IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA No.3473/M/2013
Assessment Year: 2008-09

M/s. UniDeritend Limited, Libery Building, Sir Vithaldas Thackersey Marg, Mumbai – 400 020 **PAN: AAACU 0028K**	Vs.	The Additional Commissioner of Income Tax, Range – 1(3), Room No.564, Aayakar Bhavan, M.K. Road, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Dr. K. Shivaram, A.R.
Revenue by : Shri Santosh Mankoskar, D.R.

Date of Hearing : 26.11.2015
Date of Pronouncement : 26.11.2015

O R D E R

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 21.02.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The assessee has taken the following grounds of appeal:

"A) **Addition on account of Capital Subsidy - Rs. 10,00,000/-**

1) The learned Commissioner of Income Tax (Appeals) - 2, Mumbai [CIT(A)] erred on facts and in law in upholding the addition made by the Additional Commissioner of Income Tax - 1(3), Mumbai (AO) on account of capital subsidy of Rs. 10,00,000/- u/s. 41(1) of the Income Tax Act.

2) The learned CIT(A) erred on facts and in law in taxing the capital subsidy of Rs. 10,00,000/- u/s. 41(1) without giving an opportunity of being heard to the appellant while holding that the capital subsidy was taxable

u/s. 4 1(1).

3) The appellant prays that your honour hold that that the capital subsidy received of Rs. 10,00,000/- was a capital receipt and was not liable to tax.

B) General

4) The above grounds of appeal are without prejudice to one another and the appellant craves leave to add, alter, amend, delete or modify any of the above grounds of appeal."

3. The brief facts of the case are that during the financial year 2001-02 the assessee had installed wind energy project at a cost of Rs.1189.87 lakhs. As per the policy of Maharashtra Government, to promote generation of energy through non conventional sources to supplement the ever increasing demand of the electricity in the state, the wind power projects have been granted status of small scale industries and the state government gives the capital subsidy up to 30% of the fixed capital investment to the promoters subject to a condition that wind power plant has successfully operated with a minimum 12% plant load factor for at least one year. The assessee accordingly applied for the said capital subsidy which was granted to the assessee during the relevant financial year 2007-08 at Rs.20 lakh. During the subsequent year i.e. F.Y. 2008-09, assessee had to refund back subsidy to the extent of Rs.10 lakhs.

4. The Assessing Officer (hereinafter referred to as the AO) observed that the assessee had already claimed 100% depreciation on the windmill, and as such the subsidy was required to be reduced from the cost of asset and hence the assessee had received a benefit of Rs.10 lakh. He accordingly added the said sum into the income of the assessee. The AO further observed that even otherwise the written Down Value (WDV) of the asset was nil, hence subsidy was to be taxed as short term capital gains under section 50 of the Act.

5. In appeal, the Ld. CIT(A) held that as 100% depreciation was allowed to the assessee on the asset itself, hence the receipt of subsidy was a benefit

received and was hence taxable under section 41(1)of the Act. Being aggrieved by the order of the Ld. CIT(A), the assessee has come in appeal before us.

6. We have heard the rival contentions and have also gone through the records. At the outset, the Ld. A.R. of the assessee has brought our attention to the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Reliance Industries Ltd." (2011) 339 ITR 632 (Bom.) wherein the Hon'ble Bombay High Court, while relying upon the decision of the Hon'ble Supreme Court in the case of "CIT vs. Ponni Sugars and Chemicals Ltd." (2008) 306 ITR 392 (SC), has held that if the object of the subsidy was to set up a new unit in a backward area to generate employment therein, then the subsidy was to be treated on capital account and the sales tax incentive was to be treated as capital receipt.

7. Admittedly, in the case in hand, the capital subsidy, as it is named in the notification of the scheme dated 12.03.1998 of the Government of Maharashtra, has been granted as an incentive to promote and encourage the installation of wind mill for generation of electricity. The said subsidy being provided to the assessee to encourage the setting up of wind mill to promote generation of energy through non conventional sources, thus, is to be treated as capital receipt.

8. So far as the applicability of the section 41(1) is concerned, it relates to the benefit derived by an assessee in respect of loss, expenditure or trading liability and not in respect of capital receipts. So far as the 'Explanation 10' to 'Section 43(1)' is concerned, we find that as per the policy of the government, the subsidy is not given automatically on the acquisition of asset or for the purpose of acquisition of asset. The precondition is that the assessee must

install a wind power project and that the wind power plant must be successfully operated with a minimum 12% plant load factor for at least one year. Admittedly, the assessee had installed the project in the financial year i.e. 2001-02. The assessee after successfully operating the plant with a minimum 12% plant load factor for one year had applied for capital subsidy vide letter dated 31.03.03, which subject to fulfillment of certain conditions were ultimately released to the applicant during the financial year i.e. 2007-08 at Rs.20 lakhs. However, out of the said amount of Rs.20 lakh, Rs.10 lakh had to be returned back by the assessee to the government. So the mere acquisition of the asset was not sufficient to claim subsidy. The subsidy was not given for the purpose of acquisition of the asset but on the production of power generation as an incentive to promote through non conventional sources. Hence, the grant of subsidy in this case is of such a nature that it cannot be directly relatable to the asset acquired. The activity i.e. production of energy by operating the plant in accordance with the specified standards is the pre-requisite condition. The subsidy was not granted to the assessee on the acquisition of asset which was acquired in the financial year i.e. 2001-02 but only in the financial year i.e. 2007-08 on achieving more than 12% plant load factor. It is also pertinent to mention here that the assessee had to pay back half of the amount of subsidy because of non fulfillment of certain conditions. Under such circumstances the proviso to explanation 10 to section 43(1), is applicable to the case in hand. The co-ordinate Kolkata bench of the Tribunal in the case of "DCIT vs. Rasoi Ltd." (2014) 46 taxman.com 214 (Kolkata-Trib.), while relying upon the decision of the Hon'ble Supreme Court in the case of "CIT vs. P.J. Chemicals Ltd." (1994) 210 ITR 830/76 taxman 611, has held that for computation of deprecation, no part of government subsidy for encouragement for setting up of industrial projects could be deducted from actual cost of WDV of fixed assets, if same is not relatable to acquisition of

assets. The relevant observation is reproduced as under:

> "6. From the above facts and circumstances, admitted facts are that during the year under consideration assessee company received incentive subsidy from Govt. of West Bengal under West Bengal Incentive Scheme, 1999 (WBIS) as encouragement for setting up of industrial project. It is also a fact that maximum limit of the subsidy was restricted with reference to the value of fixed capital investments in land, building, plant and machinery but no part of the subsidy was specifically intended to subsidize the cost of any fixed asset, therefore, it cannot he said that the subsidy was to meet a portion of cost of the asset. According to us, the assessee has rightly not reduced the amount of subsidy received from the actual cost/WDV of the fixed assets while claiming depreciation. It is also a fact that revenue during scrutiny assessments of the assessee for AY 2003-04 and 2004-05, the above stated subsidy was considered as capital receipt accepting the contention of the assessee. For the sake of consistency also the AO should not have changed the stand now. Even Hon'ble Supreme Court in the case *of CIT v. P.J. Chemicals Ltd.* [1994] 210 ITR 830/76 Taxman 611 has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under sec. 43(1) for the purpose allowing depreciation. It is further held that if Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as a percentage of such cost, it does not partake the character of payment intended either directly or indirectly to meet the "actual cost". By implication, the above judgment also provides that if the subsidy is intended for meeting a portion of the cost of the assets, then such subsidy should be deducted from the actual cost, for the purpose of computing depreciation. As per Hon'ble Supreme Court, law is that if the subsidy is asset-specific, such subsidy goes to reduce the actual cost. If the subsidy is to encourage setting up of the industry, it does not go to reduce the actual cost, even though the amount of subsidy was quantified on the basis of the percentage of the total investment made by the assessee.
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> 7. The law is already settled on the subject. Now, the only wavering is with reference to Explanation 10 provided under sec.43(1). The said Explanation provides that where a portion of the cost of an asset acquired by the assessee has been met directly, or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or

reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. It is further, provided thereunder, that where such subsidy or grant or reimbursement of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee. In order to invoke Explanation 10, it is necessary to show that the subsidy was directly or indirectly used for acquiring an asset. This is again a question of fact. The relatable subsidy to such asset can be reduced from the cost only if it is found that the cost for acquiring that asset was directly or indirectly met out of the subsidy. Likewise in the proviso, it is necessary to show that the subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify the amount directly or indirectly used for acquiring the asset. Here also, a finding of fact is necessary that an asset was acquired by directly or indirectly using the subsidy. The above Explanation and the proviso thereto do not dilute the finding of the Hon'ble Supreme Court in the case of P. *J. Chemicals Ltd. (supra)* that asset-wise subsidy alone can be reduced from the actual cost. The above Explanation and the proviso therein attempt to explain the law. They are not bringing any new law different from the law considered by the Hon'ble Supreme Court in the above cases.

8. In view of the above facts and circumstances of the case and legal position explained by Hon'ble Supreme Court in the case of P.J. *Chemicals Ltd. (supra),* we are of the view that CIT(A) has rightly allowed the claim of depreciation of assessee. We uphold the same. This issue of revenue's appeal is dismissed."

9. So far as the contention of the AO that the subsidy is liable to be taxed under section 50 of the Act is concerned, we find that in this case neither there was a transfer of any asset from the block nor did the block has ceased to exist. It is not a case of capital gains by way of transfer but it is only a case of capital receipt as observed above as an incentive by the state government to promote the generation of electricity through non conventional sources.

10. In view of the above, in our view, the subsidy received by the assessee is not taxable under section 41(1) neither under section 43(1) and nor under section 50 of the Act.

11. Hence, the appeal of the assessee is allowed and the AO is directed to treat the subsidy received by the assessee as non taxable capital receipts.

Order pronounced in the open court on 26.11.2015.

Sd/-	**Sd/-**
(Ashwani Taneja)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 30.11.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.