

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No. 300 / 2017

Pr. Commissioner of Income Tax-Central, New Central Revenue
Building, Statue Circle, Jaipur (Raj.)

----Appellant

Versus

M/s. Deepak Vegpro Pvt. Ltd., Old Industrial Area, Itarana Road,
Alwar (Raj.)

----Respondent

Connected With

D.B. Income Tax Appeal No. 301 / 2017

Pr. Commissioner of Income Tax-Central, New Central Revenue
Building, Statue Circle, Jaipur (Raj.)

----Appellant

Versus

M/s. Deepak Vegpro Pvt. Ltd., Old Industrial Area, Itarana Road,
Alwar (Raj.)

----Respondent

For Appellant(s) : Mr. Siddarth Bapna for Mr. Anil Mehta

For Respondent(s) : Mr. Sanjay Jhanwar with Ms. Archana
Mr. Amol Vyas

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

JUDGMENT

02/01/2018

1. In both these appeals common question of law and facts are involved, hence, they are decided by this common judgment.

2. By way of these appeals, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has

allowed the appeal of the assessee and dismissed the appeal of the department.

3. This Court while admitting the appeals on 20.11.2017 framed following substantial question of law:

In appeal No.300/2017

(I) Whether on the facts and in the circumstances of the case the learned ITAT is justified deleting the addition of Rs.5,40,69,558/- made by the AO on account of disallowance of claim of VAT reimbursement.

In appeal No.301/2017

(I) Whether on the facts and in the circumstances of the case the learned ITAT is justified deleting the addition of Rs.3,24,17,009/- made by the AO on account of disallowance of claim of VAT reimbursement.



4. Counsel for the appellant has taken us through the judgment of the Tribunal and contended that the Tribunal has seriously committed an error in allowing the appeal of the assessee and dismissing the appeal of the Department.

4.1 However, learned counsel for respondent has relied upon following decisions:

1. Commissioner of Income Tax, Madras vs. Ponni Sugars and Chemicals Ltd. [2008] 306 ITR 392 (SC), wherein it has been observed as under:

14. In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this Court in the case of Sahney Steel and Press Works Ltd. (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10% of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that

subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods were also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this Court by way of a special leave petition. It was held by this Court on the facts of that case and on the basis of the analyses of the Scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not for acquiring the capital asset. It was not to meet part of the cost. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt. Accordingly the matter was decided against the assessee. The importance of the judgment of this Court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee 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 the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the



assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant.



15. In the decision of House of Lords in the case of Seaham Harbour Dock Co. v. Crook (1931) 16 TC 333 the Harbour Dock Co. had applied for grants from the Unemployment Grants Committee from funds appropriated by Parliament. The said grants were paid as the work progressed the payments were made several times for some years. The Dock Co. had undertaken the work of extension of its docks. The extended dock was for relieving the unemployment. The main purpose was relief from unemployment. Therefore, the House of Lords held that the financial assistance given to the company for dock extension cannot be regarded as a trade receipt. It was found by the House of Lords that the assistance had nothing to do with the trading of the company because the work undertaken was dock extension. According to the House of Lords, the assistance in the form of a grant was made by the Government with the object that by its use men might be kept in employment and, therefore, its receipt was capital in nature. The importance of the judgment lies in the fact that the company had applied for financial assistance to the Unemployment Grants Committee. The Committee gave financial assistance from time to time as the work progressed and the payments were equivalent to half the interest for two years on approved expenditure met out of loans. Even though the payment was equivalent to half the interest amount payable on the loan (interest subsidy) still the House of Lords held that money received by the company was not in the course of trade but was of capital nature. The judgment of House of Lords shows that the source of payment or the form in which the subsidy is paid or the mechanism through which it is paid is immaterial and that what is relevant is the purpose for payment of assistance. Ordinarily such payments

would have been on revenue account but since the purpose of the payment was to curtail/obliterate unemployment and since the purpose was dock extension, the House of Lords held that the payment made was of capital nature.

16. One more aspect needs to be mentioned. In Sahney Steel and Press Works Ltd. (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.



2. Shree Balaji Alloys vs. Commissioner of Income Tax and Anr. [2011] 333 ITR 335 (JKHC), wherein it has been observed as under:

26. In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, can not, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone.

27. Thus, looking to the purpose, of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the Public Interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the Appellants-assesses,

cannot be construed as mere Production and Trade Incentives, as held by the Tribunal.

28. Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bonafide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.

29. The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

30. For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence Revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel and Ponni Sugars cases (supra).

5. He relied upon the following observations made by the Tribunal:

5.15 In light of above discussion, the legal proposition which has been laid down by the Special Bench in case of Reliance Industries after taking into consideration the decision of the Hon'ble Supreme Court in case of Sahney Steel & Press Works Ltd and by the subsequent decision of the Hon'ble Supreme Court in case of Ponni Sugar and Chemical Ltd, the character of the 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 not relevant. The source is immaterial. The form or the mechanism through which the subsidy is given is immaterial. If the object of the subsidy scheme was to enable the assessee to run business more profitably, then the receipt is on revenue account. On the other hand, if the object of the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit, then the receipt of subsidy was on capital account.



5.16 In the instant case, the subsidy in the form of VAT reimbursement is provided to the assessee company in terms of the Industrial Incentive Policy of state of Bihar formulated in the year 2006. The objective of the policy was to establish new industries and to revive the sick and closed units in the state of Bihar and to create favorable environment to attract the investors of state and from abroad. The thrust of the policy was growth in the per capita income of the state and industrial growth as well as accelerated employment opportunities. Under this Industrial Incentive Policies-2006, there are provisions for granting pre-production incentive of subsidy/exemption from stamp duty and registration fee and post production incentive of grant/exemption for preparation of project reports, purchase of land/shed, technical know-how, captive power generation/diesel generating set, subsidy/incentive on Vat, exemption in luxury tax, electricity duty, conversion fee, market fee etc.

5.17 Under the said policy, one of subsidy/incentive available to the new units, which is under consideration before us, is the reimbursement to the extent of 80% against the admitted VAT amount deposited in the account of the Government for a period of 10 years. The maximum subsidy/incentive amount was restricted to 300% of the capital employed. Applying the purpose test, the objective and the purpose of providing the VAT subsidy (to the extent of 300% of capital employed) is clearly related to encouraging setting up of the new units which commences production within five years from 1.4.2006 and to generate fresh employment opportunities in the state. It is noted that even the Id CIT(A) has given a similar finding where he states that the purpose of the industrial incentive scheme is to encourage all round development of

the state of Bihar. Further, the subsidy is calculated on the amount of VAT collected and deposited with the Government which would subsequently be entered in the passbook and verified by the Commercial taxes department. There is a distinction between the entitlement towards the said subsidy and its subsequent disbursement. The assessee becomes entitled to such subsidy once it has set up the new unit in the state of Bihar and the disbursement happens when the assessee company actually starts production. From a monitoring and implementation stand point, it is essential that subsidy is provided to genuine industries setting up new units, making capital investment, building infrastructure, actually commences production and generate employment opportunities in the state of Bihar. To this effect, the quantum of subsidy is linked to capital invested and also the disbursement thereof is linked to VAT which is collected and deposited on goods actually produced and sold. By its very nature, the subsidy would thus be payable after the commencement of production but that would not make it a revenue receipt as it was only a mode of disbursement and had nothing to do with the object for which the subsidy was given. The object for which the subsidy is granted, would takes primacy over the fact that it was given after the commencement of production and conditional upon the same. The subsidy is thus on capital account.

5.18 It is noted that a similar view has been taken by the Coordinate Bench in case of Harinagar Sugar Mills (supra) while examining the reimbursement of VAT on molasses under the Bihar Incentive Package 2006.

5.19 Further, we have noticed that the Finance Act, 2015 w.e.f. 1-4-2016, has enlarged the definition of income given u/s 2(24) by inserting sub-clause (xviii), which reads as under:- "(xviii) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43."



5.20 In light of above amendment in the definition of income, any subsidy given by the Central Government or a State Government or any authority etc. for any purpose, except where it is taken into account for determination of the actual cost of the asset under Explanation 10 section 43(1), has become chargeable to tax. Even if a subsidy is given to attract industrial investment or expansion, which is a otherwise a capital receipt under the pre-amended era, shall henceforth be treated as income chargeable to tax, except where it has been taken into account for determining the actual cost of assets in terms of Explanation 10 to section 43(1). This amendment is with effect from 1-4-2016 and is prospective in its application. In the instant case, as the assessment year under consideration is 2009-10, Section 2(24)(xviii) shall have no operation.

5.21 In light of above discussions and in the entirety of the facts and circumstances of the case, VAT subsidy received by the assessee from the Government of Bihar is a capital receipt and accordingly not chargeable to tax. In the result, ground no. 3 of the assessee's appeal is allowed.

5.1 In that view of matter, both the issues are answered in favour of assessee against the department.

6. The appeals stand dismissed.

(VIJAY KUMAR VYAS), J.

(K.S. JHAVERI), J.