आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.814/Kol/2018 Assessment Year:2013-14

M/s Kkalpana Industries (India) Ltd., Rajkuthir, 2B, Pretoria Street, Kolkata-71 [**PAN No. AABCK 2239D**]	बनाम **/** **V/s.**	Principal Commissioner of Income Tax, Central-1, Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Ravi Tulsiyan, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri P.K. Srihari, CIT-DR
सुनवाई की तारीख/Date of Hearing	20-08-2018
घोषणा की तारीख/Date of Pronouncement	06-11-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2013-14 arises against the Principal Commissioner of Income Tax, Central-1,(P.CIT) Kolkata's order dated 07.02.2018 directing the Assessing Officer to frame afresh assessment after setting aside the regular one framed dated 22.03.2016 in exercising revision jurisdiction vested u/s 263 of the Income Tax Act, 1961; in short as 'the Act'.

We have heard Shri Ravi Tulsiyan, advocate for assessee and Shri P.K. Srihari/ CIT-DR appearing at Revenue's behast. Case file perused.

2. We advert to the basic facts pertaining to instant lis first of all. This assessee is a company carrying out manufacturing business. It filed its return on 29.09.2013

declaring income of ₹8,84,47,520/-. The same stood summarily processed on 31.12.2014. This followed the impugned regular assessment framed on 22.03.2016 u/s 143(3) of the Act *inter alia* making various disallowances / additions under different heads not forming subject-matter of challenge before us.

3. It emerges that the P.CIT issued his section 263 show cause notice dated 29.12.2017 proposing to revise the above regular assessment after terming it as erroneous causing prejudice to interest of the Revenue as follows:

> *"The above mentioned assessment order has been examined by me along with the assessment record. I found that you have claimed deduction u/s. 80-IB on the entire amount of profit earned from the Silvasa Unit of your company. On further examination, I found that the profit and loss account of the Silvasa unit contains income from interest of Rs.3,48,13,006/-. Export incentive of Rs.1,16,89,00/- and other non-operational income of Rs.15,809.-. These incomes are included in the profit eared from Silvasa unit considered for computation of deduction u/s. 80-IB. Te deduction u/s. 80-IB is provided from the income derived from the eligible business. The interest income of Rs.3,48,13,006/- and the other non-operational income of Rs.15,809/- are not related to the manufacturing activity carried out in Silvasa unit and hence, such income cannot be said to be derived from the eligible business of Silvasa Unit. It is also to be noted that export incentives have been held to be as not the income derived from the eligible business and hence, on such income, deduction u/s 80-IB is not allowable a held by the Hon'ble Supreme Court in the case of Liberty India –vs- CIT (2009) 317 ITR 218 (SC). Therefore the AO has wrongly allowed the deduction u/s. 80-IB on the income from interest of Rs.3,48,13,006/, export incentive of Rs.1,16,89,000/- and other non-operational income of Rs.15,809/-. Because of allowing excess deduction u/s. 80-IB on account of non-eligible business income, the deduction u/s. 80-IB has been allowed in excess of Rs.1,91,86,105/-. Due to allowing of such deduction on above mentioned non-eligible business income, your income has been under assessed to the extent of Rs.1,91,86,105/- resulting into levying of less tax to the extent of short assessment of income.*
>
> *2. In view of under am of your income and levying of less tax, the above mentioned order dated 22/03/2016 passed by the AO, DCIT, CC-1(3), Kolkata has become erroneous in so far as prejudicial to the interest of revenue and hence, this assessment order is required to be revised as per the provision of section 263."*

4. The assessee filed its reply dated 06.02.2018 vehemently contesting the Pr. CIT's revision show cause notice extracted herein. It firstly pleaded that the impugned regular assessment was neither erroneous nor caused any prejudice to the interest of the Revenue so as to invoke section 263 revision proceedings in view of the

corresponding amendment by way of Explanation-2 inserted vide Finance Act, 2015 with effect from 01.06.2015. It then averred that the above interest income of ₹3,48,13,006/- comprised of three components. First one was interest income of ₹91,16,938.45 from FDs amounting to ₹107,43,188/- purchased out of CC account and deposited towards margin and against letter of credit in earlier years. Then came the second component of ₹31,14,372/- treated as receivables in profit and loss account in Silvasa unit from M/s Cable Corporation of India Ltd. Remaining sum of ₹2,10,71,267/- was shown as received from various parties availing loans. The assessee stated as per its "Schedule 20: Finance Costs" in profit and loss account relevant to Silvasa unit was of ₹10,07,38,133/- comprising of the former components of borrowings in earlier years followed by late payment of statutory dues amounting to ₹10,03,08,955.60 and ₹3,29,177.60 respectively. Its case therefore was that netting of above interest income and expenditure; if adopted as per various judicial precedents right from hon'ble apex court to this tribunal would result in interest expenditure to the tune of ₹6,54,95,949.60 leaving no scope for assessment of it is interest income.

5. There is no dispute about the P.CIT having dropped his show cause qua the non-operative income heads (supra). The assessee thereafter came to latter surviving issue of incentive income amounting to ₹1,16,89,000/- received as assistance from the Government of India under Foreign Trade Policy's (FTP)'s SHIS Scheme (State Holder Incentive Scrip). It highlighted the relevant facets of the said policy as follows:

> *"On perusal of the Scheme, it shall be evident form page… of the paper book that the SHIS Scheme was brought in by the Government of India as a part of its Foreign Trade Policy with the objective to promote investment in up gradation of technology of some specified sectors as listed in Para 3.16.4 of the scheme wherein Status Holders would be entitled to incentive scrip @ 1% of FOB value of exports made, of the specified sectors, in the form of duty credit. The same stands evident from the objective enumerated in the Scheme at.*
> *Further the Scheme states that the SHIS scheme shall be with Actual User Condition and shall be used for imports of capital goods (as defined in FTP) relating to the sectors specified in* ***Para 3.16.4*** *of the said scheme.* ***Para 3.16.4*** *of the* ***SHIS Scheme*** *specified the following sectors:*
>
> > '1. Leather Sector (excluding finished leather);
> > 2. Textiles and Jute Sector;
> > 3. Handicrafts;
> > 4. Engineering Sector (excluding Iron & Steel, Nonferrous Metals in primary or intermediate forms. Automobiles & two wheelers, nuclear reactors & 41 parts and Ships, Boats and Floating Structures ;

5. Plastics; and
6. Basic Chemical (excluding Pharma Products).

The assessee being engaged in the business of manufacturing polymer compounds in India, it falls under the 'plastics' sector. What transpires from the above is that the assessee has been provided assistance/incentive by the Government of India under the SHIS Scheme for import of capital goods relating to the manufacturing activity undertaken by it in the 'plastics' sector. The Government of India by way of providing assistance to the assessee under the SHIS Scheme for importing capital goods utilized by it in the manufacture of polymers, has reimbursed the assessee's components of cost of running a business from which profits and gains are derived.

Elaborating on this further, the assessee would like to submit that the assistance of Rs.1,16,89,000/- received by it during the relevant Assessment Year from the Government of India under the SHIS Scheme was utilized by it for the purchase of machineries namely, Buss Kenader Pant, VarexCoex 7 Layer Blown Film, Flexograaphic Press machine, upper Combi Laminating Machine, all of which are utilized in its manufacturing of polymers. Evidencing the same, the assessee at page 23 of the paper book has enclosed a detailed breakup of the assistance of Rs.1,16,89,000/- received by it under the SHIS Scheme.

Also at pages 25 to 27 and 36 to 39 of the paper book the assessee has enclosed copies of SHIS scrips providing assistance of Rs.1,16,89,000/- to the assessee vide two different scrips, one amounting to Rs.98,51,9009/- and the other Rs.57,89,171/-. Specimen copies of Bill of Entry, evidencing utilization of the sum of Rs.1,16,89,000/- for import of capital goods (the machineries mentioned above) are enclosed at pages 28 to 35 and 40 to 50 of the paper book.

In the light of the above the assessee would like to submit that the assistance received by it under the SHIS Scheme is not an Export Incentive, as alleged by your goodself in view of the Hon'ble Supreme Court of India's decision in the case of ***Liberty India*** *(supra). Instead it is a subsidy received from the Government of India.*"

6. The assessee's strongly emphasis in above terms that the DCIT's show cause notice was liable to be dropped. The same stand declined in DCIT's order under challenge *qua* the two surviving issue (supra) as follows:-

"4.1 I have considered the above written submission. The Ld. AR has opposed the revision u/s. 263 arguing mainly contending that all the three types of income mentioned by me in para 2 of this order are derived from thebu of the assessee eligible for deduction u/s. 80IB.
4.2 Regarding interest income of Rs.3,48,13,006/-, the Ld. AR has given the details that such income is earned from FDR, Debtor (Cable Corporation of India) and from parties having received loan from the assessee. He also pointed out that apart from earning interest income, the assessee has also incurred expenses on payment of interest. In the light of these facts, the Ld. AR argued that it is a settle deposition of law as tatted by several judicial authorities including the Hon'ble Supreme Court of India that for the purpose of excluding interest income from the claim of section 80IB

*of the Income Tax Act, gross interest income cannot be considered and such exclusion of interest income from the claim of deduction u/s. 80IB of the Income Tax Act 1961 has to be done by netting it off with interest expenditure. However, all the judgements referred by him in this regard are found to be related to computation of deduction u/s. 80HHC. However, in all these decisions, it is held that interest income earned on FDR does not have an immediate nexus with export business and therefore, has to be necessarily be treated a "**Income From Other Sources**" and not "**Business Income**". However, for this purpose, the AO has to give a specific finding that the interest income is not business income but income from other sources and the corresponding interest expenditure that has been laid out to earn such income from other sources has to be determined and deducted from such interest income to compute net interest income taxable under the head "**Income From Other Sources**". So, it clear that interest income from FXDRs, loan given to parties and on late payment by debtors are to be assessed under the head "Income from Other Sources" but for computing the income under section 56 of the Act a income from other sources, the AO has to determine corresponding interest expenditure that has been laid out to earn such income from, other sources and the net interest income has to be computed by the AO to be excluded from the income considered for the deduction u/s 80IB.*

4.3 As regards the non-operational income of Rs.15,809/-, it has been explained that this income has been earned on sale of scrap (Rs.3,063.73), an amount received from Indian Oil Corporation towards short supply of materials (Rs.7,400.00) and on reimbursement of freight expenses on export of samples (Rs.5,345.27). Ld AR by referring to certain judgements as discussed in his written submission reproduced in para 3 of this order has shown that all the above three types of income in the non-operational income are related to the business of manufacturing unit of the assessee, which is eligible for deduction u/s.80IB of the Act. After considering the explanation of the Ld AR about the nature of income included in the amount of Rs.15,809/- and the judgements referred by him, I find that this income is related to manufacturing activities of the business of the assessee eligible for deduction u/s. 80IB of the Act and hence, on account of this income, no revision u/s. 263 is required to withdraw deduction u/s. 80IB.

*4.4 As regard the export incentive of Rs.1,16,89,000/-, the Ld. AR tried to explain this amount as being in the nature of subsidy used in import of capital goods relating to the manufacturing activity undertaken by it in the plastic sector and compared it with transport subsidy, interest subsidy and power subsidy received from the Government by another company, M/s Meghalaya Steels Ltd. in the case of which, Hon'ble Supreme Court income **CIT vs. Meghalaya Steels Ltd.** (2016) 383 ITR 217 (SC) has held that any assistance/incentive received by an assessee as reimbursement towards cost of manufacturing falls under the head "**profits & Gains of Business or Profession**" and qualify for deduction u/s. 80IB of the Income Tax Act, AR in this respect. As far as export incentive is concerned, it has not been found to be similar to the subsidy received by M/s Meghalaya Steel Ltd. However, in the interest of justice, the AO should after calling for entire details relating to export incentive received by the assessee examine its nature and compare with the nature of subsidy received by Meghalaya Steels Learned. As discussed by the Guahatdi High Court an then the decision of the Hon'ble Supreme Court in that case and find out whether depending on the nature of export incentive received by the assessee company which decision of*

> *Hon'ble Supreme Court would be more appropriate to follow in case of the assessee, whether decision in case of* ***Liberty India (supra)*** *or of* ***Meghalaya Steel (supra)*** *and accordingly, decide to allow or disallow section 80IB deduction on export subsidy received by the assessee company.*
> *5. In view of ,my above decision, the assessment order u/s. 143(3) dated 22/03/2016 is set aside and restored to the file of the AO to the extent of examining the issue relating to allowing deduction u/s. 80IB on interest income of Rs.3,48,13,006/- and export incentive of Rs.1,16,89,000/- received by the assessee as per my direction in previous para and then, pass a afresh assessment order. Other additions made in original assessment order shall remain intact."*

This is what leaves the assessee aggrieved against the P.CIT's directions to the Assessing Officer for examining the twin issues of interest income and export incentive income (supra) for their eligibility u/s. 80IB deduction.

7. We have given our thoughtful consideration to rival contentions reiterating both assessee's and Revenue's respective stands against an in favour of the P.CIT's revision order in issue. We came to ambit scope of the CIT/P.CIT revisional jurisdiction first of all. Hon'ble apex court's landmark decision in Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) made it ample clear long back that the crucial expression "***prejudicial to the interest of the revenue***" is to be read in conjunction with an erroneous order passed in assessment framing the subject-matter of revision. Their lordships observed that every loss of revenue in consequence to the assessment in issue cannot be treated as prejudicial to interest of the revenue. For example, where an assessing authority adopts one of the course possible in law and it has resulted in loss of revenue or where two issues are possible and one of them has been taken in assessment and the Commissioner does not agree to same, it cannot be taken as an instance involving erroneous assessment prejudicial to interest of the revenue unless of course the Assessing Officer's view is unsustainable in law. The very view stood reiterated in *CIT vs. Max India Ltd*. (2007) 295 ITR 282 (SC), *CIT v. Nahar Exports Ltd.* (2007) 288 ITR 494 (P&H), *CIT vs Gabriel India Ltd* (1993) 203 ITR 108 (Bom) *Grasim Industries vs. CIT* (2010) 321 ITR, 92 (Bom) and *CIT vs. Honda Siel Power Products Ltd.* **ITA No.1376//2009** and **1382/2009** to name a few judicial precedents. We keep in mind all this settle legal preposition to revert back to the twin issues (supra) raised in the P.CIT's sec. 263 order under challenge.

8. It is not out of place for us to make it clear that the P.CIT has not made it as a case of Assessing Officer having not conducted any enquiry either in section 263 show cause notice or his revision order under challenge. His former view is that the assessee's interest income of ₹3,48,13,000/- does not qualify for sec. 80-IB deduction since not "**derived**" from eligible business as per "Liberty India" case (supra). We do not find the relevant facts involved in the instant lis to similar vis-à-vis those before their lordships. It emerges first of all that assessee's gross interest income has been derived from FDRs amounting to ₹10,07,38,133/- giving rise to interest of ₹106,27,366.13 (effectively ₹105,26,705/-) from customers on late payment of dues wrongly treated as interest from FDR. These FDR had been purchased out of the taxpayer's cash credits account with various banks such as Dena Bank, Standard Chartered Bank, IndusInd Bank, HSBC Bank and State Bank of India as well as deposits towards margin and guarantee against letters of credit in earlier years. Second head of interest income of ₹206,76,847/- has been derived from loans advanced to the parties out of cash credits accounts in course of business. Next head of interest income is ₹36,09,453/- from debtors / customers M/s Cable Corporation of India Ltd., Eminent Communications P. Ltd., Indo Alusys Industries Ltd. and Shiv Priya Cables P. Ltd. along with delayed receipts of payments. Corresponding interest expenditure against the same in "bank interest CC" head as per page 57 in paper book reads ₹733,74,867.15. This interest expenditure therefore turns out to be much excess than interest income because of loan rate head higher than interest rate. Net thereof comes to ₹4,21,71,315.15 i.e. interest income ₹3,48,13,000/- - interest expenditure ₹7,33,74,867.15; respectively.

9. This gives rise to yet another key question as to whether the assessee's interest income of ₹3,48,13,000/- or only the net sum hereinabove is liable to be assessed as per law. Learned Departmental Representative fails to dispute the settled legal proposition that it is only the net of interest income and expenditure instead of the former component only that has to be excluded for the purpose of computing sec 80IB deduction. Various judicial precedents *ACG Associated Capsules P. Ltd. v. CIT* (2012) 343 ITR 89 (SC) and *CIT vs. Shri Ram Honda Power Equip* (2007) ITR 475 (Del) answer the very question in assessee's favour. Hon'ble Gujarat high court's

judgment in *CIT vs. Nirma Ltd.* (2014) 367 ITR 12 (Guj) makes it clear that although the former foregoing judicial precedent dealt with 80HHC deduction involving complex computation formula this distinction in itself vis-a-vis section 80I of the Act will not be material the impugned deduction so far as the central question of exclusion of certain profits from the activity which is not eligible for deduction as per the two statutory provisions is concerned. Their lordships state in clear terms that as and when any profit is sought to be excluded from the impugned provision deduction, it is not gross but net only (*gross profit reduced by expenditure incurred for the same*) that would be excluded. This Tribunal's various decisions in *Sagar Foods vs. ITO Wd 2(4) Bhavagar* in **ITA No. 750/Ahd/2014**, *Al Reza Food vs. ITO Wd 2(4) Bhavnagar*, **ITA No.633/Ahd/2014**, *M/s Lalsons Enterprises vs. DIT* (2004) 89 ITD 255 [ITAT (Del)] and *Pioneer Industries vs. ITO* **ITA No.250/Del/2015** echo the very legal principle. It thus emerges that the revenue authorities have to adopt only netting formula whilst excluding assessee's income to be not derived from eligible business. Such a netting exercise admittedly leaves behind negative interest income of ₹4,21,71,315.15 (supra). This sufficiently indicates that even if the P.CIT's directions under challenge are upheld at this stage in principle, net result thereof would be assessment of a negative figure only. All this leads us to the conclusion that the Assessing Officer's action assessing assessee's positive interest income of ₹3,48,13,006/- has been wrongly taken as an instance of an assessment both erroneous as well as the one causing prejudice to the interest of the revenue in absence of any revenue loss. We therefore follow the above judicial precedents (supra) to hold that the P.CIT has erred in law as well on facts in exercising his revision jurisdiction vested u/s 263 of the Act in a revenue neural instance *qua* the former interest income issue. We accordingly accept assessee's and reject those raised at the Revenue instance on the former issue of non eligibility of interest income amounting ₹3,48,13,006/- for the purpose of computing u/s 80-IB deduction.

10. Next comes the latter issue of the P.CIT's exercising his revision jurisdiction qua the assessee's assistance of ₹1,16,89,000/- from Government of India under the Foreign Trade Policy SHIS Scheme (State Holder Incentive Scrip). This scheme is compiled in paper book pages 8 to 22. Para 3.16.4 makes it clear that Government of

India introduced this scheme as part of its Foreign Trade Policy with an objective to promote investment in upgradation of technology in some sectors wherein stake holders would be entitled to incentive scrip @ 1% of FOB value of exports made in specified sectors in the form duty credits.

11. This taxpayer undisputedly manufactures polymer components. It comes in "***plastics***" sector therefore as per SHIS Scheme. Case records suggest that the assessee has availed Government of India's assistance / incentive for import of capital goods relating to manufacturing activity in plastic sector. It is thus an instance involving reimbursement of cost of running eligible business forming profits qualifying for sec 80-IB deduction. The assessee's paper book at page 23 gives all the relevant details of the impugned sum of ₹1,16,89,000/- regarding purchase made out Buss Kneader Plant, Varex Coex 7 Layer Blown Film, Flexographic Press Machine, Super Combi Laminating Machine; all purchased in the relevant previous year. Corresponding specimen copies of bills of entry / utilization form part of records between pages 24 and 50 in paper book. The same are not disputed at the Revenue's behest very fairly. All this sufficiently indicates that the impugned assistance availed under SHIS Scheme has been wrongly treated to be at par with an export incentive.

12. Hon'ble apex court's decision in *CIT vs. Meghalaya Steels Ltd.* (2016) 383 ITR (SC) has made it clear that the relevant issue in Liberty India (supra) pertained to DEPB credit / Duty Drawbacks. Their lordships have distinguished the clinching words in issue i.e. "***attributable to***" and "***derived from***" to hold that the latter expression is very much narrower in connotation to the former since intending not to cover beyond first degree nexus. Their lordships observe that transport, interest and powers subsidies go to reduce the cost of production and therefore, they amount to revenue receipts eligible for sec. 80-IB deduction since having a direct nexus with the manufacturing activity in other words.

13. We also wish to discuss here hon'ble apex court's yet another decision on the nature of subsidy in *Sahney Steel and Press Works Ltd. v. CIT* (1997) 228 ITR 253 (SC) dealing with a case of subsidy in the form of sales tax paid on raw materials, machinery, finished goods; subsidy on power consumption and water rate etc., for the purpose of carrying on the relevant business. Their lordships applied purpose test to

conclude that any assistance by way of reimbursing cost incurred in relation to a business falls under the head profits and gains of the business or profession. Section 28(iii)(b) of the Act also specifically treats income from cash assistance; under whatever name, receivable by any person against exports or under Government of India scheme to be chargeable as business income. It is therefore clear that assessee's assistance received of ₹1,16,89,000/- under SHIS Scheme is towards cost incurred for import of capital goods in polymer manufacturing. It is in the nature of a revenue receipt eligible for sec. 80-IB deduction since the scheme provides forr the purpose of importing capital goods utilized in polymer manufacturing thereby reimbursing running cost of business as against that in the nature of DEPB / Duty drawbacks credited in profit and loss account forming subject-matter of adjudication in "Liberty India" (supra). Learned CIT-DR fails to rebut the basic fact that this SHIS Scheme states its purpose to be for providing investment its upgradation of technology only. It also imposes actual user conditions

14. The assessee has further placed on record CBDT's Circular No. 39 dated 29.11.2016 (paper book 51 to 52) has making it clear that revenue subsides received from Government towards cost of production / manufacture or for sale of manufacturing goods are profits and gains eligible for various deductions under Chapter-VI-A of the Act.

15. Learned Departmental Representative vehemently contends at this stage that this SHIS Scheme is for the purpose of acquisition of capital assets to be utilized for expansion of existing units his case that this subsidy falls in capital account only. Hon'ble apex court's decision in *CIT vs. Ponni Sugars and Chemicals Ltd* (2008) 306 ITR 392 (SC) containing a detailed discussion qua the nature of subsidy issue quoted during the course of hearing reads as follows:-

> "*14. 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 Ltd. *. In that case, on behalf of the assessee, it was contended that the subsidy given was up to 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 leave 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 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 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.

15. In the decision of the House of Lords in the case of Seaham Harbour Dock Co. v. Crook [1931] 16 TC 333, the Harbour Dock Co. had applied for grants from the Unemployment Grants Committee from funds appropriated by Parliament. The said grants were paid as the work progressed the payments were made several times for some years. The Dock Co. had undertaken the work of extension of its docks. The extended dock was for relieving the unemployment. The main purpose was relief from unemployment. Therefore, the House of Lords held that the financial assistance given to the company for dock extension cannot be regarded as a trade receipt. It was found by the House of Lords that the assistance had nothing to do with the trading of the company because the work undertaken was dock extension. According to the. House of Lords, the assistance in the form of a grant was made by the Government with the object that by its use men might be kept in employment and, therefore, its receipt was capital in nature. The importance of the judgment lies in the fact that the company had applied for financial assistance to the Unemployment Grants Committee. The committee gave financial assistance from time to time as the work progressed and the payments were equivalent to half the interest for two years on approved expenditure met out of loans. Even though the payment was equivalent to half the interest amount payable on the loan (interest subsidy) still the House of Lords held that money

received by the company was not in the course of trade but was of capital nature. The judgment of the House of Lords shows that the source of payment or the form in which the subsidy is paid or the mechanism through which it is paid is immaterial and that what is relevant is the purpose for payment of assistance. Ordinarily, such payments would have been on revenue account but since the purpose of the payment was to curtail/obliterate unemployment and since the purpose was dock extension, the House of Lords held that the payment made was of capital nature.

16. One more aspect needs to be mentioned. In Sahney Steel and Press Works Ltd, this court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. ** the assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/ expansion of existing business.*

17. Applying the above tests to the facts of the present case and keeping in mind the object behind the payment of the incentive subsidy, we are satisfied that such payment received by the assessee under the scheme was not in the course of a trade but was of capital nature."

16. Next comes hon'ble jurisdictional high court's decision in CIT vs. Balramapur Chini Mills Ltd. (199) 238 ITR 445 (Cal) holding that the incentive received by the assessee for repayment of loan taken for expansion of plant and machinery (capital asset) was in the nature of a capital receipt. The Revenue's instant argument also deserves to be not accepted. We are of the view that even if the impugned subsidy assistance is taken as a capital receipt than a revenue one, the result will still be only revenue neutral. We reiterate hon'ble apex court's decision in ***Malabar Industrial Co. Ltd.*** (supra) that sec. 263 of the Act does not come into play in case both the relevant conditions of assessment being erroneous as well as causing prejudice to interest of the revenue are not satisfied. The question as to whether non-inclusion of such a capital receipt in computation of income in assessment amounts to an error causing prejudice to interest of the revenue or not stands answered in assessee's favour in *Subhash Kabini Power Corporation Ltd. vs. CIT* (2015) 37 ITR (Trib) 106 (ITAT)(Bang) treating it as a revenue neutral instance not exigible to sec. 263 revision proceedings. The Revenue's appeal has against the same has been rejected in hon'ble Karnataka high court's decision in *CIT vs. Subhash Kabini Power Corporation Ltd.* (2016) 385 ITR 592 (Kar). We conclude in view of all these facts and legal precedents

that the P.CIT has erred in directing the Assessing Officer to frame afresh assessment *qua* the twin issues of interest as well as incentive subsidy thereby holding the regular assessment in issue to be erroneous causing prejudice to interest of the revenue. We accept assessee's arguments on both these grounds. The PCIT's order under challenge is reversed. We accordingly restore the impugned regular assessment dated 22.03.2016 framed in assessee's case.

17. This assessee's appeal is allowed.

Order pronounced in open court on 06/11/2018

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(J.Sudhakar Reddy)	(S.S.Godara)
Accountant Member	Judicial Member

*Dkp-Sr.PS

दिनांकः- 06/11/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Kkalpana Industries (I) Ltd., Rajkuthir, 2B, Pretoria Street, Kolkata-71
2. प्रत्यर्थी Respondent-Pr. CIT, Central-1, DCIT, CC-1(3), Aayakar Bhawan, Poorva 110, Shantipally, Kolakata-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।