

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", NEW DELHI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI C.M. GARG, JUDICIAL MEMBER
I.T.A. Nos. 678 & 679/Del/2012
A.YRS. : 2005-06 & 2006-07

DCIT, CIRCLE 11(1),
NEW DELHI
ROOM NO. 312, CR BLDG.,
NEW DELHI
(Appellant)

vs. M/S INDO RAMA TEXTILES LTD.,
A-60, OKHLA INDUSTRIAL AREA,
PHASE-II, NEW DELHI
(PAN/GIR NO. : AAACI0084R)
(Respondent)

Assessee by : S/Sh. Ajay Vohra, Rohit Jain, Adv.
& Upvan Gupta, CA
Department by : Sh. RIS Gill, Sr. D.R.

ORDER

PER SHAMIM YAHYA: AM

These appeals by the Revenue are directed against the respective order of the Ld. Commissioner of Income Tax (Appeals) for assessment years 2005-06 & 2006-07.

2. The grounds raised in ITA No. 678/Del/2012 read as under:-

- "1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of ₹ 5,77,95,190/- made on account of treatment of sales tax subsidy as revenue receipts.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO not to charge interest u/s. 234B.
3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.”

3. The grounds raised in ITA No. 679/Del/2012 read as under:-

- “1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of ₹ 3,31,18,000/- made on account of treatment of sales tax subsidy as revenue receipts.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO not to charge interest u/s. 234B.
3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.”

4. In this case assessee has received a sales tax subsidy of ₹ 5,77,95,190/- for A.Y. 2005-06, ₹ 331,18,000/- for A.Y. 2006-07 from the Government of Maharashtra as revenue receipt. In the return of income following decision of the Special Bench of the tribunal in the

case of DCIT vs. Reliance Industries Ltd. 88 ITD 273 (Mumbai) the receipt was shown as a capital receipt not liable to tax. However the AO did not agree with this proposition. The AO further relied upon the Hon'ble Apex Court decision in the case of Sahney Steel & Press Works Ltd. Vs. C.I.T. 228 ITR 253 and Delhi High Court decision in case of Steel Authority of India 257 ITR 241 and Calcutta High Court decision in the case of Kesoram Industries and Cotton Mills Ltd. 191 ITR 518 and held that the receipt was capital in nature. Following were the broad reasons for holding the receipts as revenue in nature –

“On examining of the scheme, it has been observed that :-

- i) The subsidy was not intended to be a contribution towards capital outlay of the industrial unit.
- ii) It was given with the object of enabling the assessee to carry on its business, although the purpose behind it may be to encourage industrialization.
- iii) The incentive is available only after the industry has started functioning.
- iv) Sales tax is a part of the sales and in turn is revenue receipt.

- v) Also, it was well settled that where subsidies granted were given by the government to assist a trader in his business, they were generally speaking payments of a revenue nature.”

5. Upon assessee’s appeal, Ld. CIT(A) gave a finding that the issue in dispute stood covered by the Special Bench decision of the Tribunal in the case of Reliance Industries which stood affirmed by the Mumbai High Court. Ld. CIT(A) further observed that the scheme applicable in the Reliance Industries was 1979 scheme, however in the 1993 scheme terms and conditions are of the same nature and intent as is evident from the following comparative chart filed by the Id. Counsel.

Salient features	1979 Scheme	1993 Scheme
Object of subsidy (see preamble)	Promotion of industrialization in backward areas of the State of Maharashtra through Scheme of incentives.	Promotion of industrialization in backward areas of the State of Maharashtra through scheme of incentives.
Eligibility claim	a) Eligible unit to make application after completion of initial effective steps. b) Complete final effective steps.	a) Eligible unit to make application after completion of initial effective steps. b) Complete final effective steps.
Initial steps	<ul style="list-style-type: none"> Effective possession of land Obtaining provisional SSI 	<ul style="list-style-type: none"> Effective possession of land Obtaining provisional SSI

	<p>registration/ letter of intent from Government of India and / or permission from State Government for setting up eligible unit.</p>	<p>registration/ letter of intent from Government of India and / or permission from State Government for setting up eligible unit.</p>
Final effective steps	<ul style="list-style-type: none"> • Tying up means of finance for project to satisfaction of implementing authority. • Acquisition of at least 10% of total fixed assets at site. • Expenditure of at least 25% of total capital cost of project. 	<ul style="list-style-type: none"> • Tying up means of finance for project to satisfaction of implementing authority. • Acquisition of at least 10% of total fixed assets at site. • Expenditure of at least 25% of total capital cost of project.
Granting of Eligibility Certificate from SICOM (implementing authority)	Effective from date of commencement of commercial production.	Effective from date of commencement of commercial production.
Mode of disbursement of sales tax incentive	<p>a) By way of Exemption of purchase tax, sales tax on purchase of raw materials, sales tax payable on sale of finished goods, CST on sale of finished goods as a % of fixed capital investment.</p> <p>b) By way of interest</p>	<p>a) By way of Exemption of purchase tax, sales tax on purchase of raw materials, sales tax payable on sale of finished goods, CST on sale of finished goods as a % of fixed capital</p>

	free unsecured loans or refund.	investment. b) By way of interest free unsecured loans. c) By way of deferral of payment of sales tax liability.
Other benefits	<ul style="list-style-type: none"> • Refund of octroi without any monetary ceiling • 75% contribution towards preparation of feasibility study • Preferential treatment in government / government undertaking statutory bodies purchase programme. 	<ul style="list-style-type: none"> • Refund of octroi / entry tax upto 100% admissible fixed capital investment of eligible new unit. • 75% contribution towards preparation of feasibility study. • Refund of electricity duty for EHTP or 100% EOU. • 10% waiver of cost of power line for prestigious units.

5.1 Ld. CIT(A) further noted that the Mumbai Tribunal in the case of Everest Industries Ltd. In ITA No. 814/Mum/2007 has held that salient features of the 1993 scheme are identical to that of 1979 scheme. Ld. CIT(A) further found that for assessment year 1997-98 in the case of Indo Rama Synthetic Ltd., the tribunal set aside the matter to the file of the AO to compare the terms of the 1993 scheme with that of the 1979 scheme as applicable in the case of Reliance Industries Ltd. 88

ITD 273. Ld. CIT(A) further observed that Ld. CIT(A) in the case of Indo Rama Synthetics Ltd. for A.yrs. 2003-04 & 2004-05, on comparison of the 1979 scheme and the 1993 had held the sales tax subsidy received from the Maharashtra Govt. under the 1993 scheme as not a revenue receipt. Ld. CIT(A) noted that CIT(A) for A.Y. 2004-05 in the case of Indo Rama Synthetics Ltd. has held on the issue as under:-

“In the present case, the purpose of granting sales tax incentive is clearly only to provide and incentive for establishment of new industries regions or to expand its existing units of the State of Maharashtra. The intention is not to increase the viability of the eligible units but to promote development of further industry and infrastructure in the region. In the aforesaid circumstances, the exemption availed of by the appellant’s eligible units under the said notification would, in view of view of the decisions cited above, be a capital receipt not liable to tax. Therefore, this ground is held in favour of the appellant and notional amount of sales tax subsidy is held as capital receipt not chargeable to tax. The Ld. CIT(A)-XV had also allowed this sales tax subsidy disallowance in the A.Y.

2003-04 relying on the case of law of DCIT vs. Reliance Industries Ltd. 88 ITD 273 (ITAT Special Bench Mumbai) in assessee's own case. Therefore, the addition of ₹ 885425094/- is deleted.”

6. Considering the above Ld. CIT(A) held that in view of the finding given by the CIT(A) for A.Y. 2003-04, 2004-05 and 2005-06 in the case of Indo Rama Synthetics Ltd. that there is no difference between the sales tax subsidy scheme 1979 vis-a-vis the sales tax subsidy scheme of 1993, following the Mumbai ITAT Special Bench decision in the case of Reliance Industries 88 ITD 273, which has been subsequently upheld by the Bombay High Court as reported in 2010-TIOL-210-HC-Mum and the Mumbai ITAT decision in the case of Everest Industries Ltd. in ITA No. 814/Mum/2007 and the appellant having received the sales tax subsidy under the 1993 scheme, the amount involved being sales tax subsidy was a capital receipt.

7. Against the above order the Revenue is in appeal before us.

8. We have heard the rival contentions in light of the material produced and precedents relied upon. We find that the Ld. CIT(A) has given a finding that issue in dispute was covered by the Special Bench decision of the Tribunal in the case of Reliance Industries Ltd. Though

the scheme is applicable in the case of Reliance Industries Ltd. was 1979 scheme, however, in the 1993 scheme terms and conditions were of the same nature and intent. For this purpose, a comparative chart has been referred by the Ld. CIT(A). As per the comparative chart the terms and conditions applicable in 1979 scheme were of the same nature and intent of the 1993 scheme. Further, Mumbai Tribunal in the case of Everest Industries Ltd. In ITA No. 814/Mum/2007 has held that salient features of the 1993 scheme are identical to that of 1979 scheme. It was further noted that the Ld. CIT(A) for A.Y. 2003-04, 2004-05 & 2005-06 in the case of Indo Rama Synthetics Ltd. held that there is no difference between the sales tax subsidy scheme of 1979 vis-a-vis the sales tax subsidy scheme of 1993. In these decisions the Ld. CIT(A) has followed the Mumbai Tribunal, Special Bench decision in the case of Reliance Industries 88 ITD 273. In the background of the aforesaid discussion and precedents, we find that the Ld. CIT(A) has passed a correct order which does not need any interference on our part. Accordingly, we uphold the same.

9. Apropos issue of charging of interest u/s. 234B.

In this case AO has imposed interest u/s. 234B of the IT Act on the assessee. Assessee in this regard submitted to the Ld. CIT(A) as under:-

“It is respectfully submitted that since there was no default on the part of the appellant in payment of advance tax under sections 208 to 210, no interest is leviable under section 234B of the Act in view of the legal position discussed hereunder:

The provisions of sub-section (1) of section 234B read as under:

“234B Interest for defaults in payment of advance tax.

(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount

by which the advance tax paid as aforesaid falls short of the assessed tax.

On perusal of the aforesaid it will be kindly noticed that in terms of the aforesaid section 234B of the Act, interest is leviable in a case where an assessee defaults in payment of advance tax. Thus, the primary condition for imposition of interest under section 234B of the Act is default on the part of the assessee in payment of advance tax. In terms of sections 208 to 210 of the Act, it will be further noticed that an assessee is required to compute and pay advance tax during the relevant previous year on the estimated income of the assessee.

In the present case, the appellant paid advance tax by estimating its income during the previous year 2004-05 in accordance with the then prevailing legal position and the provisions of the Act. It is only on account of subsequent retrospective amendment in law that the advance tax paid by the appellant would fall short of the tax payable on the income as per the amended law. It was not possible for the appellant to foresee the retrospective amendment to take place after more than 5 years from the end of the relevant previous year and pay advance tax on the basis of the amended law. Therefore, by no stretch of imagination can it be held that there was any default on the part of the appellant in payment of advance tax in

accordance with the provisions of sections 208 to 210 during the financial year 2004-05. The claim for provision was clearly allowable as deduction to the appellant in accordance with the legal position prevailing in the financial year 2004-05.

In view of the aforesaid, it is respectfully submitted that since there was no failure/ default on the part of the appellant in payment of advance tax on provision for excess tariff during the financial year 2004-05, no interest was leviable under sections 234B of the Act"

In support of the ground, Id. Counsel relied upon following decisions:-

(i) Delhi High Court in the case of CIT v. Anand Prakash: 179 Taxman 44.

(ii) Delhi Bench of the Tribunal in Priyanka Overseas Ltd. v. DCIT: 79 ITD 353.

(iii) Calcutta High Court in the case of Emami Ltd. vs. CIT 337 ITR 470."

9.1 Considering the above, Ld. CIT(A) held that interest u/s. 234B is not leviable in the instant case as held by the ITAT, Delhi in the case of DCIT vs. Uttam Sugar Mills Ltd. in ITA No. 3223/Del/2010 vide order dated 16.12.2010 reported in 137 TTJ 157. Ld. CIT(A) noted that the Tribunal considered whether in view of retrospective amendment made by the Finance Act, 2008 inserting section 115JB(2), Explanation

1(h) in the Act which provided that the book profit be increased by the amount of the deferred tax w.e.f. 1.4.2001, interest u/s. 234B and 234C could be levied by the AO on the income computed u/s. 115JB.

The Bench held as under:-

“The question is as to whether interest under ss. 234B and 234C of the Act can be charged for default in payment of advance tax and for deferment of advance tax, respectively, where the payment of tax became due only because of the amendment by way of insertion of Explanation 1(h) to s. 115JB (2) of the Act, the amendment having been made operative retrospectively. It was due to the filing of the revised statement of assessable income, that the book profit was increased by the amount of the deferred tax. But for the retrospective amendment, the assessee was not liable to be taxed on account of adjustment of deferred tax. Undeniably, this is the obtaining legal position as per Apollo Tyres Ltd. vs. CIT (2002) 174 CTR (SC) 521 : (2002) 255 ITR 273 (SC) and Asstt CIT vs. Balarampur.

Chini Mills Ltd. (2007) 111 TTJ (Kol) 230. Now, the amendment having come about only by virtue of the Finance Act 2008, obviously there was no mala fide intention on the part of the assessee, as has been recognized in Priyanka Overseas Ltd. vs. Dy. CIT (2002) 75 TTJ (Del) 783: (2001) 79 ITD 353 (Del), in a similar fact situation. It was noted therein that from CBDT Order No. F 400/234/95-IT(BJ), dt. 21st May, 1996, it was clear that the intention of the tax authorities was not to levy interest where any amendment came with retrospective effect This gets further corroborated from the fact that while processing the return of income, the AO himself did not charge interest under ss. 234B

and 234C of the Act Further, it has been time and again held that where the assessee is under a bona fide belief and based his estimate of income as per the law prevailing at the relevant time, no interest under ss. 234B and 234C of the Act is leviable. This is the position settled under col. 1 p. 3 of the CIT(A)'s order: Aero Leather (P) Ltd. vs. Union of India (1992) 194 ITR 7 (Del); Asstt CIT vs. Jindal Irrigation Systems Ltd. (1996) 56 ITD 164 (Hyd); Sant Lal vs. Union of India (1996) 134 CTR (P&H) 581 : (1996) 222 ITR 375 (P&H); A.M. Sainalabdeen Musaliar vs. Union of India & Ors. (1999) 155 CTR (Ker) 647: (2000) 242 ITR 400 (Ker); CBDT Order No. F. 400/234/95-IT(B) dt 21st May, 1996 and amended on 30th Jan., 1997; CIT vs Anand Prakash (2009) 224 CTR (Del) 72: (2009) 20 DTR (Del) 259: (2009) 316 ITR 141 (Del); Priyanka Overseas Ltd. vs. Dy. CIT (supra); and CIT vs. Satish Traders (2001) 166 CTR (MP) 80: (2001) 247 ITR 119 (MP). Obviously, no one can be forced to perform impossibility.

In view of the above, the learned CIT(A) cannot at all be said to have erred in holding that interest under ss. 234B and 234C of the Act was wrongly charged. Therefore, finding no force in the grievance sought to be raised by the Department by way of the ground taken, the same is rejected."

9.2 Considering the above, Ld. CIT(A) held that AO is directed not to charge interest u/s. 234B, on the adjustment made to the book profits u/s. 115JB on account of retrospective amendments in section 115JB by Finance Act, 2008.

10. Against the above order the Revenue is in appeal before us.

11. We have heard the rival contentions in light of the material produced and precedent relied upon. We find that this issue is covered in favour of the assessee by the decision of the Tribunal relied upon by the Ld. CIT(A). Ld. Departmental Representative could not cite any decision on the contrary. Hence, following the precedent above, we uphold the order of the Ld. CIT(A).

12. In the result, both the appeals filed by the Revenue stand dismissed.

Order pronounced in the open court on 22/6/2012.

Sd/-

Sd/-

[C.M. GARG]
JUDICIAL MEMBER

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Date 22/6/2012

"SRBHATNAGAR"

Copy forwarded to: -

- | | | | |
|--------------|---------------|--------|------------|
| 1. Appellant | 2. Respondent | 3. CIT | 4. CIT (A) |
| 5. DR, ITAT | | | |

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches