

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)  
AND  
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

**ITA No. 1422/MUM/2020  
Assessment Year: 2008-09  
&  
ITA No. 1429/MUM/2020  
Assessment Year: 2010-11**

DCIT, Circle-1, Thane,  
Room No. 22, B-Wing, 6<sup>th</sup> floor,  
Ashar IT Park, Wagle Industrial  
Estate,  
Thane(W)-400604.

**Appellant**

Assessee by : Mr. Yogesh Thar/Shri Chaitanya  
Joshi, AR  
Revenue by : Ms. Richa Gulati, DR &  
Mr. Ashok Singh, CIT-DR

Date of Hearing : 18/01/2023  
Date of pronouncement : 20/01/2023

M/s Everest Industries  
Limited,  
G-1, A-32, Genesis Mohan  
Coop. Industries, Mathura  
Road,  
New Delhi-110044.  
**PAN No. AAACE 7550 N**  
**Respondent**

**ORDER**

**PER OM PRAKASH KANT, AM**

These two appeals by the Revenue are directed against two separate orders, both dated 03.12.2019, passed by the Ld. Commissioner of Income-tax (Appeals)-1, Thane [in short 'the Ld.



CIT(A)] for assessment year 2008-09 and 2010-11 respectively. Being identical issue involved in both these appeals, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. We take up the appeal of the Revenue for assessment year 2008-09. The grounds raised by the Revenue are reproduced as under:

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. 5,37,44,724/- 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. At the outset, the Ld. Counsel of the assessee submitted that issue-in-dispute raised by the Revenue is covered by the order of the ITAT for assessment year 2010-11 in ITA No. 7791 of 2019 and 554 of 2020. Therefore, he submitted that order of the Ld. CIT(A) on the issue-in-dispute might be upheld. The Ld. Departmental Representative (DR) on the other hand, could not controvert the above facts.

4. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. In the grounds raised, the Revenue is aggrieved with the action of the Ld. CIT(A) in deleting an amount of ₹5,37,44,724/- which was claimed by the assessee as capital receipt but held the Assessing Officer as revenue receipt. The Ld. CIT(A) in para 6.2 to 6.5 of the impugned order has reproduced factual background in respect of issue of sales tax incentive. The relevant paragraphs are reproduced as under:

*“6.2 I have carefully considered the facts of the case, findings of the A.O., submission of the appellant and material placed on record.*

*In the instant case, the Hon'ble ITAT in vide Order dated 15.09.2017 restored the issue to the file of the AO stating that the AO should compare the 1979 Scheme of Government of Maharashtra with that of New Package Scheme of*



*Incentive, 1993. The AO passed order u/s 143(3) r.w.s. 254, in the A.Y. 2008-09, holding the sales tax incentives as revenue in nature and held that,*

*"In ITAT the issue of sales tax incentive of Rs.5,37,44,724/- claimed as capital receipt was set aside to the file of the AO for fresh adjudication with a direction 10 compare the sales tax incentive scheme of 1979 availed by Reliance Industries Limited and the New Package Scheme of Incentive 1993 which is availed by the assessee. However, the issue of sales tax incentive claimed as capital receipt, allowed by the Hon'ble ITAT in the case of Reliance Industries Limited, has been sent back to the Hon'ble Bombay High Court by the Hon'ble Supreme Court with a direction to decide whether sales tax incentive is a capital receipt or not. Accordingly, the issue has not yet attained finality. The case of the assessee for AY. 2003-04 has been clubbed with the appeal pending in the case of Reliance Industries in the Hon'ble Bombay High Court. Accordingly, since the Income Tax Department has not accepted the view of the Tribunal both in case of Reliance Industries and the assessee and filed further appeals before the Hon'ble High Court and these appeals are still pending with the Hon'ble High Court, the contention of the assessee to claim sales tax incentive as capital receipt is not tenable and hence disallowed, in view of the detailed discussion*



*made by the AO in the assessment order passed w/s  
143(3) dated 23.12.2010 "*

*On perusal of the above paragraphs, it is clear that the AO did not compare the terms and conditions of the Sales Tax Incentive Scheme of 1979 availed by Reliance Industries Ltd. with the New Package Scheme of Incentives, 1993 which was availed by the appellant company. Thus, the directions of Hon'ble Mumbai ITAT as per order dated 15.09.2017 were not followed by the AO in the right earnest. The AO thereafter proceeded to make an addition of Rs.5,37,44,724/- on account of Sale Tax Incentives as revenue receipts on the ground that the decision of Hon'ble Mumbai High Court in the case of Reliance industries Ltd. had not attained finality.*

*6.3 Here it is pertinent to mention that in appellant's own case, the Hon'ble ITAT for A.Y. 2003-04 has allowed the appeal on this issue holding sales tax incentive to be capital in nature.*

*Further, the then CIT(A) has also allowed the appeals on this issue in favour of the appellant company for A. Y. 2007-08, 2008-09 and for A.Y. 2009-10 vide order dated 09.11.2012 and 31.03.2015 respectively.*

*6.4 Subsequently while disposing the appeal of the appellant company for AY 2009-10, the Hon'ble Mumbai ITAT vide its order dated 30.01.2018 in ITA Nos.3804&3849/Mum/2015 again remanded the matter to the Assessing Officer and he was directed to compare the scheme deliberated upon by the*



*Tribunal in the case of Reliance Industries Ltd. and the scheme of 1993 applicable availed by the appellant.*

*The set aside assessment for A.Y. 2009-10 was completed by the AO on 28.12.2018 us 143(3) r.w.254 of the Act with the following findings in para 3.2 & 3.3.*

*"3.2 I have considered the facts of the case and the submission made by the assessee. The issue of Sales Tax Incentive of Rs.5,83,36,300/-claimed as capital receipt was set aside to the file of the Assessing Officer with a limited purpose for comparing the sales tax incentive scheme of 1979 availed by Reliance Industries Limited and the New package scheme of incentives 1993 which is availed by the assessee. It is seen that the comparison between the two schemes has already been made by the Hon'ble ITAT in assessee's own case for AY 2003-04 in its order dated 04.12.2009 and held that both the schemes are similar and identical. Accordingly, by placing reliance on the ITAT Order for AY 2003-04,it is held that both the schemes are similar and identical.*

*3.3 However, the issue of sales tax incentive claimed as capital receipt, allowed by the Hon'ble ITAT in the case of Reliance Industries Limited, has been sent back to the Hon'ble Bombay High Court by the Hon'ble Supreme Court with a direction to decide whether sales tax incentive is a capital receipt or not. Accordingly, the issue has not yet attained finality.*



*The case of the assessee for AY 2003-04 has been clubbed with the appeal pending in case of Reliance Industries in the Hon'ble Bombay High Court. Accordingly since the Income Tax Department has not accepted the view of the Tribunal both in case of Reliance Industries and the assessee and filed further appeals before the Hon'ble High Court, the contention of the assessee to claim sales tax incentive as capital receipt is not tenable and hence disallowed".*

*6.5 It is noted that in the case of appellant for A.Y. 2003-04 in ITA 814/Mum/2007, it was held by the Hon'ble Tribunal that both the schemes are similar and identical and it was adjudicated by the Hon'ble ITAT that this issue is squarely covered by the decision of the Special Bench in the case of DCIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum)(SB)."*

4.1 The Ld. CIT(A) further referred to the finding of the Ld. CIT(A)-3, Nashik to support his finding. The Ld. CIT(A) after comparing the Maharashtra Incentive Scheme, 1979 with Maharashtra Incentive Scheme, 1993, followed the decision of the Tribunal for AY 2003-04 in ITA No. 814/M/2007 and his predecessor and held that the sale tax incentive received by the assessee under the "new package scheme 1993" is capital in nature. The Tribunal in ITA No. 7791 of 2019 and 534 of 2020 for assessment year 2010-11 has also mentioned the facts and scheme under consideration as follows:



“9.1 On Grounds of appeal no. 1() to I(n) of the revenue ie, "Sales Tax Incentive under New Pachion Scheme of Incentives (PSI), 1993. [Rs.2,23,927341-1, the Learned Counsel for the Assessee drew the attention of the Bench with respect to the brief facts of the case are that the assessee company had set-up. a manufacturing unit in backward area of Nashik, Maharashtra. The assessee company is having. Ius manufacturing unit of Asbestos cement sheets and accessories at Lakhmapur, Nasik. The said unit at Lakhmapur was eligible for sales tax incentive as per the Government of Maharashtra resolution vie Industries, Energy and Labour Notification No. IDL/1088/6603/1&D-8 dated 30-9-1988 which was extended further w.e.f. 1-10-1993. Under the said scheme, the assessee company was not required to pay (1) Sales Tax "LST" and CST, additional sales tax, purchase tax, turnover tax payable on sale of finished products or purchase of material. Based on the said scheme, Sicom Ltd, the implementing agency has certified that the assessee company was eligible for incentives under the scheme and issued eligibility certificate No. FINC()/1993/EXEMPTION/EC-4498 dated 1-1-2002, effective from 1-1-2002 to 31-1-2016 i.e., for 169 months granting sales tax exemption of Rs. 17,30,13,750/- for additional investment of Rs. 18.90 crores made at the factory at Lakhmapur. In terms of the said scheme, during the previous year i.e., for the A. Y. 2010-11 the assessee company availed the said incentives/subsidy on account of sales tax aggregating to Rs. 6,74, 12,461/-. In the return of income the assessee company excluded the



*above subsidy on account of sales tax incentive in computing the total income under normal provisions of the Act. The assessee took this said exclusion as capital receipt, however, the Revenue treated this amount as revenue receipt and added back to the total income of the assessee company.”*

4.2 Thereafter, the Tribunal (supra) directed to delete the addition treating the sales tax incentive as capital receipt. The relevant finding of the Tribunal is reproduced as under:

*“12. We have heard the submissions of both the parties and perused the material available on record. We find that the present issue is fully covered in assessee’s own case in ITA.No.814/Mum/2007 for the A.Y. 2003-04 wherein the Tribunal allowed relief in respect of the matter in issue. Further, the Special Bench of the Tribunal in the case of DCIT vs., Reliance Industries Ltd., [2004] 88 ITD 273 (Mum) held that sales tax subsidy received under the Package Scheme of Incentives, 1979 is for the purpose of industrial development of the backward districts as well as generation of employment, thus, establishing a direct nexus with the investment in fixed capital assets and hence, a capital receipt. Against this Special Bench order of the Tribunal, the Department filed an appeal before the Hon’ ble High Court of Bombay which is pending for adjudication. In this connection, it is relevant to state that the Hon’ ble Supreme Court in the case of Union of India vs., Kamlakshi Finance Corporation Ltd., [1991] 55 ELT 433 (SC) has held that ‘ mere fact that the order of the appellate authority is not*



*“acceptable” to the Department and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. We find that since the order of the Special Bench of the Tribunal is still holds the field and in absence of any contrary decision brought to our notice by the Ld. D.R, and the order of the Ld. CIT(A) in deleting the addition made by the A.O. is in accordance with law, we find no reason to interfere with the order of the Ld. CIT(A) on this issue and, therefore, we hold that the amount of incentive is not a revenue receipt, but, it is a capital receipt and, therefore, we direct the A.O. to delete the addition. The Revenue fails in its grounds of appeal Nos.1(i) to 1(iv) and, therefore, the grounds on this issue are dismissed.”*

4.3 Since, the Tribunal (supra) has allowed the sales tax incentive received under the same scheme under which the assessee has received sales tax incentive in the year under consideration and therefore, issue-in-dispute being squarely covered by the order of the Tribunal (supra), the grounds raised by the Revenue are dismissed.

5. Now we take up the appeal of the Revenue in ITA No. 1429/M/2020 for assessment year 2010-11 wherein grounds raised by the Revenue are reproduced as under:

- 1. Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in holding the order passed u/s 143(3) r.w.s. 263 as void ab initio*



*without considering the fact that the ITAT's order quashing the order passed u/s 263 by the CIT u/s.263 of the Income Tax Act, 1961 has not attained finality?*

2. *Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in holding the order passed u/s 143(3) r.w.s. 263 as void ab initio without deciding the specific grounds of appeal on merits?*

6. The issue-in-dispute in the grounds raised is that Revenue seeks to agitate the dismissal of assessment order u/s 143 consequent to order u/s 263, of the Act as the order u/s 263 has been quashed by the ITAT. In our opinion, the foundation u/s 143(3) r.w.s. 263 was order u/s 263 of the Act, which has already been demolished, then the consequent order passed cannot survive. The relevant finding of the Ld. CIT(A) on the issue-in-dispute is reproduced as under:

#### **"5. DECISION**

*During the appellate proceedings, the appellant filed written submission inter-alia, stating as under:*

- 2.0 *Further, it is submitted that the appellant had also filed an appeal before the Hon'ble Mumbai ITAT against order us 263 dated 25-11-2013, bearing ITA No. 532/Mum/2014. In the said appeal, the appellant was of the view that since the AO has made*



*requisite enquires during the course of assessment proceedings and thereafter disallowed the claim, the order passed by the AO cannot be treated as erroneous and prejudicial to the interest of revenue. The case was extensively presented on facts, legal principles and also judicial supports and several submissions were filed to counter each & every contention of the Hon'ble Members and the Departmental Representative. Accordingly, the Hon 'ble ITAT after giving a patience hearing set aside the order of Commissioner us 263 of the as being without authority of law and restored the Assessment Order u/s 143(3) dated 28-03-2013. However, the ITAT has not decided on merits of allowability of these subsidy since that may lead to influencing the adjudication pending before the CIT(A).*

*2.1 Hence, the appeal was decided in the favour of the appeal and the order us 263 dated 25-11-2013 is quashed. Therefore in the light of the aforesaid ITAT order, the present appeal filed before your goodself becomes infructuous."*

*6.2 While passing order of the CIT u/s 263 the Hon'ble Tribunal, 'E' Bench. Mumbai in its Order dated 21.08.2019 has held as under:*

*"29. Since in the present case the assessing officer has already analysed one aspect of the matter which was pending before the CIT(A), the matter cannot be*



*again relooked by the Commissioner on any other aspect as the order of the assessing officer gets merged with the order of CIT(A) in view of the decision of the Hon'ble Bombay High Court as above. Thus, the Commissioner had no power to touch upon the issues of treatment of sales tax and excise duty incentives in the impugned proceedings us 263 of the Act.*

*30. We make it clear that since the matter on the issue of excise duty exemption and sales tax incentive is pending before the CIT(A), we are restricting ourselves to the validity of proceedings us 263 of the Act and are not discussing the merits of the issue as doing so may lead to influencing the adjudication pending before the CIT(A). As such, we are not expressing any opinion on the merits of the case.*

*31. In light of our above discussion, we hold the Commissioner has wrongly assumed jurisdiction on the above issue w/s 263 of the Act and we thus vacate the order of the Commissioner us 263 of the Act as being without authority of law and restore the assessment order dated 28.03.2013 (supra) qua the aforesaid issues."*

*In view of the above order the Hon'ble Tribunal, the order passed u/s 143(3) r.w.s. 263, challenged before me, become void ab initio. As far as Appeal pending before the CIT (Appeal) on the issue of excise duty exemption and sales tax incentive is concerned the same has been adjudicated by CIT (Appeal)-3, Nasik*



*vide his Order dated 16.10.2019. Accordingly, grounds of appeal are allowed.”*

6.1 In view of above, we do not find any infirmity in the finding of the Ld. CIT(A) on the issue-in-dispute. Accordingly, the grounds raised by the Revenue are dismissed.

7. In the result, both the appeals filed by the Revenue are dismissed.

**Order pronounced in the open Court/under Rule 34(4) of the ITAT Rules, 1963 on 20/01/2023.**

**Sd/-  
(ABY T VARKEY)  
JUDICIAL MEMBER**

**Sd/-  
(OM PRAKASH KANT)  
ACCOUNTANT MEMBER**

Mumbai;  
Dated: 20/01/2023  
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,  
(Sr. Private Secretary)  
**ITAT, Mumbai**