwise, in any particular cases or generally, by notification, declare that the turnover of sales in respect of such goods by the manufacturer thereof shall, during such period not exceeding fifteen years from such date on or after the date of starting production as may be specified by the State Government in such notification, which may be the date of the notification or a date prior or subsequent to the date of such notification, and where no date is so specified from the date of first sale by such manufacturer, if such sale takes place within six months from the date of starting production, and in any other case from the date following the expiration of six months from the date of starting production, and subject to such conditions as may be specified, be exempt from trade tax on sale of goods whether wholly or partly or be liable to tax at such reduced rate as it may fix:*

Provided that in respect of goods manufactured in a new unit having a fixed capital investment of fifty crore rupees or more or in an existing unit which may make fixed capital investment of fifty crore rupees or more in expansion, diversification, modernization and backward integration or in any one of them, within such period not exceeding five years as may be specified in the notification, the exemption from or reduction in the rate of tax may be granted after considering the recommendation of a committee constituted by the state government in this behalf.

(2) *It shall be lawful for the State Government to specify in the notification under sub-section (1) that the exemption from, or reduction in the rate of tax, shall be admissible—*

(a) *generally in respect of all such goods manufactured subsequent to the date of such notification; or*

(b) in respect of such of those goods only as are manufactured in a new unit, the date of starting production whereof falls on or after the first day of October, 1982; or in either case

(bb) in respect of those finished goods which are manufactured in a unit which has undertaken backward integration; or

(c) in respect of those goods only which are manufactured in a unit which has undertaken expansion, diversification or modernization on or after April 1, 1990, and which in the case of diversification, are different from the goods manufactured before such diversification, and in the case of expansion or modernization are additional production as a result of such expansion or modernization; and

(d) only if the manufacturer furnishes to the assessing authority an Eligibility Certificate granted by such officer, in accordance with such procedure, as may be specified;

(e) with effect from a date prior to the date of the notification.

(2-A) Notwithstanding anything to the contrary contained in subsection (2) or any notification issued in pursuance thereof, the State Government may grant exemption, under this section, to a new unit which has obtained power connection, if it has, after the date of starting production and before the twenty ninth day of January, 1985, consumed at least 25 percent of the total sanctioned electricity load in the manufacture of goods as distinct from the consumption in connection with the establishment of the factory or workshop.

(2-B) If there is discontinuation of business, within the meaning of sub-section (1) of Section 18, of the manufacturer who was eligible for exemption from or reduction in the rate of tax under sub-section (1), whether such exemption from or reduction in rate of tax was already granted or not, and if he is succeeded by another manufacturer, by means of sale, licence, contract, lease, managing agency or in any other manner such successor manufacturer may, subject to the provisions of sub-section (3), apply to the officer competent to grant eligibility certificate under Clause (d) of sub-section (2), within sixty days of such succession, for the grant, under this section, of exemption from or reduction in rate of tax for the

unexpired portion of the period for which exemption from or reduction in the rate of tax was or could be granted to the former manufacturer:

Provided that the aforesaid officer may, in its discretion and for adequate and sufficient reasons to be recorded in writing, entertain an application moved within six months of the date of the expiration of the period specified in this sub-section.

Provided further that such manufacturer and successor manufacturer for the purpose of liability of tax shall be treated as the transferor and the transferee under Section 3-C.”

20.7 Section 4A of the Trade Tax Act authorizes the UP State Government to issue notification for allowing exemption from the trade tax to either the new industrial undertakings or the undertakings who have taken substantial expansion.

20.8 On the basis of empowerment given u/s 4A of the Trade Tax Act, the UP State Government issued a notification dated 21st February 1997 specifying the eligibility conditions for availing the exemption from payment of trade tax as well as the extent of exemption available with reference to the capital investment made in the industrial units after obtaining the eligibility certificates from the office of the district industry centres or other industrial development organization, as the case may be - copy of notification dated 21st February 1997 placed at page 368 of the paper book. As per article 6 of the said notification, the capital investment would include:

Land, building, plant & machinery, tools, dies and fixtures.

20.9 The entitlement of the incentive under the scheme has been fixed on the basis of location of the unit as mentioned in article 7 of the notification.

The assessee's industrial unit was located in district Ghaziabad. For district Ghaziabad, the availability of the incentives was fixed at 150% of the capital investment.

20.10 The eligibility certificate dated 19th August 1997 was issued by the Addl. Director Industries, Noida certifying the eligibility from exemption of trade tax up to 150% of the incentive investment - the copy thereof has been placed at page 391 of the paper book.

20.11 Another eligibility certificate dated 3rd November 2003 was issued by the Addl. Chief Executive Officer, Noida enhancing the trade tax exemption up to Rs.959,51,76,417.94 on account of additional capital investment made by the assessee since 1st April 1997 to 4th December 1999 - copy placed at page 397 of the paper book.

20.12 Later on, the UP Trade Tax Act was abolished and in place thereof, the UP VAT Act, 2008 has come into force. The UP VAT Act contains provision of Section 42 which states that the benefits accrued to an assessee under the UP Industrial Policy in terms of Section 4A of the Trade Tax Act shall remain continued. The relevant extract of Section 42 of UP VAT Act is as under:

42. Treatment of industrial units availing exemption or reduction in the rate of tax under erstwhile Act

(1) No industrial unit,-

(a) availing benefit of exemption from or reduction in the rate of tax under the erstwhile Act or under the Central Sales Tax Act, 1956 on the turnover of sales or purchase or both as the case may be, before the commencement of this Act; or

(b) which is granted the benefit of exemption from or reduction in the rate of tax on the turnover of sale or purchase or both as the case may be, under the erstwhile Act or under the Central Sales Tax Act,

1956; shall be permitted to avail the benefit of exemption from, or reduction in the rate of, tax on the turnover of sale or purchase or both as the case may be, on or after the commencement of this Act.

(2) The industrial unit availing the benefit of tax deferment under the erstwhile Act or under the Central Sales Tax Act, 1956 before the commencement of this Act or a unit which is granted facility of tax deferment under the erstwhile Act or under the Central Sales Tax Act, 1956 shall continue to avail the facility of deferment for net tax payable under this Act and the Central Sales Tax Act, 1956, subject to such conditions and restrictions as may be prescribed.

(3) (a) the industrial unit availing or granted benefit of exemption from, or reduction in the rate of tax under the erstwhile Act or under the Central Sales Tax Act, 1956 on the turnover of sales of manufactured goods or turnover of purchase of any raw material, processing material, consumable stores, fuel other than petrol and diesel, lubricant required for use in manufacture of goods or in the packing of goods manufactured by such industrial unit or both, and

(i) whose facility of exemption or reduction in the rate of tax is based on the fixed capital investment as provided under the erstwhile Act or notification issued there under; or

(ii) an industrial unit purchased from the State Government or any corporation or undertaking owned or controlled by the State Government and to whom exemption or reduction in the rate of tax has been granted under the erstwhile Act may apply to the Commissioner for issue of the Certificate of Entitlement in the prescribed form and in prescribed manner.

(b) The Commissioner after examining the relevant records and report from the assessing authority and if he is satisfied that the information

furnished is correct and complete, shall issue within 60 days from the date of receipt of the application, the Certificate of Entitlement in prescribed form and in prescribed manner containing such particulars as may be prescribed including period of validity of certificate and amount of entitlement if any.

(c) If the Commissioner is satisfied that particulars furnished by an industrial unit in the application is wrong or incomplete or is not worthy of credence, he shall after giving the applicant the opportunity of being heard, reject the application and inform the industrial unit accordingly.

(d) Subject to an appeal to the Tribunal under section 57 the order passed by the Commissioner in this behalf, shall be final.

(4) The industrial unit availing or granted benefit of exemption from, or reduction in the rate of, tax on the turnover of sales before the date of commencement of this Act or an industrial unit which is granted the facility of exemption from, or reduction in the rate of, tax on or after such commencement, on the turnover of sales under the erstwhile Act or the Central Sales Tax Act, 1956, shall be entitled for exemption by way of refund of net tax paid along with the return of tax period in prescribed manner and on fulfilling the conditions that,-

| (a) the unit shall hold valid registration certificate issued under this Act or under the Central Sales Tax Act, 1956,

(b) the unit shall have a valid Certificate of Entitlement issued by the Commissioner,

(c) the amount of refund shall not be more than an amount equal to net tax paid for relevant tax period,

(d) the net tax payable has been deposited along with return of tax period in prescribed manner,

- (e) the refund shall be subject to the provisions of section 40 except that the amount shall not be adjusted against the admitted tax liability,*
- (f) the facility of refund shall cease on the day when the amount or the period mentioned in the Certificate of Entitlement, whichever is earlier,*
- (g) the tax payable on the turnover of sales of goods mentioned in the Certificate of Entitlement and which is manufactured in the industrial unit shall be deducted from the total amount mentioned or described in the Certificate of Entitlement,*
- (h) the industrial unit has not misused the facility of exemption from or reduction in the rate of tax in any manner.*

Explanation: The expression 'net amount of tax payable' means -

- (i) the differential amount of tax payable under this Act on the sale of taxable goods other than non-vat goods, manufactured in the unit and input tax credit available to the extent or proportionate to taxable goods other than non-vat goods sold, in case of an industrial unit availing facility of exemption from tax under the erstwhile Act and the Central Sales Tax Act, 1956,*
- (ii.) the partial amount of net tax computed under clause (i) above, in proportion to the rate of tax available for exemption to the rate of tax payable under the erstwhile Act, in case of an industrial unit availing benefit of reduction in the rate of tax*

(4A) The industrial unit availing or granted benefit of exemption from tax on the turnover of purchase before the date of commencement of this Act shall be entitled for exemption by way of refund of Earned Input Tax Credit computed on the basis of data declared in the documents submitted along with the return of tax

period in prescribed manner and on fulfilling the following conditions that,-

- (a) the industrial unit shall hold valid Certificate of Entitlement issued by the Commissioner as provided under sub-section (3);*
- (b) the amount of refund shall not be more than an amount equal to input tax credit earned during relevant tax period,*
- (c) the refund shall be subject to the provisions of section 40 except that the amount shall not be adjusted against the admitted tax liability,*
- (d) the facility of refund shall cease on the day when the amount or the period mentioned in the Certificate of Entitlement, whichever is earlier,*
- (e) the facility of exemption from tax by way of refund shall be available only in respect of raw material, processing material, consumable stores, fuel other than petrol and diesel, lubricant, required for use in manufacture of goods or in the packing of manufactured goods mentioned or described in the Certificate of Entitlement*
- (f) the amount of exemption from tax by way of refund on the turnover of purchase of goods, shall be deducted from the total amount mentioned or described in the Certificate of Entitlement.*
- (g) the industrial unit has not misused the facility of exemption from tax in any manner.*

Explanation: "Earned Input Tax Credit" means the amount of admissible Input Tax Credit computed on the basis of data declared in the returns of tax period where industrial unit was availing benefit of exemption under the erstwhile Act.

- (5) (a) The amount found refundable shall be refunded within a period of 30 days from the last date of the month in which dealer*

files the return of relevant tax period. Where the return of tax period is not complete and dealer fulfils the requirement of return on a date later to the due date for filing of return of tax period, such date shall be deemed to be the date of filing of return of tax period."

(b) The amount of refund shall be made in such manner as may be prescribed.

(c) The industrial unit failing to deposit the net tax admittedly payable within prescribed time and in prescribed manner or deposits it after due date, the amount of interest leviable and penalty imposed if any, shall be adjusted and only the balance amount shall be refunded.

(6) (a) The total amount of the refund shall be limited to the extent of the differential amount of the total eligible amount available for exemption or reduction in the rate of tax and the amount availed in exemption or reduction in the rate of tax before the commencement of this Act.

(b) The total period of the refund shall not exceed difference of the total period available for exemption or reduction in the rate of tax and the period exhausted before the commencement of this Act.

(7) If any amount is found refundable and is not refunded within the prescribed time, the industrial unit shall be entitled to simple interest at the rate of twelve percent per annum from the last date prescribed for refund. The amount of interest shall be refunded in such manner as may be prescribed.

(8) The industrial unit availing the benefit of tax deferment as provided under sub-section (2) or availing the facility of refund as provided under subsection (4), shall be eligible to issue tax invoices and to claim input tax credit subject to provisions of section 13. The industrial unit availing the facility of refund on both sale and

purchase, shall be eligible for claiming Input Tax Credit while computing net tax payable on the turnover of sale of goods described in the Certificate of Entitlement."

(9) Where the amount or the period for exemption or reduction in the rate of tax changes on account of any valid reason or otherwise, the Commissioner shall suo motu or on an application of the industrial unit, amend the certificate of entitlement accordingly.

(10) The facility of refund shall be available under this Act and under the Central Sales Tax Act, 1956.

(11) An industrial unit claiming the refund under this section shall not be deemed to have been assessed based on the returns filed by it and any refund made shall be subject to assessment requiring production of accounts in support of the return filed.

(12) The provisions of this section shall mutatis mutandis apply to those units which were established before 9th November 2000 (the date of reorganization of Uttar Pradesh) and now situated within the territory of Uttarakhand subject to the following conditions;- (a) the goods are manufactured in a unit established in the State of Uttarakhand having eligibility certificate (validity commencing prior to 9th November 2000) issued under section 4-A of the erstwhile Act for the manufacture of such goods, (b) such goods are sold for the first time after their manufacture within the period of facility of exemption or reduction in the rate of tax, after bringing them into the State by way of transfer other than sales, by manufacturer having his place of business in the State of Uttarakhand, (c) valid and genuine certificate issued by the Assessing Authority of the State of Uttarakhand is produced before the assessing authority of the State of Uttar Pradesh indicating therein that the amount has been

reduced in the overall limit of exemption or reduction in the rate of tax available to the manufacturer.

(13) Facility of refund of tax under sub section (12) shall be withdrawn, if the certificate referred to in clause (c) of subsection (12) is found false or fake and not issued by the relevant assessing authority of Uttarakhand

(14) On scrutiny of accounts or subsequent investigation it is found that data furnished along with return of the tax period is found wrong or not reliable or based on no genuine material on record, without prejudice to the provisions of section 54, the excess amount refunded shall be deposited within 30days of notice received from the assessing authority along with interest at the rate of 15percent per annum with effect from the date of refund to the date of deposit, failing which the excess amount refunded shall be recovered as an arrears of land revenue.”

20.12 The provision of sub-section (3) of Section 42 of the UP VAT Act requires an assessee to obtain a fresh eligibility certificate and accordingly the assessee obtained a fresh entitlement certificate dated 7th November 2008 from the concerned authorities and the same have been placed at page 397 of the paper book.

20.13 Under the UP VAT Act, there was a slight deviation from the UP Trade Tax Act. Under the UP Trade Tax Act, the persons/assesseees who were eligible for the incentives under the UP Industrial Policy and were having the entitlement certificates were exempted from payment of trade tax on their turnover. However, under the new UP VAT Act, the persons who were eligible for the incentives and were availing exemption from payment of tax under the Trade Tax Act are now required to pay VAT first on their turnover to the State Government and in turn thereafter the State Government will issue the refund.

20.14 The quantification of refund under the scheme has also to be made by the authorities while framing the assessment under UP VAT Act. For the year under consideration, the relevant assessment has been made by the VAT Authorities vide order dated 6th April 2013 - copy thereof has been placed at page 398 of the paper book and the eligibility of the VAT refund has been worked out by the authorities at internal page 14 of the order at Rs. 19,12,31,759/-.

21. The ld. counsel contended that the nature of incentives provided under the UP Industrial Scheme either by way of granting of exemption from payment of trade tax or the refund of VAT has to be examined with reference to the objects and purposes for which the UP Industrial Development Scheme was framed. Having perusal of the various salient features of the Scheme as described above, it is clear that the incentives under the Scheme have been provided for attracting capital investment in the State for the purpose of industrialization and setting up of new industries to generate more employment opportunities.

22. Before us, the ld. DR submitted that it is clearly in the nature of revenue receipt and relied upon the judgement of the Hon'ble Supreme Court in the case of **Sahaney Steel & Press Works Ltd. Vs. CIT 228 ITR 253 (SC)**.

23. We have heard the contentions as well as perused the relevant material as referred to above. The subsidy scheme has to be seen in the light of the object for which various State Governments have been provided to attract investment in the nature or for other specified areas in order to boost industrialization for the investment in the interest of general public at large as well as to create employment.

24. Before us Id. Counsel submitted that in order to attract investment in the industries or other specified areas, various State Governments as well as the Central Government have launched various incentive schemes from time to time in order to boost the industrialization or the investment in a particular field or area in the interest of general public at large as well as to create employment opportunities. The courts have also examined the nature of such incentives as provided to the investors in various schemes from time to time and the courts have consistently held that the nature of incentives is linked with the purposes and objects for which the incentives have been provided under the scheme. If the purpose of incentive provided under a particular scheme is for attracting capital investment in the State and to generate employment opportunities, the incentive available to the investor assessee would be capital in nature and not the revenue receipts. The courts have also held that the time of availability of the incentive and mode of making available as well as its source is irrelevant to determine the nature of scheme. The nature of incentive under a scheme always depends upon the objects and purpose for which the scheme is framed.

25. We find that in the instant case, as is clear from the UP Industrial Scheme, the incentive in the form of trade tax exemption or refund of the Vat has been allowed to the entrepreneur by the State Government only for the purpose and having an object to boost industrialization of the State, by way of establishment of new industries so that more generation of employment could be made which is a prime responsibility of the State Government.

26. In the case of Sahney Steel & Press Works Ltd. vs. CIT in 228 ITR 253, the Hon'ble Supreme Court, while examining the incentive received by the said assessee from the Andhra Pradesh Government, which was to be given to all new industrial undertakings, at page 262 of the Report observed as under:

“If any subsidy is given, the character of the subsidy in the hands of the recipient - whether revenue or capital - will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as a trading receipt. The source of the funds is quite immaterial.”

From the aforesaid observation of the Hon'ble Supreme Court in the case of Sahney Steel (supra), it is clear that the nature of the incentive of the subsidy received by an assessee from the Government, has to be examined with reference to the purpose for which the incentive has been granted. On the basis of the principle as enunciated by the Hon'ble Supreme Court in the case of Sahney Steel to determine the nature of subsidies in the hands of the recipient assessee - whether capital or revenue - the courts have examined the various other incentive schemes framed by the State Government and Central Government from time to time.

27. The Hon'ble Supreme Court in the case of **CIT Vs. Ponni Sugars & Chemicals Ltd. 260 ITR 605** had laid down the principle of purposive test after observing as under:-

“In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel and Press Works Ltd. (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10% of

the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel case lies in the fact that it has discussed and analyzed 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 11 substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant.”

28. Further the same principle was reiterated in the case of **CIT Vs. Chaphalkar Brothers** (supra) holding that the object of the subsidy was to industrialize the State and to generate employment in the State and held that whatever mode of subsidy it will not make a difference. Hon'ble Calcutta High Court in the case of **CIT Vs. Rasoil Ltd. 335 ITR 438 (Cal.)** following the principle laid down by the Hon'ble apex court in **Ponni Sugars & Chemicals** (supra) held that subsidy granted by the West Bengal Government equivalent to 90% of the Sales Tax paid was also a capital receipt. Similar view has been taken by the Hon'ble Delhi High Court in the case of **CIT Vs. Bougainvillea Multiplex Entertainment Centre Pvt. Ltd. 373 ITR 14 (Del)**.

29. Here also as noted above the object of the scheme under the Uttar Pradesh Industrial Policy and the Uttar Pradesh VAT Act, 2008 as per Section 42 provided that the benefit accrued to an assessee under the Section in terms of 4A of the Act as remained will continue and the assessee has to obtain fresh eligibility certificate which has been taken as assessee also had certificate dated 7th November, 2008, a copy of which has been placed at page 397 of the Paper book. The only difference between the earlier Uttar Pradesh Industrial Policy and the Uttar Pradesh VAT Act, the person eligible for incentives and were for availing exemption for payment of tax under the State Government and thereafter the State Government will issue the refund. For the year under consideration the assessee has placed on record relevant assessment passed by the authorities under the Uttar Pradesh VAT Act, 2008 where the refund has been worked out at Rs.19,12,31,759/- The nature of the incentive provided under the Uttar Pradesh Industrial Scheme by way of giving exemption was refund of VAT has to be seen with reference to the object and purposes for which Uttar Pradesh Industrial Scheme was framed. A perusal of the salient features as reproduced hereinabove it is quite evident that incentive under the Scheme has been provided for taxing capital investment and the State for the purpose of industrialization and setting up of new industries to generate more employment opportunities. The refund now VAT as given to the industrial undertakings only for the purpose of fulfilling the best industrialization of the State by establishment of new industries. Thus, incentive provided under the Uttar Pradesh Industrial Scheme is nothing, but capital subsidy not liable to be taxed in view of the judgement of Hon'ble apex court and Hon'ble Delhi High Court as cited above. The VAT subsidy amounting to Rs.19,12,32,000/- is a capital receipt and hence not liable for tax and

it cannot be treated as revenue receipt liable for tax. Accordingly, the additional ground raised by the assessee is allowed.

30. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on : 30th November, 2021.

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated : 30/11/2021.

MEHTA

Copy forwarded to

1. Appellants;
2. Respondents;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	30.11.2021
Date on which the typed draft is placed before the dictating member	30.11.2021
Date on which the typed draft is placed before the other member	30.11.2021
Date on which the approved draft comes to the Sr. PS/ PS	30.11.2021

Date on which the fair order is placed before the dictating member for pronouncement	30.11.2021
Date on which the fair order comes back to the Sr. PS/ PS	30.11.2021
Date on which the final order is uploaded on the website of ITAT	30.11.2021
date on which the file goes to the Bench Clerk	30.11.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	