IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : F : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SMT BEENA PILLAI, JUDICIAL MEMBER

ITA No.3002/Del/2011
Assessment Year: 2005-06

ACIT, Circle-10(1), New Delhi.	Vs.	Pasadensa Foods Ltd., (Now known as Dabur Foods Ltd.), 4th Floor, Punjabi Bhawan, 10, Rouse Avenue, New Delhi.

ITA No.2731/Del/2011
Assessment Year: 2005-06

Pasadensa Foods Ltd., (Now known as Dabur Foods Ltd.), 4th Floor, Punjabi Bhawan, 10, Rouse Avenue, New Delhi.	Vs.	ACIT, Circle-10(1), New Delhi.

(Appellant) (Respondent)

Assessee By	:	Shri M.P. Rastogi, Advocate
Department By	:	Shri Atiq Ahmad, Sr. DR

Date of Hearing	:	22.11.2017
Date of Pronouncement	:	23.11.2017

ORDER

PER R.S. SYAL, VP:

These two cross appeals – one by the assessee and the other by the Revenue arise out of the order passed by the CIT(A) on 10.03.2011 in relation to the assessment year 2005-06.

2. First ground of the Revenue's appeal is against the treatment of subsidy of Rs.2.5 crore as capital in nature.

3. Briefly stated, the facts of the case are that the assessee declared receipt of Rs.2.5 crore as capital in nature, being, the amount subsidy from West Bengal Government under West Bengal Incentive Scheme, 2000. It was submitted that same was 'Capital Investment subsidy' given to incentivize the setting up of units in West Bengal and, hence, not a revenue receipt. The Assessing Officer treated the same as revenue. The ld. CIT(A) overturned the assessment order on this point.

4. Having heard both the sides and perused the relevant material on record, it is seen, as an admitted position, that the subsidy of Rs.2.50 crore was given for setting up of unit in West Bengal and the same has

been characterized as `Capital investment subsidy'. The Hon'ble Supreme Court in *Sahney Steel and Press Works vs. CIT (1997) 228 ITR 253 (SC),* has held that the operational subsidy which is received after commencing the business is taxable income. The Hon'ble Apex Court has further laid down in this case that the purpose of subsidy should be examined. If such subsidy is for encouraging the establishment of new units, then, it is capital, but, the operational subsidies allowed after commencing of business, are taxable in nature. The Hon'ble Supreme Court in *CIT vs. Ponni Sugar & Chemicals Ltd. (2008) 306 ITR 392 (SC)* has again laid down that the 'purpose test' should be applied for determining the character of subsidy. If the subsidy is given for expansion etc., then, it is a capital receipt irrespective of the fact that it is given in the form of more open quotas etc. Turning to the facts of the instant case, we find it as an admitted position that the assessee received this amount as a *quid pro quo* for setting up of its unit in West Bengal. The same, being, allowed for setting up of industry has been rightly held by the ld. CIT(A) to be capital receipt. The impugned order is confirmed. This ground fails.

5. Second ground of the Departmental appeal is against the deletion of addition of Rs.1,68,33,194/- made by the Assessing Officer on account of capitalization of interest. The assessee paid certain interest. On perusal of the details of fixed assets, as have been tabulated on pages 19 onwards of the assessment order, the Assessing Officer observed that the business did not commence during the year and, hence, interest should be capitalized. This led to the addition of Rs.1,68,33,194/-. The ld. CIT(A) observed that the business of the assessee started in assessment year 2004-05, which fact was duly admitted by the Assessing Officer while framing assessment for such preceding year. That being the position, it was held that the disallowance of interest was not called for. The Revenue is aggrieved against the deletion of disallowance.

6. We have heard both the sides and perused the relevant material on record. Case of the AO is that since the business was not set up, hence interest relatable to such assets should not be allowed as deduction. There is no doubt on the fact that the assessment for the assessment year 2004-05 was completed u/s 143(3) in which the Assessing Officer

accepted the business to have started. In that view of the matter, no disallowance of interest can be made for the assets which have been already put to use.

7. On perusal of the Annual accounts of the assessee for the year under consideration, it was observed from the Schedule of fixed assets, a copy of which is available on page 78 of the paper book, that heavy additions have been shown during the year totaling to Rs.8,08,09,000/-. Addition to Plant & machinery stands at Rs.5.61 crore and addition to the Building at Rs.2.19 crore. Opening gross figures show total of assets at Rs.14.47 crore with Building at Rs.2.98 crore and Plant & machinery at Rs.10.99 crore. On a pointed query from the Bench, the ld. AR submitted that the Mango pulp plant started in the preceding year and that is the reason for which the Assessing Officer treated the business as commenced in his order for the assessment year 2004-05. As regards heavy additions made to Plant & machinery and Building during the year, the ld. AR candidly admitted that Pineapple unit was being set up and it commenced during the year relevant to the assessment year under

consideration. It is, therefore, clear that all the assets of the assessee were not put to use, after installation, throughout the year. Proviso to section 36(1)(iii) provides that: 'any amount of the interest paid in respect of capital borrowed for acquisition of an asset (whether capitalized in the books of account or not) for any period beginning from the date on which the capital was borrowed for acquisition of the asset *till the date on which such asset was first put to use, shall not be deducted as allowed.*' In view of this clear proviso set out in section 36(1)(iii), it becomes abundantly clear that any interest paid in respect of capital borrowed for acquisition of asset shall not be allowed as deduction for the period till such asset is first put to use. Since the Pineapple unit of the assessee was not admittedly operational throughout the year, interest on capital borrowed for acquisition of assets meant for the Pineapple unit cannot be allowed as deduction till such assets are put to use. No such details are available with the ld. AR. In the given circumstances, we set aside the impugned order to this extent and remit the matter to the file of Assessing Officer for examining the amount of interest paid by the assessee on capital borrowed for acquisition of fixed

assets. Amount of interest pertaining to the period up to the which such assets of Pineapple unit were not first put to use, shall not be allowed as deduction. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in this case.

8. Last ground of the Revenue's appeal is against deletion of addition of Rs.41,18,347/- made by the Assessing Officer on account of administrative expenses. Following the view taken for disallowing interest, the Assessing Officer opined that no business activity took place till August, 2004 and hence 2/3rd of the Selling and Administrative expenses were to be capitalized on pro-rata basis. This led to the addition of Rs.41,18,347/-. The ld. CIT(A), also following his view of the assessee having commenced the business in preceding year, overturned the assessment order on this score. While disposing off ground no. 2 of the Revenue's appeal, we have modified the finding of the ld. CIT(A) regarding setting up of the business in the preceding year by holding that only the Mango pulp business was set up and the Pineapple business was in the process of being setting up which the

assessee claims to have been actually set up in July, 2004. In view of this fact, the expenses relating to Pineapple unit are required to be capitalized and those relating to Mango pulp unit should be allowed as deduction.

9. The only issue raised by the assessee in its appeal is against the reduction of the amount of subsidy under West Bengal Incentive Scheme, 2000 from the value of fixed assets for the purposes of granting deduction. The ld. AR contended that the amount of subsidy of Rs.2.50 crore should not have been reduced from the value of fixed assets. He relied on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. P.J. Chemicals (1994) 210 ITR 830 (SC)* in which it has been held that the amount of subsidy received under Central Scheme should not be reduced from cost of assets for depreciation.

10. Having gone through the relevant material on record, it is found that the assessee, in fact, received capital investment subsidy of Rs.2.50 crore which relates to the setting up of its unit in West Bengal. The moot question is whether the amount of such subsidy of Rs.2.50 crore

should be reduced from the cost of fixed assets. It is, no doubt, true that the Hon'ble Supreme Court in *P.J. Chemicals (supra)* has held that subsidy received from Government under Central Subsidy Scheme is an incentive and not for the specific purpose of meeting a portion of cost of assets and the same is, therefore, not deductible from 'actual cost' for the purposes of calculation of depreciation. However, it is relevant to note that the Parliament has neutralized the effect of the judgment in *P.J. Chemicals (supra)* by inserting Explanation 10 to section 43(1) w.e.f. 01.04.1999, which reads as under:-

> Explanation 10.—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 a 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 :
>
> Provided that where such subsidy or grant or reimbursement is 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.

11. It is obvious from a perusal of the Explanation that where a portion of the cost of an asset has been met even indirectly by the Government or any other person 'in the form of a subsidy', such an amount of subsidy or reimbursements etc. shall not be included in the actual cost of the asset to the assessee. Thus, it is clear that the judgment in the case of *P.J. Chemicals (supra)*, therefore, no more holds the field w.e.f. assessment year 1999-2000 onwards.

12. The ld. AR also relied on the judgment of the Hon'ble Gujarat High Court in *Banco Products (I) Ltd. vs. DCIT (2015) 379 ITR 1 (Guj)* to contend that the amount of subsidy should not be reduced from the actual cost for the purposes of depreciation. The Hon'ble Gujarat High Court in *Banco Products (supra)* has held that where portion of cost of asset acquired by assessee had been met directly or indirectly by Central Government or State Government or any authority established under any law or by any person, in form of a subsidy, then, cost as was relatable to such subsidy, shall not be included in actual cost of asset to assessee. However, what is material for consideration is that in that case assets

were acquired in 1993-94 and Explanation 10 to section 43(1) came to be inserted w.e.f. A.Y. 1999-2000 onwards. The Hon'ble High Court has recognized this position in para 10 by observing that : `Another aspect of the matter is that on the date when the assessee had invested in fixed capital assets, Explanation 10 to sub-section (1) of section 43 of the Act was not on the statute book and hence, the actual cost came to be computed in terms of the law as existing at the relevant time. Nothing happened in the year under consideration so as to justify the action of reduction from the written down value of the block of assets. *Explanation 10 to sub-section (1) of section 43 of the Act came into effect only from 1.4.1999 that too prospectively and, therefore, has no application, more so, when plant itself was set-up in assessment year 1993-94.'* Since in the instant case, the assets relating to the Pineapple unit were acquired/set up much later than the date of applicability of Explanation 10 and as per the version of the ld. AR the project became ready for operations in July, 2005, we find that the mandate of Explanation 10 to section 43(1) gets fully attracted. The decision in *Banco Products (supra)*, therefore, supports the Revenue's stand point

instead of the assessee. It is ergo held that the amount of subsidy received by the assessee to the tune of Rs.2.50 crore will require reduction from the cost of acquisition of the assets and would consequently lower the amount of depreciation as has been held by the lower authorities. The impugned order is countenanced on this score. The ground of the assessee fails.

13. In the result, the appeal of the Revenue is partly allowed for statistical purposes and that of the assessee is dismissed.

Order pronounced in the open court on 23rd November, 2017.

Sd/-	Sd/-
[BEENA PILLAI] JUDICIAL MEMBER	[R.S. SYAL] VICE PRESIDENT

Dated, 23rd November, 2017.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.