IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'F', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.2143/Del/2011
Assessment Year: 2007-08

M/s. PVR Ltd. **61, Basant Lok, Vasant Vihar** **New Delhi-110057** **PAN No.AAACP4526D**	**Vs**	**Addl. CIT Range-14** **New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant	**Sh. Gaurav Jain, Advocate** **Sh. Sudarshan Roy, Advocate** **Sh. V.K. Garg, Advocate** **Sh. Parveen Kumar, CA**
Respondent	**Sh. P.N. Barnwal, CIT DR**

Date of Hearing	**01.11.2023**
Date of Pronouncement	**07.11.2023**

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the CIT(A)-27, New Delhi dated 07.02.2011 pertaining to A.Y. 2007-08.

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

1. That the Ld. Commissioner of Income tax (Appeals) [Ld.CIT(A)) has erred on facts and in law in making an addition of Rs.9,05,84,001/- in respect of Entertainment tax (E Tax) excluded from sales, pursuant to grant in aid allowed by the different State Governments as capital subsidy to promote the setting up of multiplex in specified areas of the state. The said amount of E Tax, though accepted as capital receipt by the Assessing Officer (Ld. AO), has been treated as revenue receipt by the Ld. CIT(A).

2. That the treatment of the said amount of E Tax as revenue receipt as against capital receipt claimed by the assessee and accepted by the Ld.AO is based on erroneous views and / or non-appreciation of the facts and law involved including the law as laid down by the apex court in the case of CIT V. Ponni Sugar and Chemicals Ltd., 306 ITR 392.

3. That the treatment of the said amount of E Tax as revenue receipt a against capital receipt claimed by the assessee and accepted by th Ld.AO, is inconsistent inter alia with the view of the Hon'ble High Court Allahabad

and Karnataka where similar grant in aid of E Tax has been h as capital receipt.

4. That the Ld. CIT (A) has erred in not appreciating that the assessee is the proprietor/manager of the multiplex as per State Entertainment Tax Act. As such the treatment of the subject E Tax subsidy as of revenue nature on the ground that the assessee is not the owner of the multiplexes and the subsidy is meant for the owner of the multiplex is unlawful and deserves to be deleted in toto,

5. That the Ld. CIT(A) has erred on facts and in law in not allowing the assessee's alternative claim that in case the said amount of E Tax is treated as income, the same is an allowable expense u/s 43B as deemed payment of tax. As per settled law, if any receipt of tax is taxed as trading receipt, then any deemed payment thereof is also allowable as an expense.

6. That without prejudice to the grounds herein above, the amount of E Tax capital subsidy of Rs. 9.05.84.001/- is not to be reduced from actual cost of the fixed assets for computing depreciation as the same is not covered under

the provisions of Expla. 10 to Sec. 43(1). Without prejudice to other grounds if E Tax grant in aid is a revenue receipt, it is in any case not to be reduced from the actual cost of fixed asset for computing admissible depreciation.

7. That the Ld. CIT(A) has erred on facts and in law in confirming the disallowance of loss / expenditure debited to P & L a/c of Rs. 29,09,928/-in respect of ESOP and ESPS schemes. The disallowance has been made by erroneously treating said expenditure / loss as notional, a capital expense and as a contingent liability.

8. That the said disallowance of Rs. 29,09,928/- on account of ESOP and SPS schemes as confirmed by the Ld. CIT(A) is based on erroneous facts d erroneous views and/ or non-appreciation of the facts and law involved. The said claim is not notional, is a revenue expense and does not constitute a contingent liability. The claim has been incurred and debited to P & L a/c as required under binding SEBI guidelines and is admissible in law and there is no provision under the Act against allowance of the same.

9. That the Ld. CIT(A) has erred on facts and in law in confirming the disallowance of Rs. 6,40,823/- u/s 14A read with Rule 8D in relation to income not forming part of total income. Hardly any expense on the facts involved was incurred for earning of the non-taxable income i.e. dividend on investments. There is no specific identification of any such expenditure for earning of such non-taxable income by the Ld. A.O. As such and otherwise too the expenditure assumed or deemed to be incurred on non-taxable income cannot be disallowed.

10. That the Ld. CIT(A) has erred on facts and in law in confirming the following additions for computing book profit u/s 115JB:

i) Depreciation disallowed u/s 43(1) - Rs. 1,14,42,076/-

ii) Additional disallowance u/s 14A-Rs. 6,40,823/-

11. That the additions and disallowances as made as per the provisions of the Act cannot be the basis of addition to book profit for the purposes of MAT u/s 115JB unless the same are covered under the explanation to section 115JB of the Act. Depreciation has been debited in the profit and

loss account as per applicable accounting standards and is not covered und any of the adjustments mentioned in the explanation to section 115JB. T addition to book profit as made by the Ld. AO is liable to be deleted.

12. That the assessment as made and the order of the Ld. CIT(A) are aga the law and facts of the case involved.

13. That the grounds of appeal as herein are without prejudice to each other.

14. That the assessee respectfully craves leave to add, amend alter and / or forego any ground(s) at or before the time of hearing.

3. Ground Nos.1 to 4 relates to the issue whether Entertainment tax collected and retained by assessee as incentive / subsidy given by state Governments on account of development of new Multiplexes in the state is capital or revenue receipt.

4. At the very outset the Counsel for the assessee stated that this issue is no more resintegra as it has been decided by this Tribunal in favour of the assessee and against the revenue in A.Y. 2006-07 in ITA No.1897/Del/2010.

5. We have carefully considered the orders of the authorities below. We find force in the contention of the Counsel. The issue is squarely covered by the decision of the coordinate Bench in ITA No.1897/Del/2010 for A.Y. 2006-07. The relevant findings read as under :-

> *13. We have heard rival contentions and gone through the relevant material available on record. We propose to decide the various issues, arising out of this appeal in the following paragraphs:*
>
> *The entertainment subsidy*
>
> *(i) Facts have been narrated above. First we would like to deal with the argument of the ld. DR in relation to the plea that the receipt in question should not be treated as subsidy, but as an illegal receipt or regular receipt of income. We are unable to accept the contention of Id. DR as the department is not in appeal before the ITAT against the order of CIT(A). we refrain ourselves from entertaining such a plea, without there being a specific ground taken by revenue. Both the authorities have ultimately held the receipt in question to be entertainment subsidy only. AO*

held it to be capital receipt and Id. CIT(Appeals) by using his power of enhancement 49 held it to be revenue in nature. In our considered view, as long as the receipt in question has been held to be entertainment subsidy in the hands of the assessee, it is of no use to devolve into some alleged discrepancies in the assessee's application for license and eligibility to entertainment tax and assessee's revenue sharing agreement. The fact of the matter remains that the revenue sharing agreement and the Govt. of U.P. notification holding the as eligible for subsidy is on the record and ultimately accepted by both the authorities. We, therefore, confine ourselves to the issue about the nature of subsidy being capital or revenue, therefore, we do not wish to go into other issues about the discrepancies in application. assessee's eligibility for subsidy or income being illegal in nature.

(ii) Coming to the nature of subsidy, 14. CIT(Appeals) held it to be revenue in nature:

(a) relying on the judgment of Hon'ble Supreme Court in the case of Sahney Steel 228 ITR 253 (SC):

(b) It has been further held that the grant received by assessee was not related to any asset or capital out lay as the payment of subsidy was made after completion of multiplex theatre based on its running for a period of three years.

(c) The amount of subsidy was only quantified to the limit of cost of asset and the amount of entertainment tax collected by the assessee.

(d) The benefit is given on the basis of collecting the E. Tax from the cinema viewers, which is a trading receipt. Retaining it and not paying a trading receipt to the Govt. amounts to revenue receipt.

(e) Since the entertainment subsidy is trading receipt the consequent subsidy will be revenue in nature only.

(iii) The assessee in the original return had offered the amount as revenue receipt. In our considered view as the facts emerge. the multiplex scheme of the U.P. Govt, came by way of amending rules of the earlier Cinematographic Act. Earlier the incentives were given for construction of

new cinema halls and by new scheme it was given for construction of multiplexes.

(iv) In the cases of Pramod Kumar Shukla; Sharda Chitra Mandir: Kalpana Palace; and Sadichha Chitra (supra), such type of subsidy for construction of new cinema halls, has been held by Hon'ble Allahabad and Bombay High Court to be capital in nature.

(v) In our view the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra) has laid down the tests which are mentioned herein above. Looking at them, the basis of the scheme is very important to determine the nature of subsidy. The new scheme of multiplex under Cinematographic Act and the fact that earlier the new cinema halls construction subsidy was held to be capital in nature fortifies our view.

(vi) Due to onslaught of cable television, there being steep decline of cinema viewers, Govt. desired to give fresh Incentive to new cinema halls albeit new modern cinema halls which are known as multiplexes. Thus, the purpose of the amended cinematograph scheme was like its earlier

purpose and intended to promote the cinema industry by construction of cinema halls which have multi screens and are known as multiplexes. Looking at the purpose of the earlier scheme, in our view the purpose of new scheme, is also to promote the cinema industry by setting up of long ferm operational and modern multiplexes equipped with the latest technology as far as possible. Thus applying the purpose test the entertainment subsidy in question is capital in nature.

(vii) The mode of payment of subsidy is not important and merely because it is linked with the collection of entertainment tax, will not be decisive to ascertain its character. This is so because the Govt. by amended scheme desired the construction of new multiplexes and further modulated the scheme in such a manner that these multiplexes work for a longer time i.e. 5 years. The incentive was released in such a manner that it will ensure the long term operation i.e. attracting the viewers and collection of E. Tax. One of the ways could have been to give upfront subsidy, in that case Govt. could not have ensured the long term operation. In order to promote the

scheme, release of incentive required operators to put in their best efforts. The release of subsidy upfront would have come directly from the coffers of the Govt. To avoid such pressure, instead it has been provided in the form of viewership and entertainment tax collection.

(viii) The Hon'ble Supreme Court has clearly held that mode and method of release of subsidy will not determine the character. Similarly, the source of the subsidy is also irrelevant fe, whether the subsidy comes directly from the coffers of the Govt, or it is sourced from instalment of E Tax, It was modulated in such a way that the assessee derived it from alternate resources which in this case is cinema viewers or thereby entertainment tax collection. The scheme was designed to promote the investors in entertainment industry to establish new multiplexes. The object and purpose is to promote ailing cinema industry as a whole, In our considered view, Hon'ble Supreme Court judgment in Ponni Sugars & Chemicals Ltd, (supra) answers the question before us and is fully applicable to assessee's case.

(ix) The issue is further clinched by Hon'ble Bombay High Court in the case M/s Chapalkar Brothers (supra), which has clearly held the subsidy given for construction of multiplexes to be capital in nature and merely because it was linked to entertainment subsidy and not with repayment of loans, cannot be held to be revenue in nature.

(x) Facts in the case of Sahney Steel & Press Works Ltd. Vs. CIT (1997) 228 ITR 253 (SC), relied on by ld. DR, are on different footing. In that ease incentives were production incentives in the sense that ass was entitled to such incentives only after it went into production. The scheme was not to make any payment directly or indirectly for the setting up of the industries. It was only after the industries had been set up and production had been commenced that the incentives were to be given. On these facts, the Hon'ble Court held that amounts received were production incentive and operational subsidies and not capital subsidies. Subsidy payment were held to be revenue in nature. The facts being distinguishable to

assessee' case, ratio of Ponni Sugar & Chemicals is applicable to assessee's case.

xi) In view of direct judgments of Hon'ble Bombay High Court in M/s Chapalkar Brothers (supra); and that of Hon'ble Supreme Court judgment in the case of Ponni Sugars & Chemicals Ltd. (supra), which has approved many such judgments cited in the body of the order, we hold that the subsidy received by the assessee is capital in nature, This ground of the assessee is allowed.

13.1. Coming to the alternate submission about the applicability of See B. since we have held the subsidy to be capital in nature, the alternate .1 und does not survive.

13.2. Coming to the next ground about applicability of Explanation 10 to 43(1), Id. counsel has relied on Hon'ble Supreme Court judgment in the case of CIT VS. P.J. Chemicals Ltd. (supra) and ITAT Vishakhapatnam Bench judgment in the case of Sasisri Extractions Ltd. Vs, ACIT (2008) 307 (AT) 127. The scheme of the U.P. Govt. has been spelt out above. The incentive does not refer to acquire any particular asset: the object and purpose of the

scheme was to promote the cinema industry by promoting the construction of multiplexes to ward of effects of cable television.

13.3, Hon'ble Supreme Court judgment in the case of CIT VS. P.J. Chemicals Ltd. (supra) has held that "actual cost" should be interpreted in a liberal manner. The purpose of the U.P. Govt. being to promote the cinema industry as a whole, only because the basis for determining the subsidy is capped at the capital assets, will not mean that he scheme is to meet the cost of any specified asset directly or indirectly. Therefore, the amount of such subsidy cannot be held to reduce the actual cost of asset u/s 43(1) Explanation 10 of the Act.

13.4. Ld. DR has filed written submission, which we have referred hereinabove in para 11E(ii). While arguing it to be revenue subsidy, has pleaded that there was no obligation on assessee to utilize the subsidy in any specified manner. Similarly, Id. CIT(Appeals) also while holding the subsidy to be revenue in nature, has given a finding that the

subsidy was not relatable to any specific asset of the multiplex.

13.5. Department cannot aprobate and reprobate on the same issue. While stressing the subsidy as revenue in nature both ld. CIT(Appeals) and ld. "CIT(DR) have offered a view that subsidy was not intended to be utilized in specified manner. The view make it clear that the subsidy was not provided for meeting the cost of any asset.

13.6. In view of these facts and circumstances, we hold that E. Tax subsidy was not given to meet the cost of any specific asset. Our view is further fortified by the coordinate Bench judgment in the case of Sasisri Extractions Ltd. (supra) in which case incentive subsidy received for setting up of new unit for manufacture of edible oils was held to be not meant to directly or Indirectly reduce the cost of any asset was linked with the capital , only because the amount of subsidy cost of assets.

13.7. In view of Hon'ble Supreme Court judgment in the case of Chemicals Ltd. (supra); ITAT Vishakhapatnam

Bench judgment in the case of Sasisri Extractions Ltd. (supra) and the department itself proposed that there was no obligation on assessee to utilize it for any specific purpose will not be hit by Explanation 10 to Sec. 43(1). We are, therefore, of the view that entertainment subsidy being for the promotion of cinema/ multiplex industry; only because the methodology adopted is to cap it to capital cost of assets will not mean to reduce the cost of asset directly or indirectly in terms of Explanation 10 to Sec. 43(1). This ground of the assessee is allowed.

6. Respectfully following the decision of the coordinate Bench we allow this ground in favour of the assessee.

7. The aforementioned decision of the coordinate Bench will also cover the issues raised vide ground No.5 and 6 and are accordingly decided in favour of the assessee.

8. Ground Nos 7 and 8 relates to the expenses on account of ESOP and ESPS schemes is a contingent liability not allowable as revenue expenses.

9. On perusal of the record we find that this issue was decided by the coordinate Bench against the assessee in A.Y.2006-07 in ITA

No.1897/Del/2010 but when the matter was agitated before the Hon'ble High Court H.C set aside the issue in favour of the assessee in IT Appeal No.564 of 2012 order dated 23.08.2022. The relevant findings read as under :-

> *8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the*

service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e. at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is of ESOPs is not a

contingent liability but is an ascertained liability. entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of Se aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal, therefore, paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him deduction under section 37(1) of the Act subject to fulfillment of the condition.

3. This Court in Pr CIT v. New Delhi Television Ltd. [2018] 99 taxmann.com 401/120171 398 LT Bench in Biocon Ltd. (supra).

4. The subsequent appeals being ITA 107/2015 and ITA 214/2019 filed by the Commissioner on similar issues have been dismissed by this Court following the judgment of the Karnataka Biocon Ltd. v. Dy. CIT (2021):125 taxman.com 164/278 Taxman 121/431 ITR 326.

5. Consequently, following the judgment of the Karnataka High Court in Biocon Ltd. (supra) law is decided in favour of the assessee and it is held that the Income-tax Appellate Tribuna holding that the difference between the price at which stock options were offered to e appellant company under ESOP and ESPS and the prevailing market price of the stock on th such options was not allowable revenue expenditure under section 37(1) of the Incor Accordingly, the impugned judgment of the Tribunal is set aside.

10. Respectfully following the binding decision of the Hon'ble Jurisdictional High Court (supra) we direct to delete the impugned additions. Ground No.7 and 8 are allowed.

11. Ground No.9 relates to the disallowance u/s.14A as per rule 8D of the Act.

12. A perusal of the assessment order show that the AO has disallowed considering all investments including those which do not yield any exempt income. We find that the assessee has computed the disallowance suo-moto as per rule 8D.

13. On careful consideration we are of the considered view that rule 8D is not applicable for the year under consideration as held by the Hon'ble Supreme Court in the case of Godrez & Boyce Manufacturing Company 394 ITR 449.

14. We are further of the considered view only those investments need to be considered which give exempt income as held by the Hon'ble High Court of Delhi in the case of Caraf Builders and constructions 112 taxmann.com 322, ACB India Ltd. Vs. ACIT 374 ITR 108 (Delhi).

15. Considering the facts of the case in the light of decision of the Hon'ble High Court of Delhi (supra) we direct the AO to delete the impugned disallowance of Rs.640823/-. Ground No.9 allowed.

16. Ground No.10 and 11 relates to the disallowance of depreciation under normal provisions permitted to be adjusted in book profit u/s.115JB of the Act by the AO.

17. After pursuing the assessment order we are of the considered view that the AO does not have jurisdiction to go beyond net profit shown in P & L account except to the extent profit in explanation of section 115JB of the Act. As held by the Hon'ble Supreme Court in the case of Apollo Tyres 255 ITR 273, Malayala Manorama Co. Ltd 300 ITR 0251.

18. Respectfully following the ratio laiddown by the Hon'ble Supreme Court we direct the AO not to consider the impugned disallowance of depreciation for the computation of book profit u/s. 115JB of the Act. Similar would be the fate of disallowances u/s. 14A read with rule 8D though we have deleted the same vide ground No.9 of the appeal. Ground No.10 and 11 read with ground No.9 are allowed.

19. Additional ground is in relation to the Entertainment tax subsidy whether to be excluded from book profit for MAT purposes.

20. Qua our decision rendered while deciding ground No. 1 to 4, this additional grievance becomes academic in nature and hence need no separate adjudication.

21. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 07.11.2023.

Sd/-	Sd/-
[ASTHA CHANDRA]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: November, 2023.
Neha, Sr PS
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi