

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
MS ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 755/Del/2015
(Assessment Year: 2010-11)

LG Electronics India Pvt. Ltd, Plot No. 51, Udyog Vihar, Surajpur Kasna Road, Greater Noida, Gautam Budh Nagar, Uttar Pradesh (Appellant) PAN: AAACL1745Q	Vs. ACIT, Circle-2, Noida (Respondent)
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Assessee by :	Shri Ajay Vohra, Sr. Adv, Shri Neeraj Jain, Adv Shri Ramit Katyal, AR Mr. Aditya Vohra, Adv
Revenue by:	Mr. Rajesh Kumar, CIT DR
Date of Hearing	17/07/2023
Date of pronouncement	13/10/2023

ORDER

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.755/Del/2015 for AY 2010-11, arises out of the order of the Id AO [hereinafter referred to as 'Id. AO', in short] dated 12.01.2015 passed u/s 144 r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') (hereinafter referred to as 'Id. AO').
2. The assessee has raised the following grounds of appeal:-

"Sales Tax/VAT Subsidy

12. That the AO/ DRP erred on facts and in law in treating sales tax subsidy of Rs. 84,07.00,774 as taxable revenue receipt following the findings in the order of the preceding years, not appreciating the fact that the subsidy having been granted to the appellant for the purpose of setting up its factory in a notified area, would qualify as capital receipt, not liable to tax.

12.1 That the AO/DRP erred on facts and in law in not appreciating that purpose for which the subsidy or incentive is given would define the

character of receipt in the hands of the recipient and not mode of payment.”

3. At the outset, we find that this appeal of the assessee has already been disposed of by this Tribunal vide order dated 16.09.2022. However, a miscellaneous application was preferred by the assessee stating that this Tribunal while adjudicating ground No. 12 with regard to taxability of sales tax subsidy received under Maharashtra Incentive Scheme and Uttar Pradesh Incentive Scheme, had only given a finding with regard to taxability of sales tax subsidy under Uttar Pradesh Scheme and no finding was given for Maharashtra Incentives Scheme. Accordingly, this Tribunal had disposed of the miscellaneous application of the assessee accepting the plea vide MA No. 285/Del/2022 dated 31.03.2023 specifically recalling the earlier order only for the limited purpose of adjudicating ground No. 12 in respect of subsidy received from Maharashtra Govt.

4. In view of the above, we have to adjudicate the taxability of sales tax subsidy received by the assessee from Maharashtra Govt amounting to Rs. 58,64,82,702/- alone in this appeal.

5. The primary facts with regard to this sales tax subsidy are highlighted as under:-

i. The LGEIL had one of its manufacturing units in Ranjangaon, Pune in the state of Maharashtra.

ii. In order to encourage the dispersal of industries to the less developed areas of the State, the Maharashtra State Government has announced for Industrial Policy of Maharashtra, 2001. The Policy states that the State has entered into the phase of second generation economic reforms, with emphasis on structural changes in addition to fiscal incentives for the promotion of industry and balanced regional growth. This has coincided with increasing

international competition and rapid technological changes, which pose new challenges for industry. The Industrial Policy 2001 set out below has been formulated in this context, keeping in view the objectives of sustained growth and employment, and an expansion of livelihood opportunities. It supplements the provisions of the Information Technology and other sectoral policies announced earlier. The components of the new Package Scheme of Incentives contained in this Policy will be operative from 01" April, 2001 up to 31" March, 2006.

iii. In terms of the Policy, the Maharashtra State Government has announced for a package of incentives to New/Expansion Units set up in the developing region of the State. This Package Scheme of Incentives, introduced in 1964, was amended from time to time. The last amended scheme, commonly known as the 1993 Scheme was operative from the 1" October, 1993 to 31" March, 2001. Government has decided to revise the 1993 Scheme and bring into force a new scheme, viz. the 'Package Scheme of Incentives, 2001', hereinafter referred to as the PSI 2001, for intensifying and accelerating the process of dispersal of industries to the less developed regions and promoting high-tech industry in developed areas of the State coupled with the object of generating mass employment opportunities. As per the classification of areas given in the PSI-2001, the unit of assessee situated in Shirur Taluka, comes under "Group B(under Pune District): Comprising the area where some development has taken place".

iv . Based upon the above PSI - 2001, assessee has applied for the Eligibility Certificate under Mega Project Category and the same was granted by the Directorate of Industries, Maharashtra State under the above mentioned PSI-2001 as amended vide G.R. No. IDL-1005/(CR-119)/IND-8, dt. 02nd June, 2005 for Mega Projects

& MOU dated 06 September, 2005 entered into by the assessee with Govt. Maharashtra vide Eligibility Certificate No. 21 dated 16 November, 2006 ("EC") . The Eligibility Certificate entitles the company for the Industrial Promotion Subsidy as under:

"to the extent of 75% of Gross Fixed Capital Investment (As defined in PSI-2001) made after 11th August, 2005 and not less than Rs. 250 Crores within a period of three years from the date of completion of final effective steps as defined in PSI-2001 for the expansion project

or

to the extent of taxes paid to the State Government on the increased turnover as a result of proposed additional FCI within a period of 7 years from the date of Commercial Production i.e. 12" August, 2005.

whichever is lower. (As under the scheme, incentive was provided by way of refund of VAT hence it is obvious that incentive cannot be greater than the VAT paid.)

Thus assessee is required to invest minimum of Rs. 250 crores in Gross Fixed Capital (as defined in PSI-2001) alongwith its ancillaries within 3 years from the date of completion of final effective steps (as defined in PSI-2001) i.e. 29th December 2005.

v. Accordingly, assessee has made the required investment and Director of Industries, vide Addendum II of Eligibility Certificate dated 24th July 2009, certified the Gross Fixed Capital Investment of Rs. 256.19 crores made by assessee alongwith its ancillaries upto 29.12.2008. Therefore total incentive admissible to the

assessee is Rs. 192.14 crores being 75% of Gross Fixed Capital Investment. The EC provides that the incentive will be disbursed as per the modalities of payment determined by Govt. of Maharashtra.

vi. As per the aforesaid Eligibility Certificate, the assessee is eligible for subsidy for six years and two months.

vii. In this regard, the Modalities for sanction and disbursement of Industrial Promotion Subsidy under PSI-2001 prescribed by the Maharashtra Government vide GR No. PSI 2108/CR 36/Ind-8 dated 03.12.2008, states as under:

"1. Definitions:-

"Industrial Promotion Subsidy" in respect of Mega Projects under PSI 2001 & 2007 means an amount equivalent to the percentage of "Eligible Investments" which has been agreed to as a part of the customized package, or the amount of tax payable under Maharashtra Value Added Tax Act (MVAT) 2002 and Central Sales Tax (CST) Act, 1956 by the eligible Mega Projects in respect of sale of finished products eligible for incentives before adjustment of set off or other credit available for such period as may be sanctioned by the State Government, less the amount of benefits by way of Electricity Duty exemption, exemption from payment of Stamp Duty, refund of royalty and any other benefits (as may be specified by the Government) availed by the eligible Mega Projects under PSI 2001/2007, whichever is lower.

2. Filing of claims for IPS:

2.1 An eligible Mega Project shall file a valid claim on an annual basis. The 1st valid claim shall pertain to the period commencing from the date of start of commencement of commercial production as established by the Implementing Agency or from such other date as may be approved by the State Government.

2.2 A valid claim shall comprise of application in the prescribed format along with the necessary documents as may be stipulated therefore.

3. Sanction of IPS:

.....

3.2 The valid claim should be filed within 11 months of the close of the concerned financial year. The 1st such claim shall be filed within 11 months from the close of the financial year in which the Eligible Unit was issued Eligibility Certificate or its effective eligibility was established, whichever is later. However, valid claims in respect of such Eligible Units pertaining to the period prior to financial year 2008- 2009 shall be filed within 6 months from the date of this GR."

viii. Accordingly, the assessee first pays the amount of tax in form of Value Added Tax (VAT) on its turnover and for claiming the subsidy, as prescribed in the aforementioned modalities, filed claim of refund of VAT paid by it subject to prescribed adjustment. The assessee has filed its first claim for the period from commencement of production after the approved expansion upto 31" March, 2007 i.e., upto the close of F.Y. 2006-07 in which the Eligibility Certificate was issued to the assessee. Thereafter the assessee filed its subsequent claim for the period upto 31" March 2010.

- ix. The overall subsidy available to the assessee is Rs. 192.14 crores being 75% of total investment in fixed capital asset of Rs. 256.19 crores. During the captioned assessment year, the assessee has claimed VAT paid as given in aforesaid table amounting to Rs. 58.65 crores and considered the same as capital receipt and hence not taxable. In support of its contention, we submit as under:
- x. The strategy of Maharashtra Government Industrial Policy 2001 which states: "The State has entered into the phase of second generation economic reforms, with emphasis on structural changes in addition to fiscal incentives for the promotion of industry and balanced regional growth. ... The Industrial Policy 2001 set out below has been formulated in this context, keeping in view the objectives of sustained growth and employment, and an expansion of livelihood opportunities...."
- xi. The Preamble the PSI-2001 scheme of the state government, it is written as: "In order to encourage the dispersal of industries to the less developed areas of the State, Government has been giving a Package of Incentives to New/Expansion Units set up in the developing region of the State since 1964 under a Scheme popularly known as the Package Scheme of Incentives.")
6. The Industrial Policy of Maharashtra Govt is enclosed in page 24 of the Paper Book. The main purpose of this industrial policy is apparently to accelerate the flow of investment in industry and infrastructure, promoting IT, high-tech, knowledge based and biotech industries, augmenting exports from the industrial units in the state and creating large scale employment opportunities duly ensuring environment planning. The Package Scheme Incentives, 2001, issued by Govt of Maharashtra, Industries, Energy and Labour Department dated 31.03.2001 is enclosed in pages 39 to 69 of the Paper Book. From the

preamble of the Package Scheme of Incentives, 2001, we find that the scheme is meant for investing and accelerating the process and dispersal of industry to the less developed regions and promoting high-tech industries in developed areas of the state coupled with the object of generating mass employment opportunities. The Package Scheme Incentives, 2007 is enclosed in pages 70 to 98 of the paper book. Under the scheme, incentives are given for mega projects wherein, it is specified that the quantum of incentives within the approved limit will be decided by the High Powered Committee under the Chairmanship of Chief Secretary, Govt of Maharashtra and the Infrastructure Committee under the Chairmanship of the Chief Minister of Maharashtra who will have the power to customize and offer special/ extra incentives for the prestigious mega project on a case to case basis. The assessee herein had signed a Memorandum of Understanding (MOU) with Govt of Maharashtra on 06.09.2005 which is enclosed in pages 4 to 6 of the Paper Book. In the said MOU, the assessee had agreed to make investment of Rs. 535 crores over and above investment made as on 1st August, 2005 towards further expansion of their existing project at Ranjangaon, Pune. It was also agreed by the assessee that it would manufacture additional products such as CD Writer, GSM, CDMA Handset and set up GSM R&D laboratory; the assessee would generate additional employment of 2000 persons by 2010 etc. The State Govt in turn would offer incentives to the assessee by way of exemption from electricity duty for 15 years; fixed capital investment made beyond the stipulated period are to the extent of taxes paid to the State Govt. on an increased turnover as a result of proposed additional fixed capital investment within a period of 7 years, whichever is lower and the State Govt. would also expedite issue notification for lowering the CST rate to 0.5% on GSM, CDMA Handsets. The eligibility certificate issued by the Joint Director of Industries, Govt of Maharashtra to the assessee is enclosed in page 8 of the Paper Book wherein, the quantum of subsidy and method of determination of subsidy payable to the assessee is stipulated. Further, the assessee was also mandated to

make further investment in setting up the infrastructure in the eligible units for which yet another eligibility certificate was issued by Director of Industries dated 24.07.2009 approving the further investments made by the assessee. From the perusal of the aforesaid facts and the documentary evidences submitted by the assessee in the paper book which are referred hereinabove, it is apparently evident that the purpose of the assessee for being given sales taxes subsidy by the Govt of Maharashtra under their incentives scheme is only for setting up of the industries in a designated locality to accelerate the growth of industries in that locality so as to promote employment opportunities thereon.

7. The Id DR before us filed written submission dated 26.07.2023 reiterating the arguments advanced by him during the course of hearing. The main crux of the written submission of the Id DR is that Tribunal had already decided the issue at par with the subsidy received from Uttar Pradesh Govt and heavily relied on the findings of the Tribunal order dated 16.08.2022 in ground No. 12. It is pertinent to note that this order has been recalled vide MA 285/Del/2022 dated 31.03.2023 only for the limited purposed of adjudication of ground No. 12 qua the subsidy received from Maharashtra Govt. While recalling this order, the Tribunal had categorically stated that no finding has indeed been given with regard to subsidy received from Maharashtra Govt. Hence, the reliance placed by the Id DR on the said Tribunal order dated 16.08.2022 in paras 116 to 118 would not advance the case of the revenue qua the subsidy received from Maharashtra Govt. The Id DR further on merits argued that the sales tax subsidy is entitled to the assessee after commencement of the commercial production of the units and the method of determination of the said subsidy would be the payment of sales tax by the assessee to the Govt and thereafter seek refund thereon. He vehemently pleaded that since the subsidy is given after the commencement of the commercial production of the assessee it is only meant for meeting the working capital requirements of the assessee and accordingly constitutes revenue

receipt chargeable to tax. Reliance in this regard placed by the Id DR on the decision of the Hon'ble Supreme Court in the case of Sahney Steel and Press Works Ltd Vs. CIT reports in 228 ITR 253 (SC). In other words, the Id DR argued that the subsidy given to the assessee was only for running the industry after commencement of production by the assessee and that the date of commencement of commercial production would be reckoning factor for deciding the nature of subsidy. We are unable to comprehend ourselves to accept this line of argument of the Id DR in view of the fact that from the perusal of the Incentives Schemes of Govt. and the objectives and preamble thereon which are reproduced herein above, it is categorically clear that the subsidy is being contemplated to promote development and setting up of industry in under developed areas. The Package Scheme of Incentives, 2017 further strengthen the fact that the subsidy would also be extended to the industries which are undertaking expansion. In the instant case, there is absolutely no dispute that the assessee had indeed set up a unit in the designated locality and becomes an eligible unit to receive the subsidy from the Maharashtra Govt in accordance with their industrial policy. Further, the Maharashtra Govt had already through its High Powered Committee after due examination of the units set up by the assessee and the activities carried out by the assessee thereon had allowed the assessee to make its claim of sales tax subsidy among others from the Govt. It is not in dispute that said subsidy is paid to the assessee. The purpose of the incentives scheme/ subsidy is relevant and the method of determination of the said scheme/ subsidy is immaterial. This has been duly dealt by the Hon'ble Supreme Court in the case of CIT Vs. Ponni Sugars and Commercial Ltd reported in 306 ITR 392 wherein, the Hon'ble Supreme Court had also clarified what decision it had rendered in Sahney Steel and Press Works Ltd which has been relied upon by the Id DR (supra). For the sake of convenience, the relevant operative portion of the decision of the Hon'ble Supreme Court in the case of Ponni Sugars and Commercial (supra) is reproduced below:-

"13. The main controversy arises in these cases because of the reason that the incentives were given through the mechanism of price differential and the duty differential. According to the Department, price and costs are essential items that are basic to the profit making process and that any price related mechanism would normally be presumed to be revenue in nature. In other words, according to the Department, since incentives were given through price and duty differentials, the character of the impugned incentive in this case was revenue and not capital in nature. On the other hand, according to the assessee, what was relevant to decide the character of the incentive is the purpose test and not the mechanism of payment.

14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of *Sahney Steel and Press Works Ltd. (supra)*. In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10% of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of Commnr. Of Income Tax, Madras vs M/S. Ponni Sugars & Chemicals Ltd on 16 September, 2008 assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly the matter was decided against the assessee. The importance of the judgment 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 of the subsidy 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.

15.

16. One more aspect needs to be mentioned. In Sahney Steel and Press Works Ltd. (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.

17. Applying the above tests to the facts of the present case and keeping in mind the object behind the payment of the incentive subsidy we are satisfied that such payment received by the assessee under the Scheme was not in the course of a trade but was of capital nature. Accordingly the first question is answered in favour of the assessee and against the Department."

8. Further, we find that the Id AR on the impugned issue has raised rightly placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Chaphalkar Brothers reported 33 taxmann. Com 431 which had been duly approved by the Hon'ble Supreme Court which reported in 88 taxmann.com 178.

9. Further, we also find that the very same Maharashtra Govt Incentive Scheme was subject matter of consideration by the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Kirloskar Oil Engines Ltd reported in 55 taxmann.com 96; decision of the Pune Tribunal in ITA No. 828/Pun/2014 dated 17.05.2017 and decision of Pune Tribunal in the following cases:-

- a) Decision of Pune Bench of Tribunal in the case of Klaus Multiparking System Pvt. Ltd. v. ACIT in ITA No. 308 & 309/PUN/2017;
- b) Decision of Pune Bench of Tribunal in the case of Suraj Cotex v. ITO. in ITA No. 662/PN/2014;
- c) Decision of Pune Bench 'A' of Tribunal in the case of Innoventive Industries Ltd v. DCIT in ITA No. 1360/PUN/2016; and
- d) Decision of Pune Bench 'B' of Tribunal in the case of Innoventive Industries Lid v. DCIT in ITA No. 601/Pune/2013.

10. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, the Ground No. 12 qua the receipt of subsidy from Maharashtra Govt is decided in favour of the assessee. This order has to be read together with the earlier Tribunal order dated 16.08.2022 and MA order dated 31.03.2023.

11. In the result, the appeal of the assessee is allowed in view of the above mentioned terms.

Order pronounced in the open court on 13/10/2023.

-Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 13/10/2023
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
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