

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 1468/Kol/2015
Assessment Year : 2009-10

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| DCIT, Circle-10(1), Kolkata | Vs. | M/s Indian Oil Petronas Pvt. Ltd. (PAN: AAACI 5573 R) |
| Appellant | | Respondent |

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| Date of Hearing (Virtual) | 20.12.2021 |
| Date of Pronouncement | 16.03.2022 |
| For the Appellant | Shri N.S. Saini, A.R |
| For the Respondent | Smt. Ranu Biswas, Addl. CIT |

ORDER

Per Shri Rajesh Kumar, AM:

This is an appeal preferred by the Revenue against the order of the Commissioner of Income Tax (Appeals)-4, Kolkata [hereinafter referred to as ‘CIT(A)’] dated 21.09.2015 for the assessment year 2009-10.

2. The only issue raised by the revenue is against the order of Ld. CIT(A) granting relief to the assessee by treating the sale tax subsidy as capital receipt whereas the AO has treated the same as revenue receipts. The Revenue has also challenged the order of Ld. CIT(A) for allowing the relief to the assessee by ignoring the fact that the claim was not made in the original return or in the revised return of income by the assessee.

3. Facts in brief are that the return of income was electronically filed on 29.09.2009 declaring total income of Rs. 14,09,87,750/-. The case of the assessee was processed u/s 143(1) of the Act accepting the returned income. Thereafter the case was selected for scrutiny and statutory notices were duly issued and served upon the assessee. The assessee is engaged in the business of manufacturing, trading terminalling of liquefied petroleum gas. During the course of assessment proceedings, the assessee made its claim for first time before the AO that for remission of sale tax

in the form of subsidy received from the State Government amounting to Rs. 14,91,51,889/- is not taxable on the ground of being capital receipt and therefore not chargeable to tax. The AO rejected the claim of the assessee by observing that the claim was not made in the return of income filed by the assessee and therefore not maintainable and allowable in terms of ratio laid down by the Hon'ble Supreme Court in the case of CIT Vs Goetz India Ltd. reported in 284 ITR 323 (SC).

4. In the appellate proceedings, the Ld. CIT(A) allowed the claim of the assessee after considering the arguments and written submissions filed by observing and holding as under:

5.2. *I have considered the submissions of the AR and perused various judicial decisions cited before me in support of the appellant's claim. It is observed that the claim made by the appellant in the present appeal that the amount of incentive of Rs. 14,91,51,889/- received in the form of sales tax remission from the West Bengal Government under the "West Bengal Incentive Scheme, 1999; is a capital receipt not liable to tax was admittedly not made in the return of income filed u/s 139(1) as well as u/s 139(5). In the course of proceedings u/s 143(3) before the appellant however made this claim by filing a letter and thereafter submitted supporting documents. From the assessment order I find that the AO rejected the claim of the appellant primarily on the ground that such claim was not made by the appellant in the return of income and therefore there was no question of allowing deduction in respect of subsidy received by the appellant from the State Government by way of sales tax remission. In view of the judicial decisions and the ratio laid down by the Supreme Court in the case Of Jute Corporation of India Ltd Vs CIT (187 ITR 688) & National Thermal Power Co. Ltd Vs CIT (229 ITR 383) and Calcutta, Bombay & Delhi High Courts in Mayank Poddar (HUF) vs. WTO (262 CTR 633), CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd, (252 CTR 151), CIT vs. Jai Parabolic Springs Ltd (306 ITR 42) and also ITAT, Kolkata in the case of DCIT vs. Ramesh Chandra Kedia (ITA No. 2072/Kol/2007) dated 27.06.2008, I am inclined to hold that an assessee is legally entitled to make a fresh claim in the appellate proceedings even if such, claim was not made in the return of income. In view of these judicial decisions the claim made by the appellant is admitted for adjudication.*

5.3. *During the year under consideration the appellant company received incentive of Rs. 14,91,51,889/- in the form of sales tax remission under the 'West Bengal Incentive Scheme, 1999' and which was credited to the profit and loss account under the said scheme, West Bengal Industrial Development Corporation Ltd. issued an "Eligibility Certificate" to the appellant being NO. INC (99)/EC-87(B) dated 4th June, 2002. The Eligibility Certificate was issued for appellant's project at Block-Sutahata Block-I, Post Office, Haldia-721602 Police Station Bhabanipur, District- Midnapur (E) for the manufacture of blended LPG having capacity of 6,00,000 tonnes. As per the scheme the West Bengal Industrial Development Corporation Ltd sanctioned the incentive in the form of remission of sales tax on sale of finished goods due for payment by it for a period of 9 years subject to ceiling of 100% of the gross value of fixed capital assets of the approved project or T75 crore whichever is less, as per para 10.1.1 (ii), 10.1.7 of the scheme, it therefore appeared that the incentive in the form of sales tax remission was for setting up of a new industrial unit.*

5.4 On perusal of West Bengal Incentive Scheme, 1999, notified on 22.06.1999, it is observed that it starts with the wordings:

'Whereas, the Governor is of the opinion that it necessary and expedient to extend incentive for promotion of industries in this State;

Now, therefore, the Governor is pleased hereby, in supersession of the West Bengal Incentive Scheme, 1993 sanctioned under Commerce & Industries Department's Notification No. 188-CI/C dated 30.03.1993 and amended from time to time, to approve and sanction the Incentive Scheme for large, medium and small scale industrial units as under:

Section 4 of the WBIS provide the applicability of the 1995-Scheme and it says that it shall generally be applicable to all large, medium, cottage and small scale projects and tourism units in large/medium sector to be set up and also to expansion projects of existing units on or after the 1st April, 1999. The units may be in the private sector, co-operative sector, Joint sector as also companies/undertakings owned or managed by the State Government. Section 6 of the Scheme provide-the 'Eligibility Criteria for incentives under the 1999-Scheme' and section 7 provides 'Classification of Developed areas and Backward areas' in three groups viz. Group A, Group B and Group C. The appellant's project falls under Group B. Section 8, 9, 10 and 11 provide for various types of incentives and subsidies which are 'State Capital Investment Subsidy', 'Sales Tax', 'Waiver of Electricity Duty' and 'Subsidy for conversion of piped coal gas' etc. From the above, it was observed that the Scheme- 1999 was announced for promotion of industries in the State of West Bengal with various incentives and subsidies as mentioned above. As per Scheme incentives were to be given for setting up of new units or expansion of the existing units and the same was not to facilitate the trade or business of the industries.

5.5 Thus, the main object and purpose of the Scheme for which it was sanctioned was 'Promotion of industries in the State of West Bengal'. Similar Schemes were sanctioned by the State Government earlier also to promote setting up of industries in the State and under those schemes various incentives were given to the registered and eligible industries. The Prime Object of all the Schemes was to provide incentives to promote industries in the State of West Bengal. With this object West Bengal Incentive Scheme, 1999 was announced by the State Government w.e.f. 1st April, 1999 which was in supersession of West Bengal Incentive Scheme 1993. It is observed that in the case of appellant company West Bengal Industrial Development Corporation Ltd, vide letter no. INC(99)/EC-87(B) dated 4th June 2002 issued Eligibility Certificate to the appellant for setting up a new unit for the manufacture of blended LPG at Block - Sutamata Block-I, Post Office Haldia 721602 Police Station Bhabhanipur District Midnapur (E). As per the approval letter the appellant company was granted incentives in the form of remission of sales tax, exemption of sales tax and waiver of electricity duty As per the Scheme, the incentive was provided for setting up of new unit, but the mode of calculation of incentive was sales tax paid/collected by the appellant. In view of the foregoing facts & circumstances. I am of the opinion that it would not be correct to say that the subsidy/incentive was given to the appellant for the purpose of assisting in carrying on business or trade by way of refund of sales tax or that there was cessation of liability on account of payment of sales tax attracting the provisions of section 41(1) of the act Though, the method of calculation of incentive/subsidy is collection of sales tax but the purpose of giving the incentive was setting up/expansion of industries in the backward areas of the State of West Bengal. On perusal of approval letter/eligibility certificate, it is apparent that the incentive was allowed to the appellant company for setting up a new unit for manufacture of 6,00,000 tonnes per year of Blended LPG. The sole objective of the scheme formulated by the State Government was to allow incentive to the entrepreneurs to establish the new industries or expand the existing industries in backward area for overall economic development of the

State of West Bengal. On going through the West Bengal Incentive Scheme, it is observed that the subsidy was not allowed to assist the appellant company in carrying on its trade or business or carrying out the business operation. The unit which was set up by the appellant company, is located in the backward area of Village-Haldia, District-Midnapur in the State of West Bengal As per the Incentive Scheme. 1999, the appellant's unit falls under Group-B of classification of areas. Accordingly, the appellant company had received incentive in the form of sales tax remission and other incentives specified for group-B location Since, the incentive has not been allowed to the appellant-company for facilitating its business or trade, the amount received by the appellant on account of sales tax remission, would be capital in nature.

5.6 *The Supreme Court in the case of CIT vs Ponni Sugars & Chemicals Ltd (306 ITR 392) applying the principles laid down in the earlier decision in the case of Sahney Steel & Press Works Ltd (supra) held that the character of a subsidy receipt in the hands of the assessee under the scheme has to be determined with respect to the purpose for which the subsidy is granted. In the opinion of the Apex Court, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial If the object of the subsidy is 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 is to enable the assessee to set up a new unit or to expand an existing unit then the receipt of the subsidy would be on capital account. In the case of appellant company, the incentive was received from the West Bengal Government under the West Bengal Incentive Scheme. 1999 in the form sales tax remission. However, the sole object of the incentive scheme was to enable the appellant to set up a new manufacturing unit at village-Haldia District-Midnapur In the case of appellant, it had invested a substantial amount in fixed capital assets for the purpose of setting up a new unit. Hence, as per the principles laid down by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd (Supra), the receipt on account of incentive in the form of sales tax remission received by the appellant was on capital account.*

5.7 *The Calcutta High Court in the case of CIT vs. Rasoi Ltd (335 ITR 438) observed that the assessee received a subsidy amount of Rs. 5,34,86,887/- as Industrial Promotion Assistance from the Government of West Bengal In the books of account, the said amount was shown as income under the head "Other Income" In the notes to accounts, the assessee mentioned that although the amount had been accounted for in the above manner, the company has been legally advised that it was of the nature of capital receipt for the purpose of computation of taxable income and in the return of income filed by the assessee. it claimed the amount to be in the nature of capital receipt. The AO dismissed the claim of the appellant and held that the subsidy was utilized for meeting revenue disbursements and therefore, was supplementary trade receipts and to be considered as revenue receipts. The CIT (A) confirmed the order of the AO. However, the ITAT allowed the appeal of the assessee and held it as capital in nature. On appeal before the Hon'ble High Court, the revenue contended that for determining the nature of subsidy, the three factors are required to be seen-(i) whether the benefit of incentive/subsidy was available only to new units or expanded units without any intention to supplement the trade receipts or it was in the nature of a help with an intention to supplement the trade receipts of an existing undertaking, (ii) whether the benefit is given before the start of production or after the start of production, (iii) whether the scheme, by which benefit is given, permits the beneficiary to utilize the money according to its wish or whether it restricts or put any limit on the utilization of the amount. In this case, the assessee has, by virtue of the scheme, got back the sales-tax payable by it to the State Government and thus, the same should be treated as revenue receipt as held by the Supreme Court in the case of Sahney Steel & Press works Ltd (supra). The assessee contended that the object of the scheme, was helping the industries with capitals. In the case of Sahney Steel & Press Works Ltd (supra), the question was whether the grant of subsidy had fallen within the purview of*

Sec. 41(1) of the Act and such question was answered against the assessee. However, in' the case of assessee, although the subsidy was equivalent to the amount paid by the assessee to the State Government by way of sales-tax, yet, the same could not be termed as subsidy "in: terms of refund of sales-tax paid". After hearing both the .parties, the Hon'ble Calcutta High Court held as follows:

"The object of the subsidy is for expansion of their capacities, modernization, and improving their. marketing capabilities and thus, those are for the assistance on capital account. Similarly, merely because the amount of subsidy was equivalent to 90% of the sales-tax paid by the beneficiary does not imply that the same was in the form of refund of sales-tax paid. As pointed out by the Supreme Court in the case of Senairam Doongarmall vs. CIT, Assam reported in AIR 1961 (SC) 1579, it is the quality of the payment that is decisive of the character of the payment and not the method of the payment or its measure and makes it fall within capital or revenue. Thus, in the case before us, the amount paid as subsidy was really capital in nature."

5.8 In the case of appellant, the incentive in -the form of sales tax remission, though, calculated on the basis of payment/collection of sales-tax, was received under the West Bengal Incentive Scheme, 1999 for setting up of new manufacturing unit. I find that the decision of the Hon'ble Calcutta High Court in the case of Rasoi Ltd. (supra) is squarely applicable to the facts of the appellant's case and therefore the incentive received by way of sales tax remission is capital in nature."

5. After hearing the rival submission and perusing the material on record including the appellate order passed by the Ld. CIT(A), we observe that the remission of sales tax granted by the State Government in the form of subsidy for setting up Industrial units in the backward district of West Bengal and for giving impetus to the employment in the State has been held to be capital receipt by the coordinate bench. We note that the issue is squarely covered by the decision of Co-ordinate Bench in the assessee's own case and also by various decisions of the Hon'ble Apex Court and other judicial forums. We note that in assessee's own case the Co-ordinate Bench in ITA No. 1930/Kol/2016 AY 2010-11 vide order dated 15.03.2019 has decided the similar issue in favour of the assessee wherein it was held as under:

8. We have heard both the parties and perused the material available on record. We note that the assessee had claimed the amount of incentive of Rs. 8,65,96,694/- as a capital receipt, which was received in the form of sales tax remission from the West Bengal Government under the "West Bengal Incentive Scheme, 1999." The assessee company had received incentive of Rs. 8,65,96,694/- in the form of sales tax remission under the 'West Bengal Incentive Scheme, 1999' and which was credited to the profit and loss account. Under the said scheme, West Bengal Industrial Development Corporation Ltd. issued an "Eligibility Certificate" to the assessee being no. INC(99)/EC-S7(B) dated 4th June 2002. The Eligibility Certificate was issued for assessee's project at Bloclc-Sutahata Block-I. Post Office Haldia-721602, Police Station Bhabhanipur District Midnapur (E) for the manufacture of blended

LPG having capacity of 6,00,000 tonnes. As per the scheme the West Bengal Industrial Development Corporation Ltd sanctioned the incentive in the form of remission of sales tax on sale of finished goods due for payment by it for a period of 9 years subject to ceiling of 100% of the gross value of fixed capital assets of the approved project or Rs.75 crores whichever is less, as per para 10.1.1 (ii). 10.1.7 of the scheme. It is therefore appears that the incentive in the form of sales tax remission was for setting up of a new industrial unit. Before the AO, the assessee relying on several decisions of Apex Court as well the Calcutta High Court and ITAT, Kolkata had thus claimed that 'the subsidy received from State Government was a capital receipt and therefore not liable to tax under the normal computational provisions as well as deeming provisions of section 115JB of the Act.

9. We note that the AO rejected the claim of the assessee on the premise that the subsidy received was revenue in nature and taxable u/s. 28(iv) of the Act. The AO observed that the remission of sales tax amounted to cessation of trading liability and hence the provisions of Section 41 also attracted and therefore, AO rejected the claim of the assessee. We note that on examination of the relevant facts and on perusal of West Bengal Incentive Scheme, 1999, notified on 22.06.1999, it was observed that the Scheme-1999, was announced for promotion of industries in the State of West Bengal with various incentives and subsidies. As per Scheme, the incentives were to be given for setting up of new units or expansion of the existing units and the same was not to facilitate the trade or business of the industries. It was noted that the West Bengal Industrial Development Corporation Ltd. vide letter no. INC(99)/EC-87(8) dated 4th June 2002 had issued Eligibility Certificate to the assessee for setting up a new unit for the manufacture of blended LPG at Block - Sutahata Block- Post Office Haldia 721602, Police Station Bhabhanipur District Midnapur (E). As per the approval letter, the assessee company was granted incentives in the form of remission of sales tax and waiver of electricity duty for setting up the unit at Haldia. As per the Scheme, the incentive was provided for setting up of new unit, but the mode of calculation of incentive was sales tax paid/collected by the assessee. In view of the facts and circumstances, we note that the subsidy/incentive was not given to the assessee for the purpose of assisting in carrying on business or trade by way of refund of sales tax nor was there any cessation of liability on account of payment of sales tax attracting the provisions of section 41(1) of the Act. We note that the method of calculation of incentive/subsidy is collection of sales tax but the purpose of giving the incentive was expansion of industries in the backward areas of the State of West Bengal. Since the assessee was not given the incentive for facilitating its business or trade, the amount received by the assessee on account of sales tax remission, was held to be capital in nature. For that we rely on the following judgments, Viz:(i) CIT vs. Rasoi Limited (2011-TIOL-320HC-KOL-IT) (Cal He) (ii) Balaji Alloys Limited vs. CIT (333 ITR 335) (J&K HC) ,(ii) CIT vs. Siya Ram Garg (HUF) (49 OTR 126) (P&H HC) (iv) OCIT vs. Reliance Industries Ltd (88 ITO 273) (Mum ITAT). That being so, we decline to interfere in the order passed by Id CIT(A), his order on this issue is hereby upheld and grounds of appeal raised by the Revenue is dismissed.”

Since the issue before us is identical and facts are materially same vis a vis facts of the case as decided by the coordinate bench as discussed above, we are, therefore, inclined to dismiss the appeal of the revenue by upholding the order of Id CIT(A).

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

Order is pronounced in the open court on 16th March, 2022.

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Rajesh Kumar)
Accountant Member

Dated: 16th March, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-10(1), Kolkata
2. Respondent – M/s Indian Oil Petronas Pvt. Ltd., 1/393, Gariahat Road, Kolkata-700068.
3. The CIT(A)-4, Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata