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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/18/2021
IA No.GA/2/2018 (Old No.GA/515/2018)
PRINCIPAL COMMISSIONER OF INCOME TAX-4, KOLKATA
VS.
M/S. KRISHI RASAYAN EXPORTS PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : SEPTEMBER 14, 2022.

Appearance:
Mr. Tilak Mitra, Adv.
… for appellant

Mr. R.K. Murarka, Sr. Adv.
Mr. S.D. Verma, Adv.
…for respondent

The Court :- This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the `Act') is directed against the order dated 12h May, 2017 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata (Tribunal) in I.T.A. No. 1953 & 2080/Kol/2014 for the assessment year 2011-2012.

The appeal was admitted to decide the following substantial question of law:-

"Whether the interest subsidy and excise refund would be treated as capital receipt or revenue receipt for the purpose of computation of book profit under the provision of Section 115JB of the Income-Tax Act, 1961 ?"

We have heard Mr. Tilak Mitra, learned standing Counsel appearing for the appellant/revenue and Mr. R.K. Murarka, learned senior Counsel appearing for the respondent/assessee.

The substantial question of law involved in this appeal is squarely covered in favour of the assessee and against the revenue in the light of the decision of the Hon'ble Supreme Court in Commissioner of Income-Tax-I, Kolhapur vs. M/s. Chaphalkar Brothers Pune, (2018) 400 ITR 279 (SC). The operative portion of the judgment reads as follows :-

"After setting out both the Supreme court judgements 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, and the appeals were, therefore, dismissed.

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."

Identical issue was also considered by this Court in the case of *Principal Commissioner of Income-Tax vs. Ankit Metal And Power Ltd., (2019) 416 ITR 591 (Cal)* wherein apart from considering the effect of the subsidy the Court also considered as to whether when a receipt is not in the character of income as defined under Section 2(24) of the Act, whether it can be said to form part of the book profit under Section 115 JB. The said question was answered in favour of the revenue in the following terms :-

"31. In this case since we have already held that in the relevant assessment year 2010-11 the incentives "interest subsidy" and "power subsidy" is a "capital receipt" and does not fall within the definition of "income" under section 2(24) of the Income-tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under section 115JB of the Act, 1961. In the case of Apollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific Provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in the book profit for the purpose of computation under section 115JB of the Income-tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under section 115JB of the Income-tax Act, 1961. The third issue involved in the instant appeal which requires adjudication is whether the action of the Tribunal entertaining/allowing the claim which was made by the assessee before the Assessing Officer by filing a revised computation instead of filing a revised

return since the time to file the revised return had lapsed, for claiming to treat the incentive subsidies in question as capital receipts instead of revenue receipts as claimed in original return. The Assessing Officer had denied this claim. The Revenue has attacked the order of the Tribunal by relying on the decision in the case of Goetze (India) Ltd. v. CIT reported in [2006] 284 ITR 323 (SC).

This case does not help the Revenue/appellant. In this case the Supreme Court has made it clear that its decision was restricted to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under section 254 of the Income-tax Act, 1961. The Hon'ble Supreme Court in the said decision held as follows (page 324 of 284 ITR):

> "In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961."

This judgment was followed by our court in the case of CIT v. Britannia Industries Ltd. reported in [2017] 396 ITR 677 (Cal) holding that the Tribunal has the power to entertain the claim of deduction not claimed before the Assessing Officer by filing a revised return. Respectfully following the aforesaid decision as well as the view already taken by us in this case that the aforesaid subsidies are capital receipt and not an "income" and not liable to tax, the Tribunal in exercise of its power under section 254 of the Income-tax Act justified this claim though no revised return under section 39(5) of the Act was filed before the Assessing Officer. We answer both the question Nos. 1 and 2 in the negative and in favour of the assessee.

Accordingly, the appeal of the Revenue is dismissed with no order as to cost."

In the light of the above decisions, the substantial question of law framed for consideration has to be answered against the revenue.

Accordingly, the appeal is dismissed on the substantial question of law.

The stay application also stands dismissed.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

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