

OD-1 & 2

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income tax)
ORIGINAL SIDE

IA No. GA/1/2017 (Old No. GA/3676/2017)
ITAT/376/2017
PRINCIPAL COMMISSIONER OF INCOME TAX-4, KOLKATA
Vs.
M/S AMBUJA CEMENT EASTERN LIMITED

IA No. GA/2/2017 (Old No. GA/3678/2017)
ITAT/376/2017
PRINCIPAL COMMISSIONER OF INCOME TAX-4, KOLKATA
Vs.
M/S AMBUJA CEMENT EASTERN LIMITED

BEFORE:

The Hon'ble JUSTICE T. S. SIVAGNANAM
AND

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 11th April, 2022.

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

Mr. J.P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunjhunwala, Adv.
Mr. S. Rudra, Adv.
... for the respondent

Re: IA No. GA/1/2017 (Old No. GA/3676/2017)

The Court : We have heard Mr. Tilak Mitra, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned Senior counsel appearing for the respondent/assessee.

There is a delay of 155 days in filing the appeal. We are satisfied with the reasons given by the appellant in not being able to prefer the appeal within

the period of limitation. Therefore, the delay is condoned. The petition for condonation of delay being IA No. GA/1/2017 (Old No. GA/3676/2017) is allowed.

Re : ITAT/376/2017

This appeal by the revenue filed under Section 260A of the Income Tax Act 1961 (the Act) is directed against the order dated 16th November, 2011 passed by the Income Tax Appellate Tribunal “A” Bench, Kolkata in ITA/2109/Kol/2013 for the assessment year 2005-06.

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

- 1) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in treating remission of sales tax as capital receipt and not a revenue receipt though the same was received in the ordinary course of business ?*
- 2) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in deleting the addition made by the Assessing Officer by not considering the decision of the Hon’ble Calcutta High Court in the case of CIT Versus Chindwara Fuels reported in 245 ITR 9 ?*

The short issue involved in this instant case is whether the subsidy which was granted by the Government of West Bengal was a capital receipt or otherwise. The Tribunal in the impugned order followed the decision of the co-

ordinate Bench of the Tribunal in the assessee's own case for the assessment year 2001-02 and 2002-03 in ITAT Nos. 2475 & 2476 (Kol) of 2005 dated 05.05.2006. It appears that as against the said decision the revenue had preferred appeals before this Court, however, those appeals were dismissed as early as in the year 2014 for removal of certain defects. Be that as it may, the legal issue involved in the instant case is no longer *res integra*. In this regard, we placed reliance on the decision of the Hon'ble Supreme Court in Commissioner of Income Tax vs. Ponni Sugars And Chemicals Ltd. ; [2008] 306 ITR 392 (SC), wherein it was held as follows:-

*“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 and Press works Limited** . In that case, on behalf of the assessee, it was contended that the subsidy given was upto 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 was 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 writ petition. It was held by this Court on the facts of that case and on the basis of the analyses 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 or 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** 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 utilised 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. It is 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 or the mechanism through which the subsidy is given are irrelevant.”

In the case on hand, the assessing officer placed reliance on the decision of the Hon’ble Supreme Court in Sahney Steel And Press Works Ltd Vs. CIT ; (1997) 228 ITR 253 (SC). This decision was taken note of by the Hon’ble Supreme Court in *Ponni Sugars* and the same was distinguished by observing the basic test to be applied in judging the character of a subsidy is to examine as to for what purpose the subsidy was given. The Hon’ble Supreme Court lays down the clarity called “purpose test”. It was pointed out that the point of time at which the subsidy is paid is not relevant and the source is immaterial and the form of subsidy is also immaterial. The said decision would clearly apply to the facts and circumstances of the case. We had an occasion to consider an identical issue in respect of a scheme formulated by the Government of West Bengal in the year 2000 in the case of Principal Commissioner of Income Tax Central – 1, Kolkata Vs. M/s. Budge Budge Refineries Limited; reported in ITAT/261/2017 dated February 8, 2022. After taking note of the decision in *Ponni Sugars* and also examining the purpose for which the subsidy was granted, the appeal filed by the revenue was dismissed. In the light of the above stated legal decision, we find no error in the order passed by the Tribunal dismissing the appeal filed by the revenue.

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

Consequently, the application for stay being IA No. GA/2/2017 (Old No. GA/3678/2017) also stands dismissed.

We take note of the submission made by the learned senior counsel for the respondent/assessee that the assessee had merged with M/s. Ambuja Cement Limited with effect from 1st January, 2006. However, the cause title has not been amended. Be that as it may, since the legal issue has been settled and we have dismissed the appeal filed by the revenue, the effect of judgment will enure in favour of the amalgamated company as well.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

RS/GH.