आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.: 2958 & 2959/CHNY/2019**

निर्धारण वर्ष /Assessment Years:2015-16 & 2016-17

George Maijo Industries (P) Ltd., 2-b, Apex Plaza, 5, Nungambakkam High Road, Chennai – 600 034.	v.	**The ACIT,** Corporate Circle -II(1), Chennai.
PAN: AACCG 6145R (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Vikram Vijayaraghavan, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri G. Johnson, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 31.03.2022

घोषणा की तारीख/Date of Pronouncement : 06.04.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These appeals by assessee are arising out of different orders of the learned Commissioner of Income Tax (Appeals)-6, Chennai in ITA No.126/CIT(A)-6/2017-18 & 85/CIT(A)-6/2018-10 dated 03.09.2019 & 06.09.2019. The assessments were framed by the ACIT, Corporate Range -2, Chennai for the assessment years 2015-16 & 2016-17

u/s.143(3) of the Income Tax Act, 1961 (hereinafter 'the Act') vide orders dated 18.12.2017 & 13.12.2018 respectively.

2. At the outset, the ld.counsel for the assessee stated that the facts and circumstances are exactly identical in both the years and issue is also identical and same. Hence, he wants to argue from assessment year 2015-16 in ITA No.2958/Chny/2019. The only common issue in both the appeals of assessee is as regards to the order of CIT(A) confirming the action of AO in treating the Special Additional Duty [payment of custom duty] as income of the assessee on receipt basis, whereas the receipts were in the nature of contingent receipt and actually the assessee has offered for taxation in subsequent year, as and when actually sanctioned by the Customs Department and received by the assessee.

3. Brief facts are that the assessee claimed deduction of Rs.1,40,28,289/- on account of Special Additional Duty (SAD) receipts in its computation of income as under:-

SAD receivables being contingent receipt	-	Rs.1,39,77,719/-
Profit on sale on fixed assets	-	Rs. 50,570/-
Total	-	Rs.1,40,28,289/-

The AO required the assessee to explain as to why the SAD receipts should not be taxed in this very year amounting to Rs.1,40,28,289/-. The assessee replied before the AO that the deduction claimed is on account of SAD receipts which are not received in the year and the same was offered to tax in subsequent year. The AO noted that the assessee is maintaining its accounts on mercantile system of accounting and furnished details in audit report and return of income, the assessee must compute income based on accrual of income as the SAD receipts have accrued to the assessee. Aggrieved against addition made by the AO, assessee preferred appeal before CIT(A).

4. The CIT(A) after considering the statutory audit report whereby assessee has claimed SAD receipts as provision, contingent liability and contingent assets. As per clause 29 of audit report, it was claimed that this receipt is subject to verification and approval by customs authority and hence, the same is in the nature of contingent receipt. According to CIT(A), once the assessee is following mercantile system of accounting and both the statutory auditor as well as assessee has signed the audit reports accompanied by balance sheet, the assessee was required to offer the SAD receipts as income for taxation and should not have

claimed the same as deduction. Accordingly, he confirmed the disallowance made by the AO. Aggrieved against the order of CIT(A) confirming the order of AO, the assessee came in appeal before the Tribunal.

5. Before us, the ld.counsel for the assessee explained that the assessee company is crediting the SAD portion to cost of goods sold i.e., material consumption account instead of taking it to separate head under income group. The SAD portion comes as a deduction from material consumption rather than capturing the same under any head of income. The assessee claimed that in the financial year 2014-15 relevant to assessment year 2015-16, the assessee company has accounted SAD receipts of Rs.139 lakhs and by this amount, the profit of the assessee is increased. The assessee claimed that these SAD receipts were never received and it is pending adjudication before the Customs authority. The assessee claimed that these are contingent receipts and a mere provision and actually it has not accrued to the assessee nor received. The ld.counsel for the assessee explained that the assessee company has claimed SAD refund and the value of import purchases from July 2014 to March 2015 amounting to Rs.1,39,77,719/- as on 31.03.2015. The ld.counsel explained that this amount is subject to

quantification by the Customs Authorities and Customs Authorities till this financial year i.e., 31.03.2015 has not finalized the claim. Accordingly, the assessee has made claim of the same and disclosed this amount in subsequent year as and when customs authorities have finalized this claim. The ld.counsel for the assessee stated that the assessee consistently following this system of accounting and disclosing the receipts of SAD as and when the customs authorities finalized the claim. The ld.counsel for the assessee filed a certificate from the Chartered Accountant of the assessee company which explained that the assessee is claiming exclusion and thereafter inclusion of the same amount in subsequent years in the return of income. The relevant certificate issued by Chartered Accountant dated 22.03.2022 reads as under:-

> "For assessment year 2015/16 to 2021/22 following is the Amount of Special Additional Duty (SAD) provided in the accounts of George Maijo Industries (P) Limited, 2B Apex Plaza, Nungambakkam High Road, Chennai – 34 and actually received by the Company

Financial year	Assessment year	Amount excluded from Total income as in computation	Amount offered to taxation in computation towards this account
31/3/2015	2015/16	13,97,771.00	Nil
31/3/2016	2016/17	1,12,03,110.00	1,07,60,600.00
31/3/2017	2017/18	71,47,791.00	95,99,623.00
31/3/2018	2018/19	7,05,543.00	53,47,433.00
31/3/2019	2019/20	Nil	18,03,998.00
31/3/2020	2020/21	Nil	Nil
31/3/2021	2021/22	Nil	Nil

As on 31/3/2021 an amount of Rs.55,22,505/- is due from Customs Department towards SAD amount receivable.

What is stated above has been extracted from ITR filed for the assessment years 2015/16 to 2021/22."

The ld.counsel for the assessee also relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Excel Industries Ltd., (2013) 358 ITR 0295.

6. On the other hand, the ld.Senior DR heavily relied on the order of AO as well as the CIT(A). He argued that once the assessee is following mercantile system of accounting and whatever is accrued to the assessee, he should disclose in the return of income and cannot claim any deduction on the plea that the particular receipt is contingent or a mere provision.

7. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the assessee admits that whatever SAD receipts are taxable but only question is year of taxability. The assessee's claim is that a particular claim of SAD receipts is not settled by the Customs Authorities and it is pending verification before the customs authorities. The assessee claimed that in regard to this amount of Rs.1,39,77,719/- claim of deduction

made of SAD receipts in this year is already been offered for tax in subsequent years. The ld.counsel for the assessee before us filed complete chart, year-wise, as and when these SAD receipts are verified and authenticated by customs authorities. The assessee has included the same in respective return of income of the respective years.

7.1 We have gone through the facts in entirety and noted that the claim of assessee seems reasonable but the claim is subject to verification. Before us, as relied on by ld. Counsel for the assessee on the decision of Hon'ble Supreme Court in the case of Excel Industries Ltd., *supra,* we noted that exactly identical situation was dealt in by Hon'ble Supreme Court wherein Hon'ble Supreme Court has applied various tests and tests enumerated in para 27 & 28. We noted that the Hon'ble Supreme Court also held that income accrues when it becomes due but it must also accompanied by a corresponding liability of the other party to pay the amount. Further held that, only then it can be said that for the purpose of taxability that income was hypothetical and it had really accrued to the assessee. We noted that the Hon'ble Supreme Court in the case of Excel Industries Ltd., *supra,* has considered this issue in detail vide para 17 to 32 as under:

17. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In Commissioner of Income Tax v. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC) it was held as follows:-

> *"Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."*

18. The above passage was cited with approval in Morvi Industries Ltd. v. Commissioner of Income-Tax (Central), [1971] 82 ITR 835 (SC) in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that: "..... the date of payment ..... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."

20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

21. In so far as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the

assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee.

22. In Godhra Electricity Co. Ltd. v. Commissioner of Income Tax, [1997] 225 ITR 746 (SC) this Court reiterated the view taken in Shoorji Vallabhdas and Morvi Industries.

23. Godhra Electricity is rather instructive. In that case, it was noted that the High Court held that the assessee would be obliged to pay tax when the profit became actually due and that income could not be said to have accrued when it is based on a mere claim not backed by any legal or contractual right to receive the amount at a subsequent date. The High Court however held on the facts of the case that the assessee had a legal right to recover the consumption charge in dispute at the enhanced rate from the consumers.

24. This Court did not accept the view taken by the High Court on facts. Reference was made in this context to Commissioner of Income Tax v. Birla Gwalior (P.) Ltd., [1973] 89 ITR 266 (SC) wherein it was held, after referring to Morvi Industries that real accrual of income and not a hypothetical accrual of income ought to be taken into consideration. For a similar conclusion, reference was made to Poona Electric Supply Co. Ltd. v. Commissioner of Income Tax, [1965] 57 ITR 521 (SC) wherein it was held that income tax is a tax on real income.

25. Finally a reference was made to State Bank of Travancore v. Commissioner of Income Tax, [1986] 158 ITR 102 (SC) wherein the majority view was that accrual of income must be real, taking into account the actuality of the situation; whether the accrual had taken place or not must, in appropriate cases, be judged on the principles of real income theory. The majority opinion went on to say:

> *"What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the*

year of closing an income which has accrued cannot be made "no income".

26. This Court then considered the facts of the case and came to the conclusion (in Godhra Electricity) that no real income had accrued to the assessee in respect of the enhanced charges for a variety of reasons. One of the reasons so considered was a letter addressed by the Under Secretary to the Government of Gujarat, to the assessee whereby the assessee was "advised" to maintain status quo in respect of enhanced charges for at least six months. This Court took the view that though the letter had no legal binding effect but "one has to look at things from a practical point of view." (See R.B. Jodha Mal Kuthiala v. Commissioner of Income Tax, [1971] 82 ITR 570 (SC)). This Court took the view that the probability or improbability of realisation has to be considered in a realistic manner and it was held that there was no real accrual of income to the assessee in respect of the disputed enhanced charges for supply of electricity. The decision of the High Court was, accordingly, set aside.

27. Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realisation of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic.

28. Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.

29. In Radhasoami Satsang Saomi Bagh v. Commissioner of Income Tax, [1992] 193 ITR 321 (SC) this Court did not think it appropriate to allow the

reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years. In arriving at this conclusion, this Court referred to an interesting passage from Hoystead v. Commissioner of Taxation, 1926 AC 155 (PC) wherein it was said:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."*

30. Reference was also made to Parashuram Pottery Works Ltd. v. Income Tax Officer, [1977] 106 ITR 1 (SC) and then it was held:

> *"We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> *"On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter — and if there was no change it was in support of the assessee — we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken."*

> 31. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.
>
> 32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers.

7.2 As in the present case, the subject verification of SAD receipts whether approved by customs authorities and when it was approved, the income accrued in that year only. This is a matter of verification by the AO. Even the AO will verify whether the assessee in subsequent year has declared the corresponding income or not. As the issue is clear that income will accrue when the corresponding liability of the other party to pay the amount and on this principle we remand the matter back to the file of the AO for verification. The appeal of the assessee is allowed subject to verification of facts.

8. Similar are the facts in assessment year 2016-17 in ITA No.2959/Chny/2019. Therefore taking a consistent view, the appeal of the assessee is allowed subject to verification of facts. Hence, the appeals of the assessee for both the assessment years 2015-16 & 2016-17 are allowed subject to verification of facts.

9. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the court on 6th April, 2022 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य /ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 6th April, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.