* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: January 09, 2015
Pronounced on: January 30, 2015

\+ **ITA 586/2013**
\+ **ITA 587/2013**
\+ **ITA 161/2014**
\+ **ITA 204/2014**

COMMISSIONER OF INCOME TAX-I ..... Appellant
Through: Mr. Rohit Madan and Mr. Ruchir Bhatia, Advocates.

Versus

BOUGAINVILLEA MULTIPLEX ENTERTAINMENT CENTRE PVT. LTD. ..... Respondent
Through: Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA
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1. These four income tax appeals under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as "the Act") give rise to common question of law and, therefore, have been heard together and are being decided through this common judgment.

2. The respondent assessee is engaged in the business of running of multiplex cinema halls and shopping malls in the name and style of "Spice World" situated at 1-2, Sector 25A, Noida, Gautam Budh Nagar, (Uttar Pradesh), and has been the beneficiary of a scheme promulgated by the State Government with the objective of encouraging setting up of such multiplex

cinema halls where under it has been granted exemption from entertainment tax payment. It claimed deduction to the extent of entertainment tax collected in the corresponding financial years terming the amounts as capital receipts. The Assessing Officer disallowed the said claims but, on appeal, the Commissioner Income Tax (Appeals) [CIT(A)] rejected the contention of the Revenue and allowed the deduction claimed by the assessee. The appeal of the Revenue against the said order of CIT(A) was turned down by Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT").

3. The Revenue urges the following question of law; which is hereby framed:

> "Whether the ITAT has not erred in law and on facts in holding that the entertainment tax subsidy granted to the respondent during the relevant year(s) is a capital receipt?"

4. Before coming to the question of law, certain basic facts need to be noted.

5. In ITA No. 587/2013, the dispute relates to assessment year 2006-2007. The assessment order under Section 143(3) of the Act was passed on 15.12.2009, *inter alia*, declining the deduction on account of entertainment tax in the sum of ₹1,33,74,831/- from the total income. The income was assessed at ₹3,47,24,940/- (inclusive of the element of advertisement expenditure which is not the subject matter here) whereupon a tax demand (including penalty and interest) was raised in the sum of ₹1,13,42,475 /-. The CIT(A) in appeal No. 167/2009-2010 rejected the view of the Assessing Officer restoring the deduction vide order dated 26.10.2010.

6. In ITA No. 586/2013, the dispute relates to assessment year 2007-

2008. The assessment order under Section 143(3) of the Act was passed on 22.12.2009, *inter alia*, declining the deduction on account of entertainment tax in the sum of ₹6,12,57,194/- from the total income. The income was assessed at ₹7,39,19,581/- (including advertisement expenses) whereupon a tax demand (including penalty) was raised in the sum of ₹2,77,96,504/-. The CIT(A) in appeal No. 300/2009-2010 rejected the view of the Assessing Officer restoring the deduction vide order dated 03.12.2010.

7. The orders of CIT(A) concerning the assessment years 2006-2007 and 2007-2008 were challenged by the Revenue by way of income tax appeal Nos. 5517/Del/2010 and 491/Del/2011 which were heard with cross objection Nos. 415/Del/2010 and 41/Del/2011 filed by the assessee. Both the said appeals and the cross objections were disposed of through common order of ITAT passed on 22.03.2013 against the Revenue, upholding the view taken by CIT(A).

8. In ITA No. 204/2014, the dispute relates to assessment year 2008-2009. The assessment order under Section 143(3) of the Act was passed on 19.11.2010, *inter alia*, declining the deduction on account of entertainment tax in the sum of ₹6,75,56,204/- from the total income. The income was assessed at ₹ 7,74,86,970/- (inclusive of advertisement expense) whereupon a tax demand (including penalty) was raised in the sum of ₹3,00,28,647/-. The CIT(A) in appeal No. 149/2010-2011 rejected the view of the Assessing Officer restoring the deduction vide order dated 18.10.2011.

9. In ITA No. 161/2014, the dispute relates to assessment year 2009-2010. The assessment order under Section 143(3) of the Act was passed on 28.11.2010, *inter alia*, declining the deduction on account of entertainment tax in the sum of ₹5,60,49,044/- from the total income. The income was

assessed at ₹3,91,69,316/- whereupon a tax demand (including penalty) was raised in the sum of ₹3,00,28,647/-. The CIT(A) in appeal No. 149/2010-2011 rejected the view of the Assessing Officer restoring the deduction vide order dated 18.10.2011.

10. The orders of CIT(A) concerning the assessment years 2008-2009 and 2009-2010 were challenged by the Revenue by way of income tax appeal Nos. 146 and 2164/Del/2012 which were heard with cross objection Nos. 43 and 243/Del/2012 filed by the assessee. Both the said appeals and the cross objections were disposed of through common order of ITAT passed on 19.07.2013 with similar result as noted earlier.

11. Entertainment tax is leviable under Uttar Pradesh Entertainment and Betting Tax Act, 1979, Section 3 whereof to the extent necessary may be extracted as under:-

> *"**3. Tax on payment for admission to entertainment** – (1) Subject to the provision of this Act, there shall be levied and paid on all payments for admission to any entertainment, other than an entertainment to which Section 4 or Section 4-A or Section 4-B applies or a compounded payment is made under the proviso to this sub-section an entertainment tax at such rate not exceeding one hundred and fifty percent of each such payments as State Government may from time to time notify in this behalf, and the tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed. ……."*

12. It is not in dispute that Section 11 of the Uttar Pradesh Entertainment and Betting Tax Act, 1979 authorizes the State Government to exempt any class of entertainment from payment of entertainment tax.

13. It is stated that against the backdrop of steep decline of viewership due to various reasons including onslaught of cable television leading to

erosion in entertainment tax collections and with a view to encourage setting up of multiplex cinema halls and malls, in order to promote the viewership in cinema halls, various State Governments, being aware that setting up an operation of such multiplexes involves various problems including huge capital investments, had come up with schemes offering incentives to cinema industry. It appears that the Government of the State of Uttar Pradesh formulated a promotional scheme to such effect and notified it by Government order issued on 13.07.1999.

14. An extract (English translation from the vernacular) of the relevant portion of the U.P. Government Order dated 13.07.1999, which is the basis of the claim of the assessee in the matters before us, has been submitted by the assessee as under:-

> *"1. So many promotional schemes for opening of multiplexes in the State have already in vogue. In pursuance of the same of late a G.O. No. 1803/11-KSV-6-98-20-(R)/12/98 dated 07.12.1998 has been issued for opening of permanent multiplexes under the promotional scheme under which the grant is available for a period of three years for opening cine halls in the area inhabited by a population of more than three lacs.*
>
> *2. In pursuance of the same it has been experienced that in spite of various promotional schemes, the new cine multiplexes are not opening in large numbers as expected and viewer ship in the cine halls has also been declining. Therefore, the Govt. after due consideration has decided for setting up of multiplexes fully developed in keeping with the modern ways and techniques and such multiplexes cine halls which have an investment of more than ₹ 1.4 Crores and which have at least three cine halls; shall be entitled exemption of Entertainment Tax 100% for the first year and 75% for second and third years."*

15. The Government of Uttar Pradesh promulgated on 12.11.2001, bringing into effect a modified scheme, extending the benefits available under the scheme issued on 13.07.1999, in furtherance of incentives to promote setting up of multiplexes exhibiting cinema through another order, English translation of the relevant portion whereof is provided as under:-

> *"Sub. Amendment in G.O. No. 1161/11/KSV-6-99-Twenty-R(12)/98 dated 13.7.99 issued with a view to promote scheme for opening of Multiplexes Cine Halls in the State of U.P."*
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> > *"Under Film Policy, 1999 the Govt. with a view to promote opening of multiplexes theatres issued a G.O. No. 1161/11/KSV-6-99-Twenty-R(12)2/98 dated 13.7.99. The multiplexes opening under this scheme shall have the provision of granting entertainment tax exemption 100% for the first year and 75% each for second and third years. ……."*
> >
> > [emphasis supplied]

16. It is not in dispute that by way of yet another Government order, notified on 27.09.2005, the scheme was further extended. English translation (of original text in Hindi) of the Government order dated 27.09.2005 has also been submitted by the assessee, relevant extract whereof is as under:-

> *"Sub.: Extension of Encouragement Scheme for 05 years implemented by Government Order No. 2226/11-T.R.-6-2001-Twenty-R(12)/98 T.C., Dated 12.11.2001 with the purpose of opening Multiplex Cinema Halls in Uttar Pradesh.*
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> *With the purpose of encouraging construction of Multiplex Cinema Halls in the State of Uttar Pradesh, facility of exemption of Entertainment Tax 100% for 05 years had been provided through Government Order No. 2226/11-T.R.-6-2001-Twenty-R(12)/98 T.C., Dated 12.11.2001. Under this Scheme, benefit of Grant was allowed to such Multiplex Cinema Halls Owners, who have completed construction of Multiplex Cinema Halls by*

obtaining prior permission for construction by 31.03.2004 from District Magistrate under the Rules as provided in Uttar Pradesh Films Rules, 1951 and have obtained Licence by 31.03.2005. Thus, at present, this Scheme has been expired.

2. Decision has been taken for keeping aforesaid "Encouragement Scheme" for further 05 years with some amendment after its expiry on 31.03.2005. Under this Scheme, after fulfilling every condition of obtaining Grant to Multiplex Cinema Halls and after giving affidavit by Cinema Halls Owners in Form-III and after producing Agreement in Form-IV, facility of exemption of Entertainment Tax up to 100% for first three years and 75% for next two years from the date of first release shall be allowed.

3. This 'Encouragement Scheme' shall be effective from 01.04.2005 and benefit of this Scheme will be available to all such Multiplex Cinema Halls, who have completed construction of Multiplex Cinema Halls by obtaining prior permission for construction by 31.03.2004 from District Magistrate under the Rules as provided in Uttar Pradesh Films Rules, 1951 and have obtained Licence by 31.03.2005.

4. Benefit of this 'Encouragement Scheme' will be also available to such Multiplexes at present under construction, who have obtained permission for construction under the Scheme of Government Order, dated 12.11.2001, but could not obtained licence up to 31.03.2005.

5. Apart from above, this 'Encouragement Scheme' will be applicable on those Multiplexes, who have got constructed after demolition of old Cinema Halls, subject to, they fulfill standards as prescribed for construction of Multiplexes and guidelines.

6. Following Grant will be allowed to Multiplex Cinema Halls, too being constructed under present "Encouragement Scheme" violating Government Orders issued earlier relating to encouragement of Multiplex Cinema Halls, i.e. Government Order No. 1161/11 TRS-6-99-Twenty-R(12)/98, Dated 13th July, 1999; Government Order No. 2532/11 TRS-6-2000-Twenty-R(12)/98, Dated 17th January, 2001; Government Order No. 813/11 TRS-6-2001-Twenty-R(12)/98, Dated 04th April, 2001 and Government Order No. 2226/11 TRS-6-2001-Twenty-R(12)/98 TC, Dated 12th November, 2001 respectively—

(a) For obtaining Grant, Multiplex Owner after obtaining Licence, shall have to submit application on Form-1 to concerned District Magistrate and after issuance of Licence by District Magistrate, Grant will be sanctioned under the conditions mentioned in Form-II and only after producing affidavit under own signature in Form-II and Agreement in Form-IV by Multiplex Owner, 'Grant Scheme' shall be effective and payable from the date of first Film.

(b) If any decision is not taken within 6 months from the date of submission of application to concerned District Magistrate by Multiplex Owner for obtaining benefit of 'Grant' under

'Encouragement Scheme', then applicant can submit his Representation before the Government.

(c) *District Magistrate shall have to be satisfied on the date of issuing Licence that Multiplex Cinema Hall is fully ready for Show.*

(d) *If cost of construction of Multiplex Cinema Halls, wherein construction related to Cinema Theatre (construction for commercial purposes, such as shops, hotels, swimming pool etc. are not included) including apparatus and interior etc. in the form of Grant is obtained before completion of 5 years, then Grant shall not be payable for remaining period of 5 years.*

(e) *Prior to obtaining Grant under this Scheme, it will be essential to disclose all the actual details of costs of construction of Cinema Hall at the time of submitting application for Multiplex Owner, wherein cost of land won't be included.*

(f) *In regard to actual cost, it will be necessary for Multiplex Owner to produce Certificate of Government valuer at his own cost.*

(g) *After expiry of period of obtaining benefit of Grant under this Scheme, it shall be necessary to start of Show at Cinema Halls within minimum next five years.*

(h) *During the period of Grant, Multiplex Owners shall have no right to realize additional charge to be given from time to time for maintenance.*

(i) *Multiplex Owner shall have to prepare Accounts of income from ticket being issued for each Show in Form-'B' according to Rule 13 of Uttar Pradesh Entertainment and Taxation Rules, 1981 and amount of payable tax in the period of Grant shall be shown separately. Compliance of conditions of section 8 of U.P. Entertainment and Betting Act, 1979 shall be necessary for Multiplex Owner.*

(j) *It won't be necessary to deposit tax amount in cash equivalent to Grant by Multiplex Owner and it will be presumed in this regard that according to directions issued under Rule-24 of Uttar Pradesh Entertainment and Betting Rules, 1981, amount equivalent to Grant is deposited, but it will be required for necessary adjustment in accounts, but Multiplex Owner shall submit details of total amount of permissible Grant of that month along with aforesaid Bill, which shall be counter-signed by District Magistrate. Thus, on the basis of counter-signed Bill, the Treasury Officer instead of making payment of Grant in cash, shall get it deposited under the Head of Accounts "2045 Miscellaneous tax on goods and services" in Grant No.90 and under the head of "Establishment-20-Additional Charge/Contribution/State Aid" related to Fee – Ayojanettar – 101 Collection Charge – Entertainment Tax – 03. Verified Counter-signed statement along with Bill shall work as Voucher.*

(k) *Multiplex Owner shall comply with the orders issued time to time by Prescribed Authority under Uttar Pradesh Entertainment and Betting*

Act, 1979 and Uttar Pradesh Entertainment and Betting Rules, 1981.

(l) If the District Magistrate or the Government gets satisfied that Grant has been sanctioned on the basis of wrong facts or Multiplex Owner has violated any of the conditions given in Form – II, total amount of Grant along with interest @ 18% per annum shall be realized as recovery of land revenue."

[emphasis supplied]

17. It is clear from a perusal of the orders issued by the Government of Uttar Pradesh that the object of the policy of the State Government was to promote development and operation of permanent functional multiplexes, the investment to be made by the entrepreneurs first to claim subsidy for development of the cine industry, the reimbursement being linked with the exemption from payment of entertainment tax that comes to be collected, on the basis of the exemption certificate(s) to be provided by the specified authorities under the State Government.

18. It is also pertinent to note that though the extension of the scheme for five years was primarily meant for such entrepreneurs as had completed construction of multiplex cinema halls on the basis of permission obtained by 31.03.2004 and had obtained the licence for running such facility by 31.03.2005, it was also extended to cover such multiplexes as were "under construction" at the time of issuance of the order and consequently would not have obtained licence for the same to be operationalized by 31.03.2005. Further, under the scheme extended by order dated 27.09.2005, the exemption from entertainment tax would be to the extent of 100% for the first three years and 75% for the next two years from the date of the first release, it being subject to a cap equivalent to the cost of construction (including the cost incurred for apparatus, interiors etc. but excluding that for construction for other commercial purposes such as shops, hotels etc. as

indeed the cost of land). The multiplex owner seeking to avail the benefit of this scheme would not be required to deposit the entertainment tax collected, his obligation being only to maintain and submit accounts in prescribed forms showing such receipts. The scheme provides for presumption of deposit (deemed deposit), necessary adjustment of accounts being monitored by the District Magistrate who would countersign the corresponding bills.

19. It is the contention of the assessee that the object and purpose of the scheme is to extend the incentive to multiplex industry and not for reimbursing the cost of any specific asset used therein and further that the grant of subsidy by the State Government depends not only on the commencement of the multiplex but also is linked to its operation since the ultimate aim is to promote cinema industry by establishing permanent and long-term operational multiplex.

20. Coming to the case of the assessee in the matters before us, it needs to be noted that it had started its business operation with effect from 02.12.2005 and on the basis of application made to the District Magistrate (the authority competent under the local entertainment tax law), it claims to have been granted exemption certificates in terms of the Government order dated 27.09.2005 in respect of the multiplex in question for each of the assessment years in question.

21. The assessee had filed its return of income for assessment year 2006-2007 on 30.11.2006, declaring an income of ₹91,38,544/-. The case was selected for scrutiny assessment for which notice under Section 143(2) was issued on 10.10.2007. During scrutiny, it was revealed to the Assessing Officer that a claim of deduction of ₹1,33,74,831/- had been made on account of subsidy of entertainment tax collected during the corresponding

financial year, referring in this context to the U.P. Government scheme last extended on 27.09.2005 (hereinafter referred to as "the UP Scheme"). It was contended that the amount had been retained as capital receipt for income tax purposes and hence it was not taxable. The Assessing Officer asked for justification for entertainment tax deduction to be allowed as capital receipt. The assessee submitted reply dated 01.07.2008, the relevant portion whereof has been extracted by the Assessing Officer in his assessment order for assessment year 2006-2007 as under:-

> *" ...entertainment tax is exempted for a period of* 5 *years to the newly set up multiplexes in the state of Uttar Pradesh under a scheme issued by the UP Govt. under the UP Entertainment and Betting Tax Act,* 1979. *The scheme was valid in respect of multiplexes which commence operation on or before* 31st *March, 2005 which was extended for a further period of five years i.*e. *in respect of multiplexes which are set up on or before* 31st *March 2010. On the other hand, the assessee started its business operation on 02.12.2005. The scheme was issued by the UP govt. on 13.07.1999 granting entertainment tax exemption to newly multiplexes set up in the state in accordance with section* 11 *of the UP Entertainments and Betting Tax Act* which *gave a power to the state govt. to exempt any class of entertainment from payment of entertainment tax keeping in view the promotion of peace, international goodwill, arts, sports or other public interest.*
>
> *Accordingly, the assessee co. made an application to the District Magistrate to grant it exemption of entertainment tax payment as per the notification dated* 27. *09.2005 of the UP govt. Since the multiplex set up by Bougainvillea complied with all the conditions for eligibility to get entertainment tax exemption, the District Magistrate vide its letter dated 17.03.2006 granted it eligibility certificate for exemption from payment of entertainment tax for a period of five years under the notification dated 27.09.05.*

In accordance with the eligibility certificate issued by the Distt. Magistrate, Bougainvillea got an entertainment tax exemption of about ₹134 *lacs during the FY ended 31.03.06. The above amount was credited by the co. in its books of accounts as income. However, while filing the return of income, the same has been claimed to be exempt in accordance with the decision of Hon'ble Supreme Court in the cases of Sahney Steel and Press Works Ltd. us. CIT* 228 *ITR* 253 *wherein the Hon'ble* SC *has held that the character of receipt of a subsidy in the hands of the recipient would depend upon the purpose for which the subsidy has been granted. In case the subsidy has been granted for the purpose of setting up a business, the same would constitute a project subsidy and be capital receipt in the hands of the recipient. However, if a subsidy has been granted for carrying out business operation and is given with the view to augment the profit of the business, same would constitute to be a revenue receipt. ...*

In view of the above decision of the Hon'ble SC which has very categorically stated that any subsidy granted for setting up a business would constitute a capital receipt in the hands of the recipient, in the case of subsidy granted to the assessee co. pursuant to a scheme, the purpose of which was to encourage setting up of multiplexes in the state of UP and not augmentation of profit of the multiplex, the receipt by the assessee co. constitute a capital receipt.

The CBDT has also issued a circular dated 01.08.1974 clarifying that any subsidy given for the purpose of industrial growth and not for the purpose of supplementing the profits of the undertaking would be of the nature of a capital receipt not chargeable to tax. ..."

22. On consideration of the submissions made before him, the Assessing Officer concluded as under:-

(i) The Assessee had received exemption from payment of entertainment tax from the UP Government which is in the nature of subsidy;

(ii) The subsidy had been given to the assessee after commencement of its business and operationalization of the multiplex;

(iii) The subsidy is in the nature of exemption from payment of entertainment tax, which is generated during the course of running of cinema halls in the multiplex and is not linked to any of the fixed assets of the company; and

(iv) There is no stipulation in the scheme of subsidy regarding the manner in which the subsidy amount is to be utilized by the company which is left free to use it in the manner it deems fit.

23. On the basis of above findings, the Assessing Officer declined to accept the claim that the entertainment tax subsidy has been received on capital account and instead decided to treat it as receipt of revenue account. He observed that the view taken by Supreme Court in the case of *Sahney Steel and Press Works Ltd. vs. CIT* [228 ITR 253] could not inure any benefit to the present assessee since the money had come to the hands of the assessee (in that case) after or conditional upon commencement of production which rendered it liable to be treated as assistance for purposes of trade. He reasoned that the money could be treated as having been received for capital purposes only if the purpose was to help the assessee in setting up its business or completion of the project which could not be the case here since money had been received (by way of collections in the form of entertainment tax) after the business operations had commencement and, thus, it had not become available for production of or bringing into existence any new asset. He also noted that there is no restriction here regarding the

use of the exempted amount which was available to the assessee with full freedom as to its utilization. Referring to *Sahney Steel* (supra), the Assessing Officer further added that if subsidy is granted year after year, post setting up of the new industry and commencement of production, such receipt could only be for purposes of carrying on of the business.

24. Similar view was taken by the Assessing Officer in the subsequent three assessment years resulting in similar disallowance.

25. In appeals before the CIT(A), the assessee *inter alia*, referred to judgment of Supreme Court in *Commissioner of Income Tax v. Ponni Sugars and Chemicals Ltd.* [(2008) 306 ITR 392 (SC) : (2008) 9 SCC 337] to hold that it is the object for which subsidy/assistance is given is what determines its nature, the form of the mechanism through which the same is granted being irrelevant. The first appellate authority found that the entertainment tax subsidy availed of by the assessee was a capital receipt since it was limited by the cost of the project in excluding land and because it was linked to setting up cinema halls, profitability accruing therefrom could only be incidental to the business.

26. The view taken by the Assessing Officer was, thus, upturned by CIT (A) and the deduction allowed in favour of the assessee. The Revenue appealed unsuccessfully before the ITAT.

27. In the case of *Sahney Steel* (supra), the assessee company had set up a factory in the State of Andhra Pradesh. The industrial unit had gone into production in the year 1973 and for purposes of assessment year 1974-1975, it had obtained refund of sales tax to the extent of ₹14,565/- in terms of notification issued by the State Government where under certain facilities and incentives were given to all the new industrial undertakings that had

commenced production on or after 01.01.1969 the investment capital not exceeding ₹5 crores. Such incentives were allowable for the period of five years from the date of commencement of production but could not be filed until and unless production had commenced.

28. The Assessing Officer had included the said amount of the assessable income. It was this view which was upheld by the Supreme Court, *inter alia*, observing as under:-

> *"... If any subsidy is given, the character of the subsidy in the hands of the recipient – whether revenue or capital – will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial.*
>
> *For example, if the scheme was that the assessee will be given refund of: sales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacity in a backward area, the entire subsidy must be held to be a capital receipt in the hands of the assessee. It will not be open to the revenue to contend that the refund of sales tax paid on raw materials or finished products must be treated as the revenue receipt in the hands of the assessee. In both the cases, the Government is paying out of public funds to the assessee for a definite purpose. If the purpose is to help the assessee to set up its business or complete a project as in Seaham Harbour Dock Co.'s case (supra), the monies must be treated as to have been received for capital purpose. But if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade."*
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> [emphasis supplied]

29. In *Ponni Sugars* (supra), the assessee company had received subsidy under a similar incentive subsidy scheme wherein a manufacturer could avail a higher free sale sugar quota with permissibility to retain the excise duty collected on the sale price of free sale sugar in excess of the normal quota, paying to the Government only the excise duty collectable on the price of levy sugar. The assessee under the said scheme was obliged to utilize the subsidy only for repayment of term loans undertaken by it for setting up new units or for expansion of existing business. The assessee in that case had also claimed the incentive received to be a capital receipt not to be included in its taxable income. The Revenue had resisted the claim on the ground that incentive granted took the character of revenue receipt since it was given through price and duty differentials.

30. Supreme Court ruled 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 & Press Works Ltd (supra). In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent 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 analysis 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 of 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 & Press Work's Ltd.'s case (supra) lies in the fact that it has discussed and analyzed 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 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."

[emphasis supplied]

31. The Revenue, however, argues in the matters at hand that the assessee cannot be allowed to treat the entertainment tax subsidy as capital receipts because the U.P. Scheme leaves it at liberty to utilize the funds in the manner it likes. In this context, it craves reference to following further observations of Supreme Court (appearing in Para No. 16) in the case of *Ponni Sugars* (supra):-

> *"16. One more aspect needs to be mentioned. In Sahney Steel & Press Works Ltd.'s case (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."* [emphasis supplied]

32. The UP Scheme under which the assessee claims exemption to the extent of entertainment tax subsidy, claiming it to be capital receipt, is clearly designed to promote the investors in the cinema industry encouraging establishment of new multiplexes. A subsidy of such nature cannot possibly be granted by the Government directly. Entertainment tax is leviable on the admission tickets to cinema halls only after the facility becomes operational. Since the source of the subsidy is the public at large which is to be attracted as viewers to the cinema halls, the funds to support such an incentive cannot be generated until and unless the cinema halls become functional.

33. The State Government had offered 100% tax exemptions for the first three years reduced to 75% in the remaining two years. Thus, the amount of

subsidy earned would depend on the extent of viewership the cinema hall is able to attract. After all, the collections of entertainment tax would correspond to the number of admission tickets sold. Since the maximum amount of subsidy made available is subject to the ceiling equivalent to the amount invested by the assessee in the construction of the multiplex as also the actual cost incurred in arranging the requisite equipment installed therein, it naturally follows that the purpose is to assist the entrepreneur in meeting the expenditure incurred on such accounts. Given the uncertainties of a business of this nature, it is also possible that a multiplex owner may not be able to muster enough viewership to recover all his investments in the five year period.

34. Seen in the above light, we are of the considered view that it was unreasonable on the part of the Assessing Officer to decline the claim of the assessee about the subsidy being capital receipt. Such a subsidy by its very nature, was bound to come in the hands of the assessee after the cinema hall had become functional and definitely not before the commencement of production. Since the purpose was to offset the expenditure incurred in setting up of the project, such receipt (subject, of course, to the cap of amount and period under the scheme) could not have been treated as assistance for the purposes of trade.

35. The facts that the subsidy granted through deemed deposit of entertainment tax collected does not require it to be linked to any particular fixed asset or that is accorded "year after year" do not make any difference. The scheme makes it clear that the grant would stand exhausted the moment entertainment tax has been collected (and retained) by the multiplex owner meeting the entire cost of construction (apparatus, interiors etc. included),

even if it were "before completion of five years".

36. As held by the Supreme Court in the case of *Sahney Steel* (supra), the character of the subsidy is to be determined having regard to the purpose for which it is granted. The "purpose test", referred to in *Ponni Sugars* (supra) when applied to the case at hand, leaves no room for doubt that the assistance in the form of entertainment tax exemption is shown to have come in the hands of assessee to enable it to set up the new unit which renders it a receipt on capital account. The periodicity (year to year) of the subsidy, its source (collections from the public at large) and the form (deemed deposit) are irrelevant considerations.

37. The factual matrix in *Ponni Sugars* (supra) is nearer home to the case at hand which is distinguishable from the case of *Sahney Steel* (Supra). In *Sahney Steel* (supra), the incentives were linked to production which is the prime reason why the subsidy of sales tax was held to be operational subsidy or revenue in nature.

38. Indeed, in *Ponni Sugars* (supra), the fact that the amount received as subsidy was required necessarily to be utilized only for repayment of term loans for setting up of the new unit was one of the important factors taken into account for treating it to be capital receipt. The case at hand is not very different. As observed earlier, the subsidy is meant to liquidate the cost incurred in setting up of the multiplex cinema hall and for making it operational by installing the requisite apparatus. The flow of subsidy stops as soon as the expenditure on such account is met in entirety.

39. For the foregoing reasons, we find that ITAT in the impugned orders has taken a correct view of law on the basis of available facts to conclude that the assessee is entitled, in terms of the UP Scheme, to treat the amounts

collected towards entertainment tax as capital. The question of law raised in these appeals is, thus, answered in the negative against the revenue/appellant.

40. The appeals of the Revenue challenging the view taken by CIT and ITAT are, thus, liable to be dismissed. This court, however, is of the view that the matter cannot end only with such result of the process. We notice that the Assessing Officer having declined to grant the benefit under the scheme to the assessee (claiming the amounts collected as entertainment tax to be capital receipts), the first and the second appellate court concluded their respective orders (in appeals brought by the assessee and revenue respectively) by holding that the claim of the assessee was correct. It appears that there has been no exercise undertaken to find on facts as to the expenditure incurred by the assessee in the cost of construction and setting up of the cinema hall to make it functional so as to assess the extent of capital subsidy it can claim over the assessment years in question on account of entertainment tax exemptions.

41. Thus, while dismissing the appeals of the Revenue, we direct the Assessing Officer to do the needful in the above regard for finalizing the assessments for the periods in question.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

JANUARY 30, 2015
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