OD–7

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

ITAT/47/2024
IA NO: GA/1/2024, GA/2/2024
PRINCIPAL COMMISSIONER OF INCOME
TAX CENTRAL 2 KOLKATA
VS
RITUM JAIN

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 19th February, 2024.

<u>*Appearance*</u> :
Mr. Om Narayan Rai, Adv.
Mr. Soumen Bhattacharjee, Adv.
…for appellant

The Court :- We have heard Mr. Om Narayan Rai, and Mr. Soumen Bhattacharjee, learned standing Counsel for the department. The respondent has been served and an affidavit of service has been filed. There is delay of 286 days in filing the appeal. WE are satisfied with the explanation offered, the delay in filing the appeal is condoned.

The application is allowed.

This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 is directed against the order dated 24.11.2022 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in IT (SS)A No. 37/Kol/2019 for the assessment year 2015-16. The revenue has raised the following substantial questions of law for consideration:-

A) Whether the Learned Tribunal has committed substantial error in law by dismissing the appeal of the Revenue and in allowing the assessee's claim of the Sales tax incentive received from the State Government under West Bengal Industrial Promotion (Assistance to Industrial Units) Scheme in short (IPS) 2010 as capital receipt in place of Revenue Receipt?

B) Whether the Learned Tribunal has committed substantial error in law by not appreciating that the assessee has neither filed revised return under Section 139(5) of the Income Tax Act claiming the Sales Tax incentive to be capital receipt nor given any notice to the Assessing Officer alleging non-taxability of the capital receipt on the ground of the same being under Industrial Promotion Scheme of Government of West Bengal before completion of assessment ?

It is not in dispute that substantial questions of law which have been raised in appeal are covered against the appellant/assessee in the light of the judgement of this Court in ITAT/44/2023 dated 27.3.2023 in the case of Principal Commissioner of Income Tax, Central Kolkata –2 Vs. Shanti Nath Detergents Pvt. Ltd. The operative portion of the judgement reads as follows :-

> **"**So far as the substantial question no.[a] is concerned, the same is squarely covered by the decision of this Court in the case of Principal Commissioner of Income Tax vs. Krishi Rasayan Exports [P] Ltd.; [2022] 145 taxmann.com 191 [Cal]. The operative portion of the decision reads as follows :-
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> "4. 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 CIT vs. M/s. Chaphalkar

Brothers [2017] 88 taxmann.com 178/[2018] 252 Taxman 360/400 ITR 279. 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.
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> 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."

5. Identical issue was also considered by this Court in the case of *Pr.CIT vs. Ankit Metal And Power Ltd.,* [2019] 109 taxmann.com 93/266 Taxman 237/416 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 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."

Following the above decision the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.