

**THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'H' NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND SHRI
ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 3364/Del/2016 Assessment Year: 2007-08
ITA No. 3365/Del/2016 Assessment Year: 2008-09
ITA No. 5839/Del/2016 Assessment Year: 2009-10

ACIT, Central Circle-30, New Delhi	Vs.	Jindal Poly Films Ltd., 19 th Hapur Bulandshahr Road, PO: Gulaothi, New Delhi
PAN :AAACJ7650E		
(Appellant)		(Respondent)

ITA No. 3360/Del/2016 Assessment Year: 2007-08
ITA No. 3361/Del/2016 Assessment Year: 2008-09
ITA No. 5645/Del/2016 Assessment Year: 2009-10

Jindal Poly Films Ltd., 19 th Hapur Bulandshahr Road, PO: Gulaothi, New Delhi	Vs.	ACIT, Central Circle-30, New Delhi
PAN :AAACJ7650E		
(Appellant)		(Respondent)

Assessee by	Shri Rohit Jain, Adv. & Ms. Deeoashree Rao, CA & Shri Samrath Singh, Adv.
Department by	Ms. Sapna Bhatia, CIT DR

Date of hearing	26.03.2024
Date of pronouncement	04.06.2024

ORDER

PER ANUBHAV SHARMAL, JUDICIAL MEMBER:

The revenue and assessee both are in appeal against the order of CIT(A)-30, New Delhi, (also referred as first appellate authority) dated 21/03/2016 in AY 2007-08 and 2008-09, and order dated 28/07/2016, in AY 2009-10, passed in appeal u/s 250 of the Income Tax Act 1961 (here in after mentioned in brief as 'the Act'), arising out of assessment order passed by assessing officer (in short 'AO') ACIT, Central Circle-30, New Delhi, passed u/s 153A of the Act.

2. We have heard both the sides and have carefully gone through the submission and material before us.

2.1 The assessee company is engaged in the business of manufacturing of Polyester chips of all grade, Biaxially Oriented Polyester Film (Bopet Film), Biaxially Oriented Poly Propylene Film (BOPP), Metalized Film and PVDC Film. These products are sold in domestic market as well as export market. There was search and

seizure action was conducted on assessee and its group companies on 14.11.2011. Accordingly, the Assessing Officer issued notice under Section 153A of the Income- Tax Act, 1961 and directed the assessee to file return and thereafter framed the assessment. The assessee in response to the notice under Section 153A of the Act filed the returns for respective years. During the course of assessment proceedings, the Assessing Officer also made a reference to the Transfer Pricing Officer (TPO) and sought his comments. However, he could not make any addition as the TPO held that the transactions between assessee and the foreign entities were at arm's length.

2.2 On the basis of additions made by the AO as deleted by the CIT(A), there are following **four issues** common in the appeals.

1. Disallowance made by the Assessing Officer on the ground that expenditure claim by the assessee for loading and unloading charges of the films are bogus. CIT(A) had deleted that addition for which revenue is in appeal. The issue is common in all the appeals.

2. The disallowances made by AO u/s 14A read with Rule 8D of the Income Tax Rules. The issue is common in all the appeals. Both the sides have raised respective grounds in all the years.

3. Addition of Rs.48,00,000, in AY 2007-08, made by the AO on allegation of purchase of land at Nasik. CIT(A) had deleted the same for which revenue is in appeal.

4. Assessee is beneficiary of sales-tax subsidy of under Package Scheme of Incentives (Maharashtra), 1993. An additional ground was raised before the CIT(A) for claiming exclusion of this subsidy which was dismissed by CIT(A). The ground is common in all the appeals of assessee.

3. **First issue;** The first disallowance, the Assessing Officer has made on the ground that expenditure claimed by the assessee for loading and unloading charges of the films are bogus. In respect of this disallowance the assessee mainly argued that the payments were made via banking channel and after deducting the TDS and the contractor to whom the payments made were income-tax assesseees and hence the assessee has successfully discharged its burden and the Assessing Officer failed to bring any adverse material in this regard. Further, the Assessing Officer has also failed to provide cross-examination of the persons whose statements were relied upon. Further, the assessee has also produced the contractors before the

Assessing Officer who confirmed the receipts of payments. Considering all these aspect, the CIT(A), following the order for assessment years 2010-11 to 2012-13, which order has now been affirmed by the this Tribunal, in ITA No.256/Del/2015 & Ors. dated 06.02.2024 allowed the appeal of the assessee. Aggrieved with the order of learned Commissioner (Appeals), Revenue has preferred appeal before us and assailed the order of learned Commissioner (Appeals). The learned CIT DR strongly argued the case and relied upon the findings of the Assessing Officer in this regard, but failed to bring out anything to distinguish with the issue as stands covered in favour of assessee.

3.1 We consider it appropriate to reproduce the findings of co-ordinate bench in favour of the assessee, as under;

"4. Against this order, assessee appealed before the Id. CIT (A). Ld. CIT (A) elaborately considered the issue and thereafter, he obtained written submissions from

the assessee and obtained remand report from the AO also. Finally, he deleted the addition by holding as under :-

“ First main basis of the addition is revolving around the non existence of the alleged contractor at the address mentioned in the contractors bills enquired during search and post search proceedings. Subsequently, during the post search proceedings, when it was informed to the appellant for the first time why contractor expense should not be

disallowed. The appellant submitted that the summons have been served on the contractors and they will comply with the requirements. These facts have been reproduced in the assessment order. Thereafter, during the assessment proceedings, when the appellant was asked to substantiate the expense paid to these contractors, the appellant filed documentary evidences in form of the PAN card/ Adhar Card, service tax registration, copy of service tax return, copy of bank statement of the appellant company and e-TDS details about such contract payment etc. Subsequently, the Ld. Assessing officer asked to produce these sub contractors. During the assessment proceedings, the appellant produced five out of six contractors and statements of these contractors were recorded by the assessing officer. All of them confirmed that they have provided labour to the appellant company for packing and loading of finished product. During the appellate proceeding, the appellant has produced even sixth contractors Sh. Satravir Singh before the assessing officer whose statement was recorded by the Assessing Officer. In his statement, he confirmed to have supplied labour for packing, loading and unloading. The assessing officer has stated these fact in the assessment order.

During the remand, proceedings, when sixth labour contractor Sh. Satyabir Singh was produced before the assessing officer, he also explained that he has left the address where enquiry was done during search and post search proceedings, and shifted to the native place. He also stated that he was earlier residing at Sardar complex in Nasik and there is a rental agreement for the same. The relevant portion of statement is reproduced as under:-

"Q14. You could not be found during the search and survey operations and moreover during post search investigation and even during assessment proceedings. Please explain?

Ans. I had left the work with the company at that time. I went to my village in May 2010 itself. The investigation and enquiries were made at my previous addresses. Now company approached me for statement and I appeared

Q 16. Where did you reside at Nashik

Ans. I used to reside at Sardar Complex. Cinema Gali, Igatpuri, Nashik.

Q17. Please furnish the proof of residing at Nashik?

Ans. I used to reside in bachelor quarter from 2000 to 2004 and then took a residence on rent agreement of which was executed at that time. J will produce it if it is traced."

In his statement, he has confirmed that he has provided labour to the appellant company. In view of the above facts, in my view, non traceability of contractor during search and post search proceeding has non weithage as these contractors were produced before the assessing officer and explained the reasonof their non presence at the address on the bills.

Second evidence relied by the assessing officer is that the employee of the company used to withdraw cash from the contractor's bank accounts. I have perused the bank accounts. Entries of withdrawal are 'self. Therefore, the cash has been withdrawal by the contractors. The contractors during the statement, however, accepted that the employee of the appellant company used to accompany him at the time of withdrawal of cash from the bank and cash used to be carried in companies vehicle. This arrangement was used to ensure for the payment distributed to labourers hired for the work of the company.

Third evidence relied by the Ld. Assessing Officer is that these contractors are Ex-employee of the company. There is no denial to the fact that these contractors were ex-employee or town persons. The contractors have also accepted these facts. Ld. AR argued that for continuous supply of labour, only reliable and known person can be deployed. Fourth basis relied by AO is that in the computer of the appellant bills of these contractors were found. All the contractors have stated that the bills were prepared at the premise of the appellant as these contractors were only supplying labour and does not have separate infrastructure. The only issue remains whether being known person as contractor, there is excess payment towards services rendered by the contractors. In this regard, Ld AR vehemently argued that before the assessing officer, the appellant has submitted that number of contract labour provided by these contractors are maintained by the appellant company and average monthly salary of each such employee is ranging from Rs. 6,000 to 7500/- which is minimum for semi-skilled labour. Further, the appellant has provided figures of salary and wages for per kg. production in similar industries. In appellant's case, the salary and wages per kg. production is in the range of 10%to 25% of other industries. There is no adverse findings in the assessment order on this submission. In view of the above facts and circumstances, I do not consider that there is excess payment on account payment for packing, loading and unloading charges made to contractors.

Considering the entire facts and circumstances of the case, in my view, no disallowance are required to made for the payment to contractors for loading, unloading and packing. Accordingly, the disallowance made to the contractors for each assessment year is hereby deleted. These grounds of appeal are allowed."

5. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the records.

6. We find that the main plank of AO's action was that these labour suppliers are either bogus or ex-employees of the assessee; that these persons were not found at their respective addresses. However, Id. CIT (A) in his order has given a finding that during the remand proceedings, 5 out of 6 contractors were produced before the AO and statements of these contractors were recorded by the AO. All of them confirmed that they have provided labour to the assessee company for packing and loading of finished product. Furthermore, before the Id. CIT (A), assessee produced the sixth contractor whose statement was also recorded. In his statement, he confirmed to have supplied labor for packing, loading and unloading.

6.1 Furthermore, another plank of AO is that the employee of the assessee company used to withdraw cash from the contractor's bank account. Ld. CIT (A) has noted that he has perused the banks accounts and the entries of withdrawal were self. Therefore, he held that cash withdrawn by the contractors and the contractors during the statement accepted that the employee of the assessee company used to accompany him at the time of withdrawal of cash from the bank and cash used to be carried in company's vehicle and this arrangement was used to ensure for the payment distributed to labourers hired for the work of the company.

6.2 Another plank of the AO is that these contractors are ex-employees of the assessee company. It has been submitted that this fact has been accepted. For this explanation, the assessee submitted that for continuous supply of labour, only reliable and known person can be deployed.

6.3 Another plank of AO is that in the computer of the assessee, bills of these contractors were found. It has been submitted that all the contractors have prepared the bills at the premise of the assessee as these contractors were only supplying labour and did

not have separate infrastructure. Furthermore, Id. CIT (A) has also found that the salary and wages per kg. production is in the range of 10% to 25% of other industries and there was no adverse findings in this regard in the assessment order. Furthermore, books have not rejected. been

7. Accordingly, in the background of aforesaid discussion, we do not find any infirmity in the well-reasoned order of Id. CIT (A), hence we confirm the same."

3.2 Respectfully following the order of the Co-ordinate Bench, ground no 1 in appeal of Revenue is decided against the Revenue.

4. **Second issue;** Now, coming to the question of disallowance u/s 14D r.w.r 8D, it comes up that the assessee and the Revenue are in appeal in all the three years under consideration. In AY 2007-08, a disallowance of Rs.53,42,806/- was made which has been made on the basis of average value of investment which has been restricted by the CIT(A) by excluding investment made in growth oriented mutual funds. The Id. AR has apprised that in assessee's own case relying the judgement in the case of **Abhisar Buildwell (2023) 149 taxmann.com 399**, in AY 2006-07 vide ITA No.3980/Del/2016, order dated 25.08.2023, assessment has been quashed and as the present year under consideration for i.e., AY 2007-08 is also of an unabated assessment, in the absence of any incriminating material

relied for making this addition, same cannot be sustained. We are completely in agreement with ld. AR and accordingly inclined to delete the addition made by the ld. tax authorities below for AY 2007-08.

4.1 In AY 2008-09, a disallowance of Rs.49,65,427/- was made by the ld. AO under Rule 8D(ii) and (iii), and the assessee had claimed before the CIT(A) that there were no administrative expenses and investments not resulting in exempt income were to be excluded. It was specifically pleaded that the investment made in Growth Option Mutual Fund fall outside the purview of section 14A and finally that disallowance u/s 14A cannot exceed exempt dividend income. The ld. CIT(A) agreed with the appellant assessee and directed the AO to restrict the disallowance to exempt dividend income earned during the year. The ld. AR has contended that the investments were made out of own funds and the interest bearing funds were not utilized for making investments.

4.2 Now admittedly, during the year 2008-09, net investment of Rs.7,78,30,470/- was made. On behalf of the assessee, the ld. AR has pointed out following;

- Opening cash and cash equivalents available with the assessee amounted to Rs.7,73,43,231 which may be regarded as generated out of cash flow from operating activities of the immediately preceding year 2008-09;
- Net cash from operating activities of the assessment year 2008-09 amounted to Rs.230,95,73,808 which by itself is sufficient to not only to cover the fresh investments made during the year but also the entire investments held by the assessee;
- No fresh borrowings were made by the assessee during the year under consideration. Instead, the assessee was able to repay the loans taken for business purposes out of its surplus funds. The same is evident from the face of balance sheet wherein the outstanding loan funds of Rs.237.32 crores as on 31.03.2007 are shown to have fallen to Rs.170.80 crores as on 31.03.2008;
- Assessee had huge accumulated reserves and surplus of more than Rs.912.86 crores as on 31.03.2008 which makes it patently clear that the assessee has sufficient interest free funds to make investments in shares/ mutual funds;

4.3 Then ld. AR has specifically relied the judgement of Hon'ble Gujarat High Court in the case of CIT vs. UTI Bank Ltd., 32 taxmann.com 370, in which SLP of the Revenue stands dismissed to contend that where assessee used own funds, disallowance cannot be made u/s 14A. Further, the ld. AR has submitted that in any case Growth Option Mutual Fund are outside the scope of section 14A and reliance was placed on the following two judgements:-

- (i) Manugraph India Ltd. vs. DCIT, ITA No.4761/Mum/2013 (Mumbai Tribunal); &
- (ii) Everest Kanto Cyliners Ltd., ITA No.7073/Mum/2012.

4.4 The ld. AR further submitted that even otherwise, the ld. AO has committed an error in making the disallowance by not excluding the investments not resulting in any exempt income during the year under consideration for which the judgement of the Hon'ble Delhi High Court in ACS India Ltd. vs. ACIT, 374 ITR 108 was relied. The ld. DR, on the contrary, relied the order of ld. AO.

4.5 Similarly, in AY 2009-10, the appellant received dividend income amounting to Rs.1,67,80,803/- from certain investments which was claimed as exempt u/s 10(34) of the Act. However, disallowance

was made u/s 14A by the AO on the ground that certain expenses must have been incurred towards earning of aforesaid exempt income and, accordingly, additions under Rule 8D(ii) and (iii) were made. The additions of the assessee were similar to those made in AY 2008-09. The CIT(A) in AY 2009-10 had directed the AO to restrict the disallowance excluding investment made in Growth Oriented Mutual Funds and has also directed to restrict interest disallowance under Rule 8D(ii) to the extent of interest payment from cash credit account as such investment is made from such account and immediate source of fund invested is cash credit facility. In regard to present year 2009-10, the ld. AR has pointed out that the net investment of Rs.87,75,37,048 was made and for which the fund flow and cash flow position was explained as follows:-

- Opening cash and cash equivalents available with the assessee amounted to Rs.7,63,73,941 which may be regarded as generated out of cash flow from operating activities of the immediately preceding year 2008-09;

- Net cash from operating activities of the assessment year 2009-10 amounted to Rs.126,17,47,638 which by itself is sufficient to cover the fresh investments made during the year by the assessee;
- Assessee had huge accumulated reserves and surplus of more than Rs.973.08 crores as on 31.03.2009 which makes it patently clear that the assessee had sufficient interest free funds to make investments in shares/ mutual funds;

4.6 Giving thoughtful consideration to the facts and circumstances and submissions, in regard to AY 2008-09 and AY 2009-2010, we are of the considered view that primarily the tax authorities have taken into consideration the personnel expenditure to conclude that such a big investment could not have been managed without human intervention although the assessee has claimed that the investments were made out of own funds. It was a question of fact for which sufficient facts were brought on record by the assessee on the basis of fund flow and cash proposition, as cited above. The Revenue cannot dispute the availability of huge accumulated reserves and surpluses and cash from operating activities in the year under consideration. There is no evidence that interest paid on borrowed funds had any

nexus with the investments made in shares/mutual funds. We are of the considered view that as there was sufficient funds available, the Revenue is not justified to make any addition u/s 14A.

5. **Third issue;** Ground of appeal raised by the Revenue, in AY 2007-08, is with respect to the deletion of addition of Rs.48,00,000 alleged to have been made by the assessee in purchase of land at Nasik. The Assessing Officer in this regard was of the view that the assessee has made the investment in the land out of the books of accounts and hence he added the amount of Rs.48,00,000 under Section 69 of the Act. Before CIT(A) the assessee pointed out that no incriminating material was found during the course of search which would show that the assessee has made any investment outside the books of accounts. In fact, the document which was relied upon by the Assessing Officer was a mere proposal for the purchase of alleged land and the proposal was never acted upon. The learned authorized representative of the assessee also pointed out that even after search, no details of any land at Nasik has been found. CIT(A) allowed the claim of the assessee and observed as under:

"(i) It has been stated by A.O. in assessment order that assessee failed to prove the source of payment made in cash for purchase of land. Therefore, an addition of Rs. 48 lacs has been made u/s 69 of the 1.T. Act, as unexplained investment.

(ii) In the appellate proceedings, appellant submitted that during the assessment proceeding, the appellant vide letter dated 27.02.2014, submitted before the A.O. that the above document in Annexure- A-2 at page 34, contains only proposal for purchase of land being gut no. 941 (9 acres), 974 (2.5 acres), 975 (4.5 acres), 979/980, 981 (9 acres) total 25 acres. It was further submitted that no such land was actually purchased by the appellant, either during the F.Y. 2006-07 or in any other previous or subsequent year(s). In support thereof, the appellant submitted before the A.O., complete details of land purchased by the appellant during the F.Y. 2006-07 to F.Y. 2012-13 and also, provided copies of their sale deeds and treatment in the books of accounts. Based on this, it was submitted that since no such land was ever purchased, the question of alleging cash payment does not arise at all. Therefore, it is respectfully submitted that the appellant had successfully discharged the burden cast under section 69 of the Act. It is further submitted that the documents so seized, on the basis of which, the above addition is made, were only proposals for purchase of certain land and there was actually no purchase of that land by the appellant.

(iii) In the appellate proceedings, it has also been submitted by the appellant that no cheque payments have been made for the alleged deal shown in the loose paper, inventoried as Annexure-A-2 at page 34. Therefore, it is claimed that not a single payment has been made through cheque and therefore, question of payment of cash amount did not arise.

From the above, it is clear that the deal of purchase of the land in loose paper seized, has not taken place and therefore, there is no question of payment of cash for such alleged deal and it was only a proposal.

In view of the above, I hold that alleged investment is not made, since, transaction has not materialized. Accordingly, I agree with the argument of the appellant and therefore, findings of the A.O. are erroneous. Therefore, addition of Rs. 48,00,000/- made u/s 69 of the Act, as unexplained investment, is deleted."

5.1 Learned CIT DR has relied upon the order of the Assessing Officer, without actually pointing out what was the direct evidence found in search, to counter the findings of CIT(A), and establish if at all any land was purchased. The findings of CIT(A) based on pure question of fact, disproved by assessee, require no interference.

6. **Fourth issue;** In AY 2007-08, the ground raised by assessee, arises from the fact that assessee is beneficiary of sales-tax subsidy of Rs.32.91 crores under Package Scheme of Incentives (Maharashtra), 1993. An additional ground was raised before the CIT(A) for claiming exclusion of this subsidy which was dismissed with following relevant findings:

"(iv) Further, during the appellate proceedings, the AR was asked to show as to how the subsidy amount has been accounted for in the books of accounts. However, it has been submitted by the AR that same has been claimed as exempt and sales have been made without charging/collecting sales tax from the

customers/purchasers. Therefore, the amount of sales tax chargeable. But not charged and collected on exempt sales, is not accounted for neither in P & L a/c nor in the balance sheet. Therefore, the question of offering the alleged subsidy of Rs.32.91 crores does not arise. Accordingly, in my considered opinion, this claim now made in the appellate proceedings for the first time, is not only imaginary one, but also false, as the income has not been affected/increased on account of such alleged subsidy. It will not be out of place to mention here that not a single entry, relating to the alleged claim, has been recorded in the regular books of accounts as:

1. Nothing has been mention in the final accounts and tax audit report (filed in Form 3 CD), and
2. AR failed to substantiate such claim in the appellate proceedings.

In view of the above, the additional ground, does not deserve to be admitted, as there is no merit in the alleged claim.

Accordingly, the additional ground is dismissed, as not admitted."

6.1 Admittedly the year under consideration AY 2007-08, is non-abated year, for the purpose of assessment under section 153A of the Act. Admittedly similar issue was raised by the assessee in assessment year 2006-07, which was also a *non-abated year of assessment* and the Co-ordinate Bench, dismissed the appeal of assessee as assessment was not on basis of any incriminating evidence found during search.

The co-ordinate bench has not commented upon the merits of the issue involved. Against the order of the Tribunal, assessee has preferred appeal before the Hon'ble Delhi High Court and Hon'ble High Court vide order dated 9.2.24 admitted the appeal on question of law as to whether an assessee is allowed to make additional claim in an unabated assessment. Thus as of now the issue of maintainability of additional claim before CIT(A), of AY 2007-08, is covered against the assessee and determined accordingly.

7. The issue is also common to AY 2008-09 and 2009-10. Admittedly the years involved are for *abated assessment years*. Since, revenue alleges that incriminating material was found in respect of the impugned years, the issue pending before the Hon'ble High Court doesn't operate against the assessee and the claim of assessee about maintainability of additional claim can be considered on merit for which the learned counsel for the assessee has drawn the attention of the Bench towards the judgment of Co-ordinate Bench in ITA No.5248/Del/2015 in the case of **Jindal India Ltd.I vs. ACIT**, where in too the year involved was abated year assessment and Co-ordinate

bench has held that the additional ground can be raised before CIT(A), with regard to claim of sales tax subsidy/incentive being treated as capital receipt. The co-ordinate bench has held as follows;

"22. We have given a thoughtful consideration to the orders of the authorities below. In so far as A.Y. 2009-10 is concerned, the only reason given by the learned Commissioner (Appeals) for not entertaining the claim of subsidy is that the same was claimed by way of a revised computation of income and is therefore, not allowable as per the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra).

23. We are of the considered view that the CIT(A) grossly erred in not appreciating the decision of the Hon'ble Supreme Court in its true perspective. In the judgment itself the Hon'ble Supreme Court has categorically laid down that there is no fetter on the appellate authority to entertain such claim."

8. The Co-ordinate Bench has not only admitted the claim of the assessee but also allowed the claim of the assessee. However, that case related to the subsidy in respect of West Bengal Incentive Scheme, 1999 and the present case is related to the Incentive Scheme of Maharashtra, 1993 for which Learned counsel appearing for the assessee pointed out that Hon'ble Delhi High Court in the case of **CIT V. Indo Rama Synthetics Ltd. [2024] 337 CTR (Del) 159** has considered the Incentive Scheme of Maharashtra, 1993 and held the receipts were capital in nature. This judgment of Hon'ble

Jurisdictional High Court, has discussed all the aspects, which CIT(A) has gone into and asserted by Ld. SR. DR. As no contrary view is cited by the ld. Sr. DR, we consider the issue to be covered in favour of the assessee on the basis of following findings of Hon'ble Delhi High Court in case of **Indo Ram (supra)**;

“12. We have heard the learned counsel for the parties and perused the record.

13. As would be evident from the narration of facts and the submissions recorded hereinabove, the nature of subsidy in the hands of an assessee is fact-centric.

13.1 What has uniformly emerged upon perusal of the case law cited by both sides is that the courts have applied the "purpose test" for concluding one way or the other as to whether the subsidy received should be treated one on capital or revenue account. The principles enunciated by the Supreme Court in Sahney Steel's case have been uniformly applied in all cases which followed decision.

14. In the Sahney Steel case, the Supreme Court dealt with an incentive scheme forged by the Government of Andhra Pradesh. The incentives were given in the form of refund of sales tax on raw materials, machinery and finished goods, subsidy on power consumed for production, exemption from payment of water rate on water drawn from sources which were not maintained at the cost of the government or any local body, refund of water rate in respect of water drawn from a government source or source maintained by any local body but returned after purification, limitation qua liability on account of assessment of land revenue or taxes on land use for the establishment of any industry and additional incentives to new industrial units set up in designated areas.

14.1 Although the aforesaid incentives were provided, their disbursement was linked to the commencement of production. Thus, an assessee became entitled to incentives only after the industrial unit began production.

14.2. The scheme framed by the Government of Andhra Pradesh did not envisage a direct or indirect disbursal of incentives for setting up the industry.

14.3 The Supreme Court, thus, based on its examination of the scheme, concluded that the incentives received by the assessee in that case were akin to an operational subsidy. In other words, the court concluded that the incentives/subsidies had to be treated as trade or supplementary trade receipts. Notably, a specific observation was made by the court concerning the refund of sales tax on the purchase of machinery, while repelling the argument made on behalf of the assessee that since a part of the refund was linked to a capital asset, it had to be necessarily treated as a capital receipt.

14.4 The observations made by the court in this context being significant and perhaps apposite in unravelling the predicament in which one can get caught while deciphering as to how the incentives received by the assessee in a given case should be treated, for convenience, are extracted hereafter:

*"18. Mr. Ganesh's further argument was that the three types of refunds contemplated in the scheme, the refund of sales tax on purchase of machinery must be treated as capital. The payment for the purchase of machineries must be of capital nature and the entire payment of sales tax must have been treated as capital expenditure of the Company. If any refund of sales tax paid on purchase of capital goods is made the refund will partake of the character which it had originally borne. Such refunds cannot in any circumstances be treated as trade receipts or supplementary trade receipts. This argument overlooks the basic principle laid down in the cases discussed above. It is not the source from which the amount is paid to the assessee which is determinative of the question whether the subsidy payments are of revenue or capital nature. The first proposition stated by Viscount Simon in *Ostime's Case* (supra) is that if payment in the nature of subsidy from public funds are made to the assessee to assist him in carrying on his trade or business, they are trade receipts. The sales tax upon collection forms part of the public funds of the State. If any subsidy is given, 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. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial. For example, 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*

capacity in a backward area, the entire subsidy must be held to be a capital receipt in the hands of the assessee. It will not be open to the revenue to contend that the refund of sales tax paid on raw materials or finished products must be treated as revenue receipts in the hand of the assessee. In both the cases, the Government is paying out of public funds to the assessee for definite purpose. If the purpose is to help the assessee to set up its business or complete a project as in Seaham Harbour Dock Company's Case(supra), the monies must be treated as to have been received for capital purpose. But if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade." [Emphasis is ours]

15. As noted hereinabove, this principle, i.e., the purpose test, has been applied in subsequent judgments rendered both by the Supreme Court as well as by various High Courts [See Ponni Sugars and Chemicals Ltd.; Chaphalkar Brothers and Nestle India Ltd.]

16. Therefore, what the court requires to examine while applying the purpose test to the incentive/subsidy received by an assessee are the following aspects: (i) First, does it assist in setting up an industry, as opposed to carrying out trade or business operations? (ii) Second, is the incentive/subsidy given to operate the industrial unit profitably and not for setting it up? (iii) Third, while employing the purpose test, the court is not concerned with the source, the timing or the mode and manner in which the subsidy is measured and paid. In other words, the quantification of the subsidy/incentive (whether it is linked to turnover or the cost of a capital asset) would not be a determinative factor in concluding the nature of the receipt. The purpose and the object with which the benefit/incentive/subsidy is extended would determine its character in the hands of the recipient, i.e., the assessee.

17. Against the backdrop of the aforesaid principles, it will be helpful to advert to the purpose and object of the 1993 Scheme. The purpose and object of the 1993 Scheme is best illustrated by referring to the preamble of the 1993 Scheme "In order to achieve dispersal of industries outside the Bombay-Thane- Pune belt and to attract them to the underdeveloped and developing 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. The Package Scheme of Incentives, introduced in 1964, was amended from time to time. The last amended Scheme, commonly known as the 1988 Scheme was operative from 1st October, 1988 to 30th September, 1993. The question of revising the 1988 Scheme to rationalise 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, had been under consideration of the Government. In the light of the experience gained in implementation of the earlier Schemes, particularly the 1988 Scheme, and in the changed circumstances of the liberalised industrial policy of the Government of India, and with a view to achieving the objectives outlined above, the Government has decided to revise the 1988 Scheme and bring into force a New Scheme, viz., the Package Scheme of Incentives, 1993 (hereinafter referred to as "the 1993 Scheme")."

[Emphasis is ours] 17.1 A careful perusal of the preamble would show that the 1993 Scheme was forged to achieve three broad objectives. (i) First, to disperse industries outside the Bombay[now Mumbai]-Thane- Pune belt and to attract new and expanded units to developing and underdeveloped areas of the State. (ii) Second, to rationalise incentives accorded by intensifying and accelerating the dispersal of units from developed to underdeveloped/developing areas. (iii) Third, the development of underdeveloped regions of the State, particularly those which were at some distance from the Bombay [now Mumbai]-Thane-Pune belt. 17.2 Thus, the central theme, object and purpose of the 1993 Scheme was to industrialise underdeveloped and developing areas which fell outside the Bombay [now Mumbai]-Thane-Pune belt by incentivising the setting up of new and expanded units.

18. A closer look at the 1993 Scheme would show that the following incentives were envisaged as captured in paragraph 5 of the said scheme: "5. INCENTIVES The incentives under the 1993 Scheme will be admissible to a New Unit/Pioneer Unit/Prestigious Unit, and will be in the nature (i) Sales Tax Incentive by way of Exemption/Deferral/Interest-Free Unsecured Loan, (ii) Special Capital Incentive for SSI Units, (iii) Refund of Octroi/Entry Tax (in lieu of Octroi), (iv) Refund of Electricity Duty, (v) Concession in the Capital Cost of Power Supply, and (vi) Contribution towards the Cost of Feasibility Study."

19. Each of the incentives referred to above was made admissible to either one or more of the following units categorised as new/pioneer or prestigious. 19.1 A perusal of the definition of new unit/pioneer unit/prestigious unit would show that there is a common denominator: a brand-new unit had to be set up. The only difference was that insofar as the pioneer unit was concerned, it included a large-scale new unit or a large-scale fixed capital investment made by an existing unit. In other words, there was an expansion of an existing unit.

19.2 Insofar as the prestigious unit was concerned, its definition is almost similar to a pioneer unit; the only difference being that it had to be set up in a specific district, i.e., Gadchiroli District. It is common knowledge that Gadchiroli is a problematic area for more than one reason; therefore, setting up an industry in that area is challenging.

20. Besides this, the scheme also refers to a sick unit, which, as per the definition provided in paragraph 3.17 of the scheme, includes a small-scale industrial unit.

21. Therefore, the common thread running through various incentives provided under the scheme (to which we have referred above) was the setting up a new unit or large-scale investment in fixed capital. The fact that the eligibility certificate was to be issued by the agency implementing the scheme after the commencement of commercial production by the eligible unit appears to have been incorporated in the 1993 Scheme to ensure that the object and the purpose of the 1993 Scheme, which was to industrialise underdeveloped and developing areas was fulfilled.

22. Thus, in our opinion, the argument advanced on behalf of the appellant/revenue that a perusal of paragraphs 3.1 and 3.3 of the 1993 Scheme would show that the incentives were tied in with production is untenable. The complete focus of the 1993 scheme was to achieve the object, as noticed above, engrafted in its preamble.

23. As noticed hereinabove, the respondent/assessee was entitled to avail of sales tax subsidy/incentive under two eligibility certificates dated 13.12.1994 and 15.10.1996 [as amended] for 14 years and 13 years & 11 months, respectively, subject to a maximum entitlement of 110% of capital investment made in setting up of the industrial units.

23.1 Investment in capital assets such as land, buildings, plant and machinery was only a measure adopted for calculating the sales tax subsidy/incentive [which in this case was availed by the respondent/assessee by retaining the sales tax it had levied on its goods].

23.2 A perusal of the eligibility certificate dated 13.12.1994 would show that it was issued for setting up a "new unit", while the eligibility certificate dated 15.10.1996 was given to a "pioneer unit" which had undertaken expansion.

24. Therefore, the argument that the sales tax subsidy/incentive was granted to assist in carrying on business operations and thereby help make the industries more profitable, both on facts and in law is untenable.

25. At the risk of repetition, it must be stated that the sole purpose of the 1993 Scheme was to set up new units and/or expand existing units in underdeveloped and developing areas; an aspect which also emerges on perusal of classification of areas given in paragraph 1.3 of the 1993 Scheme. 25.1 In the categorisation, a clear distinction has been drawn between developed areas [Group A] and those where some development has taken place [Group B] or are less developed than those falling under Group B [Group C], those which are the least developed areas of the State not covered under Group A/Group B/Group C [Group D] and areas which are least developed lacking basic infrastructure and not covered under Group A, Group B, Group C and Group D [Group D+]. 26. The fact that the 1993 Scheme is different from the scheme which the Andhra Pradesh Government framed [which was considered in *Sahney Steel*] is evident upon perusal of the order passed by the CIT(A). The finding of fact returned by the CIT(A) is that the 1993 Scheme is akin to the 1979 Scheme considered in *DCIT v. Reliance Industries Ltd.* 26.1 Even though the appellant/revenue did not inform us as to whether the decision of the special bench of the Tribunal rendered in *DCIT v. Reliance Industries Ltd* was carried further in appeal, we are of the opinion that the frame of the 1993 Scheme clearly indicates that it was mainly envisaged to industrialise underdeveloped and developing areas and not to improve the production capability or profitability of industrial units, which may have been incidental benefits of the said scheme. 27. Apart from the *Sahney Steel* judgement, Mr Shlok Chandra, on behalf of the appellant/revenue, has also cited the decisions rendered in *Commissioner of Income Tax v Rassi Cements Ltd* by the Andhra Pradesh High Court, *Wardex Pharmaceuticals (P.) Ltd v ACIT* by the Madras High Court and lastly, a judgement of this court in *Commissioner of Income Tax v Steel Authority of India Ltd.* A close perusal of these judgements would show that they are distinguishable on facts.

27.1. In *Rassi Steel*, the court was called upon to decide whether the power subsidy received by the assessee under an incentive scheme framed by the State of Andhra Pradesh was a revenue receipt. The court concluded that the power subsidy received by the assessee [albeit after the commencement of production] was based on actual power consumption and, hence, had nothing to do with investment subsidy for establishing industries in backward areas. It is in this context that the court ruled that the power subsidy received was a trading receipt and, hence, taxable.

27.2. The *Wardex* case concerned financial assistance received by an assessee from the Government of West Bengal under a scheme titled "West Bengal Industrial Promotion (Assistance to Industrial Units) Scheme, 1994". The scheme brought registered dealers within its sway who manufactured specified goods in West Bengal via SSI units. The scheme also provided that for obtaining assistance, one of the parameters which was operable was that the registered dealer should not have discontinued manufacturing activities for fifteen (15) days. It was only when these requirements stood fulfilled that the assessee was extended financial assistance equivalent to 90% of the sales tax paid by him for a quarter.

27.3 The court noted that there was no provision in the scheme that financial assistance would be given to invest in a fixed asset or establish a new unit. Given these peculiarities, the court concluded that the financial assistance obtained by an assessee would have to be treated as a revenue receipt. Clearly, the facts obtaining in the said case are distinguishable from those that arise for consideration in the aforementioned appeals.

27.4 Insofar as *Steel Authority of India Ltd* is concerned, it must be noted that it is a cryptic order in which the court notes that the assessee had received a grant-in-aid from the Central Government for operations and not to bring into existence a new asset. Based on the purpose test evolved in *Sahney Steels Ltd*, the court answered the question of law as framed in favour of the revenue. In other words, the court held that the grant-in-aid was a revenue receipt. Once again, we must emphasise that the facts mentioned in the judgement suggest that the aid received was on the revenue account.

Conclusion: 28. Given the foregoing discussion, we are not inclined to interfere with the impugned order dated 22.06.2012 passed by the Tribunal concerning AY 1997-98. The question of law, as framed in *ITA 393/2014*, is answered in favour of the respondent/assessee and against the appellant/revenue. The sales tax

subsidy/incentive received by the respondent/assessee under the 1993 Scheme was a capital receipt.”

9. However, the assessee has not provided the working of the quantum of the subsidy arrived in its books of account so we restore the matter back to the file of the Assessing Officer for quantifying the exact amount of the subsidy after calling replies from the assessee and supportive documents in this regard. In other words, the issue of exemption of sales-tax subsidy has been principally accepted to be termed as capital receipts but for the limited purposes for the quantification of the figures, the matter is restored to the Assessing Officer.

10. In the result, the appeals of assessee for AY 2007-08 is allowed partly and of other years in hand is allowed with consequences to follow as per the determination of issues above and appeals of revenue are dismissed.

Order pronounced in the open court on 04.06.2024.

Sd/-
(G.S. PANNU)
VICE-PRESIDENT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 04th June, 2024.

Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi