

Tax Scan - Simplifying Tax Laws

आयकर अपीलीय अधिकरण “H” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 5675/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2011-12)

Dy. Commissioner of Income Tax - 4(2), Room No. 642, 6 th floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020.	बनाम/ v.	M/s Harinagar Sugar Mills Ltd., World Trade Centre, Centre No. 1, 10 th Floor, Cuffe Parade, Colaba, Mumbai- 400 005.
स्थायी लेखा सं./PAN : AAACH2831H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by	Shri Amit Kumar Singh,DR
Assessee by :	Shri Jayesh Desai

सुनवाई की तारीख /**Date of Hearing** : 30-03-2016

घोषणा की तारीख /**Date of Pronouncement** : 22-06-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 5675/Mum/2014, is directed against the appellate orders dated 21-07-2014 passed by the learned Commissioner of Income Tax (Appeals)- 8, Mumbai (Hereinafter called “the CIT(A)”), for the assessment year 2011-12, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 27-12-2013 passed by the learned Assessing Officer (hereinafter called “the AO”) u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called “the Act”).

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in stating that the capital subsidy received under the Bihar Incentive package is not to be deducted from WDV of the plant and machinery ?

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that subsidy received by the way of reimbursement of commercial Tax (VAT) is not a revenue receipt ?

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to delete the addition made to book profits on account of excess depreciation and subsidy received by the way of reimbursement of commercial Tax (VAT) ?”

3. The brief facts of the case are that the assessee company is engaged in the business of manufacturing of sugar, alcohol, biscuit and wind energy. The assessee company also own sugarcane farms in which the sugar cane is grown and which is consumed by the sugar mills of the assessee company.

4. The A.O. observed that the assessee company has received capital subsidy of Rs. 4,11,43,000/- being 10% of investment in machineries and equipments and subsidy of Rs. 2,26,70,311/- by way of reimbursement of Excise duty under Bihar Incentive Package – 2006 for undertaking expansion of its capacity from 8500 TCD to 10000 TCD in the previous year 2007-08 (assessment year 2008-09). The assessee company has treated the said subsidy as capital receipt and credited the amount to the capital reserve account , without crediting the same to the Profit & Loss account. However, the AO has rejected the claim of the assessee company by treating the said receipt as capital receipts and the capital subsidy of Rs. 4,11,43,000/- being 10% of investment in machinery and equipments was reduced from the cost of Plant and Machinery and proportionate depreciation was disallowed , and

also subsidy of Rs. 2,26,70,311/- by way of reimbursement of Excise duty was treated as revenue in nature and added to the income of the assessee company by the AO vide assessment orders u/s 143(3) of the Act for the assessment year 2008-09. Similarly, the A.O. observed that the assessee company had received capital subsidy of Rs. 3 crores under Bihar Incentive Package – 2006 for setting up of the distillery unit being 10% of investment in machineries and equipments for establishment of distillery plant and subsidy of Rs. 4,13,51,468/- by way of reimbursement of Excise duty under Bihar Incentive Package 2006 for undertaking expansion of its capacity from 8500 CTD to 10000 TCD in the previous year 2008-09 (assessment year 2009-10). Again, the AO held that capital subsidy of Rs. 3 crores being 10% of investment in machineries and equipments is to be reduced from the cost of plant & machinery and proportionate depreciation was disallowed and subsidy of Rs. 4,13,51,468/- by way of reimbursement of Excise duty was treated as revenue in nature and was added by the AO to the total income of the assessee company for the assessment year 2009-10 vide assessment orders passed u/s 143(3) of the Act.

For the assessment years 2008-09 and 2009-10, the matter went up to the Tribunal and the Tribunal in ITA No. 772/Mum/2012 for the assessment year 2008-09 vide orders dated 31st January, 2014 held that capital subsidy being 10% of investment in machineries and equipments is not required to be deducted from the cost of plant and machinery and also the subsidy received as excise duty reimbursement cannot be taken as revenue receipt and the A.O. is not entitled to add the above two items to the book profit computed u/s 115JB of the Act. The relevant findings of the Tribunal are as under:-

“2.3 We have heard both the sides and perused the material on this ground of appeal. A reading of the incentive package resolution of the Bihar Government dated 12.09.2006 indicates that the object of the said scheme is for the development of sugar industry in the state and

establishment of new sugar Mills, establishment of co-industries based on sugarcane and to supplement the efforts in expanding capacity of present Sugar Mills, and in order to solve the problem of additional financial load faced by the investors and in order to minimize the burden on them the surplus funds so generated by the State Incentive policy could be used for repayment of term loan taken from Central Financial Institutions and Banks so that these projects could become viable. Para 2 of the said resolution further states that under the new Industrial Policy of the State, under the provisions of attracting capital investment for technical development and expansion of capacity of the sugar factory as well as for the establishment of new sugar mills, approval of a 'Planned Sugar Industry Incentive Package' was discussed so that the Entrepreneurs of the private sector could be attracted for the establishment of sugar industry and other industries based on sugarcane or sugarcane juice could be attracted and working/ installed sugar mills also may expand their capacity and may establish other industries based on co-products of the sugarcane in the State.

2.3.1 It is pertinent to mention that the Ld.CIT(A) has stated that the wording of the said scheme read together with the said guidelines issued by the Bihar Government indicates that the subsidy is granted with the object of incentive for the entrepreneurs to establish sugar industry/expand the capacity in the state of Bihar and thus the said subsidy is given for setting up of industry or expansion of industry in the state of Bihar. We concur with the said observation of the Ld.CIT(A) that the said subsidy is given for setting up of industry or expansion of industry in the state of Bihar which is the object of the scheme. In this connection, it is relevant to state that in the case of Sasisri Extractions Ltd. (supra), the Tribunal has held that where subsidy is granted as percentage of fixed capital cost taken as basis for determining the subsidy that would only be a measure adopted under the scheme to quantify subsidy, the same could not be considered as a payment directly or indirectly to meet any portion of the actual cost. The same view has been followed by the Tribunal in a subsequent case, namely M/s. Godrej Agrovat Ltd. (supra), the order to which the present Accountant Member is also a party. It is pertinent to mention that in the appeal preferred before the High Court against the said decision of the Tribunal, the Revenue has not disputed the decision of the Tribunal in the appeal before the Hon'ble High Court. This suggests that the Revenue has accepted the decision of the Tribunal in the said case. The Hon'ble Apex Court, in the case of P.J. Chemicals Ltd. (supra), has held that the expression 'actual cost' in section 43(1) of the Income Tax Act needs to be interpreted liberally and subsidy does not partake the incidents which attract the conditions for its deductibility from actual cost. The amount of subsidy is not to be deducted from the actual cost and section 43(1) for the purpose of calculation of depreciation. Also, the Tribunal in the case of Inventaa Chemical Ltd (supra) has held that if payment of subsidy is not related to actual acquisition of assets and subsidy is granted on

capital investment on land, building and machinery, such subsidy cannot be reduced from the value of asset (WDV). Applying these ratio to the facts of the assessee's case, after noting that the revenue has not brought on record that the subsidy received by the assessee is directly or indirectly resulted in acquisition of any asset, we are of the considered opinion that the capital subsidy of Rs.4,11,43,000/- received by the assessee company under 'Bihar Incentive Package 2006' for undertaking expansion of its capacity from 8500 TCD to 10000 TCD cannot be deducted from WDV of plant and machinery. Since the Ld.CIT(A) has correctly appreciated the facts and the position of law aforementioned for reversing the order of the AO, we do not find any infirmity in the decision of the Ld.CIT(A) on this count and thus the same is upheld. Resultantly, Ground No.1 is dismissed.

3.3 We have heard both the sides and perused the material on record. It is not disputed that the subsidy scheme formulated by the Government of Bihar is for the purpose of attracting capital investment and to encourage setting up the industry/expand the existing unit. It is pertinent to mention that the character of a subsidy in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid and the source or the forms of subsidy are immaterial. If the object of the subsidy scheme is to enable the assessee in setting up the new unit or to expand the existing unit, then the receipt of the subsidy is to be treated on capital account. This established position of law has been recognised by various judicial pronouncements which have been relied by the Ld.CIT(A) in his order and also the decisions relied on by the Ld.Counsel for the assessee as aforementioned. In view of that matter we do not find infirmity in the decision of the Ld.CIT(A) in deleting the impugned addition made by the AO and thus the order of the Ld.CIT(A) on this count is upheld. Ground No. 2 is dismissed.

4.1 Having heard both the sides and perused the material on record, it is noted that the issue raised in this ground is squarely covered in favour of the assessee by the decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. Vs. CIT 250 ITR 273, wherein it has been held that the AO while computing the income under section 115J has only the power to examine whether the books of account are certified by the authorities

under the Companies Act as having been properly maintained in accordance with the said Act. The AO, thereafter, has the limited power of making increases and reductions as provided for in the explanation to the said section. To put it differently the AO does not have the jurisdiction to go behind the net profit shows in the P&L Account except to the extent provided for the explanation of section 115J. Also, it is noted that while deciding grounds no. 1 & 2 in respect of the additions under normal provisions of the income in respect of treatment of the said subsidy, we confirmed the deletions made by the Ld.CIT (A) and hence the additions made in computation of book profit under section 115JB is not sustainable. Since, the facts and position of law as aforementioned has been correctly appreciated by the Ld.CIT(A) for arriving at the decision in deleting the impugned additions made on this count, we do not find any justifiable reason to interfere with the decision of the Ld.CIT(A) and the same is upheld. Resultantly, Ground No. 3 is dismissed.”

Further, for assessment year 2009-10 in ITA No. 4474/Mum/2012 dated 28th February, 2014, the Tribunal followed the decision in assessee company's own case for the assessment year 2008-09 in ITA No. 772/Mum/2012 dated 31st January, 2014. Similarly, for the assessment year 2010-11 in ITA No. 2221/Mum/2014 dated 12th April, 2016, the Tribunal again followed its decision for the assessment year 2008-09 and 2009-10 in ITA no 772/Mum/2012 dated 31-01-2014 and ITA no. 2221/Mum/2014 dated 12-04-2016 and dismissed the appeal of the Revenue.

5. We have observed that the ground No. 1 in the instant appeal is identical to the ground raised in the appeal for assessment years 2008-09 and 2009-10 which was also allowed by learned CIT(A) in the instant assessment year following the afore-stated decisions of the Tribunal in assessee company's own case for the assessment year 2008-09 and 2009-10, hence, Respectfully following the decisions of the co-ordinate benches of this Tribunal in assessee company's own case as set out above, we hold that the capital subsidy received under the Bihar Incentive Package 2006 is not required to be deducted from WDV of plant and machinery and we dismiss ground no 1 raised by the Revenue. We order accordingly.

6. Further, we have observed that the assessee company during the previous year relevant to the instant assessment year received reimbursement of commercial taxes(VAT) on Molasses under Bihar Incentive Package 2006 amounting to Rs.43,89,465/- for setting up distillery unit . The assessee company has established the distillery unit in financial year 2007-08. The Government of Bihar has formulated the incentive scheme to promote establishment of new units and for expansion of capacity of existing units. As per this scheme, the distillery is entitled for reimbursement of commercial taxes (VAT) paid on purchase of molasses for production of alcohol and the said benefit will be available for five years from the date of establishment of distillery unit. The assessee company had expanded its capacity in the financial year 2006-07 under this scheme and the sugar mills are entitled for reimbursement of excise duty on additional sugar produced due to expansion of the capacity. This benefit is available for five years from the date of expansion of the capacity of the plant and the assessee company had received subsidy of reimbursement of excise duty in assessment years 2008-09 and 2009-10 and subsidy by way of reimbursement of commercial tax paid on molasses in the assessment year 2010-11 and the same was not offered for tax in assessment years 2008-09, 2009-10 and 2010-11 which were considered as revenue receipts by the AO. The Tribunal has already held that reimbursement of subsidy by way of excise duty is a capital receipt vide Tribunals orders in assessee company's own case in ITA no. 772/Mum/2012 dated 31.01.2014 for assessment year 2008-09, ITA no. 4474/Mum/2012 vide orders dated 28-02-2014 for assessment year 2009-10 and ITA no. 2221/Mum/2014 for assessment year 2010-11. The decision of the Tribunal in ITA No. 772/Mum/2012 is reproduced hereunder:

“3. In Ground No. 2 the revenue has agitated the action of the Ld.CIT(A) in treating the subsidy received as excise duty reimbursement is not a revenue receipt.

3.1 Briefly stated, the assessee company had received subsidy of Rs.2,26,70,311/- by way of reimbursement of excise duty under the 'Bihar Incentive Package 2006' which the assessee company treated as capital receipt. However, in the assessment framed, the AO treated the same as revenue receipt. According to the AO, the subsidy in the form of reimbursement of excise duty went on to reduce the cost of the assessee and the payment of excise duty forms part of P&L Account, the payment of which had to be treated as revenue receipt/revenue expense. Accordingly, the AO treated the impugned amount as revenue receipt and thereby made an addition of Rs.2,26,70,311/- to the total income of the assessee. On appeal, the Ld.CIT(A) deleted the impugned addition as the incentive scheme was formulated by the Government of Bihar for attracting capital incentive and to encourage setting up the industry/expand the unit. The Ld.CIT(A) in his order, relied on various decisions where it has been held that when the subsidy scheme is to enable the assessee in setting up the new unit or to expand the existing unit, then the receipt of the subsidy is on capital account. Aggrieved by the impugned decision the revenue has raised this granted in the appeal before us.

3.2 Before us, the Ld. DR has contended that the reimbursement of the excise duty has to be treated as revenue receipt by relying on the order of the AO. On the other hand, the Ld.Senior Counsel for the assessee has argued that the Ld.CIT(A) has correctly deleted the impugned addition by treating the reimbursement of excise duty as capital in nature by relying on the decisions of the Hon'ble Apex Court in the cases of Mepco Industries Ltd. Vs. CIT 319 ITR 208, CIT Vs. Ponni Sugars And Chemicals Ltd. 306 ITR 392, the decision of the Calcutta High Court in the case of CIT Vs Rasoi Ltd. 335 ITR 438 (CAL), the decision of the High Court of Gujarat in the case of CIT Vs. Tripti Menthol Industries 35 taxmann.com 515 (Gujarat) and the decision of the J&K High Court in the case of Shree Balaji Alloys Vs. CIT 333 ITR 335 (J&K).

3.3 We have heard both the sides and perused the material on record. It is not disputed that the subsidy scheme formulated by the Government of Bihar is for the purpose of attracting capital investment and to encourage setting up the industry/expand the existing unit. It is pertinent to mention that the character

of a subsidy in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid and the source or the forms of subsidy are immaterial. If the object of the the subsidy scheme is to enable the assessee in setting up the new unit or to expand the existing unit, then the receipt of the subsidy is to be treated on capital account. This established position of law has been recognised by various judicial pronouncements which have been relied by the Ld.CIT(A) in his order and also the decisions relied on by the Ld.Counsel for the assessee as aforementioned. In view of that matter we do not find infirmity in the decision of the Ld.CIT(A) in deleting the impugned addition made by the AO and thus the order of the Ld.CIT(A) on this count is upheld. Ground No. 2 is dismissed.”

In the instant assessment year, the assessee company has received subsidy by way of reimbursement of commercial taxes(VAT) paid under Bihar Incentive Scheme 2006 of Rs.43,89,465/- on purchase of molasses. It is not disputed that the subsidy scheme formulated by the Government of Bihar is for the purpose of attracting capital investment and to encourage setting up the industry/expand the existing unit. It is pertinent to mention that the character of a subsidy in the hands of the tax-payer has to be determined with respect to the purpose for which the subsidy is given. The point of time at which the subsidy is paid and the source or the forms of subsidy are immaterial. If the object of the subsidy scheme is to enable the tax-payer in setting up the new unit or to expand the existing unit, then the receipt of the subsidy is to be treated on capital account. We have observed that the learned CIT(A) has also allowed the claim of the assessee company in treating reimbursement of commercial taxes(VAT) based upon the decision of the Tribunal for earlier years with respect to the reimbursement of excise duty holding that the subsidy received by the assessee by way of reimbursement of commercial taxes(VAT) is for setting up of a new unit/expansion of existing unit and is a capital receipt not exigible to tax. We have observed that the

reimbursement of commercial taxes (VAT) on purchase of Molasses under Bihar incentive Package 2006 is given to promote establishment of new units and for expansion of capacity of existing units. As per this scheme, the distillery is entitled for reimbursement of commercial taxes(VAT) paid on purchase of molasses for production of alcohol and the said benefit will be available for five years from the date of establishment of distillery unit. We do not find any reason to interfere with the order of the learned CIT(A) with respect to this issue also as this scheme of reimbursement of commercial taxes(VAT) on purchase of Molasses under Bihar Incentive Package 2006 is similar to scheme of reimbursement of excise duty under Bihar Incentive Package 2006 and we hold that this is a capital receipt which is not chargeable to tax. We order accordingly.

7. With respect to ground no. 3 , we have observed that the Tribunal has taken consistent view in the preceding assessment years in the decisions of the Tribunal in assessee company's own case in ITA no. 772/Mum/2012 dated 31.01.2014 for the assessment year 2008-09, ITA no. 4474/Mum/2012 vide orders dated 28-02-2014 for the assessment year 2009-10 and ITA no. 2221/Mum/2014 vide orders dated 12-04-2016 for the assessment year 2010-11 , that AO is not entitled to add the capital subsidy and excise duty reimbursements received by the assessee company under Bihar Incentive Package 2006 to the book profit computed u/s. 115JB of the Act. The decision of the Tribunal in ITA no. 772/Mum/2012 for the assessment year 2008-09 is reproduced hereunder:

“4.1 Having heard both the sides and perused the material on record, it is noted that the issue raised in this ground is squarely covered in favour of the assessee by the decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. Vs. CIT 250 ITR 273, wherein it has been held that the AO while computing the income under section 115J has only the power to examine whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the said Act. The AO, thereafter, has the limited power

of making increases and reductions as provided for in the explanation to the said section. To put it differently the AO does not have the jurisdiction to go behind the net profit shown in the P&L Account except to the extent provided for the explanation of section 115J. Also, it is noted that while deciding grounds no. 1 & 2 in respect of the additions under normal provisions of the income in respect of treatment of the said subsidy, we confirmed the deletions made by the Ld.CIT (A) and hence the additions made in computation of book profit under section 115JB is not sustainable. Since, the facts and position of law as aforementioned has been correctly appreciated by the Ld.CIT(A) for arriving at the decision in deleting the impugned additions made on this count, we do not find any justifiable reason to interfere with the decision of the Ld.CIT(A) and the same is upheld. Resultantly, Ground No. 3 is dismissed.”

Respectfully following the decision of the Tribunal in assessee's own case for preceding assessment year's as set out above, we hold that AO is not entitled to add capital subsidy and reimbursement of commercial taxes(VAT) to the book profit u/s 115JB of the Act. We may clarify that we have already held the reimbursement of commercial taxes(VAT) received under Bihar Incentive Package 2006 being capital receipts not exigible to tax in preceding para's of this order. We order accordingly.

8. In the result, the appeal filed by the Revenue in ITA NO. 5675/Mum/2014 for the assessment year 2011-12 is dismissed as indicated above .

Order pronounced in the open court on 22nd June, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22-06-2016 को की गई ।

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 22-06-2016

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai