

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 716/Mum/2020 (A.Y. 2004-05)

M/s Everest Industries Ltd.

2303, Fairfield-A, Majhiwada Bridge,

Thane (West)-400601

PAN: AAACE7550N

..... Appellant

Vs.

DCIT, Circle-1

Ashar I.T. Park, 6th Floor,

B-Wing, 16-Z, Wagle Industrial Estate,

Thane (West)-400604.

..... Respondent

ITA No. 1419/Mum/2020 (A.Y. 2004-05)

ITA No. 1420/Mum/2020 (A.Y. 2005-06)

DCIT, Circle-1

Ashar I.T. Park, 6th Floor,

B-Wing, 16-Z, Wagle Industrial Estate,

Thane (West)-400604.

..... Appellant

Vs.

Everest Industries Ltd.

2303, Fairfield-A, Majhiwada Bridge,

Thane (West)-400601

PAN: AAACE7550N

..... Respondent

Appellant/Assessee by : Sh. Yogesh Thar

Respondent/Revenue by : Ms. Nilu Jaggi, Sr.DR

Date of hearing : 06/09/2022
Date of pronouncement : 25/11/2022

ORDER

PER GAGAN GOYAL, A.M:

These three appeals in which one by assessee and two by Revenue are directed against the common order Commissioner of Income Tax (Appeals)-1, Thane [for short 'CIT(A)'] dated 03.12.2019 for the similar Assessment Years (AY) 2004-05 & 2005-06. We shall first take up appeal of Revenue for A.Y. 2004-05 as lead case and then assessee's appeal for A.Y. 2004-05.

2. The Revenue has raised common grounds of appeal except variation of amounts in figures. In ITA No. 1419/Mum/2020 for A.Y. 2004-05, the Revenue has raised the following grounds of appeal:

"1. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in deleting an amount of Rs. 6,57,91,246/- being disallowance of claim of sales tax incentive.

2. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in holding that Sales Tax was embedded in the Sales prices charged by the assessee and the same was in the nature of capital receipt. The Ld. CIT (A) ignored the fact that the assessee was legally required to collect Sales Tax on the Sales made, yet it had worked out the notional Sales Tax so collected and had claimed the same as capital receipts.

3. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in relying on the decision of ITAT, Mumbai and the decision of Bombay High Court (ITA No. 1299 of 2008) in the case of Reliance Industries Limited, even though subsequent to the Departmental appeal against the Order of High Court, the issue has been remitted back to the Bombay High Court to decide afresh and the same is still pending for adjudication."

3. Brief facts of the case are that the assessee company is engaged in the business of manufacture and sale of asbestos and other cement shades and accessories. The assessee had filed return of income on 01-11-2004 declaring total income of Rs 20,59,36,128/- computed under the normal provisions of the act and declared income of Rs 19,42,92,651/- under the provisions of sec 115JB. Subsequently the assessee filed revised return declaring total income of Rs 12,22,73,180/- under the normal provisions of the act and income u/s 155JB at Rs 5,87,33,620/-. In the revised return the assessee claimed deduction on account of sales tx incentive availed under “new package scheme of incentives 1993” credited to P&L Account being incentive in the nature of capital subsidy and set off unabsorbed depreciation brought forward from earlier years.

4. Case was selected for scrutiny and assessed u/s 143(3) at Rs 71, 38, 90,910/- by making various disallowances under the normal provisions of the Act. However in the said order AO did not compute income under the provisions of section 115JB. Aggrieved with the order the appellant filed an appeal before the Ld.CIT (A). The Ld.CIT (A) dispose of the appeal vide order dated 30-11-2006 with a direction to AO to reverify the facts on account of various issues and grant relief accordingly. However the AO passed ex-party order on 31-12-2007 u/s 143(3) r.w.s. 250. Aggrieved with the order of the AO, the appellant filed appeal before the ITAT. The ITAT vide order dated 15-09-2017 granted relief to the assessee on all the issues except restored back two issues. Subsequently AO passed order consequent to ITAT order u/s 143(3) r.w.s. 254 wherein the AO had disallowed Rs 6,57,91,246/- on account of sales tax incentive.

5. Aggrieved with the above order of the AO the appellant preferred an appeal before the Ld.CIT (A) in second round. Ld.CIT (A) allowed the appeal of the assessee and treated sales tax incentive received by the appellant under the aegis of new package scheme 1993 is capital in nature. Against this order of Ld.CIT (A) revenue is in appeal before us for AY 2004-2005 and 2005-2006.

6. To adjudicate the issue we need to understand the exact **nature and purpose** of the scheme and the settled position of law thereon. It is relevant to mention here that on the similar issue in assessee own case for AY 2003-2004 ITAT Mumbai vide ITA NO 814/Mum/2007 allowed the position in favour of assessee. Moreover for AY 2007-2008, 2008-09, 2010-11 and 2011-12 the then CIT (A) s also decided in favour of assessee and held as under:

“5.1 With this background. I proceed to adjudicate this ground of appeal on merit in the succeeding paragraphs. The Package Scheme of Incentives, 1993 was introduced with a view to revise the 1988 Scheme to rationalize the scope of incentives, various scales and mode of release of incentives to intensify and accelerate the process of dispersal of industries from the developed areas and for development of the underdeveloped regions of the State, particularly those farther away from the Bombay-Thane-Pune belt. The appellant company has received Sales Tax Incentive vide Resolution No.IDC-1093(8889)/IND-8 dated 07.05.1993. Prior to that such benefits were available under 1988 Scheme and Prior to 1988 Scheme, the benefits were extended by 1979 Scheme. The Scheme of 1979 was a modified form of 1977 Scheme. The Scheme of 1988 was revised to rationalize the scope of incentives, various scales and mode of release of incentive to intensify and accelerate the process of dispersal of industries from the developed area to develop the underdeveloped regions of State, particularly those farther away from Bombay- Thane-Pune belt The Scheme of 1993 under which appellant company got benefit was basically a revised form of incentives. In this revised Scheme of 1993 the experience gained in the implementation of earlier scheme particularly of 1988 and liberalized industrial policy of Govt of India was taken into consideration and there were some modifications with regard to scope of incentives, various scales and mode of release of incentives. On perusal of the 1993 Scheme and the

eligibility certificate issued to the appellant company, it is seen that the purpose for the grant of the assistance by the Government was to encourage additional investments for expansion and modernization of the industrial undertakings located at Lakhmapur in the State of Maharashtra. The specific purpose for granting assistance through said scheme was encouragement of entrepreneurs to set up new units, to attract expansion in the existing units and revival of close and sick units. The objectives clearly indicated that the incentive/subsidy granted to the appellant company by way of Sales Tax exemption directly related to expansion of the undertaking and to encourage investment in fixed capital and hence it was a capital receipt. On comparison of 1979 scheme with 1993 scheme, the following similarities in the terms and conditions are noticed:

Salient features	1979 Scheme	1993 Scheme
<i>Object of subsidy</i>	<i>Promotion of industrialization in backward areas of the State of Maharashtra through Scheme of incentives.</i>	<i>Promotion of industrialization in backward areas of the State of Maharashtra through Scheme of incentives.</i>
<i>Eligibility Claim</i>	<i>a) Eligible unit to make application after completion of initial effective steps. b) Complete final effective steps</i>	<i>a) Eligible unit to make completion after completion of initial effective steps b) Complete final effective steps</i>
<i>Initial step</i>	<i>i) Effective possession of land ii) Obtaining provisional SST registration/letter of intent from Government of India or permission from state Government for setting up eligible unit.</i>	<i>i) Effective possession of land ii) Obtaining provisional SST registration/letter of intent from Government of India or permission from state Government for setting up eligible unit.</i>
<i>Final effective</i>	<i>i) Typing up means of finance for project to satisfaction of</i>	<i>i) Typing up means of finance for project to satisfaction of implementing</i>

<i>steps</i>	<i>implementing authority</i> <i>ii) Acquisition of at least 10% authority of total fixed assets at site</i> <i>iii) Expenditure of at least 25% of total capital cost of project.</i>	<i>authority</i> <i>ii) Acquisition of at least 10% of total fixed assets at site</i> <i>iii) Expenditure of at least 25% of total capital cost of project.</i>
<i>Granting of Eligibility Certificate from SICOM (Implementing authority)</i>	<i>Effective from date of commencement of commercial production.</i>	<i>Effective from date of commencement of commercial production.</i>
<i>Mode of disbursement of sales tax incentive</i>	<i>a) By way of Exemption of purchase tax, sales tax on purchase of raw materials, sales tax payable on sale of finished goods, CST on Sale of finished 9% of fixed capital investment.</i> <i>b) By way of interest free unsecured loans or refund.</i>	<i>a) By way of Exemption of purchase tax, sales tax on purchase of raw materials, sales tax payable on sale of finished goods, CST on Sale of finished goods, as a % of fixed capital investment.</i> <i>b) By way of interest free unsecured loans or refund.</i> <i>c) By way of deferral of payment of sales tax liability.</i>
<i>Other benefits</i>	<i>i) Refund of octroi without any monetary ceiling</i> <i>ii) 75% contribution towards preparation of feasibility study</i> <i>iii) Preferential treatment in government/government undertaking statutory bodies</i>	<i>i. Refund of octroi/entry tax up to 100% admissible fixed capital investment of eligible new unit.</i> <i>ii. 75% contribution towards preparation of feasibility study.</i>

	<i>purchase programme.</i>	<i>iii. Refund of electricity duty for EHTP or 100% EOU</i> <i>iv. 10% waiver of cost of power line for prestigious units.</i>
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We have gone through the finding on facts given by Ld. CIT (A). In the present case, the purpose of granting Sales Tax incentive was clearly to provide for establishment of new industries or expand the existing units in the State of Maharashtra. The intention was not to increase the viability of the eligible units but promote development of further industry, accelerate industrialization and infrastructure in the region. It is clear that the Sales Tax benefit as per Package Scheme of Incentives, 1993, State of Maharashtra, was oriented towards the fixed capital investment. **The quantum of incentive benefit was to be determined with reference to the gross fixed capital investment of the eligible unit during the period of eligibility.** The quantum of incentive benefit was variable and said quantum of deferral benefit was directly related to the cumulative gross fixed capital investment made by the eligible unit. **As and when further fresh capital investment was made, the quantum of Sales Tax Incentive was further increased during the period of eligibility.** The period of entitlement of benefit could be curtailed if the gross fixed investment fell short of sales tax liability. For earning eligibility for the incentive benefit, the Industrial unit was supposed to take some initial and final steps and it could apply for incentive benefit after having taken possession of the land and having made an application of DGTD for registration. Such application was to be processed by the implementing agency, i.e. SICOM without waiting for the completion of the setting up of the Industrial unit and the provisional eligibility certificate was issued to the industrial unit on acquisition of at least 10% of the total fixed assets envisaged in the project and incurrence of expenditure to the extent of 25% of the

capital cost of project. In the aforesaid facts, the exemption availed of by the appellant's eligible units under the said notification, was a capital receipt not liable to tax. **In the case of DCIT Vs. Reliance Industries Ltd.(88 ITD 273) (Mumbai SB)**, the Hon'ble ITAT observed that the thrust of the Maharashtra Scheme was the industrial development of the backward districts as well as generation of employment thus, establishing a direct nexus with the investment in fixed capital assets. The Sales Tax Incentive was envisaged only as an alternative to the cash disbursement and by the very nature, was available only after commencement of production. The object of the subsidy was to encourage the setting up of industries in the backward area and the **incentive was not given to the industrial unit for assisting it in carrying out its day to day business operations.** The Hon'ble Mumbai Tribunal in the aforesaid decision followed the principle laid down by the Hon'ble Apex Court in the case of Sahney Steel Press Works Ltd. Vs. CIT(228 ITR 253) wherein it was held that the object for which the subsidy was given was decisive. It also recognized the distinction pointed out by the Supreme Court that if the subsidy was given for setting up or expansion of the industry in a backward area, it would be a capital receipt, **irrespective of the modality or the source of funds through or from which it was given and if monies were given for assisting the assessee in carrying out the business operations, it shall be revenue receipts.** The case of the appellant company is squarely covered by the facts and principles lay down in the case of Reliance Industries Ltd. (88 ITD 273) in view of the following similarities:

a) In the Reliance's case, the assistance was given for the specific purpose of expansion and modernization of the existing unit which in turn implied meeting capital cost. In the case of the appellant company, the incentive was granted at the time of setting up its unit in the backward area and further for the expansion of the said unit implying meeting of capital cost.

b) In the Reliance's case, Sales Tax exemption was granted under 1979 Scheme of the Govt. of Maharashtra after grant of eligibility certificate. In the case of the appellant company also, Sales Tax exemption had been granted after issue of eligibility certificate.

c) In the Reliance's case, Sales Tax exemption had been quantified on the basis of percentage of investment in fixed capital assets. In the case of the appellant company also, Sales Tax exemption was granted at a percentage of investment of fixed capital assets to the extent of Rs.45.74 crores and Rs. 18.90 crores respectively. The above basis of calculating the incentive was itself an indication of its being a capital receipt.

d) In the Reliance's case, the Sales Tax exemption had been granted on the basis of sales and purchases. In the case of the appellant company also, exemption had been granted on the basis of sales.

7. As observed above the features of the scheme and a comparison chart of the scheme of the year 1979 Vis -a-Vis 1993. The scheme of 1979 has already been examined by the special bench in the case of DCIT Vs Reliance Industries Ltd (2004)88 ITD 273(Mum)(SB). The basic features of this scheme framed in 1979 and the scheme framed in 1993 (applicable to the assessee) the ITAT held that both the schemes are similar and identical hence the sales tax subsidy received by the assessee was capital receipt.

8. Moreover in our decision we have relied upon the decision of honourable supreme court in the case of CIT Vs Ponny Sugars and Chemical Ltd (2008) 306 ITR 392 (S.C). In this regard, it has been held in a number of judicial pronouncements that modality or the source of funds or from which incentive subsidy is given shall not be decisive factor in determining whether the subsidy is revenue or capital in nature rather the purpose of the incentive scheme shall be seen. The said view

finds support from the decision of the Apex Court in the case of CIT- vs. - Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392(SC) wherein it was held that:-

"The importance of the judgement of this Court in Sahney Steel case lies in the fact that it has discussed and analysed 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 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 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."

9. The Hon'ble Apex Court in the case of CIT vs. Chaphalkar Brothers (Civil Appeal Nos. 6513-6514 of 2012 order dated 07-12-2017) (SC) by placing reliance on its earlier decisions in the case of Sahney Steel & Press Works Ltd. -vs- CIT (supra) and CIT-vs- Ponni Sugars and Chemicals Ltd. (supra) reaffirmed that the purpose test' is the essential test that is to be adopted in determining the character of a subsidy. The outward form in which the subsidy is granted is not determinative of the issue. Since, in the given case object of granting entertainment duty subsidy was to promote the construction of multiplex theatre complexes, the receipt of subsidy was held to be a capital receipt, not chargeable to tax. Similar view has been held by the Hon'ble Gujarat High Court in the case of DCIT vs. Inox Leisure Ltd. (2013) 351 ITR 314 (Guj.) wherein the High Court held that entertainment tax

exemption enabling the assessee to set up a new unit or expand the existing unit is a capital receipt.

10. Further, reliance is placed on the decision of the Apex Court in the case of CIT vs Shree Balaji Alloys [Civil Appeal No. 10061 OF 20111 wherein the court upheld the decision of the Hon'ble High Court of Jammu & Kashmir in case of Shree Balaji Alloys -vs- CIT (2011) S1 DTR 217 (J&K), which relying on the principles laid down by the Hon'ble Apex Court in the case of Sahney Steel and Press Works Ltd (Supra) & Ponni Sugars (Supra) had held that subsidy received with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerating industrial development is capital receipt.

11. Reliance is also placed on the decision of the Jurisdictional High Court in CIT vs. Harinagar Sugar Mills Ltd. (ITA No. 1132 of 2014 order dated. 04-01-2017) (Bom) wherein it has been held that subsidy received for the purpose of attracting capital investment and to encourage setting up/expansion of existing units would be on capital account not chargeable to tax. The Hon'ble High Court relying on the decision of the Hon'ble Apex Court in CIT vs. Ponni Sugars & Chemicals Ltd. (supra) reiterated the fact that it is the object or purpose of the subsidy which would decide its character as revenue or capital.

12. In the case of Zenith Fibres Ltd. vs. ITO (2009-TIO1-468-ITAT-Mum) the assessee claimed sales tax incentive (exemption) as capital receipt. The Mumbai Tribunal relying on the decision in the case of Reliance Industries Ltd. (Supra) held that the Incentive was given in several instalments depending on the setting up and expansion of the industrial site and object of the said subsidy is in

nature of sales tax exemption was to fund the cost of setting up an industry. The Hon'ble Tribunal therefore held that what is of vital significance is the purpose and object of the scheme and merely because the monies are received after production commences, it cannot be said, irrespective of the purpose and object of the scheme that the receipt is of revenue nature.

13. Reliance is also placed on the decision of the Kolkata ITAT in the case of Ambuja Cement Eastern Ltd--DCIT (ITA. Nos. 2475 & 2476 (Kol.) of 2005). In the said case the Hon'ble ITAT held that the facts of the case and the legal issues involved are similar to the case of Reliance Industries Ltd. (Supra), as adjudicated upon by the ITAT. Special Bench, Mumbai. In that case also, the purpose behind granting the subsidy by the Maharashtra Government was dispersal of industries out of the Bombay-Thane congested industrial belt area as well as industrialization of the state especially in its backward regions. Unlike the case of Sahney Steel (supra), where the sales tax incentive was given simply for the purpose of helping the industries in carrying on their existing businesses, in both the Reliance Industries (supra) case and in the case of the assessee, the relevant Schemes of the Maharashtra and West Bengal Governments respectively worked on the capital field viz. setting up of the industrial units in certain specified areas and were also for the specific purposes of the respective states viz. decongestion of the saturated Bombay-Pune belt in the case of Maharashtra and industrialization of the state in case of West Bengal. The ITAT further observed that another specific purpose of the state viz. environmental pollution removal was also served. Hence, it cannot be considered that by granting subsidy to the assessee, the Government of West Bengal helped the assessee company in carrying on its day-to-day business activities.

14. Further, reliance is also placed on CBDT Circular No. 142 dated 01-08-1974 wherein the Board has clarified that where the subsidy is primarily given for helping the growth of industries and not supplementing their profits, such subsidy shall be regarded as capital receipt. In coming to the said conclusion the Board has laid emphasis on the fact that under the scheme the quantum of subsidy was determined with reference to the fixed capital and not the profits. The Board thus held that, "further, since the subsidy is intended to be a contribution towards capital outlay of the industrial unit, the Board are advised that such subsidy can be regarded as being in the nature of capital receipt in the hands of the recipient."

15. Further, in the case of **Piyush Kanti Chowdhury -vs- State of West Bengal and Ors.,2007 (3) CHN 178 (Cal)** the Hon'ble Calcutta High Court held as under-

"Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to any declaration of law' but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex Court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned."

16. In view of the aforesaid discussions it is clear that the decision of the Special Bench in the case of **Reliance Industries Limited (Supra)** and appellant's own case for AY 2003-04 is still a binding precedent even if the said orders has

been appealed and are pending before Hon'ble Bombay High Court. **In view of the above, Ground No. 1 & 2 raised by the Revenue are dismissed.**

17. Ground No.3 raised by Revenue pertains to authority of law to be followed by lower authorities i.e. AO/CIT(A). Orders of higher authorities has to be followed by lower authorities.

“The aforesaid principle has also been approved by the Hon'ble Supreme Court in the case of **UOI - Kamalakshi Finance Corporation (1991) 35 ELT 433 (8C) ((1993) AIR 1992 SC 7111**. In the said case it has been held that principles of judicial discipline demands revenue to follow appellate authority's order unreservedly unless operation thereof is suspended by a competent Court. The Hon'ble Apex Court has further held that if this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws. The aforesaid principles have been followed by the Hon'ble Kolkata High Court in the case of **Nicco Corporation Ltd, -vs- CIT (2001) 251 ITR 791 (Cal)**, Similar view has also been taken by the Hon'ble Madras High Court in the case of **Seshasayee Paper And Boards Ltd, -vs- ACIT (1986) 157 ITR 342 (Mad)** wherein it has been held that *"the decision of the Supreme Court does not automatically have the effect of vacating the order of the Tribunal which has been statutorily made final under section 254(4) of the Act. Assuming for a moment as contended by the learned counsel for the Revenue that an infirmity is now created in the order by virtue of the decision of the Supreme Court, that order cannot be read as automatically been corrected nor is the effect given to that order*

automatically undone. Its legal validity is not in any way affected by the decision of the Supreme Court. Even a wrong order has a finality and unless that finality is disturbed by a process known to law or by process authorised by law, the rights of the assessee and the Revenue will continue to be governed by the order of the Tribunal."

Considering the discussion above and legal precedents, we are of the opinion that ground no. 3 raised by the Revenue does not have any force by saying that on departmental appeal to the Hon'ble Apex Court, matter has been remitted back to the Hon'ble High Court. As the same is still pending for adjudication and neither there is any order against the assessee nor any stay on the order been granted by the Hon'ble Apex Court. In the light of above ground no. 3 raised by the Revenue is dismissed.

18. In the result, the appeal filed by the Revenue is **dismissed**.

ITA No. 1420/Mum/2020 (A.Y. 2005-06)

19. As the facts and law applicable to this appeal is similar to what we have discussed and decided vide ITA No. 1419/Mum/2020 for A.Y. 2004-05, our findings will apply *mutatis mutandis* to this appeal also.

20. In the result, appeal filed by the Revenue is dismissed.

ITA No. 716/Mum/2020 (A.Y. 2004-05)

21. The assessee has raised the following grounds of appeal:

"1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (here-in-after referred to as 'Ld. CIT (Appeals)') was not justified & grossly erred in not granting the interest u/s 244A (1A) due to delay in granting refund to appellant and necessary direction may be given to AO to grant interest u/s 244A (1A).

2. That the appellant craves leave to add, to amend, modify, rescind, supplements or alters any of the Grounds stated here-in- above, either before or at the time of hearing of this appeal."

22. For the instant Assessment Year ITAT vide order dated 15-09-2017 has granted direct relief with respect to some grounds raised by appellant and two issues were restored to the file of DCIT. The DCIT vide order dated 05-04-2018 passed order giving effect granting direct relief provided by ITAT quantifying a refund of Rs. 17,58,18,205/- inclusive of interest w/s 244A(1) of Rs. 7,31,87,464/- Further in the second order effect on set aside matters dated 28-09-2018, consequential relief on account of set off of earlier years unabsorbed depreciation has been granted and principal amount of refund was determined at Rs. 11,04,22,861/- and interest w/s 244A was quantified at Rs. 8,26,10,295/-. Thereafter in the computation sheet it is mentioned that earlier refund quantified of Rs. 17,58,18,205/- has already been issued and balance refund payable is Rs. 1,72,14,951/-.

23. In this connection, it is relevant to refer the provisions of Sec. 244A(1A) as inserted by Finance Act 2016 w.e.f. 1-04-2016 which is reproduced herein below:

"(A) In a case where a refund arises as a result of giving effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264, wholly or partly, otherwise than by making a fresh assessment or reassessment, the assessee shall be entitled to receive, in addition to the interest payable under sub-section (1), an additional interest on such amount of refund calculated at the rate of three per cent per annum, for the period beginning from

the date following the date of expiry of the time allowed sub-section (5) of section 153 to the date on which the refund is granted."

24. Reference is also made to relevant extract of Notes on Clause to Finance Bill 2016 which reads as under:-

"Clause 90 of the Bill seeks to amend section 244A of the Income tax Act relating to interest on refunds.

.....

Sub-clause (B) of the said clause seeks to insert a new subsection (14) so as to provide that that where a refund arising out of appeal effect is delayed beyond the time prescribed under subsection (5) of section 153, the assessee shall be entitled to receive, in addition to the interest payable under sub-section (1) of section 244A, an additional interest on such refund amount calculated at the rate of three per cent Per annum, for the period beginning from the date following the date of expiry of the time allowed under sub-section (5) of section 153 to the date on which the refund is granted."

25. In the decision of National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC), held that, where a Tribunal is only required to consider a question of law arising from the facts, which are on records, there is no reason why such question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of the assessee.

26. Incidentally, in the decision of the Apex Court in the case of Goetze (India) Ltd. –vs.- CIT (2006) 284 ITR 323 (SC), the Apex Court dealt with the power of the Assessing Officer to entertain a claim made before the AO, otherwise than through revised return filed on time and held that such claim cannot be entertained by AO. However, while concluding, the Apex Court made it abundantly clear that the said decision doesn't affect the power of the Tribunal to

admit additional ground. Same is the case as regards appeal before Commissioner of Income Tax (Appeals).

27. In this connection it is further observed that under Article 265 of the Constitution, the State is entitled to recover or realize only that tax which is imposed in accordance with law. It is the duty of the State to see that justice is done to its citizen. Therefore, shelter should not ordinarily be taken behind the procedural technicalities with a view to defeat a just claim of an assessee. Reliance is placed on the decision in the case of Taylor Instrument Co. (India) Ltd. -vs- CIT (1992) 198 ITR 115 (Del).

28. In this regards Central Board of Revenue (now CBDT) vide Circular No. 14 (XL-35) of 1955 dated 11-04-1955, states that, officers of the department must not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every way particularly in the matter of claiming and securing relief. Although the responsibility for claiming refunds and relief rests with the assessee on whom it is imposed by law, officers should draw their attention to any refunds or relief to which they appear to be clearly entitled but which they have omitted to claim for some reason or other.

29. Further, we placed reliance on the following judicial pronouncements of the Jurisdictional High Court:

-Hindustan Construction Co. Ltd. -vs- CIT (1994) 208 ITR 291 (Bom.)

-Inaroo Ltd. -vs- CIT (1993) 204 ITR 312 (Bom.)

-Sirdar Carbonic Gas Co. Ltd. -vs- (1993) 204 ITR 886 (Bom)

-CIT-vs-Balapur Sugar & Allied Industries Ltd. (1983) 141 ITR 404 (Bom.)

30. From the perusal of the aforesaid decisions, it could be seen that an assessee can raise a new ground for the first time before the Appellate Authorities i.e., Ld. CIT (Appeals) and/or Hon'ble ITAT. In view of the aforesaid discussion, the appellant humbly submits that it is now a settled law that the appellate authorities should entertain additional grounds raised by the assessee, to correctly assess the tax liability of the appellant in accordance with law. In the instant case the appellant is not raising any new claim which it forgot to claim in the Return of income. Rather the appellant by way of inadvertence failed to include in the original appeal memo one ground relating to non- grant of Interest u/s 244A (1A) by the Ld. DCIT.

31. With the above observations, we do not hesitate in directing the AO to follow the provisions of section 244A (1A) of the Act and pass necessary order granting due interest under section 244A (1A). We further observed that same directions had already been issued by the Ld. CIT (A) in his appeal order under section 250 of the Act still if assessee is raising the same again before us it can be reasonably assumed that directions of Ld. CIT (A) were not followed by the AO. **We direct the AO to comply with the provisions of section 244A (1A).** With this direction, we allow the ground raised by assessee.

32. In the results, appeal filed by assessee is allowed.

Order pronounced in the open court on 25th day of November, 2022.

Sd/-

(VIKAS AWASTHY)

JUDICIAL MEMBER

Mumbai, दिनांक / Dated: 25/11/2022

SK, Sr.PS

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai