

आयकर अपीलीय अधिकरण, कोलकाता पीठ "सी", कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सटस्य एवं श्री प्रदीप कुमार चौबे, न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Pradip Kumar Choubey, Judicial Member]

I.T.A. Nos. 1107 & 1097/Kol/2023
Assessment Years: 2012-13 & 2015-16

DCIT, Circle-11(1), Kolkata	Vs.	Emami Agrotech Limited (PAN: AABCN 7953 M)
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	25.09.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	18.10.2024
For the Appellant/ निर्धारिती की ओर से	Shri A. K. Tibrewal, A.R Shri Saurav Gupta, A.R
For the Respondent/ राजस्व की ओर से	Smt. Monalisha Pal Mukherjee, JCIT

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the appeals preferred by the revenue against the separate orders of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi (hereinafter referred to as the "Ld. CIT(A)") dated 13.12.2021 for the AY 2015-16.

2. At the outset, we note that the appeals are barred by limitation by 608 and 624 days respectively. We have also perused the condonation petition filed by the revenue wherein it has been stated that these appeals could not be filed on or before the due date

due to work load of assessment u/s 143(3) of the Act and assessments being getting time barred and also issuance of notices u/s 148A of the Act and handling of huge number of writ petitions filed by the various assesses in the Calcutta High Court against the orders u/s 148A(d) of the Act . We note that pursuant to the Hon'ble Calcutta High Court's directions to complete the proceedings u/s 148 of the Act within the given time frame further worsen the situation. Therefore, delay in filing the appeals was treated to be beyond the control of the revenue.

3. After hearing the rival contentions and perusing the material on record, we appreciate that the reasons for delayed filing of appeals are for sufficient reasons and therefore condoned.

ITA No. 1097/Kol/2023 for AY 2015-16

4. The only issue raised by the revenue in the various grounds of appeal is against the finding by the Ld. CIT(A) that subsidies/incentives received by the assessee was capital receipt.

5. Facts in brief are that the during the year the assessee has claimed Govt. subsidy of Rs. 52,81,39,806/- as capital receipt. During the course of assessment proceedings, the assessee was asked to explain why the Govt. subsidy should not be treated as revenue receipt which were replied by the assessee. The assessee submitted that it is entitled to incentives which in relation to its plants at Haldia and Krishnapatnam, in accordance with various incentives schemes of respective state governments. And during the year the assessee company is eligible for the following incentives / subsidies namely electricity duty of Rs. 226.10 lakh and sales tax incentives of Rs. 5,281.40 lakh. The AO disallowed the treatment made by the assessee to the subsidy/ incentive received that the assessee itself has treated such receipt as a revenue receipt in the audited profit and loss account and this accounting treatment of the subsidy has been certified by the Auditors of the company and finally the same was disallowed and added to the income of the assessee.

6. The Ld. CIT(A) has followed the decision of Co-ordinate Bench and decided the issue in favour of the assessee.

7. The Ld. D.R as fairly considered that the issue has been decided by the Co-ordinate Bench in favour of the assessee in the preceding assessment years also. However, the ld. D.R relied on the grounds of appeal.

8. The Ld. A.R on the other hand submitted that this is a recurring issue in the case of assessee and the Co-ordinate Bench has already decided the issue in favour of the assessee in AY 2011-12, 2013-14 & 2014-15 and referred to the decision of Co-ordinate Bench which is placed at page no. 49 – 91 of PB and submitted that this is being a covered issue, therefore, the appeal of the revenue may kindly be dismissed.

9. After hearing the rival contentions and perusing the material on record, we find that the issue is recurring in nature and has been decided by the Tribunal in favour of the assessee in AY 2011-12, 2013-14 & 2014-15. The operative part is reproduced as under:

“27. We have considered the rival submissions and also perused the relevant material available on record. As regards the preliminary objection raised on behalf of the Revenue challenging the action of the ld. CIT(Appeals) in entertaining the new claim made by the assessee for treating the subsidy in question received during the year under consideration as capital receipt not chargeable to tax, it is observed that this issue is squarely covered in favour of the assessee, besides the various judicial pronouncements cited on behalf of the assessee and relied upon by the ld. CIT(Appeals) in his impugned order, by the decision of the Coordinate Bench of this Tribunal in the case of DCIT –vs.- Indian Oil Petronas Pvt. Limited rendered vide its order dated 31.05.2018 in ITA No. 157/KOL/2017, wherein it was held by the Tribunal by relying on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Limited –vs.- CIT (229 ITR 383) as well as the decision of the Hon'ble Calcutta High Court in the case of Maynak Poddar (HUF) –vs.- WTO (262 ITR 633) that his jurisdiction was rightly exercised by the ld. CIT(Appeals) in entertaining the additional ground raised by the assessee claiming exclusion of capital subsidy received by way of sales tax remission under the West Bengal Incentive Scheme. We, therefore, find the objection raised on behalf of the revenue in this regard to be unsustainable and overruling the same, we now proceed to decide the issue on merit.

28. During the year under consideration, the assessee had received incentive of Rs.24,94,66,520/- under the West Bengal Incentive Scheme, 2004 in the form of refund of sales tax paid and the question that has arisen is regarding the taxability of the said amount under the Income Tax Act, 1961, which depends on the determination of the character of the amount, whether it is capital receipt or revenue receipt. There are various judicial pronouncements wherein guidelines or criteria have been laid down to determine the character of such amounts

received as incentives/subsidies. As observed by the Hon'ble Supreme Court in the case of *K.C.P. Limited –vs.- CIT [245 ITR 431]*, it is not the name given by the assessee or even by the revenue or anyone else that matters, but it is true character of the receipt that determines its taxability and being regarded as falling within the capital field or out of it. As held by the Hon'ble Supreme Court in the case of *Ponny Sugar & Chemicals Limited (supra)*, the nature of the receipt of the incentive has to be examined in the light of the object for which such incentive was paid and if the true character of the incentive is to enable the assessee to meet the capital cost, then that true character must be given full recognition and the fact that the receipt was subsequent to the commencement of production is not to be allowed to stand in the way in its proper treatment as a receipt in the capital field meant to meet a capital cost. Hon'ble Supreme Court held that it, therefore, cannot be said that the incentive given being post production, though meant exclusively for meeting the capital cost, the amount of incentive would be a trading receipt in the hands of the recipient.

29. In the case of *Sahany Steel & Press Works Limited (supra)*, which has been relied upon by the ld. Representatives of both the sides in support of their respective stand on the issue under consideration, payments had been made post production and since it was in no way linked to the steps that had been taken by the assessee in setting up the industry, Hon'ble Supreme Court held that the incentive received was revenue in nature chargeable to tax. It was, however, clarified by the Hon'ble Supreme Court that the subsidy in that case had not been granted for bringing into existence any new asset. It was further clarified by the Hon'ble Supreme Court that the character of the subsidy in the hands of the recipient, whether revenue or capital, will have to be determined by having regard to the purpose for which the subsidy is given. Explaining further with illustration, it was observed by the Hon'ble Supreme Court that if the Scheme was that the assessee will be given refund of sales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacities in backward areas, the entire subsidy must be held to be a capital receipt in the hands of the assessee. After taking note of both these decisions of the Hon'ble Supreme Court in the case of *Sahany Steel & Press Works Limited (supra)* and *Ponny Sugar & Chemicals Limited (supra)*, Hon'ble Calcutta High Court has held in the case of *Rasoi Limited (supra)* that the subsidy received by the assessee from the Government of West Bengal under the Scheme of Industrial Promotion for expansion of capacities, modernisation and improving its marketing capabilities was a capital receipt not chargeable to tax.

30. In the case of *K.M. Sugar Mills Limited (supra)* cited by the ld. D.R., subsidy was given to the assessee by the Central Government to compensate burden on account of interest, storage and insurance etc. for holding buffer stock of sugar and the object thus being to compensate the assessee in running his business, it was held by the Hon'ble Allahabad High Court that the subsidy given was clearly revenue in nature. In the case of *Keracol Chlorides Limited (supra)* cited by the ld. D.R., subsidy was granted for production and not for setting up an industry and the same, therefore, was treated as revenue receipt. In the case of *Chhindwara Fuels (supra)* cited by the ld. D.R., there was no representation made on behalf of the assessee and in the very brief order passed ex-parte, subsidy received by the assessee from the Government in the form of sales tax refund was held to be a revenue receipt by the Hon'ble Calcutta High Court mainly on the ground that the same was received by the assessee after production. In support of this conclusion, reliance was placed by the Hon'ble Calcutta High Court on the decision of the Hon'ble Supreme Court in the case of *Sahany Steel & Press Works Limited (supra)*. As already noted by us, Hon'ble Supreme Court in the subsequent decision rendered in the case of *Ponny Sugar & Chemicals Limited (supra)* has held, after taking note of their earlier decision rendered in the case of *Sahany Steel & Press Works Limited (supra)*, that if the true character of the incentive is to enable the assessee to meet the capital cost, then that true character must be given full recognition and the fact that the receipt was subsequent to the commencement of

production is not to be allowed to stand in the way of its proper treatment as a receipt in the capital field meant to meet a capital cost. As regards the decision of the Hon'ble Delhi High Court in the case of *Bhusan Steels & Strips Limited* (supra) relied upon by the ld. D.R., it is observed that the operation of the judgment passed by the Hon'ble Delhi High Court in the said case has been stayed by the Hon'ble Supreme Court by the interim order passed in SLP No. 30728 to 30732/2017.

31. The position that clearly emerges from the various judicial pronouncements cited by the ld. Representatives of both the sides, as discussed above, is that the character of subsidy in the hands of the recipient, whether capital or revenue, is required to be determined after having regard to the purpose for which the subsidy was given and the mode and source of payment as well as the point of time when the subsidy was paid is not relevant. Keeping this position in mind, let us now see the purpose for which the subsidy in question was given to the assessee in the form of sales tax refund under the West Bengal Incentive Scheme, 2004. As per the West Bengal Incentive Scheme, 2004 notified in the Official Gazette, it was meant to extend incentive for promotion of industries in the State of West Bengal and the same was applicable to all Large/Small Scale Projects and Tourism Units in Large/Small Scale Sector to be set up and also expansion project of existing Units on or after 1st April, 2004. The object of the said Scheme thus was to promote setting up and expansion of industries and the subsidy was made available to the existing industries for undertaking substantial expansion. Under the said Scheme, "Mega Projects" were not eligible for the interest subsidy and in lieu thereof IPA was made available to them @ 75% of the sales tax, which incentive was not to exceed 100% of the fixed capital investment. The subsidy thus was linked to the fixed capital investment made by the industry and it was in the form of refund of sales tax paid. In line with this Scheme, the assessee-company made expansion of its existing Haldia Manufacturing Unit situated in Midnapore District in the State of West Bengal involving huge capital outlay of Rs.168 crores and was entitled to IPA of 75% of sales tax paid for a period of 15 years subject to a maximum amount to the extent of 100% of the fixed capital investment i.e. Rs.168 crores. During the year under consideration, the assessee-company was eligible for the said incentive to the extent of Rs.24,94,66,520/- and the benefit to that extent was availed by it.

32. At the time of hearing before us, the ld. D.R. has submitted that the object of the West Bengal Incentive Scheme, 2004 was altogether different from the object of the West Bengal Incentive Scheme of 2000. He has contended that the various decisions rendered by the Tribunal and cited by the ld. Counsel for the assessee treating the subsidy under the 2000 Scheme as capital receipt thus are not applicable. He has also contended that the object of the 2004 Scheme not being very clear, the incentive/subsidy received under the said Scheme should be treated as revenue in nature. We are unable to accept these contentions of the ld. D.R. As already noticed from the relevant Scheme, the object of the Scheme was very clear to promote setting up and expansion of industries and it cannot be said that the said object was not clear as sought to be contended by the ld. D.R. Even the object of the Scheme of 2004 cannot be said to be entirely different from the Scheme of 2000, inasmuch as, the intention of the 2000 Scheme was also to extend incentive for promotion of industries in the State of West Bengal and the subsidy was meant for expansion of the capacities of the eligible industry, their modernisation and improving the marketing capabilities, which cannot be said to be materially different from the Scheme of 2004. On the other hand, there is similarity in the objects of both these Schemes, inasmuch as, it was to provide incentive for the purpose of setting up of new Units as well as for the expansion of the existing Units.

33. It is pertinent to note that the similar issue had come up for consideration before the Delhi Bench of this Tribunal in the case of *Pepsico India Holdings Pvt. Limited* (supra) cited by the ld. Counsel for the assessee. In the said case, industrial promotional assistance in the form of subsidy by way of refund of sales tax paid was received by the assessee under the same

Scheme, i.e. West Bengal Incentive Scheme, 2004 and the issue raised was relating to the taxability of the subsidy received by the assessee. While deciding the said issue, the Tribunal took note of the object of the West Bengal Incentive Scheme, 2004, which was found to be to promote setting up and expansion of projects/industry and keeping in view the said object and the ratio laid down by the Hon'ble Supreme Court in the case of CIT –vs.- Ponny Sugar & Chemicals Limited (supra) as well as in the case of CIT –vs.- Chaphalker Brothers (supra), it was held by the Tribunal that the subsidy received by the assessee under the West Bengal Incentive Scheme of 2004 was capital in nature and the same could not be taxed as revenue receipt.

34. *Having regard to all the relevant facts of the case and keeping in view the legal position emanating from the various judicial pronouncements discussed above, we are of the view that the subsidy in question received by the assessee in the form of refund of sales tax under the West Bengal Incentive Scheme, 2004 was capital in nature as the purpose of the same was for the expansion of the existing industry of the assessee. We also hold that merely because the said subsidy was to be received by the assessee only after the commencement of production would not change its character, which otherwise was capital in nature. We accordingly uphold the impugned order of the ld. CIT(Appeals) giving relief to the assessee on this issue.*

35. *As regards the issue relating to the treatment to be given to the sales tax subsidy while computing the book profit under section 115JB of the Act, it is observed that this issue is squarely covered in favour of the assessee and against the revenue by the various decisions of the Tribunal. In one of such decisions rendered in the case of Benani Industries Limited (supra), the Coordinate Bench of this Tribunal has held that the capital receipt in the form of sales tax incentive is required to be excluded while computing the book profit under section 115JB of the Act. In another decision rendered in the case of Bricksale India Limited (supra), it was held by the Mumbai Bench of this Tribunal that the amounts which are not taxable in the normal computation cannot be included while computing the book profit because such amounts do not really reflect a receipt in the nature of income and cannot form part of the book profit.*

36. *At the time of hearing before us, the only contention raised by the ld. D.R. is that it is not very clear as to whether in the cases decided by the Tribunal and relied upon by the ld. Counsel for the assessee, the amount in dispute was credited to the Profit & Loss Account of the assessee as in the present case. However, as pointed out by the ld. Counsel for the assessee from the relevant portion of the orders of the Tribunal, the amounts in dispute were credited by the assessee in the Profit & Loss Account and the factual position in the said cases thus was similar to that of the assessee. As further pointed out by the ld. Counsel for the assessee, a Note No. 20 was given by the assessee-company as Notes to Accounts forming part of its annual accounts pointing out specifically that it was entitled for sales tax incentive of Rs.2494.67 lakhs under the West Bengal Incentive Scheme, 2004. We, therefore, find no infirmity in the impugned order of the ld. CIT(Appeals) allowing the claim of the assessee for exclusion of the amount of subsidy in question while computing the book profit under section 115JB of the Act. Grounds No. 2 to 5 of the Revenue's appeal are accordingly dismissed."*

Since the facts of the case before us is quite similar to the facts as decided by the Co-ordinate Bench, we are inclined to uphold the order of Ld. CIT(A) by dismissing the appeal of the revenue.

10. Now we shall take in ITA No. 1107/Kol/2023 for AY 2012-13.

The issue raised in the revenue appeal is similar to one as decided by us in ITA No. 1097/Kol/2023 A.Y. 2015-16 and therefore our decision in ITA No. 1097/Kol/2023 A.Y. 2015-16 would, mutatis mutandis, apply to this appeal as well. Accordingly the appeal of the revenue is dismissed.

11. In the result, both the appeals of the revenue are dismissed.

Order is pronounced in the open court on 18th October, 2024

Sd/-

Sd/-

(Pradip Kumar Choubey /प्रदीप कुमार चौबे)
Judicial Member/न्यायिक सदस्य

(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 18th October, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-11(1), Kolkata
2. Respondent – Emami Agrotech Limited, 687, E. M. Bypass, Anandpur, East Kolkata Township, Kolkata-700017
3. Ld. CIT(A)- NFAC, Delhi
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata