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IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.199/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

The Dy. Commissioner of Income Tax,
Circle-8, Pune

.......अपीलार्थी / Appellant

बनाम / V/s.

M/s. Aurangabad Electricals Limited,
B-7, MIDC Chakan, Tal Khed,
Pune – 410501

PAN: AACCA2867L

......प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.225/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

M/s. Aurangabad Electricals Limited,
B-7, MIDC Chakan, Tal Khed,
Pune – 410501

PAN: AACCA2867L

.......अपीलार्थी / Appellant

बनाम / V/s.

The Dy. Commissioner of Income Tax,
Circle-8, Pune

......प्रत्यर्थी / Respondent

Assessee by	:	Shri Sharad Shah
Revenue by	:	Shri Arvind Desai

सुनवाई की तारीख / Date of Hearing : 13-07-2022
घोषणा की तारीख / Date of Pronouncement : 20-07-2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

These are cross appeals filed by the Revenue and assessee directed against the order of Ld. Commissioner of Income Tax (Appeals)-6, Pune, dated 01.11.2018 for the assessment year 2015-16.

2. Briefly, the facts of the case are as under:

The assessee is a company incorporated under the provisions of The Companies Act, 1956. The assessee is engaged in the manufacture of Automobile and Brake System Components and Generation of power through Windmill. The return of income for the assessment year 2015-16 was filed on 29.11.2015 declaring total income of Rs.22,00,74,770/-. The same revised on 20.09.2019 at a total income of Rs.15,69,54,690/-. Against the said return of income, assessment was completed by the Assessing Officer (AO) at a total income of Rs.21,87,81,512/-. While doing so, the AO made addition of Rs.19,93,315/- under the provisions of section 14A of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') and also treating the subsidy received from the Govt. of Maharashtra under the Industrial Promotion Subsidy Package Scheme, 2007 of Rs.5,98,28,000/- as revenue receipt.

3. Being aggrieved by the above disallowance, an appeal was preferred before the CIT(A), who vide impugned order had confirmed the disallowance u/s 14A. However, as regards the addition on account of subsidy held that the subsidy received is capital receipt following the

decision of Co-ordinate Bench of this Tribunal in the case of Innoventive Industries Ltd. in ITA No.601/PN/2013, order dated 24.03.2017.

4. Being aggrieved by the order of CIT(A) in upholding the disallowance u/s 14A, the assessee is in appeal before us in ITA No.225/PUN/2019 and being aggrieved by the decision of CIT(A) in holding that the subsidy received from the Govt. of Maharashtra as capital receipt which is against the Revenue, Revenue is in appeal in ITA No.199/PUN/2019.

5. Now, we shall take up the assessee's appeal. It is contended before us that the addition under the limb of (2) of rule 8D of Income-tax Rules, 1962 (hereinafter referred to as 'the Rules) has no application to the facts of the present case having regard to the fact that in the year of investments, the CIT(A) gave a finding that the investments are made out of current account which does not bear any interest out of the funds lying in current account. The findings of the CIT(A) had attained finality as Revenue is not in further appeal before this Tribunal. As regards to the disallowance under rule 8D(2)(iii), it is submitted that for the purpose of computing the amount of disallowance under rule 8D(2)(iii), the value of average investments should be computed by adopting only investments which yielded the exempt income alone has to be considered. Thus, it was submitted that the matter may be restored to the file of AO for computation of amount of disallowance under limb (iii) of rule 8D(2) of the Rules.

6. On the other hand, ld. Sr.DR has expressed no serious objection to remand the matter to the file of AO for the purpose of computation of disallowance under limb of (iii) of rule 8D.

7. We have heard the rival contentions and perused the materials available on record. The issue in the present appeal relates to the amount of disallowance u/s 14A read with rule 8D. As regards the disallowance under limb (2) of 8D, it is an undisputed position that the investments are made in the earlier year 2007-08, where the CIT(A) has rendered a categorical finding that the investments were made out of interest free funds of the assessee company and no disallowance of interest under rule 8D(2)(ii) is required. Thus, findings of CIT(A) are not under challenge before us. In the circumstances, we hold that no disallowance of interest u/s 14A read with rule 8D(2)(ii) is warranted.

8. As regards to the computation of disallowance under rule 8D(2)(iii), for the purpose of computing the average value of investments, only the investments which yielded exempt income alone has to be considered. The Hon'ble Special Bench of Income Tax Appellate Tribunal, Delhi in the case of Asstt. CIT Vs. Vireet Investment (P) Ltd., 188 TTJ (Del)(SB) 1 has held that while computing the amount of disallowance under sub clause (iii) of sub-rule (2) of Rule 8D of the Rule, the value of investment which yielded exempt income alone has to be considered for the purpose of arriving at average value of investment, on the similar lines, the decision of the Hon'ble Delhi High Court in the case of ACB India Ltd. Vs. Assistant Commissioner of Income Tax, 374 ITR 108 and the decision of the Madras High Court in the case of Marg Ltd. Vs. CIT, 318 CTR (Mad.) 148 and followed subsequently by the Hon'ble Madras High Court in the case of CIT Vs. Shriram Ownership Trust 318 CTR (Mad.) 233 and also by the

Karnataka High Court in the case of Pragathi Krishna Gramin Bank Vs. Jt. CIT, 95 Taxman.com 41 (Kar.).

9. In light of the above decisions, we find merit in the submissions made on behalf of the assessee that the amount of investment which yielded exempt income alone should be taken into consideration for the purpose of arriving at average value of investment as envisaged under sub clause (iii) of sub-rule (2) of Rule 8D of the Rule. Accordingly, we restore the matter back to the file of Assessing Officer for the purpose of computing the amount of disallowance in the above mentioned manner.

10. In the result, the appeal of assessee is partly allowed for statistical purposes.

11. Now, we shall take up the appeal of Revenue in ITA No.199/PUN/2019. The issue in the present appeal relates to the taxability of the subsidy received by the respondent-assessee under the Package Scheme of Incentives, 2007 announced by the Government of Maharashtra. We have gone through the nature of subsidy granted to the assessee by the Govt. of Maharashtra under Package Scheme of Incentives, 2007. A copy of the Scheme has been placed in paper book. The Preamble of the Scheme states that: "... The State has declared the new Industrial, Investment, Infrastructure Policy 2006 to ensure sustained Industrial growth through innovative initiatives for development of key potential sectors and further improving the conducive industrial climate in the State, for providing the global competitive edge to the State's industry. The policy envisages grant of fiscal incentives to achieve higher and sustainable economic growth with emphasis on balanced Regional Development and

Employment generation through greater Private and Public Investment in industrial development." The Scheme talks of granting incentives subject to Eligibility Criteria in favour of the Eligible Units. The definition clause in the Scheme provides that "An Eligibility Certificate under the 2007 Scheme will be issued by the Implementing Agency after ascertaining that the eligible unit has complied with the provisions of the Scheme and has commenced its commercial production." clause 5 of the Scheme states that "New projects, which are set up in these categories in different parts of the State, will be eligible for Industrial Promotion Subsidy. The quantum of subsidy will be linked to the Fixed Capital Investment. Payment of IPS every year will be equal to 25% of any Relevant Taxes paid by the eligible unit to the State or to the any of its departments or agencies." Modalities for sanction and disbursement of IPS 2007 have been given by the Govt. of Maharashtra which state that the Industrial Promotion Subsidy in respect of Mega projects under PSI 2001 and 2007 means an amount equal to the percentage of "Eligible Investments" which has been agreed to as a part of the customised Package, or the amount of tax payable under Maharashtra VAT 2002 and CST Act 1956 by the eligible Mega Projects in respect of sale of finished products eligible for incentives before adjusting of set off or other credit available for such period as may be sanctioned by the State Government, less the amount of benefits by way of Electricity Duty exemption, exemption from payment of Stamp Duty, refund of royalty and any other benefits availed by the eligible Mega Projects under PSI 2001/2007, whichever is lower. A careful perusal of the PSI, 2007 emphatically manifests that the subsidy had been granted to encourage industrial growth in less developed areas of the State. The quantification of subsidy is linked with the amount of investment made in setting up of the

eligible units. However, the disbursal of the subsidy is in the form of refund of VAT and CST paid on sale of excavators. In our considered opinion, the decisive factor for considering the nature of subsidy as a capital or revenue receipt is the 'purpose' for which the subsidy has been granted and not the manner of its disbursal. The Hon'ble Supreme Court in Sahney Steel & Press Works Ltd. v. CIT [1997] 94 Taxman 368/228 ITR 253 has held in the facts of that case that the operational subsidy received after the commencement of business was a revenue receipt but simultaneously laid down the ratio decidendi of applying the 'purpose test' for ascertaining the true nature of subsidy. The purpose test has been reiterated by the Hon'ble Supreme Court in CIT v. Ponni Sugars & Chemicals Ltd. [2008] 174 Taxman 87/306 ITR 392 by holding that the relevant consideration should be the purpose of subsidy and not its source or mode or payment. When we apply such a test on the facts and circumstances of the case, it demonstrably emerges that the purpose of subsidy is industrial growth; it is linked with the setting up of industrial units; and the amount of subsidy is linked with the amount of investment made in the eligible unit. Simply because the subsidy has been disbursed in the form of refund of VAT and CST, it will not alter the purpose of granting the subsidy, which is nothing but establishment of new industrial units in less developed areas of the State. The authorities below have been swayed by the fact that the subsidy was granted post commencement and is in the nature of refund of VAT and CST and overlooked the purpose of its granting, which is nothing but momentum in industrial pace in less developed parts of the State. Testing the factual panorama on the touchstone of the ratio laid down by the Hon'ble Supreme Court in the

above referred cases, we are of the considered opinion that the subsidy of Rs.4,58,41,000/- is a capital receipt and not chargeable to tax.

12. At this stage, it is relevant to mention that we are concerned with the A.Y. 2014-15. The Finance Act, 2015 has inserted clause (xviii) to section 2(24) w.e.f. 1-04-2016 providing that the assistance in the form of subsidy or grant of cash incentives etc., other than the subsidy which has been taken into consideration in determining the actual cost of the asset in terms of Explanation 10 to section 43(1), shall be considered as an item of income chargeable to tax. Since the amended provision of section 2(24)(xviii) is not applicable to the year under consideration, the sequitur is that the subsidy received by the assessee would not form part of its total income.

13. Similarly, the Hon'ble Supreme Court in the case of CIT vs. Chaphalkar Brothers Pune, 400 ITR 297 (SC) after referring to its earlier decision in the case of Ponni Sugars & Chemicals Ltd. (supra) held as under :-

> *"21. What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.*
>
> *22. Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore,*

they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.

23. Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shree Balaji Alloys v. CIT [2011] 9 taxmann.com 255/ 198 Taxman 122/ 333 ITR 335. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery.

24. After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars & Chemicals Ltd. case (supra) and the appeals were, therefore, dismissed.

25. We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.

26. In coming to the West Bengal cases, we find that the West Bengal Finance Act, 2003 which amended the Bengal Amusements Tax Act of 1922 also provided:

The Bengal Amusements Tax Act, 1922.

The provision seeks to provide, in order to encourage development of multiplex theatre complex, a very modern and highly capital-intensive entertainment centre, financial assistance to the proprietors of such complex by allowing them to retain, by way of subsidy, the amount of entertainment tax collected against the value of ticket for admission to such multiplex theatre complex for a period not exceeding four years;

27. Since the subsidy scheme in the West Bengal case is similar to the scheme in the Maharashtra case being to encourage development of Multiplex Theatre Complexes which are capital intensive in nature, and since the subsidy scheme in that case is also similar to the Maharashtra cases, in that the amount of entertainment tax collected was to be retained by the new Multiplex Theatre Complexes for a period not exceeding four years, we are of the view that West Bengal cases must follow the judgment that has been just delivered in the Maharashtra case."

14. Applying the ratio of the decisions of the Hon'ble Supreme Court referred to above, to the facts of the present case, since the subsidy was granted actually as incentives for encouraging the dispersal of industries to the less developed areas of the State of Maharashtra, the subsidy cannot be treated as revenue receipt.

As regards to the applicability of provisions of section 28(iv) of the Act, this envisages the value of entire benefit, whether convertible to money or not, which means the benefits have to be in the kind, the monetary benefits are not covered by the said provisions of the Act as in the catena of following decisions :-

(i) CIT vs. Indokem Ltd., 132 ITR 125 (Bombay High Court).
(ii) CIT vs. Alchemic Pvt. Ltd., 130 ITR 168 (Gujarat High Court).
(iii) Ravinder Singh vs. CIT, 205 ITR 353 (Delhi High Court).

(iv) *CIT vs. New India Industries Ltd., 204 ITR 208 (Gujarat).*

(v) *CIT vs. Mafatlal Gangabhai and Company Pvt. Ltd., 219 ITR 644 (SC).*

15. In the light of the above legal position, we do not find any merit in the ground of appeal filed by the Revenue. Hence, the ground of appeal filed by the Revenue stand dismissed.

16. In the result, the appeal of assessee is partly allowed for statistical purposes and the appeal of Revenue is dismissed.

Order pronounced in the open court on 20th July, 2022.

Sd/-	Sd/-
S.S.VISWANETHRA RAVI	**INTURI RAMA RAO**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 20th July, 2022

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-6, Pune;
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "A" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

//सत्यापित प्रति// True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary

आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune