

Form No.[J2]

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

**PRESENT:**

**THE HON'BLE JUSTICE T.S. SIVAGNANAM**

**And**

**THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA**

**ITAT/261/2017  
IA NO:GA/2/2017 [OLD NO:GA/2231/2017]**

**PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-1, KOLKATA  
VS.  
M/S BUDGE BUDGE REFINERIES LTD.**

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*For the appellant:* Mr. P.K. Bhowmick, Adv.

*For the respondent:* Mr. Ananda Sen, Adv.

Heard on : February 8, 2022.

Judgement on : February 8, 2022.

**T.S. SIVAGNANAM, J. :** This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 14<sup>th</sup> October, 2016 passed by the Income Tax Appellate Tribunal, "C" Bench, (Tribunal) in ITA No.1552/Kol/2010 and ITA No. 577/Kol/2011 for the assessment years 2007-2008 and 2008-2009.

The revenue has raised the following substantial questions of law for consideration:

- i)** Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to dismiss the appeal of the revenue holding, inter-alia, that the subsidy cannot be the subject matter of taxation in the years under appeal as the same got released/sanctioned only in the financial year 2009-2010.
- ii)** Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law to uphold the order of the CIT(A) by deleting the additions made under Section 41(1) of the said Act towards the subsidy by relying upon a decision of this Hon'ble High Court in the case of CIT –vs- Rasoi Limited without considering the settled proposition of law as held by the Hon'ble Apex Court in the case of Sahney Steel and Press Works Limited Reported in 228 ITR 253 S.C. wherein it has been held that the sales tax incentive/subsidy eligible to be received as a revenue receipt and thereby the same to be treated as income under Section 41(1) of the said Act.

We have heard Mr.P. K. Bhowmick, learned counsel for the appellant/revenue and Mr. Ananda Sen, learned counsel appearing for the respondent/assessee.

The short issue, which falls for consideration, is whether subsidy granted to the respondent assessee in terms of the West Bengal Incentive

Scheme 2000 could be taxed in the assessment years under consideration. The other question which would fall for consideration is whether the decision in the case of Sahney Steel and Press Works Limited Vs. CIT reported in 228 ITR 253 S.C. has to be applied. The Tribunal perused the West Bengal Incentive Scheme 2000 and noted that the scheme was intended to accelerate industrial development in the State of West Bengal and incentive was given for setting up industries in the State and for such purpose the amount of subsidy which was given, was in the nature of reimbursement of 75% of the Sales Tax/VAT actually paid by the assessee. The Tribunal rightly applied the “purpose test” and found that the quantification of the subsidy alone is based on reimbursement of 75% of Sales Tax/VAT actually paid by the assessee after the commencement of the project and that such quantification would be relevant for the taxability of the same going by the objects of the incentive scheme. The Tribunal taking note of the decision of the Hon’ble Supreme Court in the case of Commissioner of Income Tax Vs. Ponni Sugars and Chemicals Ltd.: [2008] 306 ITR 392 (SC) as also the decision of this case in the case of Commissioner of Income Tax Vs. Rasoi Ltd : [2011] 335 ITR 438 (Cal.) dismissed the appeal filed by the revenue. Before us, the learned Counsel would place heavy reliance on the decision of the Hon’ble Supreme Court in the case of Sahney Steel and Press Works Limited (supra) and submitted that Tribunal ought to have followed the said decision and allowed the appeal filed by the revenue. As rightly pointed out by Mr. Sen, learned Counsel appearing for respondent the decision in Sahney Steel and Press Works Limited (supra) was explained considering the facts of the case in Commissioner of Income-Tax

Vs. Ponni Sugars and Chemicals Ltd. The relevant portion of the judgement reads as follows :-

*“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 judgement of this court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is*

*immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of 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 or the mechanism through which the subsidy is given are irrelevant.”*

The above decision clearly points out that form of subsidy is immaterial and the main eligibility condition of the scheme has to be looked into and if the same is taken note of it is evidently clear from the scheme that the subsidy was for the purpose of encouraging establishment of large, medium and small scale industrial units in the State of West Bengal. As pointed out by the Hon'ble Supreme Court the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit and, therefore, the receipt of the subsidy was on capital account. The test to be applied is the object for which the subsidy/assistance is given under the incentive scheme and the form or mechanism through which the subsidy is

given would be irrelevant. The decision in *Ponni Sugars and Chemicals Ltd.* (*supra*) was taken note of and this court has granted relief to the assessee in *Rasoi Ltd.*(*supra*) . Subsequently in the case of *Principal Commissioner of Income Tax-I, Kolkata Vs. Shyam Steel Industries Ltd.* [2018] 93 taxmann. Com 495 (Calcutta), following the decision in *Ponni Sugars and Chemicals Ltd.* it was pointed out that the scheme in the said case being available only to new units and units which have undergone an expansion, the real purpose of the incentive has to be seen as capital subsidy and has to be recorded as such, as capital receipt and not a revenue receipt.

That apart we also take note of the communication sent by the Joint Secretary to the Government of West Bengal, Commerce and Industries Department to the Managing Director, West Bengal Industrial Development Corporation dated 23<sup>rd</sup> March, 2007 wherein it has been stated that the State Government has approved the package for the assessee for setting up an Edible Oil Refinery Plant and Captive Power Generation unit and the reimbursement of 75% of the sales tax paid has been termed as Industrial Promotion Assistance. Thus, we have no hesitation to hold that the Tribunal had rightly rejected the appeal filed by the revenue and granted relief to the assessee.

Furthermore, on the other issue where Section 41(1) of the Act could have been invoked the Tribunal rightly held that the said provision could be invoked only when assessee had claimed deduction in earlier year at the time of creation of liability and if the said liability ceases to exist then the provision of Section 41(1) of the Act could not be invoked. Taking note of the facts of the

assessee's case the Tribunal has held assessee has not claimed any deduction in the earlier year towards the sales tax portion of the subsidy and hence the provision of Section 41(1) of the Act cannot be invoked in the facts of the assessee's case. The findings rendered by the Tribunal clearly point out the correct legal position.

In the result, the appeal filed by the revenue is dismissed and substantial question of law are answered against the revenue.

Connected application stands dismissed.

**(T.S. SIVAGNANAM, J.)**

I agree.

**(HIRANMAY BHATTACHARYYA, J.)**