**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, VP AND**
**SHRI NARENDRA KUMAR BILLAIYA, AM**

ITA No. 764/Mum/2016 (Assessment Year: 2010-11)
ITA No. 735/Mum/2017 (Assessment Year: 2011-12)
ITA No. 7251/Mum/2017 (Assessment Year: 2012-13)

| ACIT-3(1)(1)<br>Room No. 607, 6th Floor,<br>Aayakar Bhavan, Mumbai-400 020 | Vs. | M/s. Bajaj Hindusthan Sugar Ltd.<br>(Formerly Bajaj Hindusthan Sugar & Industries Ltd.)<br>Bajaj Bhavan, 2nd Floor,<br>Jamnalal Bajaj Marg,<br>226, Nariman Point,<br>Mumbai-400 021 |
|---|---|---|
| PAN/GIR No. AAACB 4351 J | | |
| (**Revenue**) | : | (**Assessee**) |

ITA No. 5806/Mum/2012 (Assessment Year: 2009-10)
ITA No. 788/Mum/2016 (Assessment Year: 2010-11)
ITA No. 7445/Mum/2017 (Assessment Year: 2012-13)

| Bajaj Hindusthan Sugar Ltd.<br>Bajaj Bhavan, 2nd Floor,<br>Jamnalal Bajaj Marg,<br>226, Nariman Point,<br>Mumbai-400 021 | Vs. | ACIT-3(1)<br>4th Floor, 628, Aaykar Bhavan,<br>M K Road, New Marine Lines,<br>Mumbai-400 020 |
|---|---|---|
| PAN/GIR No. AAACB 4351 J | | |
| (**Assessee**) | : | (**Revenue**) |

| **Assessee by** | : | Shri Kirit Kamdar |
|---|---|---|
| **Revenue by** | : | Shri Kailash C. Kanojiya &<br>Ms. Monika H. Pande |

| **Date of Hearing** | : | 05.12.2024 |
|---|---|---|
| **Date of Pronouncement** | : | 17.12.2024 |

**O R D E R**

Per Saktijit Dey, VP:

The captioned appeals arise out of separate orders of learned Commissioner of Income Tax (Appeals), Mumbai ('ld.CIT(A) for short). Appeals relate to the assessment years (A.Y.) 2009-10, 2010-11, 2011-12 & 2012-13.

**ITA No. 5806/Mum/2012 – Assessee's appeal (A.Y.: 2009-10)**

2. The memorandum of appeal contains two grounds. In Ground no.1, the assessee has raised the issue relating to nature and character of subsidy/incentive received of Rs.9,06,95,758/- under The New Sugar Promotion Policy, 2004 of the Government of Uttar Pradesh - whether capital or revenue.

3. Briefly, the facts relating to this issue are, the assessee is a resident corporate entity engaged in manufacturing and sale of sugar. For the assessment year under dispute, the assessee filed its return of income on 29.09.2009, declaring loss. Subsequently, the assessee filed a revised return of income on 25.03.2011, again, showing loss of Rs.200,25,23,878/- and claimed TDS credit, not claimed in the original return of income. In course of assessment proceedings, the Assessing Officer (AO), while verifying the return of income and financial statements of the assessee, noticed that though the assessee in the year under consideration has received an amount of Rs.9,06,95,758/- towards subsidy/incentive under New Sugar Promotion Policy 2004 declared by the Government of Uttar Pradesh, however, the said receipt was not offered as income, claiming that it is in the nature of 'capital receipt', hence, not liable to tax. The A.O. did not agree with the claim of the assessee. After issuing a show cause notice, requiring the assessee to explain as to why the receipt should not be treated as 'revenue in nature', the A.O. completed the assessment, treating the subsidy as 'income of the assessee'. Though the assessee contested the aforesaid addition before learned first appellate authority, however, the addition was upheld.

4. Before us, ld. Counsel appearing for the assessee submitted that the issue is squarely covered in favour of assessee by various decisions of the Tribunal. In this context, he drew our attention to Tribunal's orders in A.Ys. 2007-08, 2008-09 and 2009-10.

5. Though, learned Departmental Representative ('ld. DR' for short) fairly agreed that the issue has been decided in favour of the assessee in earlier assessment years, however, he relied upon the observations of the departmental authorities.

6. We have considered rival submissions and perused the materials on record. The facts on record reveal that in terms with the New Sugar Promotion Policy issued by the Government of Uttar Pradesh, the assessee received various subsidies/incentives, including exemption from collection and payment of Value Added Tax (VAT) and Central Sales Tax (CST), etc. The dispute between the parties is regarding the nature and character of subsidy/incentive received whether - capital or revenue.

7. On perusal of the facts and materials on record, it is noticed that it is a legacy issue recuring from A.Y. 2007-08 onwards. While deciding the issue for the first time in A.Y. 2007-08, the Tribunal in ITA No. 5058/Mum/2012, vide order dated 12.01.2023 has decided the issue in favour of the assessee, holding that the subsidy/incentives received under New Sugar Promotion Policy issued by Government of Uttar Pradesh is 'capital in nature'. The same view has been reiterated by the Tribunal in A.Y. 2008-09 and the latest order passed for A.Y. 2009-10 in ITA No. 4446/Mum/2013 and 3714/Mum/2013 dated 28.08.2024. The observations of the Tribunal in this regard are as under:

> *13. Heard both the sides and perused the material on record. Without reiterating the fact as discussed above with the assistance of ld. Representative, we have perused the decision of ITAT vide ITA No. 5058/M/2012 for A.Y. 2007-08 dated 12.01.2023, the relevant extract of the decision is reproduced as under:*
>
> > *"18. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above the assesse is a public limited company engaged in in the manufacturing of sale of sugar. It has set up new sugar plant under the new Sugar Industry Promotion Policy, 2004 announced by the State Government of Uttar Pradesh in the year 2004 for the development and growth of sugar industry in the State of Uttar Pradesh as per the copy of policy placed in the paper book from page no. 125 to 226. Under the object of the New Sugar Industry Policy, 2004 it is stated that from the sugar industry of Uttar Pradesh revenue of more than Rs.400 crores is earned by State and Central Government*

*through purchase tax and excise duty. This industry lead to social and economic development of the area in which the industry is located by establishing new sugar mills. There will be increased in the capital and there will be also increased in the revenue for the state in few years. Capital of Rs.2000 crores is required for setting up mills in private sector with capacity of 1 lakh tcd. For this purpose state will have to provide economic concession special packages to industrialists for few years. Hence, the well planned Sugar Industry Promotion Policy is required which attract industrialists from private sector to set up sugar industry in the state. In the New Industries Policy 2004 for capital subsidy, following special incentives will be considered for a period of 10 years from the date of establishment over and above the facilities provide:*

*1. Entry Tax on sugar 2. VAT on Molasses*
*2. Administrative charge on Molasses 4. Stamp duty & Registration fees on land*
*5. Purchase tax on cane 6. Reimbursement of Transportation (Exemption/Reimbursement cost (Cane/Sugar)*
*7. Reimbursement of society Commission 7. Reimbursement of State Cess (Excise Share)*

*The scheme and benefit received were given in the submission made by the assesse during the course of assessment are reproduced as under: "BHL made a capital investment in excess of Rs.500 crores for commissioning various new sugar plants, distilleries and co-generation plants at several location in the state of UP and commenced production before 31' March, 2008.*

*In terms of the Policy and Notifications issued therein, BHL was granted Eligibility Certificate for five years vide letter dater dated 31' October 2005 on investing in excess of Rs.350 crores under first stage The eligibility was extended upto ten years on investing in excess of Rs.500 crores under second sage vide letter dated 31 January, 2001 Accordingly, BHL has been availing various benefits under the policy:*

*The various benefits under the Policy can be classified into the following-*

*A. Subsidy and exemptions of capital nature, which includes:-*

*i. 10% subsidy on Hexed Capital Investment*
*ii. Exemption from payment of registration charges on land.*
*iii. Exemption from payment of stamp duo on land.*

*B. Exemption from collection and deposit which includes:*
*i. Exemption from payment of UPT7 (now vat) and CST on sale of molasses.*
*ii. Zero rate of Administrative charges on molasses produced by such Units*
*iv. Exemption from payment of entry tax on sale of non levy sugar produced by such units.*
*C. Other reimbursements and exemptions, which includes:-*

> *i. Reimbursement of society commission on cane purchase.*
> *ii. Reimbursement of freight subsidy on sugar transportation.*
> *iii. Reimbursement of freight subsidy on transport of sugar cane.*
> *v. Exemption from payment of purchase tax on sugarcane. In the return of income, the aforesaid incentives granted under the polity were not excluded while computing the total income.*

*In this regard, it is submitted by BHL that the various incentives envisaged under the Policy are in the nature of the capital receipts and accordingly. not liable to tax. It is further submitted that the following incentives ought to be allowed as a deduction while computing then total income.*

*1. The receipt of the 10% capital subsidy and exemption of registration charges and stamp duty as mentioned in A' above ought not to be reduced from the cost of assets under section 43(1) of the Act.*
*2. The following notional amount of incentives referred in 'B' above are in the nature of capital receipts and ought to be reduced while computing the total income.*

| *Incentives* | |
|---|---|
| *Exemption from payment of UP7T9nowvvat) and CST on sale of molasses* | *Rs. 1,901,637* |
| *Zero rate of Administrative Charges on molasses produced by such units* | *30,215,867* |
| *Exemption from payment of entry tax on sale of non leg sugar produced by such* | *36,852,585* |
| *Total* | *68,970,08* |

*4. The incentives in the form of exemptions and reimbursements referred to in 'C' above amounting to Rs.560,779,698 are in the nature of capital receipts not eligible to tax and accordingly, ought to be excluded from the total In this connection on behalf of BHL, we wish to make the following submissions:-*

*The Government of UP introduced the now Sugar Industry Promotion Policy, 2004, inter alia, with the avowed objective of promotion of establishment of new sugar factories in the private sector to speed up industrialisation of the State. The preamble to the Policy states the proposed objectives as follows.*

*"to attract private investment in the field of the Cane Development and sugar industry by establishing sugar mills in private sector to augment the industrial Development in the State.*

*Under the Polig, now sugar factories are given incentives. The period/ quantum of various concessions/ incentives have been linked to the amount of fresh investment made for the establishment of the new sugar mill, although the incentives are to be disbursed after the establishment of the unit. The salient fatures of the background note to the polig are reproduced hereunder-*

*"Why new Sugar Industa Promotion Polity needed?*

*The total number of sugar factories working in the State is 101 having a total cane crushing capacity of 3 96 lacs TCD out of which 22 sugar mills are under State Sugar Corporation, 27 in Coopérative Sector and 52 sugarmills are established in private sector. It is clear from the basis of the average of the last 5 years that all these sugar factories are able to crush only 41.04% of the total cane produced in the state and the rest is consumed in Gur khandsari. Seed Juice, fodder and chewing.*
*Percentage of Consumption of Cane in UP*

| | | *Other consumption* |
|---|---|---|
| *Average of 1999-00to 200304* | *Sugar Mills* | *58/96%* |
| *Consumption of Cane %* | *48.85%* | *51.15%* |

*It is this clear that in UP there I savallabilio of sugarcane which can be used as raw material by the sugar mills, however, due to the sickness of the sugar mills belonging to the State Sugar Corporation mid stagnation in the expansion of the production capacity of*

*the sugar mills belonging to the Co-operative sector and due to the lack of availability of the requisite capacity in the sugar mills belonging to the private sector, gradually the State's sugar industry is lagging behind. The sugarcane farmers have to sell their produce to the Handsari/Gur Industry at quite low prices, as a result of which, on the one hand farmers are not able to get adequate price for their produce, on the other hand, contribution to the programmes for the development of the rural areas and wolfare of the common people is mostly negligible.*

*Demand and supply of sugar in the country by 2010-11*

*It is estimate that in the year 2010-11 the country's total population would be approximately 120.75 crores Due to the increase in the country's per capital average consumption of sugar, till 2010-11, 276.02 lakh tonnes of sugar would be needed for internal consumption. For the target of taking the State's contribution in the country's sugar production from 28.06% in the year 2002-03 to 30% in the year 2010-11, in the State approximately 75 lakh tonne sugar would have to be produced. It is estimated that there would be substantial increase in the country's average per capita consumption of sugar and in order to satisfy this increase demand the country's two big sugar producing States up and Maharashtra would have to come forward Since in Maharashtra the percentage utilization of sugarcane for producing sugar is at the maximum possible, therefore, UP is the only State when' by increasing the drawal percentage of sugarcane, the increased demand for sugar in the country can be met. Keeping in view the State's limited financial resources, the sick condition of the mills belonging to the Corporation, stagnation in the mills of the Co-operative sector and the inability of the mills in the private sector to completely utilize the sugarcane produced, the need is being felt for encouraging the private sector to invest funds for setting up sugar mills which are of global standards, having sugarcane crushing capacity of 5000 TCD or more. In order to meet the domestic consumption of sugar at 6% GDP growth rate, it would be required to set up mills having approximately one lakh tonne per day capacity and thus create additional capacity. The requirement of sugarcane for this increased capacity can be met by increasing the current drawal percentage of sugarcane from 5 to 7% It must also be clarified that at which ever place a new sugar mill is set up the sugarcane area of that place increases as a result of which there is no possibility of difficulty in sugarcane supply for the increased capacity. In view of the above, in order to establish new sugar mills in the State the only option is to attract industrialists in the private sector, since in view of the lack of lands the possibility of setting up mills in the Government or the Co-operative sector is negligible in order to set up new sugar mills in the private sector having capacity of one lakh tonnes per day, investment of approximately Rs 2000 crores would be needed. For creating that additional capacity, in the initial years the State Government would be required to provide special economic promotion to the industrialists in the form or special packages."*

*On the perusal of the aforesaid policy the purpose/ rational behind disbursement of subsidy/ incentive under the Polig and the primary considerations, intention and the objective sought to be achieved by the Polig are summarized as under-*

*1. Private investment in sugar industry for augmenting the industrial development in the State.*
*2. Give boost top Sugar Industry which was the only industry in the State dedicated 100% to rural economy, pproipen 0 and development*
*3. Increase in sugar production to utilizes the vast cane area in the State.*
*4. Protection of financial interests of cane farmers.*
*5. Rapid rural development and increase in revenues of the  Government.*
*6. Generation of employment opportunities."*
*"19. In terms of the New Promotion Policy of Sugar Industry of Uttar Pradesh Government the assesse company was granted eligibility certificate for 5 years vide letter dated 31.10.2005 on investing in excess of Rs.350 crores under first stage. The eligibility was*

*extended up to 10 years of investing in excess of Rs. 500 crores under 2nd stage. Therefore various benefit under the policy were availed by the assesse as discussed supra in this order. After referring the various clause of the new industry policy the assesse submitted that the various incentives given under the policy were in the nature of capital receipts. The assesse submitted that incentives granted under the policy were in the nature of the capital receipts. In this regard, we have perused the various judicial pronouncements referred by the counsel in the case of CIT Vs. Ponni Sugar & Chemical Ltd. (2008) 174 taxman 87 (SC) it is held that the test is that the character of receipt in the hands of the assesse has to be determined with respect to the purpose for which the subsidy is given. In other words in such cases one has to apply purpose test. The point of time at which the subsidy is paid is not relevant. The form of subsidy is immaterial. In the case of Everest Industries Ltd. Vs. Joint CIT (2018)19 taxman.com 330 (Mumbai Tribunal) held that sale tax incentive received by the assesse was considered as capital receipt by the A.O same was not required to be reduced from cost of assets for purpose of computing depreciation.*

*In the case of CIT Vs. Shri Balaji Alloys & Other (2016) 181 CTR (SC) 459 held that excise refund and interest subsidy received by the assesse in pursuance of incentive announced and sanctioned by the Government of India is capital receipt. In the case of Shri Balaji Alloys Vs. CIT (2011) 198 taxman.com 122 (Jammu & Kashmir), it is held that amount of excise refund and interest subsidy received by industrial unit in pursuance of incentives announced in terms of new industrial policy for accelerated industrial development in the State of J & K would be capital receipt in the hands of such Industrial Unit. In the case of CIT Kolhapur Vs. Chaphlekar Brothers Pvt. Ltd. (2017) 88 taxman.com 178 (SC) held that where object of respective subsidy schemes of state of Maharashtra provided for exemption to multiplexes from entertainment duty for a period of 3 years remission for further period of 2 years was to encourage development of Multiple Theatre Complexes, incentive would be held to be capital in nature and not revenue receipts. In the case of ACIT Vs. Gems Electrotech Ltd. (2016) 71 taxman.com 101 (Ahd Tribunal) wherein held that sale tax and excise duty subsidy received by the assesse for purpose of industrialization was capital receipt. In the case of PCIT Vs. Capgemini India (P) Ltd. (2018) 90 taxmann.com 409 (Bombay) held that grant received by assesse from state govt. in shape of allotment of land for purpose of granting employment for over 3000 people, was to regarded as capital receipts. The ld. Counsel has also furnished similar judicial pronouncements of ITAT Benches. The assesse has also demonstrated that subsidy was granted for setting up sugar industry in general and not for acquisition of any asset, therefore, same also not to be reduced from the cost of asset. The assesse has demonstrated from the material as referred above and furnished before the lower authorities that various incentives were granted under the New Sugar Industry Promotion Policy 2004 for the purpose of development and growth of sugar industry in the state and same has to be considered as capital in nature. Therefore, after considering the facts and judicial findings on the issue as discussed supra, we find the decision of ld. CIT(A) is not justified therefore the ground of appeal of the assesse is allowed.*

*14. We find this recurring issue is squarely covered by the earlier decision of the ITAT in the case of the assessee itself as discussed above therefore following the decision of ITAT this ground of appeal of the assessee is allowed.*

8. Facts being identical, respectfully following the consistent view expressed by the co-ordinate benches, we hold that the subsidy/incentive received under The New Sugar Promotion Policy, 2004 of the Government of Uttar Pradesh, being in the nature of capital receipt, is not taxable. Hence, this ground is decided in favour of the assessee.

9. In ground no.2, the assessee has raised the issue of addition of an amount of Rs.7,18,682/- on account of non-reconciliation of ITS details.

10. Briefly, the facts are, in course of the assessment proceeding, the A.O. noticed that certain transactions appearing in ITS were not offered to tax by the assessee. He, therefore, called upon the assessee to reconcile the difference. In response to the query raised, the assessee submitted that the transactions do not relate to it. However, rejecting assessee's contention, the A.O. added back an amount of Rs.7,18,682/- to the income of the assessee.

11. Before us, ld. Counsel appearing for the assessee submitted that the dispute is in relation to the following transactions:

| *Txn Code* | *Txn Filler Name* | *Amount (Rs.)* |
|---|---|---|
| *2* | *Rauzagaon chini Mills (A unit of Balrampur Chini Mills Ltd.), Faizabad* | *6,04,707* |
| *4* | *Standard Chartered Bank, Fort, Mumbai* | *28,072* |
| *5* | *Standard Chartered Bank, Fort, Mumbai* | *65,397* |
| *5* | *American Express Bank Ltd., 21, Old Court House Street, Kolkata – 700001* | *20,506* |
| | *Total* | *7,18,682* |

12. Explaining further, he submitted that these transactions do not relate to the assessee. He submitted, insofar as the amount of Rs.6,04,707/- is concerned, the party concerned has uploaded a revised Form No. 26AS, wherein assessee's name does not appear. Insofar as the rest of the transactions are concerned, he submitted, once the assessee has denied the transactions, the burden is entirely on the A.O. to make proper enquiry to find out whether the transactions actually relate to the assessee. In this context, he relied upon a decision of the co-ordinate bench in case of *M/s. Pfizer Limited vs. JCIT* (in ITA No. 4826/Mum/2016 vide order dated 30.08.2019).

13. The ld. DR relied upon the observations of the departmental authorities.

14. We have considered rival submissions and perused the material on record. Undisputedly, in response to the query raised by the A.O., the assessee has completely denied that it was in any way involved in the disputed transactions. Once, the assessee denies its involvement in the transactions, duty is cast upon the A.O. to make thorough enquiry and ascertain the veracity of assessee's claim. In the facts of the present appeal, the departmental authorities, in our view, have failed to do so. Insofar as the alleged transaction of Rs.6,04,707/- with Rauzagaon Chini Mills (A unit of Balrampur Chini Mills Ltd.), Faizabad is concerned, the assessee has submitted before us that the concerned party has uploaded revised Form 26AS, wherein the particular transaction does not appear in the name of the assessee. The A.O. is directed to factually verify this fact and delete the addition. Insofar as the rest of the transactions alleged to have been entered into with Standard Chartered Bank, Fort, Mumbai and American Express Bank Ltd., it is the duty of the A.O. to make proper enquiry to ascertain whether the transactions actually relate to the assessee or not. In case the transactions do not relate to the assessee, the additions made have to be deleted. This ground is allowed for statistical purpose.

15. In the result, the appeal is partly allowed.

**<u>ITA No. 788/Mum/2016 – assessee's appeal for A.Y. 2010-11</u>**

16. In this appeal, the assessee has raised a solitary ground in the memorandum of appeal. However, vide letter dated 07.06.2021, the assessee has raised the following additional ground:

> *1. On the facts and in the circumstances of the case and in law, the appellant prays that if the incentives received under the New SugarIndustry Promotion Policy are held to be in nature of capital receipt, then, the same ought to be reduced while computing the book profit under section 115JB.*

17. Insofar as the main ground is concerned, it is in relation to taxability of subsidy/incentive received under New Sugar Promotion Policy, 2004 issued by Government of Uttar Pradesh. While dealing with identical issue in ITA No. 5806/Mum/2012, in the earlier part of the order, we have deleted similar addition. The decision taken by us therein, will apply *mutatis mutandis* to this ground also. Hence, this ground stands allowed.

18. Insofar as the additional ground is concerned, considering the fact that the issue raised therein can be decided based on the facts and material on record, we are inclined to admit the additional ground.

19. Having heard the parties, we find the issue raised in the additional ground is squarely covered by the decision of the Tribunal in assessee's own case for A.Y. 2009-10 (supra). While dealing with the identical issue, the co-ordinate bench has held as under:

> *19. We do not find any merit in this ground of appeal of the revenue, following the decision of the ITAT Mumbai in the case of the assessee of earlier years as discussed supra in this order. We have adjudicated the ground no. 2 of the assessee holding that incentive received under the New Sugar Industry Promotion Policy, 2004 of Uttar Pradesh Government are of the nature of capital receipt, therefore we direct the assessing officer to reduce the same while computing the book profit u/s 115JB of the Act.*

20. Facts being identical, respectfully following the decision of the co-ordinate bench, we delete the addition. Hence, grounds are allowed.

21. In the result, the appeal is allowed.

**ITA No. 764/Mum/2016 – Revenue's appeal for A.Y. 2010-11**

22. In total, the Revenue has raised four grounds. In ground nos. 1 & 2, Revenue has challenged the deletion of disallowance of Rs.8,17,00,393/- made u/s. 14A read with Rule 8D(2).

23. Briefly, the facts are, in course of assessment proceeding, the A.O. noticed that in the year under consideration, the assessee has received exempt income by way of dividend amounting to Rs.3,69,29,271/-. Whereas, *suo motu,* the assessee has disallowed an amount of Rs.10 lacs based on proportionate salary cost of employees engaged in investment activity, rent, office administration, electricity, etc. Being of the view that the *suo motu* disallowance made by the assessee is not in accordance with Rule 8D(2), the A.O. rejected the computation of the assessee and proceeded to compute the disallowance, following the methodology of Rule 8D(2). While doing so, he disallowed interest expenses amounting to Rs.4,39,15,076/- under Rule 8D(2)(ii) and administrative expenses of Rs.3,87,85,317/- under Rule 8D(2)(iii), total disallowance aggregating to Rs.8,27,0,393/-. After reducing the *suo motu* disallowance made by the assessee, the A.O. made a net disallowance of Rs.8,17,00,393/-. The assessee contested the afore-said disallowance before learned first appellate authority.

24. After considering the submissions of the assessee in the context of facts and materials on record, learned first appellate authority observed that while rejecting the *suo motu* disallowance made by the assessee, the A.O. has not recorded a valid satisfaction in terms of section 14A(2) of the Act, as to why the disallowance made by the assessee is incorrect having regard to its accounts. The learned first appellate authority further held that when the assessee had mixed kitty of interest bearing and interest free fund, no disallowance of interest expenses under Rule 8D(2)(ii) could have been made. In the aforesaid premises, he deleted the disallowance made by the A.O.

25. We have considered rival submissions, and perused the materials on record. Factual matrix reveals that the *suo motu* disallowance of expenses u/s. 14A of the Act was made

by the assessee adopting a consistently followed method. While computing the disallowance, the assessee has taken into account proportionate salary cost of persons engaged in investment activity, office administration, electricity, office equipment and depreciation and miscellaneous expenses. A reading of the assessment order clearly reveals that before rejecting assessee's computation of *suo motu* disallowance and applying Rule 8D, the A.O. has not recorded any positive satisfaction to establish that the *suo motu* disallowance made by the assessee is incorrect, having regard to its accounts. Further, the fact that the assessee has surplus interest free fund, could not be controverted by the Revenue.

26. In such circumstances, we do not find any infirmity in the decision making process of learned first appellate authority. Our decision above is further bolstered by the decision of the co-ordinate bench in assessee's case in A.Y. 2008-09 vide ITA No. 2059 and 2218/Mum/2018 dated 03.05.2024, wherein, under identical facts and circumstances, disallowance made u/s. 14A read with Rule 8D, was deleted by the Tribunal. In view of the aforesaid, we uphold the decision of learned first appellate authority by dismissing the grounds.

27. In ground no. 3, the Revenue has challenged the deletion of addition of Rs.78,16,73,943/-, on account of gain on foreign exchange fluctuation, in respect of foreign currency convertible bonds (FCCB).

28. Briefly, the facts are, in course of assessment proceedings, the A.O. noticed that in the year under consideration, though, the assessee has received certain amount towards gain on foreign exchange fluctuation on FCCBs, however, the said receipt was not offered

as 'income'. Being of the view that such gain has arisen on revenue account, the A.O. treated it as income of the assessee.

29. While deciding the issue in appeal, learned first appellate authority followed the decision taken by his predecessor in assessee's case in A.Y. 2009-10 and held that the gain is in the nature of capital receipt, hence, not taxable.

30. Before us, the parties have agreed that while deciding identical issue in assessee's case in A.Ys. 2007-08, 2008-09 and 2009-10, the co-ordinate bench has restored the issue to the A.O. for fresh adjudication, after verifying the materials on record. The observations of the Tribunal in A.Y. 2009-10 (supra) are as under:

> *24. The ld. CIT(A) held that provision of foreign exchange gain written back aggregating to Rs. 79,11,26,251/- was on account of capital expenditure and the same to be excluded while computing the total income.*
> *25. Heard both the sides and perused the material on record. We find that similar issue on identical fact has been restored to the file of assessing officer by the ITAT Mumbai in the appeal of the assessee for A.Y. 2007-08 vide ITA No. 5058/M/2012. Similarly, we restore this issue to the file of assessing office for deciding the same after verification/examination of the material as directed by the ITAT for A.Y. 2007-08. Therefore, this ground of appeal is allowed for statistical purposes.*

31. Consistent with the view taken by the co-ordinate benches in respect of identical issue, in earlier assessment years, we deem it appropriate to restore the issue to A.O. to maintain consistency. This ground is allowed for statistical purpose.

32. In ground no. 4, the Revenue has raised the issue of deletion of addition of Rs.33,71,53,327/- on account of discount on buy back of Foreign Currency Convertible Bonds (FCCB).

33. Having considered rival submissions and perused the materials on record, we are of the view that this issue, being consequent to the decision to be taken on the nature and character of gain on foreign exchange fluctuation relating to FCCBs, needs to be restored back to the A.O. Accordingly, we do so.

34. Ground nos. 5 & 6 being general in nature, need not to be adjudicated.

35. In the result, the appeal is partly allowed for statistical purposes.

**ITA No. 735/Mum/2017 – Revenue's appeal for A.Y. 2011-12**

36. Ground nos. 1 to 4 are on the issue of deletion of disallowance made u/s. 14A of the Act read with Rule 8D. These grounds are identical to ground nos. 1 & 2 of ITA No. 764/Mum/2016 decided by us in the earlier part of the order. Facts being identical, consistent with the view taken by us in respect of those grounds, we dismiss the grounds raised by the Revenue.

37. In ground no. 5, the Revenue has raised the issue of deletion of addition made on account of gain on foreign exchange fluctuation in respect of FCCBs. This issue is identical to ground no. 3 of ITA No. 764/Mum/2016, decided by us in earlier part of the order. Consistent with the view taken by us, we restore the issue to the file of the A.O. with similar directions.

38. Ground nos. 6 & 7 being general in nature, do not require adjudication.

39. In the result, the appeal is partly allowed for statistical purpose.

**ITA No. 7445/Mum/2017 – Assessee's appeal for A.Y.2012-13**

40. In the main grounds, the assessee has raised the issue of taxability of incentive received under The New Sugar Promotion Policy, 2004 of the Government of Uttar Pradesh. This issue is identical to the issue raised in ground no. 1 of ITA No. 788/Mum/2016, decided by us in the earlier part of the order. Facts being identical, consistent with the view taken therein, we hold that the receipts, being in the nature of capital receipts, are not taxable. Grounds are allowed.

41. In the additional ground, the assessee has raised the issue, whether the incentive received under New Sugar Promotion Policy, 2004 of the Government of Uttar Pradesh is to be added to the book profit computed u/s. 115JB of the Act. While deciding identical ground in ITA No. 788/Mum/2016, in the earlier part of the order, we have allowed assessee's claim. Consistent with the view taken therein, we allow the additional ground.

42. In the result, the appeal is allowed.

**ITA No. 7251/Mum/2017 – Revenue's appeal for A.Y. 2012-13**

43. In ground nos. 1 to 4, the Revenue has challenged the deletion of disallowance made u/s. 14A read with Rule 8D. The issue raised in these grounds are identical to similar issues raised in ground nos. 1 & 2 in ITA No. 764/Mum/2016 decided by us in the earlier part of the order. Consistent with the view taken therein, we dismiss the grounds raised, while upholding the decision of the first appellate authority.

44. In ground no. 5, the Revenue has challenged the deletion of addition of Rs.75.56 crores on account of gain on foreign exchange fluctuation in respect of FCCBs. While deciding similar ground, being ground no. 3 in ITA No. 764/Mum/2016 decided by us in the earlier part of the order, the issue has been restored back to the A.O. To maintain consistency, we restore the issue to the A.O. This ground is allowed for statistical purpose.

45. In ground nos. 6, 7 & 8, the Revenue has challenged the deletion of addition of Rs.1,39,75,493/- towards alleged gain on sale of shares of closed business subsidiary in Brazil.

46. Briefly, the facts are, while examining the computation of income of the assessee, the A.O. noticed that the assessee has declared LTCG of Rs.93,35,951/- on account of sale

of shares of M/s. Bajaj International Participacoes Ltda. a subsidiary incorporated in Brazil. He noticed that the assessee has closed down the subsidiary and repatriated the amount invested in subsidiary. The resultant loss arising on account of repatriation based on the foreign currency value has been claimed as capital loss. After verifying the details, the A.O. was of the view that the gain is only on account of difference in the exchange rate at the time of investment and exchange rate at the time of repatriation. There is no capital appreciation in the value of the shares. He observed that the exchange gain cannot be equated with capital gain. Thus, he held that the exchange gain has to be treated as 'income from other sources'. Accordingly, he disallowed the difference due to currency fluctuation and treated it as 'income from other sources'. The assessee contested the disallowance before learned first appellate authority.

47. Having considered rival submissions and perused the materials on record, we find that learned first appellate authority has deleted the disallowance with the following observations:

> *5.5.2 It is not disputed that the appellant held shares in Brazilian subsidiary, which was sold and amount repatriated. There is no dispute, therefore, that the value in foreign currency held in Brazil represented capital asset of the appellant and the shares were sold. Whatever is realised through such transfer of capital asset has to be treated as capital receipt. This conclusion is apparent from plain reading of S. 45 r.w. section 2 (14)/(29A)/298) & (47). In the instant case, the gain on account of foreign exchange fluctuation was in intrinsic part of the receipt. The remittance would not be effected without this component of receipts.*
>
> *5.5.3 In reaching a conclusion on this issue, I find guidance from judgment of the Apex Court is Sutlej Cotton Mils Ltd. v. CIT 116 ITR 1. The Hon'ble Supreme Court, after referring to various judgments observed that the law may now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading aspect or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature. The ratio of this judgment is also followed by Hon'ble ITAT Mumbai in Dai-ichi Karkaria Ltd. Vs. Dcit, (2007)106ITD453(Mum.). Similar view has been held by Hon'ble High Court at Calcutta in ITA no. 233 of 2009, CIT vs SDB Infrastructure Pvt. Ltd. in respect of transfer of capital asset resulting in gains due to foreign exchange fluctuation. The gain has to be treated as capital receipt.*

*5.5.4 In view of the discussion above and in adherence of ratios of judgements relied upon, this ground of appeal is allowed.*

48. Having carefully gone through the observations of learned first appellate authority, we do not find any infirmity. As rightly observed by learned first appellate authority, the value of shares held in Brazil in foreign currency represented capital asset of the assessee. Therefore, when the shares were sold, the amount realized through transfer of such capital asset, has to be treated as 'capital receipt', as the transaction is on capital account. That being the factual position emerging on record, the receipts have to be treated as 'capital in receipt' and not 'income from other sources', as held by A.O. Learned first appellate authority having decided the issue in accordance with settled legal principles, we uphold the same. Grounds are dismissed.

49. Ground no. 9, being a general ground, does not require adjudication.

50. In the result, the appeal is partly allowed for statistical purpose.

To sum up:

| **ITA No.** | **Appeal by** | **(A.Y.)** | **Result** |
|---|---|---|---|
| 5806/Mum/2012 | Assessee's appeal | 2009-10 | Partly allowed |
| 788/Mum/2016 | Assessee's appeal | 2010-11 | Allowed |
| 764/Mum/2016 | Revenue's appeal | 2010-11 | Partly allowed for stastical purpose |
| 735/Mum/2017 | Revenue's appeal | 2011-12 | Partly allowed for stastical purpose |
| 445/Mum/2017 | Assessee's appeal | 2012-13 | Allowed |
| 7251/Mum/2017 | Revenue's appeal | 2012-13 | Partly allowed for stastical purpose |

*Order pronounced in the open court on 17.12.2024*

Sd/- Sd/-

(N K Billaiya) (Saktijit Dey)
Accountant Member Vice President

Mumbai; Dated : 17.12.2024
Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai