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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.445/Mum/2022
(A.Ys.2012-13)

Deputy Commissioner of Income Tax, CC, 2(2) Old CGO Building, 806, 8th Floor, M.K. Road Mumbai – 400020	Vs.	M/s Vinati Organics Ltd 1102, Parinee Crescezo, G, Block, Plot No. C38/39, Behind MCA, Bandra Kurla Complex, Bandra East Mumbai – 400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACV6538K		
Respondent	..	Appellant

ITA No.402/Mum/2022
(A.Ys.2012-13)

M/s Vinati Organics Ltd 11th Floor, 1102, Parinee Crescezo, G, Block, Plot No. C38/39, Behind MCA, Bandra Kurla Complex, Bandra East Mumbai – 400 051	Vs.	ACIT, CC-2(2)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACV6538K		
Appellant	..	Respondent

Appellant by :	Nishant Thakker & Jasmine Amalsadwala
Respondent by :	Hemant Kumar Chimanlal

Date of Hearing	16.11.2022
Date of Pronouncement	30.11.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present cross appeals filed by the assessee and the revenue based on similar facts and identical issue, therefore for the sake of convenience both these appeals are adjudicated together. The revenue has raised the following grounds before us:

> *"1. Whether the Ld.CIT (A) was justified against the AO's action of not considering the claim of sales tax subsidy of Rs. 1,49,39,458/- by ignoring the purpose for which such subsidy was given (the purpose test) and the fact that the assessee had merely stated that the sales tax subsidy was capital in nature and had not given any further clarification as to what was the purpose for which the subsidy had been given nor had it clarified as to the purpose for which the subsidy had been utilized.*
>
> *2. Whether the Ld.CIT (A) was justified against the AO's action of not considering the claim of Education Cess on income tax Rs. 67,83,793/- and Education Cess on Dividend Distribution Tax of Rs. 4,66,570/- by ignoring judgments of the Hon'ble High Courts in which Education deduction." was not allowed as deduction.*
>
> *3. Whether the words "Income tax in the Finance Act of 1964 in sub-s(2) and sub-s (2)(b) of s.2 would include surcharge and additional surcharge.*
>
> *4. Whether, the Ld.CIT(A) has erred both in law and on facts in failing to appreciate the findings of the assessing officer."*

2. Fact in brief is that return of income declaring total income of Rs.71,21,91,480/- was filed on 27.09.2012. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 06.08.0213. Further remaining facts of the case are discussed while adjudicating the ground of appeal filed by the revenue.

1st Ground: Claim of sale tax subsidy of Rs.1,49,39,458/-:

3. During the financial year relevant to the assessment year under consideration the assessee has raised additional ground of appeal before the ld. CIT(A) that assessing officer be directed to exclude the sale tax subsidy amounting to Rs. 1,49,39,458/- as capital receipt while computing the total income under the provisions of the Income Tax Act. In the additional ground of appeal filed before the ld. CIT(A) the assessee submitted that the said subsidy has been granted with an object to intensify and accelerate the process of dispersal of industries from the developed area and for development of underdeveloped region of the state. The object for granting incentive is for development of industries and generation of employment in specified area. In terms of the scheme assessee has set up manufacturing unit at lote and Mahad in the state of Maharashtra. The lote unit was eligible for sale tax subsidy as per Government resolution, industries energy and labour No. IDL - 1093/[8889]/IND-8 dated 07.05.1993. It was further submitted that as per the aforesaid policy incentive in the form of sale tax is granted for development of underdeveloped area. Therefore, it was claimed that sale tax subsidy was of the nature of capital receipt. The ld. CIT(A) after considering the remand report and terms and conditions of the scheme treated the subsidy received by the assessee and capital received. The relevant part of the decision of ld. CIT(A) is as under:

> *9.4 I have considered the facts of the case, submissions of the assessee, remand report of the AO and material on record. The brief facts of the case are that the appellant has set up a manufacturing unit at Lote & Mahad in the state of Maharashtra. The said unit was eligible for sales tax incentive as per the Government Resolution, Industries, Energy and Labour, No IDL-1093/(8889)/IND-8 dated 07.05.1993. Thus the assessee has claimed that during the previous year relevant to the assessment year 2012-13, the appellant was eligible for sales tax exemption of Rs. 1,54,15,244/- (in the additional ground of appeal the amount was stated as Rs. 1.49,39,458/ however correct amount claimed by assessee is Rs. 1,54,15,244/) as per the Package Scheme of Incentives, 1993. Basically in his remand report the AO has not discussed about the nature of expenditure whether capital or revenue, the only stand taken by the*

AO is that the assessee failed to claim such incentive while filing the return of income u/s.139(1) or in the revised return of income. However various Court's have taken a view that such claims can be made by the assessee at any stage of appellate proceedings as well. The Hon'ble Mumbai High Court has decided an identical issue in case of Pruthvi Brokers Pvt. Ltd 253 CTR 0515, where in it has been held that such issues can be raised before CITAY's though it was not claimed at the time of filing of return.

9.5 Before going into the merit of the allowability of Sales Tax Subsidy of Rs. 1,49,39,458/, the admissibility of the additional ground needs to be examined. It is an admitted fact that the claim was neither made in the Rol nor claimed before the A.O. during the assessment proceedings. Section 250(5), which empowers the CIT(A) to admit additional grounds reads as under-

> *"(5) The Commissioner (Appeals)] may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals)] is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable."*

The provision clearly specify that before admitting an additional ground, the CTT(A) has to be satisfied with respect to the omission of the ground from the form of appeal that it is (1) not wilful or (ii) unreasonable. So twin condition that the omission of the ground is neither wilful nor unreasonable need to be established by the Appellant. As seen from the submission filed by the Appellant, during the assessment proceedings relating to the AY 2014-15, the claim of Sales tax subsidy availed by the assessee and claimed as capital receipts was discussed and allowed in the order u/s. 143(3) to the extent of Rs.3,20,66.861/. It is claimed that in the instant year, since the time limit of filing the second revised return u/s 139(5) was already lapsed, it could not be claimed.

9.6 During the appellate proceedings, the assessee has submitted the copy of the scheme and eligibility certificate received from SICOM Limited (page number 29-37) of Paper Book and copy of working of the amount of Sales Tax exemption of Rs. 1,54,15,244/ placed at (38 page) of Paper book. As per the assessee, the Sales Tax Exemption/Subsidy is capital in nature, however the same was not reduced from the total income while filing the return of income u/s 139(1) of the Act. The assessee claims that, the incentive amount of Rs.1,54,15,244/- was inadvertently not reduced from the income chargeable to tax. As per the assessee, the said claim was also not raised before the AO during the course of assessment proceedings and hence the appellant had filed additional grounds of appeal on 25.10.2016. However various Court's have taken a view that such claims can be made by the assessee at any stage of appellate proceedings. The AO has objected to admission of the additional grounds. The Hon'ble Mumbai High Court has decided an identical issue in case of Pruthvi Brokers Pvt. Ltd 253 CTR 0515, where in it has been held that such issues can be raised before CIT(A)'s though it was not claimed at the time of filing of return. Recently, the jurisdictional High Court has again taken identical view in the case of Siva Equipment (P) Ltd. vs ACIT (2020) 119 taxmann.com 472 (Bombay)stating that Commissioner (Appeals) has jurisdiction to deal with additional grounds those which were available when original return was filed.

9.7 Similar decision has been rendered by the Hon'ble Karnataka High Court in case of PCIT vs Karnataka state co-op Federation Ltd. 128 Taxmann.com. Besides various Courts have taken similar view in the following cases:

1. *NTPC Vs CIT 229 ITR 383(SC),*
2. *Jute Corporation of India Vs. CTT 181 ITR 688 (SC).*

Therefore, considering the overall facts and legal position on the issue, remand report of the AO and the rejoinder of the appellant, the additional ground taken by the assessee is admitted and is adjudicated as under:

9.8 As regards Sales Tax Subsidy, the AO in its remand report has stated that the nature of a subsidy, whether capital or revenue would depend on the purpose for which such subsidy is given and in case the purpose of the subsidy is to support the assessee to set up its business, to complete a project, or to acquire a capital asset, the subsidy would be regarded as capital receipt. However, if the subsidy is given to the assessee for assisting him in carrying out the trade/business operations only after commencement of production, such subsidy would be regarded as a revenue receipt. In cases where subsidies were not granted for production of any new asset and were granted year after year only after setting up of the new industry and commencement of production, such subsidies would be regarded as assistance given for the purpose of carrying on of the business of the assessee thus, would be taxable in the hands of the assessee company. Thus the AO has explained the criteria that how to treat the subsidy whether capital or revenue receipt. However, the AO has not discussed about the nature of receipt in the case of the assessee except stating that, the assessee has merely stated that sales tax subsidy is capital in nature and has not given any further clarification as to what was the purpose for which the subsidy has been given nor has it clarified as to the purpose for which the subsidy has been utilized. On the other hand the assessee has argued that a manufacturing unit at Lote & Mahad in the state of Maharashtra was eligible for sales tax incentive as per the Government Resolution, Industries, Energy and Labour, No IDL-1093/(8889)/IND-8 dated 07.05.1993. During the year under consideration the appellant has received export incentive of Rs. 1,54,15,244/ under the scheme of export incentive from the Government.

9.9 Further, the assessee has argued that the sales tax subsidy granted by the Government is actually capital receipt and the same is not liable to be taxed and the said incentive has been granted to the appellant to set up manufacturing unit at Lote and Mahad Le, with an object to set up an undertaking in the notified backward areas. The assessee has submitted that the sales tax subsidy was reduced from the income chargeable to tax in the return of income filed by the appellant for AY 2014 15 and the appellant's claim has been allowed in the assessment order passed u/s 143(3) of the Act on 26.12.2016.

9.10 In order to determine whether the incentives received/ granted are revenue or capital in nature, one has to analyze purpose of the scheme. If the purpose of scheme is to run business more profitably then the incentive is on revenue

account and if the object of incentive is to set up a new unit or expand the unit then the incentive will be capital in nature.

9.11 Coming to the Sales Incentive Schemes, it appears, that, the appellant has been given incentives as the appellant has set up a manufacturing unit at Lote & Mahad in the state of Maharashtra. During the previous year relevant to the assessment year 2012-13, the appellant was eligible for sales tax exemption of Rs. 1,54,15,244/- as per the Package Scheme of Incentives, 1993. Copy of the scheme and eligibility certificate received from SICOM Limited has been produced by the appellant during the appellant proceedings in the form of Paper Book placed at Paper book. The said unit was eligible for sales tax incentive as per the Government Resolution, Industries, Energy and Labour, No IDL-1093/(8889)/IND-8 dated 07.05.1993.

9.12 I have considered the facts of the case, submissions of the assessee and material on record and feel that this incentive receipt in the form of sales tax subsidy is in some way connected to capital receipt in the form of technology upgradation and expansion of capacity of the plant. The Hon'ble Supreme Court in the case of CIT vs Ponni Sugars & Chemicals Ltd (2008) 306 ITR 392 (SC) has examined this issue in great detail and held that if the purpose of incentive or subsidy was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was of capital in nature. For clarity the relevant portion of the decision is reproduced as under:

> *"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 SeahamHarbour 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.*
>
> *17. Applying the above tests to the facts of the present case and keeping in mind the object behind the payment of the incentive subsidy we are satisfied that such payment received by the assessee under the Scheme was not in the course of a trade but was of capital nature. Accordingly the first question is answered in favour of the assessee and against the Department."*

9.13 An identical issue has been examined by Hon'ble ITAT Chennai in the case of Eastman Exports Global Clothing Pvt. Ltd. In ITA No. 47/MDS/2016 dated 17.05.2016. The said decision by ITAT considered Market Linked Focus Product Scheme (MLFPS) held as this incentive is capital receipt by observing as under:

> *"9. We have considered the rival submissions on either side and also perused the relevant material available on record. The Market Linked Focus Product Scheme is a scheme promoted by the Director General of Foreign Trade wherein incentive @ 2% on the FOB value of the total export was allowed. As per the Scheme, the incentive was given to export products in a specified market. The export of products which are covered under FPS list would be given incentive of 2% on FOB value of the export. In other words, it is an incentive given by the Government for exploring the new markets across the globe. The question anses for consideration is when the assessee was given incentive for exploring the new markets across the globe, whether such incentive would be a capital receipt or revenue receipt? The Apex Court in the case of Ponni Sugars & Chemicals Ltd. (supra) had an occasion to examine an identical situation and observed that if the object of the subsidy was to enable the assessee to carry on the business more profitably, then the receipt is on the revenue account. On the other hand, if the object of assistance was to enable the assessee to set up a new unit or expand the existing unit, then the receipt is on the capital account. In the case before us, the Government of India provided the incentive for exploring the new markets across the globe. Exploring a new market for a specified area would naturally expand the market area of the assessee. The incentive given to the assessee is not for running the business profitably but for expanding the market area. Therefore, this Tribunal is of the considered opinion that the incentive given by the Government to the assessee for exploring the new market is a*

> *capital receipt, hence it cannot be treated as income either under Section 2(24) or 28 of the Act. In view of the above, we are unable to uphold the order of the lower authority. Accordingly, the orders of the lower authorities are set aside and the addition made by the Assessing Officer is*

9.14 Similarly, the Hon'ble ITAT Delhi in the case of Sutlej Textiles & Industries Ltd (ITA No. 5142/Del/2013) has held the TUF subsidy has been given for the purpose of technology upgradation and for promoting capacity expansion, globalization of textile trade and employment generation and thus applying the purpose test as laid down in Ponni sugar (Supra) held the same as capital receipt and not chargeable to tax.

9.15 Similarly, the Hon'ble Punjab & Haryana High Court in the case of Sham Lal Bansal held that the TUF subsidy received by the assessee is in the nature of capital receipt and not revenue receipt.

9.16 Further, Hon'ble ITAT, Chennai in the case of M/s. CVN Textile Pvt. Ltd. Vs DCIT in ITA No. 746/MDS/2014 vide order dated 21.11.2014 in para 8 of the order held as under.

> *"The assessee second ground claims TUF receipt of 7.58 lakhs are also capital receipt. The assessment as well lower authority treated it as revenue receipt. This amount represents interest subsidy @5% separately account for receipt instead of netting the same as against interest paid amount. It emerges from CIT vs Shamlal Bansal that their lordship have held that a TUF receipt is only a capital receipt."*

9.17 Similarly, the issue whether the interest subsidy received under the technology up gradation fund scheme (TUF) is capital receipt or revenue receipt was came up for consideration before the Hon'ble ITAT, Kolkata bench in the case of M/s. Gloster Jute Mills Ltd vs Addl. CIT in ITA No. 687/Kol/2010 and the Hon'ble ITAT, vide order dated 02.07.2014 decided the issue in favour of the assessee with the following observation:-

> *"9. We have carefully considered the submissions. We find considerable cogency in the submissions of the Id. Counsel of the assessee. We find that identical issue under the Technology Upgradation Fund Scheme (in short "TUFS) of Ministry of Textiles was considered by the Hon'ble Punjab & Haryana High Court in ITA No. 472 of 2010 vide decision dated 17.01.2011. Hon 'ble High Court has considered and held the issue as under:*
>
> > *2. The assessee is engaged in manufacture and sale of woolen garments It received subsidy for repayment of loan taken for building, plant and ITA No.95/Kol/2011 M/s. Gloster Jute Mills Ltd.*
> >
> > *A. Yr.2007-08 machinery under the Credit Linked Capital Subsidy Scheme under Technology Upgradation Fund Scheme (FUFS) of Ministry of Textiles, Government of India. The assessee claimed the*

said subsidy to be capital receipt but the Assessing Officer did not accept the same and added back the same to the income of the assessee holding the same to be revenue receipt. On appeal, the CIT(A) upheld the plea of the assessee, which view has been affirmed by the Tribunal with the following observations:

> *"Having regard to the aforesaid, in our view, it is quite clear that the objective of the subsidy scheme was to enhance the technology apparatus of the assessee by assisting in acquiring machinery and further that the subsidy so received was utilized for repayment of loans taken by the assessee to set up the new unit, as was the intention of the subsidy."*

10. Considered in the aforesaid light, in our view, the facts of the instant Scase are on all fours comparable to those considered by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra) and therefore, a natural corallary is that the nature of the subsidy in question is capital. Therefore, both on the issue of the objective of the scheme and on the utilization of the funds received as subsidy, the subsidy is to be viewed as capital in nature having regard to the judgment of the Hon'ble Supreme Court in the case of Ponni Sugars & Chemical Ltd. (supra).

11. Reliance placed by the Revenue on the case of Sawhney Steels and Press Works Ltd. & others (supra), in our view, is not appropriate having regard to the aforesaid features of the scheme, which are not in dispute. Moreover, in the case of Sawhney Steel and Press Works Ltd. & others (supra), it was found as a fact that the subsidy was given to meet recurring expenditure and was not for acquiring a capital asset. Whereas in the instant case, admittedly, there is no provision in the scheme to grant subsidy to meet any recurring expenditure and neither such a case has been set up by the Department. The only objections of the Department are that the subsidy has been given after commencement of production and, secondly that it was for repayment of loans. Both these factors do not distract from the nature of the subsidy being treated as capital as explained by the Hon'ble Supreme Court in the case of Ponni Sugars Chemicls Ltd. (supra).

3. We have heard learned counsel for the appellant.

4. Learned counsel for the revenue submitted that the subsidy was not given at the time of setting up of the industry but after commencement of production for repayment of loan. In such situation, the amount should have been treated as revenue receipt, as per judgment of the Hon 'ble Supreme Court in Sahney Steel & Press Works Ltd. &Ors. v. CTT (1 997) 228 ITR 253

ITA No. 95/Kol/2011 M/s. Gloster Jute Mills Ltd.A.Yr.2007-08

5. We are unable to accept the submission.6. The purpose of scheme under which the subsidy given, has been discussed by the Tribunal. To sustain and prove the competitiveness and overall long term viability of the textile industry, the concerned Ministry of Textile adopted the TUFS scheme, envisaging technology upgradation of the industry. Under the scheme, there were two options, either to reimburse the interest charged on the lending agency on purchase of technology upgradation or to give capital subsidy on the investment in compatible machinery. In the present case, the assessee has taken term loans for technology upgradation and subsidy was released under agreement dated 12.7.2005 with Small Industry Development Bank of India. The relevant clause of the agreement under which the subsidy was given is as under:

> *"Para 8. to prevent misutilization of capital subsidy and to provide an incentive for repayment, the capital subsidy will be treated a non interest bearing term loan by the Bank/Fis. The repayment schedule of the term loan however will be worked out excluding the subsidy amount and subsidy will be adjusted against the term loan account of the beneficiary after a lock in period of three years on a pro-rate basis in terms of release of capital subsidy. There is no apparent or real financial loss to a borrower since the countervailing concession is extended 10 the loan amount.*

7. In view of above, the view taken in Sahney Steel & Press Works Ltd. &015., could not be applied in the present case, as in said case the subsidy was given for running the business. For determining whether subsidy payment was 'revenue receipt' or 'capital receipt. character of receipt in the hands of the assessee had to be determined with respect of the purpose for which subsidy is given by applying the purpose test, as held in Sahney Steel & Press Works Ltd. &Ors. itself and reiterated in later judgment in CIT v, Ponni Sugars & Chemicals Ltd. &ors. (2008) 3061TR 392 referred to in the impugned order of the Tribunal.

8. In view of above since the matter is covered by judgment of the Hon'ble Supreme Court in Ponni Sugars & Chemicals Ltd. &ors. against the revenue, no substantial question of law arises".

Thus we find that on identical issue the matter has been decided in favour of the assessee. In these circumstances, we are of the opinion that a held here in above in order to sustain competitiveness in the domestic as well as international markets and overall long-term viability of the industry, the concerned Ministry adopted the TUFS scheme envisaging Technology Upgradation of the Industry. Hence, the ITA No.95/Kol/2011 M/s. Gloster Jute Mills Ltd.

A.Yr.2007-08 subsidy received in this regard falls into capital field. Hence respectfully following the precedent as above we set aside

> *the order of the Id. CIT(Appeals) and decide the issue in favour of the assessee."*

9.18 In view of the principals laid down by the Hon'ble Apex Court in the case of CIT vs Ponni Sugars & chemicals Ltd (supra), decision of Hon'ble Punjab & Haryana High Court in the case of Sham Lal Bansal and various other decisions as given above, it is held that the Sales Tax Subsidy received by the appellant is capital receipt, which is not chargeable to tax. However, the AO will ascertain the actual amount of subsidy eligible for this purpose whether Rs. 1,54,15,244/- as claimed in the submission or Rs. 1,49,39,458/- as stated filing the additional ground of appeal."

4. Heard both the sides and perused the material on record. During the year under consideration the assessee has received the sale tax subsidy and raised additional ground before the ld. CIT(A) for considering the sale tax subsidy as capital receipt. The ld. CIT(A) has elaborated in his finding as supra that assessee has set up a manufacturing unit at Lote and Mahad in the state of Maharashtra. The said unit was eligible for sale tax as per the Government Resolution, Industries, Energy and labour, No. IDL -1093/[8889]/IND-8 dated 07.05.1993. The ld. CIT(A) has also considered the decision of Hon'ble Supreme Court in the case of CIT Vs. Ponni Sugar & Chemicals Ltd. (2008) 1306 ITR 392 (SC) wherein held that if the purpose of incentive or subsidy was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of subsidy was of the capital in nature. The ld. CIT(A) has also discussed the other decision of ITAT, Chennai in the case of Eastman Export Global Clothing Pvt. Ltd. vide ITA No.47/Mad/2016 dated 17.05.2016 wherein it is held that if the object of assistance was to enable the assessee to set up a new unit or expand the existing unit then the receipt is of the capital account. The ld. CIT(A) has also discussed the decision of ITAT, Delhi in the case of Sutlej Textiles Industries Ltd. (ITA No. 5142/Del/2013) wherein held that TUF subsidies has been given for the purpose of technology upgradation and for providing capacity

extension, globalisation of textiles trade and employment generation thus applying the propose test as laid down in Ponni Sugar the same is capital receipt not chargeable to tax. Similarly the ld. CIT(A) has also discussed the various other decision in his finding on identical issue that subsidies received pertaining to development of industries is of the nature of capital receipt.

5. During the course of appellate proceedings before us the ld. counsel also submitted that in subsequent year assessment year 2013-14 the ld. CIT(A) has allowed the appeal of the assessee treating sale tax subsidy as capital receipt and department has not raised any ground before the ITAT. It is also submitted that in assessment year 2015-16 the assessee has treated the sale tax subsidy received as capital receipt and same has been accepted by the A.O in the assessment order. In the light of the above facts and finding we don't find any force in the ground of appeal of the revenue, therefore, this ground of appeal stand dismissed.

2nd Ground: Claim of education cess of Rs.67,83,793/- as deduction:

6. The assessee has also made additional claim of deduction in respect of education cess of Income Tax of Rs.67,83,793/- and education cess on dividend distribution tax of Rs.4,66,570/- before the ld. CIT(A). The CIT(A) has allowed the claim of the assessee.

7. Heard both the sides and perused the material on record. Since surcharge or cess is a part of Income Tax and not deductible u/s 40(a)(ii) w.e.f 01.04.2005 as per Finance Act 2022. Therefore, we consider that assessee is not eligible for claiming deduction of education cess while computing total income. Therefore, this ground of appeal of the revenue is allowed.

8. The appeal of the revenue is partly allowed.

ITA No. 402/Mum/2022

1st Ground: Disallowance u/s 40(a)(i) of the Act:

9. During the course of assessment the A.O noticed that assessee has made payment to non-resident of Rs.55,160/- to ICIC prising U.K. and Rs.2,12,603/- to Platts USA. After considering the detailed submission filed by the assessee the A.O observed that the payment made were in the nature of royalty payment since the aforesaid payments were made for the right to use the process or information concerning industrial commercial or scientific experience which was liable to be taxed as royalty as per the provisions of Sec. 9(i)(vi) of the Act. The assessee company has not deduct tax as per the provision of Sec. 195 of the Act, therefore, the A.O disallowed the amount of Rs.2,67,763/- u/s 40(a)(i) of the Act.

10. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

11. During the course of appellate proceedings before us the ld. Counsel could not controvert the fact that impugned payment made to the non-resident was not attracted by the provision of Sec. 195 of the Act, therefore, we don't find any merit in this ground of appeal of the assessee, therefore, the same stand dismissed.

Additional Ground: Claim of deduction u/s 80IA on account of generation of power:

12. During the course of appellate proceedings vide letter dated 01.08.2022 the assessee filed the additional ground for claim of deduction u/s 80IA on account of generation of power.

13. Heard both the side and perused the material on record. The assessee claimed that it has coal based boiler which generate powers in the form of steam. It was also submitted for power in the form of steam was generated by the captive power plant and consumed in the manufacturing of chemicals. The assessee claimed that deduction u/s 80IA on the said unit was allowed by the A.O in the subsequent assessment year 2016-17. Since, this issue of claim of deduction u/s 80IA was not made before the lower authorities, therefore, we restore this issue to the file of the assessing officer for deciding de novo after verification of the relevant details and material to be submitted by the assessee during the course of set aside proceedings. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

14. The appeal of assessee partly allowed for statistical purposes.

15. In the result, the appeal of the revenue vide ITA No.445/Mum/2022 is partly allowed. The appeal of the assessee vide ITA No.402/Mum/2022 is partly allowed for statistical purposes.

Order pronounced in the open court on 30.11.2022

Sd/-
(Amit Shukla)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai
Date 30.11.2022
Rohit: PS

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

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

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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