IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI S.S.VISWANETHRA RAVI, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2055/Kol/2018

(निर्धारणवर्ष / Assessment Year: 2012-13)

M/s Deepak Spinners Ltd. **C/o, Salarpuria Jajodia & Co., 7, C.R. Avenue, Kolkata-700072.**	**Vs.**	**DCIT, Circle-11(1), Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AABCD 0387 R		
(Appellant)	**..**	**(Respondent)**

Appellant by : Shri S.Jhajharia, FCA
Respondent by : Shri Radhey Shyam, CIT DR

सुनवाईकीतारीख/ **Date of Hearing** **: 02/04/2019**
घोषणाकीतारीख/**Date of Pronouncement** **: 12/06/2018**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the assessee , pertaining to Assessment Year 2012-13, is directed against an order passed by the Commissioner of Income Tax(Appeals)-4, Kolkata which in turn arises out of an assessment order passed by the Assessing Officer u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), dated 30.03.2015.

2. However, in this appeal, the assessee has raised multiple grounds of appeal but at the time of hearing the main grievance of the assessee is confined to ground nos. 3 to 5 which relates to treatment of the subsidy received under technical upgradation fund scheme (TUF scheme). Whether TUF subsidy is capital in nature or revenue in nature.

3. Grounds nos. 1, 2 and 6 raised by the assessee are not pressed therefore these grounds are dismissed as not pressed.

4. Brief facts qua the issue are that the issue relating to subsidy received under TUF scheme has not been discussed by the Assessing Officer in his assessment order. However, the assessee has raised this issue during the appellate proceedings before the Ld. CIT(A) who has dismissed the appeal of the assessee observing the following:

> *"9. The assessee has also taken an Additional Grounds-*
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> 1. *For that in view of the facts and in the circumstances, Rs. 116.23 lakhs credit in the profit & loss account being the subsidy receivable from Govt. of India under TUF (Technology Up-gradation Fund) being capital receipt and being not taxable, the A.O. may kindly be directed to exclude the same from the total income.*
> 2. *The aforesaid claim having neither been made before the A.O nor in the IT return filed nor any revised return having been filed but being a capital receipt and being not taxable and having been offered for taxation under a mistaken belief that it was taxable, the ground is fully admissible by your goodself in view of the decisions of different Appellate Authorities and in view of the facts and in the circumstances the ground may kindly be admitted and decided on merit.*
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> *9.1. The same was forwarded to the AO vide my letter dated 24.04.2018 asking the AO to submit his objection, if any, within thirty days, however, no objection has been received from the AO.*
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> *10. All the grounds relate to treating to subsidy received in TUF as capital receipt. First issue to be adjudicated is where these additional grounds are admissible or not. The Ld. AR has cited the decision of Calcutta High Court in the case of ITAT No. 439 of 2016, GA No. 70 of 2017 in the case of Landis + Gyr Ltd. the Hon'ble High Court has referred to decision of Honble Supreme Court reported in 229 ITR 383 and has held that such grounds are admissible during appeal. Regarding treatment of TUF subsidy as a capital receipt. Ld. AR has relied on the decision of –*
> *"Hon'ble Calcutta High Court in CIT(A}-4, Kolkata vs. M/ s. Golster Jute Mill-Ltd. (ITAT No. 200 of 2014), G.A. No. 3980 of 2014 & G.A. No. 3981 of 2014 dt. 18.06.2018) has held such sum as capital receipt only. We have already submitted in our written submission earlier a number of judgment and had also enclosed copy of order of ITAT of Kolkata Bench judgment in Gloster Jute Mills Ltd. which has now been affirmed by Hon'ble Calcutta High Court, hence the aforesaid sum may kindly be treated as capital receipt and as non-taxable. Copy of the said order is enclosed at Annexure A*
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> *11. In view of decision of Jurisdictional High court decision in the case of Hon'ble Calcutta High Court in CIT(A)-4, Kolkata vs. MJ s. Golster Jute Mills Ltd. (ITAT No. 200 of 2014), G.A. No. 3980 of 2014 & GA. No. 3981 of 2014 dt. 18.06.2018)*

holding TUF subsidy as Capital receipt, I am allowing this ground of the appellant and therefore interest subsidy should be not chargeable to tax .

Having said that, I would like to mention that from the scheme it is evident that the said subsidy has been granted towards the interest to be paid on loan taken for upgradation of technology/purchase of new machineries, therefore, it is directly related with the fixed assets acquired by loan. Hence, by virtue of provision of Sec. 43(1) r.w. Explanation 10 of the Act, said subsidy should be reduced from the cost of asset or plant and machineries.(AO to take appropriate action).

In this respect the assessee was asked during appellate proceedings as to why not the said interest subsidy be reduced from the cost of asset in view of specific explanation 10 to section 43(1). -- -

The assessee submitted a detailed reply vide his letter dated 27-07- 2018.

I have gone through the assessee's reply and case laws cited by the AR. On careful perusal of all the case laws it is evident that all the case laws are pertaining to A.Y. prior to insertion of explanation 10 to section 43(1). Therefore they don't help the case of the assessee. Hence, by virtue of provision of sec. 43(1) r.w. Explanation 10 of the Act, said subsidy should be reduced from the cost of asset or plant and machineries. Assessing Officer is directed to take appropriate action in this respect."

5. The ld. DR has vehemently opposed the submission of the ld. Counsel stating that the subsidy received by the assessee under TUF scheme is for helping nature to run the business and to meet the day to day expenses therefore the subsidy should be treated as revenue in nature. However, the ld. Counsel for the assessee, per contra submitted that this is a fund / subsidy received by the Government to upgrade overall technology of the textile industry, therefore, it is capital in nature. The ld. Counsel pointed out that the subsidy is not attached to any specific fixed asset i.e. the assessee has not purchased any fixed assets therefore it cannot be part for fixed assets but it should be treated capital receipt.

6. We note that the issue under consideration whether the subsidy received under TUF scheme is a capital receipt or revenue receipt. The ld. CIT(A) treated it as part of fixed assets and held that said subsidy should be reduced from the cost of asset. We note that the assessee submitted before us the judgment of the Co-ordinate Bench of ITAT, Kolkata in the case of M/s Rasoi Ltd. in I.T.A.

1580/Kol/2018 for assessment year 2011-12 order dated 28.03.2018 wherein it was held as follows:

> *"3. After hearing both the parties, we find that the issue raised in the appeal is covered by the order dt. 02-04-2014, copy of the same is on record, in assessee's own case in ITA No. 1398/Kol/2011 for the A.Y 2007-08, wherein the Tribunal following the decision of the Hon'ble Supreme Court in the case of P.J. Chemicals Ltd upheld the order of the CIT-A in allowing the claim on depreciation on capital subsidy. The ld. AR submits that the said order was challenged by the appellant revenue before the Hon'ble High Court of Calcutta, wherein the Hon'ble High Court of Calcutta was pleased to dismiss the question of law framed by the revenue in challenging the finding dt. 02-04-2014 of the Tribunal, thereby the order dt. 02-04-2014 supra is binding on the appellant Revenue. We further find that the Coordinate Bench of this Tribunal in assessee's case in ITA Nos. 1989 & 1010/Kol/2013 for the A.Ys 2008-09 & 2009-10 vide its order dt. 14-08-2015 followed the decision of the Hon'ble High Court of Calcutta and dismissed the appeal of revenue. We also find that the CIT-A followed the decision of the Hon'ble High Court of Calcutta in the case of CIT Vs. Rasoi Limited in GA No. 2684 of 2014/ITAT No. 138 of 2014 dt. 05-09-2014 for the year under consideration and deleted the addition made by the AO in this year also, copy of the same is on record. For the sake of convenience the relevant portion of order dt. 02-04-2014 is reproduced herein below:-*
>
> > *"6. From the above facts and circumstances, admitted facts are that during the year under consideration assessee company received incentive subsidy from Govt. of West Bengal under West Bengal Incentive Scheme, 1999 (WBIS) as encouragement for setting up of industrial project. It is also a fact that maximum limit of the subsidy was restricted with reference to the value of fixed capital investments in land, building, plant and machinery but no part of the subsidy was specifically intended to subsidize the cost of any fixed asset, therefore, it cannot be said that the subsidy was to meet a portion of cost of the asset. According to us, the assessee has rightly not reduced the amount of subsidy received from the actual cost/WDV of the fixed assets while claiming depreciation. It is also a fact that revenue during scrutiny assessments of the assessee for A.Y 2003-04 and 2004-05, the above stated subsidy was considered as capital receipt accepting the contention of the assessee. For the sake of consistency also the AO should not have managed the stand now. Even Hon'ble Supreme Court in the case of CIT vs. P.J. Chemicals Ltd (1994) 210 ITR 830(SC) has considered this issue and held that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the actual cost. Therefore, the said amount of subsidy cannot be deducted from the actual cost under sec. 43(1) for the purpose allowing depreciation. It is further held that if Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as a percentage of such cost, it does not partake the character of payment intended either directly or indirectly to meet the "actual cost". By implementation, the above judgment also provides that if the subsidy is intended for meeting a*

portion of the cost of the assets, then such subsidy should be deducted from the actual cost, for the purpose of computing depreciation. As per Hon'ble Supreme Court, law is that if the subsidy is asset specific, such subsidy goes to reduce the actual cost. If the subsidy is to encourage setting up of the industry, it does not go to reduce the actual cost, even though the amount of subsidy was quantified on the basis of the percentage of the total investment made by the assessee.

7. The law is already settled on the subject. Now, the only wavering is with reference to Explanation 10 provided under sec. 43(1). The said Explanation provides that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. It is further, provided thereunder that where such subsidy or grant or reimbursement of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee. In order to invoke Explanation 10, it is necessary to show that the subsidy was directly or indirectly used for acquiring an asset. This is a question of fact. The relatable subsidy to such asset can be reduced from the cost only if it is found that the cost for acquiring that asset was directly or indirectly met out of the subsidy. Likewise in the proviso, it is necessary to show that the subsidy has been directly or indirectly used to acquire an asset but it is not possible to exactly quantify the amount directly or indirectly used for acquiring the asset. Here also, a finding of fact is necessary that an asset was acquired by directly or indirectly using the subsidy. The above Explanation and the proviso thereto do not dilute the finding of the Hon'ble Supreme Court in the case of P.J Chemicals Ltd. that asset-wise subsidy alone can be reduced from the actual cost. The above Explanation and the proviso therein attempt to explain the law. They are not bringing any new law different from the law considered by the Hon'ble Supreme Court in the above cases.

8. In view of the above facts and circumstances of the case and legal position explained by Hon'ble Supreme Court in the case of P.J Chemicals Ltd. supra. We are of the view that CIT(A) has rightly allowed the claim of depreciation of assessee. We uphold the same. This issue of revenue's appeal is dismissed."

4. In view of above, we find that the CIT-A was justified in deleting the impugned addition. We find no infirmity in the impugned order of the CIT-A. Ground no. 1 raised by the revenue is dismissed.

5. In the result, the appeal of revenue is dismissed."

We note that where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or State Government in the form of subsidy then so much of the cost as is relatable to such subsidy shall not be included in the actual cost of the asset. When such subsidy cannot be directly relatable to the asset acquired, then such subsidy shall not be included in the actual cost of the asset. That is, to reduce from the cost of asset, the subsidy should be directly or indirectly used for acquiring an asset. In the assessee's case under consideration no asset was being acquired by using TUF subsidy therefore it should not be reduced from fixed assets. However, such TUF subsidy is to be treated capital receipt.

Respectfully following the judgment of the Co-ordinate Bench we note that the subsidy received under TUF scheme is capital receipt and therefore we delete the addition made by the Ld. CIT(A).

7. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 12.06.2019.

Sd/-	**Sd/-**
(S.S.VISWANETHRA RAVI)	**(DR. A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

दिनांक Dated 12/06/2019
SB, Sr. PS
Copy of the order forwarded to:
1. Shri Deepak Spinners Ltd.
2. DCIT, Circle-11(1), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches