IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1281/Kol/2009 Assessment Year :2005-06

The State Fisheries Development Corporation Ltd."Bikash Bhawan", First Floor, North Block, Bidhan Nagar, Kolkata-700 091 [**PAN No. AABCT 2090 D**]	**V/s**.	ACIT, Circle-2,
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Soumitra Chowdhury, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Amitava Bhattacharya, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	10-03-2006
घोषणा की तारीख/Date of Pronouncement	19-04-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-I, Kolkata in appeal No.439/CIT(A)-I/Cir-2/07-08 dated 29.05.2009. Assessment was framed by ACIT, Circle-2, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.06.2007 for assessment year 2005-06.

Shri Soumitra Chowdhury, Ld. Authorized Representative appearing on behalf of assessee and Shri Amitava Bhattacharya, Ld. Departmental Representative appearing on behalf of Revenue.

2. During the course of hearing before us, Ld. AR did not press for the ground No. 4 & 5 so same stand dismissed as not pressed.

3. First issue in relates to ground No. 2 & 3 raised by assessee that Ld. CIT(A) erred in upholding the treatment of grant-in-aid of ₹2,38,41,000/- towards salary & PF as taxable.

4. The facts in brief are that assessee is a Limited Company and engaged in the business of pisciculture. The Govt. of West Bengal is holding 100% shares of assessee-company. During the year under consideration, assessee has received the grant-in-aid from Govt. of West Bengal for the following purposes as detailed hereunder:-

a) The grant-in-aid for ₹76.77 lacs was received for the payment of arrears of PF of the employees,

b) The grant-in-aid for ₹2,06,64,000/- for the payment of salary and wages of employees.

The assessee treated the above said receipts from the Government of West Bengal as capital in nature and therefore not taxable. However, AO during the assessment proceedings has disregarded with the claim of the assessee and treated the same as revenue receipt which is liable to tax. The AO for treating the grant-in-aid as revenue in nature relied on the decision of Hon'ble Apex Court in the case of the *M/s Sahney Steel & Press Works Ltd. Vs CIT* (1997) 228 ITR 253 (SC) wherein it was held that Government grant in aid to meet the revenue expenses will be treated as income. The AO also found during the assessment proceedings that similar disallowance was also made in the preceeding assessment year 2003-04 on account of grant-in-aid for an

amount of Rs. 48,22,698/- received from the Government of West Bengal and the same was also confirmed by the learned CIT(A) Kolkata. The assessee did not prefer any appeal to the Tribunal against the order of the ld. CIT(A). In view of above, AO has made the addition of Rs.2,83,41,000/- to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) where it was submitted that assessee is a sick public sector undertaking and the grant was received from the Government for the payment of salary and PF dues with the purpose to keep workmen in employment. Therefore it is a capital grant-in-aid and not liable to tax. The assessee has relied in the decision of the Hon'ble Delhi High Court in the case of *CIT v. Handicrafts and Handlooms Export Corporation of India Ltd.* (2014) 360 ITR 130 (Del). However, Ld.CIT(A) disregarded the submission of the assessee by observing in para-2.3 of his order, which is reproduced below:-

> *"2.3 I have gone through the submission of the assessee. It is an admitted act that grants were received towards salary and PF. It was, therefore, an operational subsidy provided by the State Govt. after setting up of the business. It is not an aid/subsidy to carry out any capital investment but to meet the revenue expenses of carrying out business. There is a difference between subsidizing the capital out lay and subsidizing the running of business. The Apex Court income* Sahney Steel and Press Work *228 ITR 253 has laid down the principles for determining the nature of subsidy/grant. It was held that the grant received for setting up the industry was capital receipts whereas grant received towards running the industry was a revenue receipt exigible to tax. The grant-in-aid received by the assessee is clearly a revenue receipt in the course of its business to meet the operational expenses and not in the nature of capital outlay. Such grant-in-aid is therefore revenue receipt and is held as taxable. The action of the Assessing Officer in treating the grant-in-aid towards salary & PF as taxable is upheld."*

Being aggrieved by this order of Ld. CIT(A) the assessee came in second appeal before us on the following grounds of appeal:-

> *"2. That the Learned Commissioner of Income-tax (Appeals) has erred in law as well as in fact in upholding the treatment of Grant-in-aid of*

Rs.23841000/- towards salary & PF as taxable, made by the Assessing Officer.

3. That the disallowance of Rs.23841000/- referred to in Ground No.2 above should be allowed in full."

6. We have heard rival submissions and perused the materials available on record. Before us Ld. AR filed paper book which is running from pages 1 to 119 and submitted that the case relied by the lower authorities does match with the facts of the case of the assessee. The above case is applicable to the situations where the government grant was given to the certain class of industries. On the contrary the ld. DR submitted that in the instant case the grant in aid is not from government to government but government to corporate. The grant was given to the assessee for the purpose of meeting the revenue expenses which are recurring in nature. The facts of the case cited by the assessee i.e. *handicrafts and handloom export Corporation of India* (supra) are different from the instant case as in that case the holding company has given cash assistance to its subsidiary company therefore the same cannot be relied upon. Finally the ld. DR vehemently supported the order of the lower authorities.

6.1 From the aforesaid discussion we find that the assessee has received a grant from the Government of West Bengal which is hundred percent sole shareholder of the assessee company. The purpose of the grant was to utilize towards the payment for salary and PF of the employees. The AO during assessment proceedings observed that the grant was given to meet the revenue expenses therefore it is fully liable to tax. However, the assessee treated the same as capital grant in aid and therefore not liable to tax. From the facts we find that the lower authorities have made the addition on account of the following:

1) The lower authorities relied in the decision of Hon'ble Supreme Court in the case of the *Sahney Steel & Press Works* (supra) for treating the grant in aid as the revenue in nature and therefore liable to tax.
2) Similar addition for grant-in-aid was made by the AO in the own case of the assessee for the assessment year the 2003-04.

Now let us see the facts of the aforesaid judgment. The Hon'ble Supreme Court has referred to salient features of various schemes formulated by the Central / State Governments and the subsidy received there-under, the purpose of the said subsidy and then determined whether or not it was taxable as revenue receipt. It has been held that the payment made as incentives or subsidies by way of refund of sales tax, power and electricity consumed on production, water rate etc. should be treated as revenue receipts. Incentives and subsidy received in the nature of production expenses after the production has started were not directly or indirectly for setting up of industries and, hence, revenue in character. Operational subsidies would be revenue in nature and they amount to trading receipts. From the aforesaid decision we observe that that the subsidies were given to the class of industries as per the schemes designed by the respective Governments. The purpose of the aforesaid subsidies was to promote the certain class of industries provided, they meet the eligibility criteria laid down in those schemes. However, in the instant case we find that the grant in aid was given to the assessee exclusively and there was no scheme as such. Therefore in our considered view the case law cited by AO in the case of *Sahney Steel & Press Works Ltd.* (supra) are different from the instant case of assessee, as it was given for the specific payment of salary and PF. The relevant portion of the sanctioned letter of Government of West Bengal is reproduced below:-

" GOVERNMENT OF WEST BENGAL
FISHERIES DEPARTMENT
Writers' Buildings, Kolkata-1
No.155-Fish(FS)/C-VI/2C-5/00-Pt/1 Dated Kolkata the 30th March 2005
From: The Joint Secretary to the Govt. of West Bengal
To: The Treasury Officer,
Bidhan Nagar Treasury, Accounts Deptt.

Jalsmpad Bhavan, Salt lake, Kolkata-91.

Sub: Sanction of a fund worth Rs.76.77 lakh (Rupees Seventy six lakh and seventy seven thousand only) as Grant-in-aid for the purpose of payment of arrear Provident Fund of the employees of the State Fisheries Development Corporation Ltd.

MEMORANDUM

In continuation of this Deptt's Memo No.87-Fish(FS)/C-VI dated 16.2.2005, the undersigned is directed by order of the Governor to say that the Governor has been pleased to accord sanction to a further sum of Rs.76.77 lakh (Rupees Seventy six lakh seventy seven thousand) only as Grant-in-aid to the State Fisheries Development Corporation Ltd., a Govt. company under the administrative control of the Fisheries Deptt., for the purpose of Provident Fund arrear dues in respect of the employees of SEDC Ltd., to the Regional provident Fund Commissioner.

*2. The Governor has further been pleased to authorize the Managing Director, State Fisheries Development Corporation Ltd., to act as the Drawing and Disbursing Officer for the amount sanctioned hereinabove. He is also requested to deposit the amount in the deposit account opened in terms of Finance Deptt. Memo No.1230-F dt. 3.2.84 by transfer of credit under the head "***8499-Othere deposits-00-120-Deosits of Government Companies and Corporations***" the allotted sum of Rs.76.77 lakh (Rupees seventy six lakh seventy seven thousand) only to be drawn by him for the purpose mentioned above. The change of deposit account has been communicated in terms of Finance Deptt. Memo No.8798-F, dated 23.12.98 wef 1.4.99.*

3. The Managing Director, State Fisheries Development Corporation Ltd., will please ensure immediately on major utilisation of the abovenoted fund for the purpose stated in para 1 above and send a compliance report to this Deptt. as early as possible.

4. The charge involved will proceed against the head "2405-Fisheries-00-101-Inland Fisheries-NP-Non Plan-007-State contribution as Grants to SFDC/WBFC for pisciculture operation 31-Grants-ini-aid-01-Slary grants"n the budget for 2004-2005.

5. This order issues with the concurrence of the Finance Deptt., of this Govt. vide their U.O.No.1141 Group A dt. 30.3.05.

6. The Accountant General, West Bengal and others concerned are being informed.

Sd/-Illegible
Joint Secretary to the
Govt. of West Bengal"

From the above, we find that the grant given by the Government to the assessee was not as per the scheme design for the promotion of some class of industries but it was given by the Government being a sole share holder of the assessee company. In our considered view, the ratio laid down by the Hon'ble Delhi High Court in the case of *CIT v. Handicrafts and Handlooms Export Corporation of India Ltd.* (2014) 360 ITR 130 (Del) is applicable to the assessee. In our view the contention of the ld. DR that in this case the cash assistance was given by the holding company to the subsidiary company therefore the facts of this case are different from the assessee is not tenable. There is no straight jacket principle to distinguish a capital receipt from a revenue receipt. It depends on the facts and circumstances of each case. This view is supported by the decision of Hon'ble Supreme Court in the case of *Mepco Industries* 319 ITR 208 (SC) wherein the Hon'ble'ble Apex Court held that in each case one has to determine the nature of subsidy based on the its own facts. We find that in the instant case the Government being hundred percent shareholder of the assessee company has given grant in aid for holding the employment. The grant-in-aid was given specifically to the assessee company and that it was not for certain class of industries. We are also relying on the decision of Hon'ble Delhi High Court in the case of *Handicrafts and Handlooms Export Corporation of India Limited* (supra) wherein the relevant portion is reproduced below.

> *"We have heard learned counsel on both sides in regard to this matter and we agree with the conclusion of the Tribunal that the sum of Rs.11,70,000 stands on no different footing from the amounts received from the STC in earlier years. We have pointed out that what happened in earlier years was that the assessee, having incurred certain losses in its export business, approached the STC for assistance to enable it to meet its liabilities consequent on such losses and the STC agreed to do so by reimbursing the losses incurred by the assessee. There was, therefore, even in those years an agreement on the part of the STC to recoup the losses made by the assessee. The circumstance, therefore, that in the present year, there was an agreement during the previous year by which the STC agreed to give financial assistance to the assessee will not, therefore, make any difference in principle. We are also of opinion that the other distinguishing feature pointed out by the Department does not also make a difference. As pointed out by the*

> *Tribunal the nature and purpose of the payments by the STC to the assessee is the same in earlier years as well as this years. In all the years the STC has only provided monies to the assessee-corporation with the object of enabling it to offset the losses which it had incurred in the curse of its business. The fact that the contribution which the STC was prepared to make to enable the assessee to do this was measured in terms of a percentage of its export earnings and was not a flat or round sum of money as in the prior years does not, it seems to us, make any difference. In all the years it is only a case of a cent per cent, holding company coming to the rescue of its subsidiary which has incurred losses and enabling it to recoup those losses and continue to carry on the business in spite of such losses. In the circumstances, what we have said in our earlier judgment in ITR Nos 17 and 84/74 (Addl. CIT v. Handicrafts and handloom Export Corporation [1982] 133 ITR 590 (Delhi) will equally apply in regard to the assistance received by the assessee from the STC during the current years."*

The aforesaid findings recorded by the Hon'ble High Court in the earlier decision i.e., *Handicrafts and handloom Export Corporation of India v. CIT* [1983] 140 ITR 532 (Del) merit acceptance, even when we apply the purpose test applied in the case of Sahney Steel and press Works Ltd. (supra) as explained in Ponni Sugar and Chemicals Ltd. (supra). It cannot be said that the earlier decision of the Delhi High Court has been overturned or overrule by the Hon'ble Supreme Court in the two decisions mentioned above. Accordingly, we answer the question of law against the Revenue and in favour of the assessee. The lower authorities have also made the addition on the ground that similar **disallowance** was made in the earlier assessment year 2003-04. In this connection, we find that the AO made the addition of grant in aid for Rs. 48,22,698/- in the assessment year 2003-04 but the AO in the assessment year 2004-05 has allowed the relief of grant-in-aid for Rs. 44 Lacs. From the facts of the case we find that grant in aid for Rs.48,22,698/- pertaining to the assessment year 2003-04 was allowed in the immediate subsequent assessment year 2004-05 for Rs. 44 Lacs. The learned AR has produced the copies of the assessment orders for the AYs 2003-04 and 2004-05 in support of its claim and the same are placed on the record. Similarly, we also find that the grant-in-aid received by the assessee in the assessment

year 2004-05 was not disallowed by the AO. The ld. DR failed to bring anything on record contrary to the argument of the ld. AR and he left the issue to the discretion of the Bench. In view of above and in the interest of justice, we are inclined to treat the grant-in-aid as capital in nature therefore it is not liable to tax. Accordingly we reverse the order of the lower authorities and ground raised by the assessee is allowed.

7. Next issue raised in ground no. 6 & 7 by the assessee in this appeal is that the ld. CIT(A) erred in confirming the order of assessing officer by disallowing the employees contribution for Rs. 43,34,151 under the PF Act.

8. During the course of assessment proceedings, AO found that the assessee has not deposited the employee's contribution to Provident fund for an amount of Rs.43,34,151/- within the due date. Therefore the AO has disallowed the same and added to the total income of the assessee.

9. Aggrieved, assessee preferred an appeal to the learned CIT(A) who has upheld the order of the AO by the observing as under:-

> *"4.1 I am of the opinion that in view of the amended provision of section 143B effective from 01.04.2004 employer's contribution to PF is to be held as admissible. The employees contribution however, is governed by section 36(1)(va) read with section 2(24)(x) and not by section 43B. this section has not been amended and therefore employees contribution is admissible only if it is paid within the due date as prescribed in the PF Act. The assessee made the payment even after the grace period as mentioned in the PF Act. Therefore, employees contribution to PF is not admissible to the assessee. The AO is directed to delete the addition made on account of employer's contribution to PF. The addition made on account of employees PF is upheld."*

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us on the following effective grounds:-

> *"6. The learned CIT(Appeals) has erred in law as well as in fact in upholding the disallowance of employee's contribution of Rs.4334151/- made by the Assessing Officer.*

7. That the disallowance of Rs.4334151/-, referred to in Ground No.6 above should be deleted."

10. We have heard both the parties and perused the materials available on record. We find that the AO has made the addition of the amount of the employee contribution as there was a delay in payment to PF authorities. However, from the assessment order we find that all the payment of employees contribution were made before the due date of filing of Income Tax Return as specified u/s.139(1) of the Act. Now, this issue stands covered in favour of assessee and against the Revenue by the decision of Hon'ble jurisdictional High Court in the case of *CIT v. M/s Vijay Shree Limited* vide ITAT No.245 of 2011 in **GA No.2607 of 2011** dated 7th September, 2011, wherein it has been held as under:-

> *"After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of* Commissioner of Income Tax vs. Alom Extrusion Ltd.*, we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec. 43(B) of the income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.*
>
> *Such being the position, the deletion of the amount paid by the Employees' contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.*
>
> *We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal."*

From the above, we find that the issue is squarely covered in favour of assessee by the jurisdictional High Court in the case of *M/s Vijay Shree Limited* (supra). As the issue is covered, hence, we allow assessee's ground of appeal.

11. Last issue raised by assessee in this appeal is that the learned CIT(A) erred in confirming the order of AO by disallowing the interest paid for delayed deposit of PF for an amount of Rs. 5,51,228/-

12. The AO during the assessment proceedings found that the assessee has paid interest of Rs. 5,51,228/- on delayed payment of PF amount. The AO disallowed the same on the ground that this interest being panel in nature and added it to the total income of the assessee.

13. Aggrieved, assessee preferred an appeal to ld. CIT(A) who has upheld the action of the AO by observing as under:-

> *"The Assessing Officer observed that the Tax Audit report mentioned the expenses on account of interest for delayed payment of PF as penal in nature. In earlier years, the CIT(A) had upheld not admitting this as a deductable expenditure. The Assessing Officer, therefore disallowed the interest paid towards delayed payment of PF. The assessee in appeal proceedings, has relied on certain decision of the Tribunal to claim that this was not penal in nature and therefore admissible. However, following the decision of my predecessor in the case of the assessee for earlier years, the disallowance is confirmed."*

Aggrieved, assessee is in second appeal before us on the following grounds No 8 and 9:-

> *"8. The Learned CIT(Appeals) has erred in law as well as in fact in confirming the disallowance of Rs.551228/- made by the Assessing Officer in the total income of the Appellant being the amount of interest paid for delayed deposit of PF.*
>
> *9. That the addition of Rs.551228/- referred to in Ground No.8 should be deleted."*

14. We have heard rival contentions and perused the materials available on record. We find that AO during the course of assessment order found that assessee has paid a sum of Rs.5,51,228/- as interest for non-payment of PF and this fact has also been mentioned in its Tax Audit Report at column-17(e)(i) as expenditure by way of penalty or fine for violation of any law and he added the same back to the total income of assessee. Considering the same, Ld. CIT(A) confirmed the action of AO. Ld. DR relied on the orders of Authorities below whereas Ld. AR left the issue to the discretion of the Bench. From the facts of the case we find that the interest paid on the late deposit of

PF is compensatory in nature therefore it should not be disallowed on the ground of treating the same as penal in nature. In this connection we are putting our reliance in the following the decision of Hon'ble Apex Court, in the case of *Prakash Cotton Mills v. CIT* (1993) 2174 air 983 (SC) whereas the head-note:-

> *"The appellant paid Rs.19635 in the accounting year for A.Y. 1966-67, on account of interest, under Bombay Sales Tax Act, 1951, for delay in payment of sales tax, and for damages for delayed payment of contribution under Employees State Insurance Act, 1947. The assessee-appellant in the return of income, claimed the amount as allowance under section 37(1) of I.T. Act. The appellant, also claimed the entire entertainment expenses, amounting to Rs.3865 as allowance under section 37(2) of the I.T. Act The Income-tax Officer treated the payment of Rs.19635 as penal interest and disallowed it as allowance under section 37(1) of I.T. Act. Out of the entertainment, expenses, amounting to Rs.3865 incurred by the Directors of the assessee company, for entertainment at the Diners club and C.C.1, the I.T.O. regarded Rs.1365 only as permissible deduction under section 37(2) of I.T. Act, taking the view that the remaining sum of Rs.2500 was attributable to personal expenses of the Directors of the assessee company and therefore impermissible deduction under section 37(2) of the I.T. Act. The Assessee appellant did not succeed in appeals before the A.A.C. and in the Income Tax Tribunal. Applications under section 256 (1) of the I.T. Act before the Tribunal and under section 256 (2) in Bombay High Court were rejected. The assessee filed appeal by special leave in Supreme Court. This Court allowed the appeal partly and, HELD: 'Mat the authority concerned has to allow deduction under section 37(1) of the I.T. Act, wherever the concerned impost is purely 983 984 compensatory in nature. Wherever such impost is found to be of a composite nature, that is partly compensatory and partly penal, the authorities are obligated to bifurcate the two components of the impost and given deduction to the component, which is compensatory in nature and refuse the deduction for the component which is penal in nature. Therefore, whenever any statutory impost paid by assessee by way of damages or penalty or interest is aimed, the assessing authority is required to examine the scheme of the provisions of the relevant statute providing for payment of such impost, notwithstanding the nomenclature of the impost as given by the statute to find, whether it is compensatory or penal in nature. Ibis Court agreed with the view taken in earlier decisions by this Court and by the Andhra Pradesh High Court, which settle the law as to when any amount paid as interest damages or penalty could be regarded as compensatory (reparatory) as would entitle the assessee to claim allowance under section 37 (1) of I.T. Act This Court concluded that the question whether the impost is in essence compensatory or is by way of penalty, has to be decided having regard to the relevant provisions of the law under which it is imposed, the reasons given in the order imposing and quantifying the damages or penalty. The imposition though called a penalty may be composite in nature comprising penalty as well as compensation for delayed payment. The nomenclature of the levy as interest, damages or penalty is not conclusive."*

From the aforesaid judgment of Hon'ble Supreme Court, we find that the interest paid for late deposit of PF with the authorities is compensatory in nature, therefore, it is entitled for deduction while computing the profit under the business head. In this view of the matter, we reverse the action of Authorities below and ground raised by assessee in appeal is allowed.

13. **In the result, assessee's appeal stands partly allowed.**

Order pronounced in the open court 19/04/2016

Sd/-	Sd/-
(Mahavir Singh)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp

दिनांकः- 19/04/2016 **कोलकाता ।**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-The State Fisheries Development Corpn. Ltd., " Bikash Bhawan" First Floor, North Block, Bidhan Nagar, Kolkata-700 091
2. प्रत्यर्थी/Respondent- ACIT, Circle-2, Kolkta
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।