

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'E', NEW DELHI**

**BEFORE SH. N.K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
SH. KUL BHARAT, JUDICIAL MEMBER**

ITA No.5248, 5249 & 5250/Del/2015  
Assessment Year: 2007-08, 2008-09 & 2009-10

<b>M/s. Jindal (India) Ltd. 2/1, Ahmed Mamuji Street, Liluah, Howrah, West Bengal-7112-14</b>	<b>Vs</b>	<b>ACIT Central Circle – 30 New Delhi</b>
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

<b>Appellant</b>	Sh. Rohit Jain, Advocate Ms. Deepashree Rao, CA Ms. Shivangi Jain, CA
<b>Respondent</b>	Ms. Sarita Kumari, CIT DR

Date of hearing:	19/10/2022
Date of Pronouncement:	19/10/2022

**ORDER**

**PER N.K. BILLAIYA, AM:**

ITA No.5248/Del/2015, 5249/Del/2015 and 5250/Del/2015 are three separate appeals by the assessee preferred against a consolidated order of CIT(A)-30, New Delhi

dated 11.05.2015 pertaining to A.Y. 2007-08, 2009-10 and 2010-11.

2. All these appeals were heard together and are disposed of by this common order for the sake of convenience.

3. We will address each appeal one by one.

### **First A.Y.2007-08**

4. The grievance of the assessee read as under :-

1. That the CIT(A) erred on facts and in law in not holding that the action of the assessing officer in not entertaining the appellant's claim for exclusion of sales tax subsidy and power incentive amounting to Rs.5,73,25,000 and Rs. 5,83,28,267 respectively, received under the West Bengal Incentive Scheme, 2000 ('the Scheme') from total income, as the same constituted capital receipt not liable to tax under the provisions of the Income tax Act, 1961 ('the Act'), was bad in law.
  - 1.1 That the CIT(A) erred on facts and in law in holding that the above claim was not legally admissible on the ground that:
    - a) the claim was made in proceedings initiated under section 153A pursuant to search carried out under section 132, which is for the benefit of the Revenue;
    - b) there was no incriminating material found during the search and hence closed assessment cannot be disturbed by initiating the proceedings under section 153A; and
    - c) revised return under section 139(5) of the Act was not filed for making the claim.
2. That the CIT(A) erred on facts and in law in holding that the sales tax subsidy and power incentive received by the appellant under the Scheme was revenue receipt instead of capital receipt as contended by the appellant

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

5. Briefly stated the facts of the case are that a search and seizure action u/s. 132 (4) of the Act was conducted on the assessee on 14.11.2011 at its business/ office premises. The assessee filed original return of income on 28.10.2007 declaring total income at Rs.49197161/-. Pursuant to the notice served u/s. 153A, the assessee filed its return of income on 09.09.2013 returning the same income of Rs.49197161/-.

6. During the course of the scrutiny assessment proceedings assessee filed a revised computation of income wherein it claimed deduction of the amount of incentive of sales tax paid and also of the amount of power incentive granted by the Government of West Bengal. The claim of the assessee was rejected by the AO relying upon the decision by the Hon'ble Supreme court in the case of Goetze India Limited 284 ITR 323.

7. The assessee agitated the matter before the CIT(A) but without any success.

8. Before us the Counsel for the assessee vehemently stated that since the search and seizure action was conducted on 14.11.2011 the assessment year A.Y .2007-08 becomes a non-abated assessment year, therefore, the same becomes nonest since nothing was found incriminating during the search proceedings and the ratio laid down by the Hon'ble Jurisdiction

High Court of Delhi in the case of Kabul Chawla 380 ITR 573 squarely apply.

9. Per contra the DR strongly supported the findings of the AO.

10. We have carefully perused the orders of the authorities below. The Hon'ble Delhi High Court in the case of Kabul Chawla (supra) has categorically held that a non-abated assessment can only be reopened u/s. 153A of the Act if during the course of the search proceedings some incriminating materials have been found.

11. Since this is not the situation in the impugned assessment year A.Y.2007-08, therefore, the assessment framed u/s. 153A of the Act becomes bad in law and deserve to be quashed.

12. Since we have quashed the assessment order itself we do not find it necessary to dwell into the claim of the assessee which was denied by the AO. The appeal is accordingly allowed.

**A.Y. 2009-10 and A.Y.2012-13**

13. The grievance of the assessee for A.Y. 2009-10 read as under :-

1. That the CIT(A) erred on facts and in law in not holding that the action of the assessing officer in not entertaining the appellant's claim for exclusion of sales tax subsidy and power incentive amounting to Rs. 2,70,53,000 and Rs. 2,63,11,071 respectively, received under the West Bengal Incentive Scheme, 2000 ('the Scheme') from total income, as the same constituted capital receipt not liable to tax under the provisions of the Income tax Act, 1961 ('the Act'), was bad in law.
- 1.1 That the CIT(A) erred on facts and in law in holding that the above claim was not legally admissible on the ground that:
  - a) the claim was made in proceedings initiated under section 153A pursuant to search carried out under section 132, which is for the benefit of the Revenue;
  - b) there was no incriminating material found during the search and hence closed assessment cannot be disturbed by initiating the proceedings under section 153A; and
  - c) revised return under section 139(5) of the Act was not filed for making the claim.
2. That the CIT(A) erred on facts and in law in holding that the sales tax subsidy and power incentive received by the appellant under the Scheme was revenue receipt instead of capital receipt as contended by the appellant

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

14. The grievance of the assessee for A.Y.2012-13 read as under  
:-

1. That the assessing officer erred on facts and in law in completing the assessment for the assessment year under consideration, vide order dated 30.03.2014 passed under section 143(3) of the Income Tax Act' 1961 ('the Act'), at an income of Rs.46,08,85,250 as against income of Rs.42,97,99,250 declared by the appellant in the revised return filed on 13.03.2014.
2. That the assessing officer erred on facts and in law in not entertaining the appellant's claim regarding exclusion of sales tax subsidy/ incentives amounting to Rs.3,10,86,000 received under the West Bengal Incentive Scheme, 2000, from the purview of taxable income, the same being in the nature of capital receipt not liable to tax under the provisions of the Act.
  - 2.1 That the assessing officer erred on facts and in law in holding that the aforesaid claim cannot be considered since the appellant made such claim by filing revised return of income at the fag end of the limitation for completion of assessment.
  - 2.2 That the assessing officer erred on facts and in law in holding that the above claim made was not legally admissible inasmuch as the appellant had made the above claim in proceedings initiated under section 153A pursuant to search carried out under section 132 of the Act, which is for the benefit of the Revenue.
  - 2.3 That the assessing officer erred on facts and in law in not appreciating that the above claim made by the appellant was: (a) legally valid having been made by way of

revised return of income filed under section 139(5); and (b) not made in the return filed pursuant to notice under section 153A, but was made in the course of regular assessment under section 143(3) of the Act.

3. That on the facts and circumstances of the case and in law, the assessing officer erred in making addition on account of incentive/ subsidy amounting to Rs.3,10,86,000 received by the appellant, not appreciating that the same constituted capital receipt not liable to tax.

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

15. Since common grievance is involved in both the appeals they are disposed of as under.

16. As mentioned elsewhere a search and seizure operation was conducted on the assessee on 14.11.2011 and the assessment for A.Y.2009-10 was initiated by the AO by serving notice u/s. 143 (2) of the Act, therefore, pursuant to the search operation the impugned assessment was abated and proceedings u/s. 153 A were initiated. The original return filed on 29.09.2009 at the Nil income was repeated by the assessee by filing the same return of income in response to the notice u/s. 153A of the Act. During the assessment proceedings assessee filed revised computation of income wherein it claimed deduction being the amount of incentive of sales tax paid and also of the amount of power incentive granted by the Government of West Bengal.

17. In so far as A.Y.2012-13 is concerned the original return filed on 28.09.2012 declaring income of Rs.460885250/- was revised on 13.03.2014 by claiming deduction of Rs.31086000/- on account of incentive of sales tax paid claiming the same as capital receipt. The claim for A.Y.2009-10 was rejected by the AO by drawing support from the decision of the Hon'ble Supreme Court in the case of Goetze India 284 ITR 323 and for A.Y.2012-13 the claim was rejected as not tenable in law and merits of the claim were not looked into by the AO.

18. When the matter was agitated before the CIT(A) the appeal for A.Y.2009-10 was dismissed by the CIT(A) relying upon the

decision of Hon'ble Supreme Court in the case Goetze India Limited (supra) and for A.Y.2012-13.

19. After considering the facts and the submission the CIT(A) observed that the assessee has claimed the deduction as per the West Bengal Incentives Scheme 2000 by which sales tax subsidy and power incentive has been provided in the scheme mainly for sustaining the units in backward year. The CIT(A) further observed that under the scheme there is no provision as to how these incentives will be used whether for capital or revenue purposes. Though the CIT(A) agreed that the basic nature of any subsidy is to be examined for the purpose but the purpose is decided mainly by utilization to subsidy. The CIT(A) concluded by holding "just because the scheme of West Bengal Government talks about generation of employment or development of the area does not make any incentive / subsidy as capital receipts in the hands of the assessee".

20. Before us the Counsel for the assessee vehemently stated that the CIT(A) grossly erred in not understanding the scheme of subsidy. It is the say of the Counsel that there is no dispute whatsoever that the assessee is eligible for the West Bengal incentive scheme 2000 for its unit at Jangalpur Distt., Hawrah. Referring to the decision of the Hon'ble Supreme Court in the case of VSSV Meenakshi Achi 60 ITR 253 the Counsel stated that the Hon'ble Supreme Court has held in this case that the

character of the subsidy in the hands of the recipient is to be determined having regard to the purpose for which the subsidy has been given. The Counsel referred to the relevant closures of the scheme and pointed out that the purpose of the scheme was to promote industrialization, development of State, generation of employment being objects in larger public interest and, therefore, the waiver of electricity duty as well as tax subsidy and capital investment subsidy are capital receipts.

21. Per contra the DR strongly supported the findings of the lower authorities.

22. We have given a thoughtful consideration to the orders of the authorities below. In so far as A.Y. 2009-10 is concerned the only reason given by the CIT(A) for not entertaining the claim of subsidy is that the same was claimed by way of a revised computation of income and is therefore, not allowable as per the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra).

23. We are of the considered view that the CIT(A) grossly erred in not appreciating the decision of the Hon'ble Supreme Court in its true perspective. In the judgment itself the Hon'ble Supreme Court has categorically laid down that there is no fetter on the appellate authority to entertain such claim.

24. Coming to the merits of the claim we find that the West Bengal Incentive Scheme 1999 was discontinued pursuant to the national policy. However, the state of West Bengal decided to introduce the West Bengal Incentive Scheme 2000 which also covered the district of Howrah and, therefore, the units of the assessee are eligible for the incentive scheme. It is provided that the industrial unit to get State capital investment subsidy on the investment made in the fixed capital depending on location with direct employment generation of 200 or more. The minimum investment qualified for special package of benefits as mega projects is Rs.25 crores and it is provided that the waiver of electricity duty on electric consumption for production/ operation for 5 years. The 2000 scheme was generally be applicable to all large, medium, cottage and small scale projects to which / medium sector tourism units to be set up and also to expansion projects of existing units on or after 1.01.2000.

25. In so far as the eligibility criteria is concerned the unit at Jangalpur Distt. Howrah is eligible and there is no quarrel in respect of its eligibility. The only reason for denying the scheme of the assessee given by the CIT(A) is that the purpose of the subsidy is to be decided by utilization of subsidy. This is not what the Hon'ble Supreme Court has decided in the case of VSSV Meenakshi Achi (supra) as in that case the Hon'ble Supreme Court has held that the character of the of the subsidy in the

hands of the recipient is to be determined having regard to the purpose for which the subsidy has been given.

26. The Hon'ble Supreme Court in the case of Ponni Sugar and Chemicals Limited 306 ITR 392 had the occasion to consider the taxability of incentive bestowed on new / expanded sugar factories and the Hon'ble Supreme Court following Sahaney Steel and Press Works Ltd. 228 ITR 253 held that the subsidy received by the assessee was in the nature of capital receipt since the object behind the same was to assist entrepreneurs in setting up of new unit/ expansion of existing business.

27. In the light of the ratio laid down by Hon'ble Supreme Court (supra). We are of the considered view that the purpose for which the incentive have been given can be gauged from the objects and reasons behind introduction of the policy and as per the policy discussed elsewhere, it can be safely concluded that the intention of the State Government of West Bengal behind providing incentives were to promote industrialization, development of State, Generation of Employment, being objects in larger public interest.

28. On identical set of facts the Hon'ble Calcutta High Court in the case of Ankit Metal and Power Limited 416 ITR 591 has considered a similar quarrel and held as under :-

*The assessee had filed original return o income treating the interest subsidy as revenue receipt, but during the assessment proceedings the assessee had rectified its mistake and claimed the aforesaid subsidies as capital receipt by filing a revised computation of income since the time limit for filing revised return had lapsed. The assessing officer, however, treated the interest subsidy and power subsidy as a revenue receipt and brought the same to tax. On appeal, the Tribunal allowed the claim of the assessee to treat said subsidies as capital receipts. On Revenue appeal, the High Court confirmed the order of the Tribunal, holding as under*

*24. On perusal of the contents of the relevant portion under the incentive subsidy schemes in question we found that in the case of the assessee the State Government under the West Bengal Incentive Scheme, 2000, and 'West Bengal Incentive to Power Intensive Industries Scheme, 2005' had actually granted the subsidy with the sole intention of setting up new industry and attractive private investment in the state of West Bengal in the specified areas in the present case Bankura which is industrially backward hence the same was of the nature of non-taxable Capital receipt. Thus according to the 'purpose test' laid out by the Hon'ble Supreme Court, various and High Courts including our Court the aforesaid subsidy should be*

*treated as capital receipt in spite of the fact that computation of 'Power subsidy' is based on the power consumed by the assessee. It is well established from submission of the assessee as enunciated above that once the purpose of a subsidy is established; the mode of computation is not relevant as held in the decisions of the Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. (supra). CIT v. Ponni sugars & Chemicals Ltd. (supra) and the decision of our High Court in case of Rasoil Ltd. (supra) against which SLP has been dismissed. The mode of computation/form of subsidy is irrelevant. The mode of giving incentive is reimbursement of energy charges. The nature of subsidy depends on the purpose for which it is given. Hence the assessee draws support from the decisions already discussed earlier as the same principle will apply here. Thus, the entire reason behind receiving the subsidy is setting up of plant in the backward region of West Bengal, namely, Bankura.*

*25. Accordingly we hold the aforesaid incentive subsidies are 'capital receipts' and is not an 'income' liable to be taxed in relevant assessment year 2010-11 on the basis of discussion made above and further taking into consideration the definition of Income under Section 2(24) of the Income Tax Act, 1961, where sub-clause (xviii) has been inserted including 'subsidy' for the first*

*time by Finance Act, 2015 w.e.f. April, 2016 i.e assessment year 2016-17. The amendment has prospective effect and had no effect on the law on the subject discussed above applicable to the subject assessment years...”*

29. Considering the facts of the case in totality in the light of judicial decisions discussed here in above we direct the AO to allow the claim of the assessee for A.Y.2009-10 and 2012-13.

30. In the result, all the three appeals of the assessee are allowed for the reasons given here in above.

31. Decision announced in the open court on 19.10.2022.

Sd/-  
**(KUL BHARAT)**  
**JUDICIAL MEMBER**

\*NEHA, Sr. Private Secretary\*

Date:- 19.10.2022

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	19.10.2022
Date on which the typed draft is placed before the dictating Member	20.10.2022
Date on which the typed draft is placed before the Other member	21.10.2022
Date on which the approved draft comes to the Sr.PS/PS	21.10.2022
Date on which the fair order is placed before the Dictating Member for Pronouncement	21.10.2022
Date on which the fair order comes back to the Sr. PS/ PS	21.10.2022
Date on which the final order is uploaded on the website of ITAT	21.10.2022
Date on which the file goes to the Bench Clerk	21.10.2022
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	