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

## BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
## AND
## SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

## ITA No. 717/MUM/2020
## Assessment Year: 2006-07

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| Everest Industries Ltd.,<br>D-206, Sector-63, Noida-<br>201301, Uttar Pradesh, India.<br><br>**PAN NO. AAACE 7550 N**<br>**Appellant** | ***Vs.*** | DCIT, Circle-1,<br>Ashar I.T. Park, 6th floor, B-<br>Wing 16-Z, Wagle Industrial<br>Estate, Thane (W)-400 604.<br><br>**Respondent** |

## ITA No. 1421/MUM/2020
## Assessment Year: 2006-07

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| DCIT, Circle-1,<br>Ashar I.T. Park, 6th floor, B-<br>Wing 16-Z, Wagle Industrial<br>Estate, Thane (W)-400 604.<br><br>**Appellant** | ***Vs.*** | Everest Industries Ltd.,<br>G-1, A-32, Genesis Mohan<br>Coop. Industries, Mathura<br>Road, New Delhi-110044.<br>**PAN NO. AAACE 7550 N**<br>**Respondent** |

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| **Assessee by** | : | Mr. Yogesh Thar<br>a/w Mr. Chaitanya Joshi |
| **Revenue by** | : | Mr. Alok Kumar, CIT-DR |
| Date of Hearing | : | 01/08/2023 |
| Date of pronouncement | : | 21/08/2023 |

## ORDER

**PER OM PRAKASH KANT, AM**

These cross appeals by the Revenue and the assessee are directed against order dated 03.12.2019 passed by the Ld. Commissioner of Income-tax (Appeals)-1, Thane [in short 'the Ld. CIT(A)'] for assessment year 2006-07.

2. The grounds raised by the Revenue are reproduced as under:

> *1. (i) Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in deleting an amount of Rs. 4,38,56,713/- being disallowance of claim of sales tax incentive.*
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> *(ii) 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.*
>
> *(iii) 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 adiudication.*
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> *2. Whether on the facts and in the circumstance of the case and law, the Hon'ble Tribunal was correct in disallowing addition of Rs. 16,03,927/- on account of lease rent liability without appreciating the fact that*

*liability is contingent/ disputed and thus not accrued in the A.Y. 2006-07?*

*3.1 Whether on the facts and in the circumstances of the case and in law, the tribunal was justified in allowing the deduction u/s 54G without appreciating the fact that the industrial undertaking was shifted in the F.Y. Peg us a say 894-95 and deduction is claimed in FY. 2006-07 which is beyond the prescribed time limit of one year before or three year after the date of transfer of capital asset as per the provision of section 50G and it can neither be considered as effected in the course of or in consequences of shifting of such industrial undertaking?*

*3.2 Whether on the facts and in the circumstances of the case and in law, the tribunal was justified in allowing the deduction u/s 54G for A.Y. 2006-07 without appreciating the fact that the same has already been claimed and allowed in the earlier years?*

*4.1 Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the AO to exclude Sales Tax incentive, while computing the book profits u/s 115]B of the Act, without appreciating that they have not been specifically excluded in Explanation 1 to section 115]B of the Act.*

*4.2 Whether the CIT (A) erred on the facts and in the circumstances of the case and in law, in directing the A to exclude Sales Tax incentive, while computing the book profits u/s 115JB of the Act despite the fact that no adjustment other than the ones mentioned in Sec.115JB is permissible as held by the Supreme Court in the case of Apollo.*

2.1 The grounds raised by the assessee are reproduced as under:

*1(a). 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 & rather grossly erred in confirming the decision of the A.O. that there has been a sale of reserved land of 22,492.50*

*sq. meters instead of sale of TDR of 1,91,106 sq. ft. during the previous year under consideration.*

*1(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified &rather grossly erred in confirming the action of the A.O.in not holding that the sale consideration received in respect of TDR is not liable to capital gain tax as there is no cost of acquisition on the above TDR.*

*2(a). That on the facts and in the circumstances of the case and without prejudice to Ground No. 1(a) and 1(b) taken here-in-above, the Ld. CIT(Appeals) was not justified & grossly erred in confirming the action of the A.O. in reducing the Fair Market Value of Land as on 01-04-1981 without appreciating the fact that the said valuation was duly supported by independent valuation report.*

*2(b). That on the facts and in the circumstances of the case and without prejudice to Ground No. 1(a) and 1(b) taken here-in-above, the Ld. CIT(Appeals) was not justified &rather grossly erred ipn confirming the action of the A.O. in adopting the Fair Market Value of Land as on 01-04-1981 as determined by the Departmental Valuer in earlier assessment years in computing the Long Term Capital Gain for the year under consideration without appreciating the fact that said valuation is bad in law.*

*3. That on the facts and in the circumstances of the case and without prejudice to Ground No. 1(a) and 1(b) taken here-in-above, the Ld. CIT(Appeals) was not justified & rather grossly erred in confirming the action of the A.O. in applying the provisions of section 50C of the Income Tax Act, 1961 in computing the capital gains without That on the facts and in the circumstances of the case and without prejudice to Ground No. 1(a) and 1(b) taken here-in-above, the appellant shall be entitled to claim proportionate indexed cost of improvement of Rs. 4,18,33,580/- while computing capital gain and hence necessary direction may please be given to the AO to allow the same.*

3. Briefly stated facts of the case are that during the year under consideration, the assessee company was engaged in the business

of manufacturing of asbestos cement sheet and accessories. For the year under consideration, the assessee filed return of income on 07.11.2006 declaring total income of Rs.22,90,16,735/- which was further revised on 28.03.2008 declaring total income at Rs.22,96,26,773/-. The return of income was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment completed u/s 143(3) of the Act on 24.12.2008, the Assessing Officer made various additions/disallowances and assessed the income to Rs.44,02,20,600/-. On further appeal, the Ld. CIT(A) allowed part relief. Aggrieved with the finding of the Ld. CIT(A), both the Revenue and the assessee are in appeal before the Income-tax Appellate Tribunal (ITAT) raising the grounds as reproduced above.

4. The ground No. 1 of the appeal of the Revenue relates to treating the sales tax incentives of Rs.4,38,56,713/- received by the assessee as capital receipt.

4.1 Before us, the Ld. Counsel of the assessee submitted that issue in dispute is covered in favour of the assessee by the order of the Tribunal for assessment year 2004-05 in ITA No. 1419/Mum/2020.

4.2 The Ld. Departmental Representative (DR) on the other hand, relied on the order of the Assessing Officer.

4.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Assessing Officer in para 4.2 of the impugned assessment order has relied on the finding of his predecessor for assessment year 2004-05 and accordingly made addition holding sales tax incentives as revenue receipt. The Ld. CIT(A) however relied on the order of the Tribunal as well as his predecessor. The relevant part of the impugned order is reproduced as under:

> *"6.2 I have carefully considered the facts of the case, findings of the AO, submission of the appellant and material placed on record.*
>
> *In A.Y. 2004-05 and 2005-06, the Hon'ble ITAT in vide Order dated 15.09.2017 restored the issue to the file of the A stating that the AO should compare the 1979 Scheme of Government of Maharashtra with that of New Package Scheme of Incentive, 1993. The A passed order u/s 143(3) r.w.s. 254, in the AY. 2004-05, holding the sales tax incentives as revenue in nature and held that,*
>
> > *"The issue of sales tax incentive of Rs.6,57,91,246/- claimed as capital receipt was set aside to the file of the 10 for fresh adjudication with a direction to 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 10 in the assessment order passed ws 143(3) dated 03.03.2006 and further confirmed by the CIT(A)"*

*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. 6,57,91,2461-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 CsIT(A) has also allowed the appeals on this issue in favour of appellant company for A.Y. 2007-08 and 2008-09 vide order dated 19.11.2012 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.380483849/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 u/s 143(3) r.w.254 of the Act with the following findings in para 3.2 &*

*"3.2 1 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)."*

4.3.1 Further, the Ld. CIT(A) also relied on the order of his predecessor for assessment year 2010-11 and 2011-12. Following the finding, the Ld. CIT(A) compared the incentives schemes of

Government of Maharashtra under which assessee received the sales tax incentives during the year under consideration. The relevant part of the Ld. CIT(A) is reproduced as under:

> *6.7 From the discussions, in the paras above, it is evident that on numerous occasions, the assessing/appellate authorities have held the schemes to be identical.*
>
> *6.8 The comparison between the two schemes is as under:*

| *Sl. No. 1* | *Maharashtra Incentive Scheme 1979* | *Maharashtra Incentive Scheme 1993* |
|---|---|---|
| *i.* | *The aim was to disperse the industries outside the Bombay-Thane-Pune belt and to hasten the pace of industrialization in the developing regions of the state* | *The aim was 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 theBombay-Thane-Pune belt* |
| *ii.* | *No incentive was available to industries in the developed areas of the State* | *No incentive was available to Group A area comprising developed areas, viz Bombay Metropolitan Region and Pune Metropolitan Region* |
| *iii.* | *The Quantum of sales tax incentive is based on amount of investment in fixed assets* | *The incentive is based on the percentage of fixed capital investment.* |
| *iv.* | *The quantum of sales tax incentive depends upon the area in which the industry was located* | *The quantum of sales tax incentive depends upon the are in which the unit is located* |
| *v.* | *The incentive was in the form of sales tax exemption or interest free unsecured loan. subject to monetary ceilings directly related to fixed capital investment.* | *The incentive will be admissible to a New unit/Pioneer unit/prestigious unit and will be in the nature of sales tax incentive by way of exemption/deferral/interest free unsecured loan subject to ceiling based on the percentage of fixed capital investment* |
| *vi.* | *The period of eligibility varied depending on whether the unit was new or existing or a pioneer unit. The period of entitlement was also directly connected to the gross fixed* | *The period of eligibility shall be computed from the date specified in the Eligibility certificate in respect of eligible units as specified in table II* |

| | | |
|---|---|---|
| | *capital investment.* | *under para 5.1 (II) for different units. The period of entitlement was also directly connected to percentage of fixed capital investment* |
| *vii.* | *An intending entrepreneur could apply for incentive immediately after taking the initial effective steps. though the final eligibility certificate and the letter of entitlement could however be granted only after commencement of production. The SICOM could process the application without waiting for the completion of the setting up of the unit and could issue a letter of intent/provisional eligibility certificate on completion of the final effective steps.* | *An eligible unit can apply for incentive after it has taken all the initial effective steps. The eligibility certificate shall be obtained within 6 months from the date of commercial production.* |

*Respectfully, following the decisions of the Hon'ble ITAT for A.Y. 2003-04,(ITA No.814 Mum 2007) and that of the Cs|T(A) for A.Y. 2007-08 and 2008-09 (vide order dated 19.11.2012 and 31.03.2015 respectively), and of the CIT-(A)-3, Nashik for A.Y. 2010-11 and 2011-12(16.10.2019 and 21.10.2019 respectively), I hereby hold ,that sales tax incentive received by the appellant under the aegis of New package scheme 1993 is "capital" in nature."*

4.3.2 Since, the Ld. CIT(A) has followed the binding precedent of the Tribunal in the case of the assessee itself for assessment year 2003-04 in ITA No. 814/Mum/2014, therefore, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute. Further, we find that the Tribunal in assessment year 2004-05 in ITA No. 1419/Mum/2020 held as under:

*"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 war 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*** |
|---|---|---|
| *Object of subsidy* | *Promotion of industrialization in backward areas of the State of Maharashtra through Scheme of incentives.* | *Promotion of industrialization in backward areas of the State of Maharashtra through Scheme of incentives.* |
| *Eligibility Claim* | *a) Eligible unit to make application after completion of initial effective steps.*<br>*b) Complete final effective steps* | *a) Eligible unit to make completion after completion of initial effective steps*<br>*b) Complete final effective steps* |
| *Initial step* | *i) Effective possession of land*<br>*ii) Obtaining provisional SST registration/letter of intent from Government of India or permission from state Government for setting up eligible unit.* | *i) Effective possession of land*<br>*ii) Obtaining provisional SST registration/letter of intent from Government of India or permission from state Government for setting up eligible unit.* |
| *Final effective steps* | *i) Typing up means of finance for project to satisfaction of implementing authority*<br>*ii) Acquisition of at least 10% authority of total fixed assets at site*<br>*iii) Expenditure of at least 25% of total capital cost of project.* | *i) Typing up means of finance for project to satisfaction of implementing authority*<br>*ii) Acquisition of at least 10% of total fixed assets at site*<br>*iii) Expenditure of at least 25% of total capital cost of project.* |
| *Ranting of Eligibility Certificate from SICOM (Implementing authority)* | *Effective from date of commencement of commercial production.* | *Effective from date of commencement of commercial production.* |
| *Mode of disbursement of sales tax incentive* | *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.* | *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* |

| | | |
|---|---|---|
| | *b) By way of interest free unsecured loans or refund.* | *finished goods, as a % of fixed capital investment.*<br>*b) By way of interest free unsecured loans or refund.*<br>*c) By way of deferral of payment of sales tax liability.* |
| *Other benefits* | *i) Refund of octroi without any monetary ceiling*<br>*ii) 75% contribution towards preparation of feasibility study*<br>*iii) Preferential treatment in government/government undertaking statutory bodies purchase programme.* | *i. Refund of octroi/entry tax up to 100% admissible fixed capital investment of eligible new unit.*<br>*ii. 75% contribution towards preparation of feasibility study.*<br>*iii. Refund of electricity duty for EHTP or 100% EOU*<br>*iv. 10% waiver of cost of power line for prestigious units.* |

*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 ofRs.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 did. 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 fired 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."*

4.3.3 Since the issue in dispute is undisputedly identical to issue in assessment year 2004-05, respectfully following the finding of the Tribunal (supra, we uphold the order of the Ld. CIT(A) on the issue in dispute. The ground No. 1 of the appeal of the Revenue is accordingly dismissed.

5. The ground No. 2 of the appeal of the Revenue relates to disallowance of provision of enhanced rent amounting to Rs.16,03,927/-. The facts in brief qua the issue in dispute are that the assessee had taken land on lease from Calcutta Port Trust (CPT) for construction of the factory. The said lease agreement was expired in February, 1998 and the CPT ordered to renew at exorbitantly high rent which was challenged by the assessee in the Hon'ble Calcutta High Court. The assessee in its books of accounts debited rent of Rs.57,84,186/- but actually paid amount of Rs.41,80,259/-. According to the Assessing Officer the balance amount of Rs.16,03,927/- was in the nature of provision thus being contingent in nature, was not allowable. According to the Ld. Assessing Officer, the assessee challenged the demand raised by the CPT before the Hon'ble High Court, therefore, the demand raised was not crystallized. The Ld. Assessing Officer relied on the decision of the Hon'ble Bombay High Court in the case of Standard Mills Co. Pvt. Ltd. 229 ITR 366. The Ld. Assessing Officer further relied n the

Hon'ble Calcutta High Court in the case of Century Enka Ltd. (1981) 130 ITR 207 and disallowed the claim of expenses as contingent liability. The Ld. CIT(A) following the finding of the Tribunal in the case of the assessee for assessment year 2003-04 deleted the disallowance.

5.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee submitted that against the exorbitant rise of the lease rent by the CPT, the assessee filed writ petition before the Hon'ble Calcutta High Court which was dismissed in financial year 2004-05. The Ld. Counsel referred to the copy of the order of the Hon'ble Calcutta High Court in writ petition, which is available on page 224 to 240 of the Paper Book. Thus according to the Ld. Counsel in view of the order of the Hon'ble High Court , which was prior to the previous year corresponding to the assessment year , the payment of lease rent was duly crystallized. He further submitted that as far as recovery of lease rent from the assessee, the Hon'ble Calcutta High Court had allowed an interim relief and according to which the assessee had paid the lease rent. The relevant order of the Hon'ble High Court allowing interim relief is available on page 248 of the paper book. The Ld. Counsel further submitted that on filing regular appeal before the Hon'ble High Court, also the claim of the assessee was rejected though it was rejected in year subsequent to the assessment year under

consideration. The relevant order of the Hon'ble High Court is available on page 289 to 298 of the paper book.

5.2 In view of the order of the Hon'ble High Court in writ petition which is before the previous year corresponding to the assessment year under consideration, therefore there is no doubt that liability to incur lease rent was stands crystallized and the assessee has paid the amount only under the order of the interim relief for payment of the rent. Thus the liability of expenses already accrued however only liability to pay was shifted. Since, the liability for the expenses accrued in the previous year corresponding to the assessment year under consideration, it is not contingent but it is crystallized. The said lease rent expenses debited in profit and loss account is allowable u/s 37 of the Act. Further, the Ld. CIT(A) following the order of the Tribunal in ITA No. 7910/Mum/2011 has deleted the disallowance observing as under:

> *"8.1 It is seen that the appellant has taken land on long term lease from Calcutta Port Trust. The initial lease agreement expired in February 1998 and while renewing the lease agreement, the CPT vide letter dated 01.03.2001 offered to renew the lease agreement for a period of 15 years with certain terms and conditions. However, the appellant found the lease rental demanded by the CPT to be high and filed a writ petition before the Hon'ble Calcutta High Court challenging the enhancement of rent. During the relevant assessment year, the appellant has debited rent of Rs.57,84, 186/- to the P & L Avc, which is the actual rent demanded by the CPT; although it has paid an amount of Rs.41,80,2591- as per the Interim Order of the Calcutta High Court. The assessing officer has disallowed Rs. 16,03,927/- being the difference between Rs.57,84,186/- and Rs.41,80,259/-*

*stating that the demand raised by CPT was not an ascertained demand since it was disputed and hence not crystallized. It is seen that the Hon'ble ITAT in its order for A.Y. 2003-04 in ITA No. 7910/M/2011 on 22.05.2013 has dealt with the issue and decided as hereunder:*

> *"5. We have considered submissions of Ld representatives of parties and orders of authorities below. We observe that assessee is maintaining its accounts on mercuntile system of accounting und, therefore the provisions for lease rent made pertaining to this period, debited to P & L Alc for the year under consideration is an allowable expenditure. The Hon ble Allahabad High Court in the case of Commissioner of Income Tax Vs. Govind Prasad Prabhu Nath, 171 ITR 417 (All) has held that till the claim of the assessee was decided by the Hon'ble Supreme Court in an appeal pending, it could not be said that there was in existence a right in favour of the assessee to receive the amount, receivable on sale of own shares pursuant to an interim order passed by Hon 'ble Supreme Court. It was held that said amount was not assessable to tax. The Hon'ble High Court has also held in the case of Commissioner of Income Tax Vs. Shree Amrit Cold Storage, 229 ITR 641 (All) that the difference in amount collected by the Government, ie. the amount collected by cold storage owner and amount to be charged notified and pending dispute on validity of notification issued fixing the maximum amount of storage charges could be charged by owners, the excess amount could not be assessable in the hands of the ssessee. Similar view has also been taken by Hon'ble P & H High Court in the case of Commissioner of Income Tax Vs. Santa Co-operative Sugar Mills Ltd., 223 ITR 661 (Raj.) in view of the above, we hold that there is no infirmity in the order of the la CIT(A). Hence, we uphold the order of LdCI(4) and reject ground of appeal taken by department."*

*Respectfully, following the decision of the Hon'ble ITAT on this issue, this ground of appeal is allowed."*

5.3 Since, the Ld. CIT(A) has followed the binding precedent on the issue in dispute in the case of the assessee itself, we do not find any error in the order of the Ld. CIT(A) and accordingly, we uphold the same. The ground No. 2 of the appeal of the Revenue is accordingly dismissed.

6. In the ground No. 3, the Revenue has raised the issue of exemption u/s 54G of the Act allowed by the Ld. CIT(A). The grounds raised by the assessee are also in relation to the computation of the claim u/s 54G by the assessee.

6.1 The facts in brief qua the issue in dispute are that the assessee has shifted the industrial undertaking from urban area to rural area in assessment year 1995-96 and 1996-97. The land owned by the assessee in urban area constituted developed land as well as reserve land. The developed land was sold in the previous year corresponding to the assessment year 2004-05, whereas reserve land has been sold in the previous year corresponding to the assessment year under consideration. The contention of the assessee that for reserve land, the assessee was entitled for Transfer Development Right (TDR) and the assessee has accordingly sold TDR in the reserve land. The assessee shown loss under the head “long term capital gain” and thus no claim u/s 54G was made. The Ld. Assessing Officer did not accept the computation of the long term capital loss of the assessee and invoking provisions of section 53C of the Act, computed the cost of acquisition of the assessee and

converted the long term capital loss into long term capital gain and further denied the claim of the assessee for section 54G deduction. But the ld CIT(A) though allowed the claim of deduction u/s 54G but upheld the computation of long term capital gain. The assessee is aggrieved in respect of the computation of the long term capital gain, whereas the Revenue is aggrieved with the deduction u/s 54G granted by the Ld. CIT(A). Before us, the Ld. Counsel of the assessee submitted that in case, the assessee gets relief on the issue of deduction u/s 54G disputed by the Revenue, then the grounds raised by the assessee will be merely rendered academic. Accordingly, we firstly, we took up the issue is dispute raised by the Revenue for adjudication.

6.2 According to the Assessing Officer, the assessee is not entitled for deduction u/s 54G of the Act as indutrial undertaking was shifted from urban area to rural area in financial year 1994-95 and thereafter the assessee has already made investment in the unit in rural area at Lakhmapur ,Nashik which was completed before 01.01.2002. According to the Ld. Assessing Officer the assessee was eligible for deduction u/s 54G in the one year prior and two years thereafter from the shifting of the industrial undertaking from urban to rural area. The relevant finding of the Assessing Officer is reproduced as under:

> *"49.1. The said pleadings, however, would not merit acceptance for the following reasons -*

*(i) The statutory provision clearly circumscribes the investment period to be one year before and three vears upon the transfer of capital asset.*

*(i) The assessee's contention that there is no bar on piecemeal sale of capital asset as per provision of Section 54G of the Act may be correct. However, the capital gain arising from each sale transaction of capital asset has to necessarily fit within the time period of one year before and three years after the transfer of such capital asset for claim of eligibility of deduction W/s 54G of the Act.*

*(iii) The certificate in respect of Sales Tax exemption, issued by the SICOM dated 07.08.1996 and 01.01.2002 clearly indicate that even after shifting of industrial undertaking of the assessee, located at Mulund, in FY 1994-95, the assessee had further expanded the capacity of the plant at Lakhmapur, Nasik. This shows that the expansion, after shifting of the industrial undertaking to Lakhmapur, Nasik, was also completed before 01.01.2002 itself. The litera of Section 54G of the Act do not provide for exemption for any further expansion in the capacity or investment in the plant and machinery, subsequent to the original shifting of industrial undertaking.*

*(iv) The computation of income for AY 2000-01 and the AY 2001-02 indicate that the assessee had sold part of residential land during the previous year relevant to AY 2000.01 and the AY 2001-02 also. However, there is no mention of any claim ws. 54G for these assessment years, in the notes attached with the computation of income. It is pertinent to note here that the assessee had, in the said notes, mentioned that they had not claimed deduction us 80IA for their Lakhmapur unit because of the negative profit. However, there is no mention of the reasons for non-claim of deduction w/s 54G of the Act indicating thereby the assessee's own stand for non-eligibility of deduction W/s 54G of the Act for AY 2000-01 and the AY 2001-02, as it did not fall within period of one year before and three years after transfer of capital asset."*

6.3 On further appeal, the Ld. CIT(A) following the finding of the Tribunal in assessment year 2004-05, allowed the exemption u/s 54G of the Act.

6.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We are of the opinion that deduction u/s 54G of the Act is allowable qua the transfer of capital asset in the process of shifting of the industrial undertaking from urban area to rural area and not qua the event of shifting. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

> *11. It is seen that the appellant has not claimed exemption u/s 54G in his return of income as it had not claimed any capital gain on account of sale of TDR. However, during the course of assessment proceedings, vide letter dated 28.11.2008, it was submitted before the AO that in case capital gain, if any, is computed by the AO, then it is eligible for exemption us 54G of the Act. The AO in page no. 14 to 86 of his order, has not allowed deduction us 54G of the Act on the ground that to avail such exemption, the industrial undertaking has to be shifted within one year before and three years after the date of transfer and since the appellant had transferred its reserved land in F.Y. 2006 while it shifted its industrial undertaking and started its commercial production in F.Y. 1994-95, it did not fall within the stipulated period. The AO has in para 48 of his order, emphasized that "what has been stipulated in the litera in section 54G'of the Act, is the shift of the industry undertaking, withir a period of one year before or three years after the date of transfer of capital asset for claiming deduction thereunder. The capital asset, in question herein, is a subject reserved' lands, which have been sold and transferred in the FY 2005-06. In order to claim the deductions, as envisaged us 54G of the Act, the shift of the industrial undertaking, therefore, has to be between the FY*

*2004-05 and the FY 2008-09. The records of the assessment for AY 1995-96 and the A. Y. 1996-97, however, show that the industrial undertaking of the assessee was shifted from the subject larger industrial lands including the subject reserved' lands at Mulund to Lakhampur, Nasik. Consequent upon its shift, the records show, the transferred undertaking of the assessee had also started the commercial production in the FY 1994-95 itself. The records of the AY 1995-96 and the AY 1996-97 also show that the assesseee had also claimed exemption us 54G for the retums filed for the said assessment years. As the industrial undertaking has already been shifted in the FY 1994,95. the assessoo cannot under any draumstancos, would be eligible to claim offsets, us 54G of the Act, from the long term capital gains derived from the sale of the subject reserved lands and as computed above.'*

*It is necessary to recapitulate section 54G and the conditions necessary for its application:*

> *1. Sec 54 is applicable when there is shifting of an industrial undertaking from an urban area to rural area*
>
> *2. There should be a transfer of a cantal asset in consequence of such shifting.*
>
> *3. Capital gain should arise from such transfer of capital asset.*
>
> *4. The assessee should within a period of one year before or three years after the date of such transfer purchase new machinery/ acquire building, land, etc.*

*It is essential to reconsider the events leading to the claim of deduction us 54G and whether the conditions bid down in the Act are fulilled by the Appellant. It is seen that after the industrial undertaking of the appellant has transferred to Lakhampur the land of the appellant at Mulund which consisted of residential land (where employees of the factory used to stay and industrial land (where the factory was located) was decided to be disposed off by the appellant. It entered into an agreement with LHCL and sold off the residential land in 1995-96 and 1996-97. After*

*cessation of manufacturing in its unit at mulund it entered into a supplementary agreement with LHCL on 27.07.1995 for disposal of this land. However, due to disputes and defaults in payments by LHCL, the appellant approached courts and had to settle through Arbitration Award. Finally, the*

*appellant transferred the rights in the reserved land to MIs. Nirmal Lifestyles on 20.12.2005. The appellant states that this transfer of capital asset was in consequence to the shifting of the industrial undertaking.*

*The AO has further held that the investment for exemption us 54G of the Act should be within one year and two years from the date of shifting of industrial undertaking and in order to claim deduction, the shift should have been between 2004-05 and 2008-09.*

*The AO further contends that the appellant has sold land earlier and piece wise sale of capital asset and investment of the gain thereof is not envisaged in the Act. He has also stated that deduction u/s 54G of the Act was not available for expansion in capacity and investment in plant & machinery after the date of shifting of industrial undertaking.*

*These issues have been explicitly discussed in the Combined Order of Hon'ble ITAT in the case of the Appellant for the A.Y.04-05 ,05-06,07-08,08-09 pronounced on 15.09.2017. The ITAT while adjudicating on the disallowance made u/s 54 G of the Act in Para 4 of its Order has held as under :*

> *4.Next effective ground of appeal (GOA.6-8)is about disallowance made u/s.54 G of the Act. With regard to admissibility of claim, made by the assessee,u/s.54G of the Act,the AO observed that in the computation of income under the head income from capital gains the assessee had computed net loss from sale of land, that it had claimed that an amount of Rs.6.79 crores had been invested in plant and machinery (P&M)head for the factory at Lakhampur Nasik,that Rs.20 crores were claimed to have been invested in the capital gain account*

*scheme as per section 54G(2),that the claim for the said amount had been taken at NIL because of loss computed under the head capital gains. Referring to the provisions of the section,he held that the capital asset in question was plot of land that was sold in the year 2004,that from the past records it was clear that the industrial undertaking had been shifted to Nasik and it had started commercial production in the AY.1995-96,that the assessee had claimed exemption u/s. 54 for the AY.s 1995-96 and 1996-97,that the land was transferred in 2004 and that the period allowed by the Act should have been between 2003 and 2007 for claiming deduction u/s. 54G, that the industrial undertaking had been shifted in the FY.1994- 95,that the assessee could not by any stretch of imagination claim that was applicable for the sale of land in the FY.2003-04,that the contention of the assessee that there was no bar on piece-meal sale of capital asset as per the provisions of section 54G was incorrect, that the capital gains arising from each sale transaction of capital asset had to necessarily fit in the time period of one year before and three years after the transfer of such capital asset for being eligible for deduction u/s.54G of the Act, that shifting of original industrial undertaking was complete before 01/01/2002 itself, that the provisions of section 54G did not intend to give exemption for any further expansion in the capacity or investment in plant and machinery subsequent to original shifting of industrial undertaking, that the computation of income for the AY.s 2000-01 and 2001-02 indicated that the assessee had sold part of residential land during the previous year relevant to those AY.s also, that there was no mention of any claim u/s. 54 for the said AY.s in the notes submitted with the computation of income.Finally,he held that claim made by the assessee for deduction u/s. 54G was not admissible for the year under consideration.*

*4.1.After considering the submission of the assessee and the assessment order, the FAA held that the section 54G had to be read as a whole, that the phrase 'in consequence of'related to the period of 3*

*years after the date of transfer of the capital asset referred to in the provisions of section 54G(1) of the Act,that the assessee had already claimed and had also been allowed the benefit of special deduction u/s. 54G in the earlier years, that it could not be allowed the same deduction again.Finally,she upheld the order of the AO.*

*4.2.Before us,the AR argued that the assessee had fully satisfied all condition for claiming deduction u/s.54G,that undertaking was shifted from urban area to non-urban area i.e. from Mulund to Lakhampur,that as a consequence of shifting of undertaking capital asset (rights in the land)had also been transferred,that the assessee had utilised the proceeds from the transfer for purchase/acquisition of specified assets within a period of one year,that an amount of 6.79 crores had been appropriated towards purchase of P&M at Lakhampur, that Rs.20 crores had been deposited under the Capital Gains Accounts Scheme 1988,that the time limit of three year had to be taken from the date of transfer of capital asset and not from the date of shifting of industrial undertaking,that the word transfer was used in conjunction with capital asset, and utilisation of the capital gains arising therefrom, that the word shifting was prefixed with phrase industrial undertaking,that it had shifted its undertaking to Lakhmpur in AY.1995-96, that to obtain economic benefits from vacant land it entered into development agreement,that due to the dispute with the developer the matter was contended before the courts,that after settlement of dispute it had transferred the capital asset in the very next year to another developer, that all the conditions of section 54G were duly complied with,that the AO and the FAA had misread the law. The DR argued that industrial unit was shifted before nine years of purchasing of plant and machinery and depositing of money in the specified bank account,that investment was not made in the time limit prescribed by the Act.*

*4.3. We have heard the rival submissions and perused the material before us. We find that during the previous year relevant to the assessment year 1995-96 the assessee had shifted its industrial undertaking out of Mumbai, that it had entered into an agreement with Lok group for transfer of development rights for the industrial land at Mulund, that because of litigation the agreement with Lok group was terminated, that later on the assessee entered into a new agreement with NL for a consideration of Rs.64.92 crores,that it made a claim that it was entitled for deduction u/s. 54G of the Act.*

*4.3.1.Before proceeding further,it would be useful to consider the background of the section 54G of the Act.Section 280 ZA of the Act,dealing with the shifting of an assessee from an urban area to another area,was omitted from 01.04.1987 and on the same day section 54G was introduced in the Act.In his budget Speec,Hon'ble Minister of Finance,while introducing the Finance Act, 1987 stated as under:*

> *"83. Concentration of industries in many of our urban areas poses serious problems of congestion, pollution and hazards. In order to encourage industries to shift out of such areas, I propose to exempt capital gains made on the sale of land and buildings in such areas provided these are reinvested in approved relocation schemes."*

*Notes on clause for the Finance Bill,1987 reads as under:*

> *"The new section 54G provides for exemption of capital gains on transfer of assets in cases of industrial undertaking shifting from urban area. Sub-section (1) provides that if an assessee transfers a long-term capital asset in the nature of machinery, plant, building or land used for the purposes of the business of the industrial under taking situated in an urban area in connection with the shifting of such undertaking to a non-urban area, and within a*

*period of one year before or three years after the date of transfer, purchases new machinery or plant and acquires land or building or constructs build ing for the purposes of his business in the area to which the under taking is shifted or incurs expenses on shifting the original asset and transferring the establishment of the undertaking to such area and incurs expenses on such other purposes as may be specified in a scheme framed by the Central Government, the capital gain shall be exempt to the extent such gain has been utilised for the aforesaid purposes. Explanation to sub-section (1) defines 'urban area' on the lines of the definition in section 280Y."*

*The relevant part of the Memorandum Explaining the Provisions in the Finance Bill, 1987, reads as under :*

*"34. Under the existing provisions of section 280ZA of the Income- tax Act, any company owning an industrial undertaking situated in an urban area, is entitled for a tax credit certificate with reference to the amount of the tax payable on capital gains arising from the transfer of its machinery, plant, etc., to any other area. These provisions have not proved to be very effective. With a view to promoting decongestion of urban areas and bal anced regional growth, the Bill seeks to exempt capital gains arising on transfer of long-term capital assets in the nature of machinery, plant, building or land used for the purposes of the business of the industrial undertaking situated in an urban area in connection with the shifting of such industrial undertaking from an urban area to a non-urban area. Accordingly, capital gains arising in such cases will be exempt to the extent they are utilised within a period of one year before or three years after the date of transfer, for the purchase of new machinery or plant or acquiring land and building, etc., for the*

*purpose of the business in the area to which the undertaking is shifted or incurs expenses on shifting the original asset and transfer ring the establishment of the undertaking to such area and incurs expenses as may be specified. As a consequential measure, section 280ZA of the Income-tax Act is proposed to be omitted. These amendments will take effect from 1st April, 1988, and will, accordingly, apply in relation to the assessment year 1988-89 and subsequent years." On a conjoint reading of the aforesaid Budget Speech, Notes on clauses and Memorandum Explaining the Finance Bill of 1987, it becomes clear that the idea of omitting section 280ZA and introducing on the same date section 54G was to do away with the tax credit certificate scheme together with the prior approval required by the Board and to substitute the repealed provision with the new scheme contained in section 54G of the Act.*

*4.3.2.The opening portion of section 54G reads as follow: Subject to the provisions of sub-section (2), where the capital gain arises from the transfer of a capital asset……."*

*In our opinion,the most important and decisive factor for claiming the deduction,arising of capital gain,is transfer of capital asset.In other words,capital gains and transfer of specified assests should have a direct and live link.Shifting of undertaking is also important,but the tax incidence will come into picture only after assets are transferred.The purpose behind the section is to decongest the urban areas and to shift the industries from the cities.In that sense it is a welfare legislation.As per the settled principles of taxation benevolent provisions of Act should always be interpreted liberally.The intention behind the section is clear that assessee should invest the sale proceeds of sale of specified assets in industrialisation or should deposit the same in a designated bank account.*

*The assessee,in the case under consideration,had entered in to an agreement with a developer for selling rights in the plots of land. But,the agreement was cancelled later on due*

*to differences between the assessee and the developer.It found a new developer and sold the specified assets resulting in accruing of capital gains.There is no doubt that after receiving the sale proceeds from the developer,the assessee had invested the money in purchasing P&M and part of it was deposited in a designated bank account. P &M purchased by it at the time of shifting the premises had nothing to do with the new P & M acquired after sale of capital assets.There is no precondition in the section that new machinery should be purchased at the time of shifting of industrial undertaking.No undertaking can function without P&M.But, the assessee can purchase machinery even after shifting and commissioning of business from the new premises. Expansion of business can take place any time. Generally, shifting of industrial unit from urban to rural areas take place simultaneously. But, in a few cases,there can be time lag between shifting of unit and receipt of capital gains. In such cases what is be considered is sale of assets and receipt of capital gains.*

*Considering the peculiar facts and circumstances of the case, we are of the opinion that the AO and the FAA had wrongly denied the benefit of the section 54 G of the Act to the assessee. Grounds No. 6-8 are decided in favour of the assesssee."*

6.5 Since, the Ld. CIT(A) has followed the binding precedent of the Tribunal in the case of the assessee itself, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly we uphold the same. The ground No. 3 of the Revenue is accordingly dismissed.

6.6 Since the assessee has already been allowed relief in respect of deduction u/s 54G of the Act while adjudicating ground No. 3 of the appeal of revenue, the grounds raised by the assessee are rendered academic and therefore we are not required to adjudicate upon the

same . The grounds of the assessee are accordingly dismissed as infructuous.

7. The ground No. 4 of the appeal of the Revenue relates to addition by the sales tax incentives while computing book profit u/s 115JB of the Act.

7.1 Brief facts qua the issue in dispute are that the Assessing Officer did not make any addition for book profit u/s 115JB of the Act as in the case of the assessee already taxable income was assesed in regular provisions of the Act. However, before the Ld. CIT(A) the assessee filed additional ground for adjudicating the sales tax incentives of Rs.4,38,56,713/- while computing the book profit u/s 115JB of the Act. The Ld. CIT(A) in detailed finding in para 12.1 allowed the ground of the assessee observing as under:

> *"12.1 Ground Nos. 9 & 10 is directed against interest levied u/s 234B & 234D This ground of appeal relates to interest levied us 234B & 234D. It is held that the charging of interest being mandatory in nature and therefore, the AO has no discretion for not charging the interest u/s 234A, 234B, 234C & 234D, in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Anjum M.H. Ghoswala 252 ITR-1. The AO, however, is directed to allow the consequential relief on account of the above findings in the previous grounds. This ground of appeal is decided accordingly."*

7.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Tribunal in the case of the assessee for assessment year 2008-

09 in ITA No. 1423/Mum/2020 has adjudicated the issue in favour of the assessee observing as under:

> *5. The grounds raised by the Revenue relates to finding of Ld. CIT(A) for excluding the 'sales tax incentive' amount while computing the book profit under section 115 JB of the Act.*
>
> *6. The briefly stated facts qua the issue in dispute are that case of the assessee was reopened on one of the ground of sales-tax exemption/incentive was wrongly reduced for the purpose of book profit under section 115JB of the Act by the Assessing Officer accepting it as a capital receipt. In the reassessment completed, the Assessing Officer observed that for the purpose of section115JB(2), every assessee being a company shall prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II and III of Schedule VI to the Companies Act 1956. The first provisio to section 115JB of the Act, further provides that while preparing the annual accounts including the profit and loss account, the accounting policies, the accounting standard and method and rates adopted for calculating the depreciation shall be the same as adopted by the company for the purpose of preparing such accounts including the profit and loss account and laid before the company at its annual general body meeting, to which permissible adjustment are to be made as mentioned in 'Explanation-1' to section 115JB of the Act. According to the Assessing Officer, the item of capital receipt is not covered in the 'Explanation-1' to section 115 JB of the Act. Thus, the assessee can reduce the amount for the purpose of computation of the book profit as mentioned in 'Explanation-1' of section 115JB of the Act only and cannot reduce any other amount, even the capital receipt for the purpose of computing book profit under section 115 JB of the Act. The Ld. Assessing Officer referred to the decision of the Hon'ble Bombay High Court in the case of CIT Vs Veekay Lal Investment Co. Ltd 249 ITR 597 (Bom); Hon'ble Kerala High Court in the case of NJ Jose and company Vs ACIT, 174 Taxman*

*141 (Kerala) ; decision of the Tribunal in the case of Growth Avenue Securities 126 ITD 179 ( Delhi-Trib); decision of the Tribunal in the case of DCIT Vs Bombay Diamond Co. 32(1) ITCL 456 (Mum-ITAT) ; decision of the Special bench of Tribunal, Hyderabad in the case of Rain Commodities Vs DCIT 4 ITR (Trib.) 551 (Hyd-Trib-SB) and decision of ITAT in the case of Sumer Builder 50 SOT 198 (Mumbai -Trib). He accordingly rejected the claim of the assessee of reducing the amount of sales-tax incentive for the purpose of computation of the book profit.*

*7. On further appeal, the Ld. CIT(A) adjudicated the appeal on 03/12/2019, wherein allowed part relief to the assessee.*

*8. Before us, the Ld. Departmental Representative relied on the order of the Assessing Officer and submitted that provisions of law do not permit for excluding the sales incentive for the purpose of book profit from the profit computed as Part II and III of Schedule VI of Companies Act, 1956. The Ld. counsel of the assessee, on the other hand, submitted that identical issue in the case of PCIT Vs Ankit Metal & Power Ltd (2019) 416 ITR 591 has been decided in favour of the assessee by Hon'ble Calcutta High Court. He also relied on the decision of the Coordinate bench of the Bombay Tribunal in the case of Ambuja Cement Limited Vs Add CIT (LTU) in ITA No. 5883/Mum/2012 and Prism Cement Ltd Vs DCIT in ITA No. 804 and 805/Mum/2018.*

*9. We have heard rival submission of the party on the issue in dispute and perused the relevant material on record. However, on perusal of the order of the Ld. CIT(A), we find that Ld. CIT(A) had adjudicated on the issue that sales-tax incentive received by the assessee under the Aegis of New Packages Scheme, 1993 was capital in nature. The issue of reduction of the same from the profit and loss account for the purpose of computation of the book profit has not been adjudicated by the Ld. CIT(A). But this being purely a legal issue and all facts having been reproduced by the Assessing*

*Officer, we proceeded to adjudicate in view of no objection of both the parties.*

*9.1 The Hon'ble Calcutta High Court in the case of Ankit Metal & Power Ltd (supra), has adjudicated the issue as under:*

*"27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of AppolloTyres Lid. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961."*

*9.2 Further, the coordinate bench of the Tribunal in the case of Ambuja cements Ltd (supra) after considering the decision of the Hon'ble Bombay High Court in the case of Harinagar Sugar Mills ltd (supra) and decision of the Hon'ble Calcutta High Court in the case of Ankit Metals and power Ltd (supra), held as under:*

> *"50. Ld. representatives fairly agree that the above issues are now covered, in favour of the assessee, by Hon'ble Calcutta High Court's judgment in the case of PCIT Vs Ankit metal & Power Lid 120197 416 ITR 591 (Call. by Hon 'ble jurisdictional High Court's judgment in the case of CIT Vs Harinagar Sugar Mills Lid [ITA No 1132 of 2014, dated 4* January 2017] and by a coordinate bench decision in the case of ACIT Vs JSW Steel Limited [(2019) 112 taxmann.com 55 (Mum)]. Learned Departmental Representative, however, relied upon the stand of the authorities below.*

*51. We find that a coordinate bench of this Tribunal, in JSW Ltd's case (supra), has inter alia, observed as follows:*

*47. We further noted that Hon'ble Kolkata High Court, in the case of Pr. CIT v. Ankit Metal & Power Lid. |20191 109 taxmann.com 93/266 Taxman 237 Ltd. had considered an identical issue and after considering the decision of Hon'ble Supreme Court in the case of Apollo Tyres Lid. (supra) held that when a receipt is not in the character of income as defined under section 2(24) of the IT. Act, 1961, then it cannot form part of the book profit us 115JB of the IT. Act, 1961. The Hon'ble High court, further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the IT. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit us 115JB of the IT. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but where the receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961.*

*48. We further noted that the ITAT special bench of Kolkata Tribunal, in the care of Sutlej Cotton mills Lad, v. Asset. CITIES 3EnS I ID 22 kaan, SEy, held that d particular receipt, which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act, as it defies the basic intention behind introduction of provisions of section 115JB of the Act. The ITAT Jaipur bench, in case of Shree Cement Led. (supra) had considered an identical issue and held that incentives granted to the assessee is capital receipt and hence, cannot he part of book profit computed us 11SJB or the Acr. Similarly. the ITAT Kolkata Bench, in the case of Sipea India (P) Lid. v. De. CIT I2017 80 taxmann.com 87 (Trib.) had considered an identical issue and held that when, subsidy in question is not in*

*the nature of income, it cannot be regarded as income even for the purpose of book profit u/s 115JB of the Act, though credited in the profit and loss account and have to be excluded for arriving at the book profit us 115JB of the Act.*

*49. Insofar as, case laws relied upon by the department, we find that all those case laws have been either considered by the Tribunal or Hich Court and came to conclusion that in those cases the capital receipt is in the nature of income, but by a specific provision, the same has been exempted and hence, the came to the conclusion that, once particular receipt is routed through profit and loss account, then it should be part of book profit and cannot be excluded, while arriving at book profit u/s 115JB of the Act 1961.*

*50. In this view of the matter and considering the ratio of case laws discussed hereinabove, we are of the considered view that when a particular receipt is exempt from tax under the Income tax law, them the same cannot be considered for the purpose of computation of book profit w/s 115JB of the IT.Act 1961. Hence, we direct the Ld. AO to exclude sales tax subsidy received by the assessee amounting to Rs. 36,15,49,828/- from book profits computed w/s 115JB of the IT. Act, 1961.*

*52. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to exclude the sales tax incentive subsidy for computing book profit under section 115 JB of the Act. The assessee gets the relief accordingly."*

*9.3 The issue in the decisions cited by the Assessing officer is of capital income under the capital gain, which is liable for tax but the capital receipt in the case of the assessee has been held as not as part of income at all and not liable for tax in the decision in the case Ankit Metal and Powers ltd. (supra) , which has been followed in the case of Ambuja Cement Limited (supra). The issue in dispute being squarely covered by the decision of the coordinate bench of*

*the Tribunal (supra), the grounds raised by the Revenue are accordingly dismissed."*

7.3 The issue in dispute being identical to the issue decided by the Tribunal (supra), we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 4 of the Revenue is accordingly dismissed.

8. In the result, the appeal of the Revenue is dismissed whereas the appeal of the assessee is dismissed as infructuous.

**Order pronounced in the open Court on 21/08/2023.**

| **Sd/-** | **Sd/-** |
|---|---|
| **(PAVAN KUMAR GADALE)** | **(OM PRAKASH KANT)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai;
Dated: 21/08/2023
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
**ITAT, Mumbai**