

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH “B”, LUCKNOW**

**BEFORE SHRI A.D JAIN, VICE PRESIDENT AND
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER**

ITA No. 15/LKW/2018
A.Y. 2012-13

JCIT, Special Range, 4 th Floor, Room No.402, Aayakar Bhawan, 16/69, Civil Lines, Kanpur 208001 PAN AABCJ 0355 R	Vs.	M/s J.K. Cement Ltd. 25/1, Kamla Nagar, Kanpur
(Appellant)		(Respondent)

Appellant by	Shri Adhir Kumar Bar, CIT DR
Respondent by	Shri Rakesh Garg, Advocate
Date of hearing	05/12/2018
Date of pronouncement	07 /12/2018

ORDER

PER: A.D. JAIN, VICE PRESIDENT:

This is Revenue's appeal for Assessment Year 2012-13, taking the following effective grounds:

- “1. Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in not appreciating the fact that the depreciation is not admissible on goodwill as per I.T. Act and rules.*
- 2. Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in not appreciating the fact that the company has issued 74,26,950/- equity shares of Rs. 10/- each to the shareholders of M/s. J..K. Synthetics Limited free of cost by debiting to goodwill account and the company has created goodwill account and declared it in fixed assets.*
- 3. Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in allowing the relief of Rs. 36,34,460/-, on account of depreciation without appreciating the fact that the assessee has not claimed any depreciation on goodwill but has allocated the entire*

amount of share capital issued to the share holders of M/s. J.K. Synthetic Limited free of cost, among all the fixed assets which is not permissible.

4. *Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts by allowing the relief of Rs. 13,74,26,007/-, on account of additional depreciation.*
5. *Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts by allowing the relief Rs. 5,93,88,041/- on account of Subsidy received from Rajasthan Govt. treated as capital receipt without appreciating the fact that the subsidy has to be treated capital or revenue has been dealt with by the Hcn'ble Supreme Court in the case of Sahney Steel & Pressing Works Ltd. Vs. CIT(1997)228 ITR253, wherein it has been said that in the case of subsidy, the assessee was free to use the money in its business entirely as it liked and was not obliged to spend the money for particular purpose."*

2. Apropos Ground Nos. 1 to 3, the assessee is a Public Limited Company and it has acquired and taken over the cement undertakings of J.K. Synthetics Ltd. ('JKSL' for short) as a going concern with effect from 4.11.2004, relevant to A.Y. 2005-06, for a purchase consideration of Rs.467.95 crores and also issue of one share of J.K. Cement Ltd. against ten shares of JKSL, aggregating to Rs.7,42,69,500/-, free of cost. It has been capitalized by assessee company as goodwill and depreciation has been claimed. The assessee company had issued 74,26,950 equity shares of Rs.10/- each free of cost to the shareholders of JKSL (in terms of rehabilitation scheme and takeover of the cement units) by debiting the goodwill account. It has claimed depreciation on the same.

3. The AO rejected the assessee's claim, observing that the assessee had not claimed any depreciation on goodwill, but had allocated the entire

amount of share capital issued to the share holders of M/s JKSL free of cost, among all the fixed assets of the assessee company and has thus enhanced the value of the fixed assets, which is not permissible. The claim was disallowed, following the assessment orders for A.Ys. 2005-06 to 2011-12. For all these years, the Id. CIT(A) reversed the orders of the AO on the ground that issuance of shares was towards part payment of purchase consideration and hence was included in the cost of acquisition of the cement undertaking; that therefore, the assessee could not be deprived of depreciation by merely debiting the issue of shares to the goodwill account. The CIT(A) held in the alternative that even if the consideration in the form of shares was paid for purchase of goodwill, this payment could be considered as payment for acquiring brands of the demerged company, on which depreciation was allowable u/s 32 of the I.T. Act. For the year consideration, the Id. CIT(A) followed the said earlier first appellate orders and the Tribunal order (APB 95-107) dated 10.06.2016 for A.Ys. 2005-06 and 2006-07.

4. Heard. In its order (supra), the Tribunal followed “CIT vs. Smifs Securities Ltd.’, 348 ITR 302 (SC) (Approved by the Hon’ble Supreme Court), ‘CIT vs. Manipal Universal Learning Pvt. Ltd.’, 359 ITR 369 (Karn.) and ‘CIT vs. Hindustan Coca-Cola Beverages (P) Ltd.’, 331 ITR 192 (Del) (approved by the Hon. Supreme Court), the Tribunal held as follows:

“16. In the light of this legal proposition, we are of the view that first of all the cost of shares allotted to the shareholders of JKSL is part of payment of purchase consideration towards the cost of acquisition of cement undertaking on which assessee is eligible for depreciation. Even in the alternative, if the cost of shares allotted to the shareholders of JKSL is considered to be the cost of goodwill acquired by the assessee, as it was shown as part of means of finance, even then it is eligible for depreciation in the light of the aforesaid judgments of the Hon’ble High Court and the Hon’ble Apex Court. Therefore, we are of the considered opinion that the Id. CIT(A) has rightly adjudicated the issue and we do not find any infirmity therein. Accordingly, we confirm his order in both the years.”

5. Further, for A.Ys. 2007-08 to 2011-12, vide order (APB 81-94) dated 30.10.2015, the Tribunal has reiterated this position to uphold the CIT(A) action in reversing the assessment orders. The Tribunal has held as follows:

“During the course of hearing, the Id. DR simply placed reliance upon the order of the AO on this issue, whereas the Id. Counsel for the assessee has placed heavy reliance upon the aforesaid order of the Tribunal. Since no contrary view has been brought before us by the Revenue, we find no justification to differ from earlier view taken by the Tribunal on this issue, we accordingly following the order of the Tribunal decide the issue in favour of the assessee. Consequently, the order of the CIT(A) in this regard is confirmed.”

6. The aforesaid Tribunal orders for A.Ys. 2005-06 and 2006-07 and 2007-08 to 2011-12 have not been shown to have been upset on appeal, or otherwise. They have also not been stated to have been stayed. The factual position for the year under consideration remains undisputedly the same as in the earlier years. Therefore, following the said Tribunal

orders, the CIT(A)'s order under appeal is confirmed. Grounds No. 1 to 3 are rejected.

7. Coming to Ground No.4, the AO rejected the assessee's claim of additional depreciation, observing thus:

"During the assessment proceedings, the assessee company vide letter dated 03-11-2014 has claimed for additional depreciation on the assets installed in the second half of the assessment year 2011-12 to the extent, of Rs.13,74,26,007/-. On going through the provisions of section 32, it has been observed that additional depreciation is allowed only at 50% on the assets put to use for less than 180 days. From the above, the company wants to claim the residual 50% of the additional depreciation on the assets put to use for (less than 180 days in the next assessment year, which is not correct as per provisions of the Act. Finance Act, 2015 has allowed 50% additional depreciation in the next year of put to use effective from 01-04-2015. Since the provision of section 32 of the Act do not provide for carry forward of the residual additional depreciation in the current assessment year, the claim of additional depreciation to the tune Rs. 13,74,26,007/- is hereby rejected."

8. The Id. CIT(A) allowed the assessee's claim, following 'M/s Automotive Coaches & Components Ltd. vs. DCIT', order dated 12.02.2016, passed by the Chennai Bench of the Tribunal in ITA No. 1789/Mds/2014, for A.Y. 2008-09, wherein, it was held that if additional depreciation could not be allowed at the rate of 20% during the year in which the machinery was installed, the balance 50% has to be allowed in the subsequent year, and 'CIT vs. Pittal India (P) Ltd.', 129 DTR 153 (Karn.), in which, it was held that the proviso to Section 32 (1)(iia) of the

I.T. Act would not restrain the assessee from claiming the balance of the benefit of additional depreciation in the subsequent assessment year.

9. No decision contrary to the above decisions has been brought to our notice. Hence, finding no error therein, the order under appeal on this issue is also confirmed. Ground No.4 is rejected.

10. So far as regards Ground No.5, the assessee received interest subsidy of Rs.5,93,88,041/- from the Rajasthan Govt. The assessee showed this as capital reserve in its balance sheet. The AO, however, treated it as a revenue receipt, following the assessment orders for earlier years. The Id. CIT(A) allowed the assessee's claim of capital receipt, following the first appellate orders for A.Ys. 2007-08 to 2011-12, as affirmed by the ITAT vide its order (supra) dated 30.10.2015.

11. The Tribunal, vide its order (supra) dated 30.10.2015, for A.Ys. 2007-08 to 2011-12, has upheld the CIT(A)'s similar action, holding :

"6. Having carefully examined the orders of the lower authorities, in the light of rival submission, we find that as per Raj Investment Policy 2003 appearing at page nos. 38 to 49 of the compilation of the assessee, the scheme will be applicable to all new investments and investments made in the existing units and enterprises for Modernization/Expansion/Diversification, subject to the condition that such units commence commercial production/operations owing to such investment during the operative period of the scheme. As per clause 3 and 7 the subsidy shall be available to the investors for seven years from the date of first repayment of interest in case of interest subsidy and first payment of wages/employment in case of

wage employment subsidy. Various conditions are spelt out in the scheme which are required to be fulfilled by the assessee for claiming the subsidy. We also find that scheme was launched to assist to the corporate sector in acquiring or expending their units. Certain conditions are also made in this scheme, which are required to be fulfilled by the corporate sector in order to avail the benefit of subsidy. Our attention was also invited to eligibility certificate issued by the Government of Rajasthan, copy which is at page no. 51 of the compilation in which the Government has imposed pre condition for offering the benefit of subsidy. The condition is that the subsidy amount is utilized for repayment of loans and there should not be any defaults in repayment of dues to the banks in respect of these loans, in terms of clause 9B(viii) of the RIPS, 2003. Our attention was also invited to the judgment of Appellate Authority for Industrial & Financial Reconstruction (AAIFR) in which the assessee has proposed to obtain a loan from the bank in order to acquire the cement division of the JK Synthetic Ltd. A copy of this order is placed on pages 52 to 73 of the compilation of the assessee. From this aforesaid documents, it has been emerged that the assessee has obtained a loan from the financial institutions to acquire a cement division as a capital assets from the JK Synthetic Ltd. and the repayment of loan was facilitated by grant of subsidy by the Rajasthan Government to assist the assessee in the repayment of loan to the financial institutions.

7. We have also carefully perused the judgment of the Apex Court in the case of Sahney Steel Works Ltd. Vs. CIT (Supra) and in the case of Ponni Sugars and Chemicals Ltd. Vs. CIT (Supra) and we find that in the case of Sahney Steel Works Ltd. character of the subsidy in the hands of the recipient-whether revenue or capital will have to be determined having regard to the purpose for which the subsidy is given. The source of the fund is quite immaterial. If the purpose is to help the assessee to set up its business or to complete a project, the monies must be treated as to have been received for capital purpose. But if the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade. In the case of Ponni Sugars and Chemicals Ltd. their lordship has held that the nature of

subsidy is to be determined in respect of purpose for the subsidy is granted. The character of subsidy is to be determined with respect to subsidy is granted. In other words one has to apply the purpose test. The point of time as subsidy paid is not relevant. The source is immaterial if the object of the subsidy is to enable the assessee to run the business more profitably then the receipt is of revenue receipt. On the other hand, object of the assistance under the subsidy scheme is to enable the assessee to setup a new unit or to expend an existing unit then the receipt of the subsidy is a receipt in capital account. Their lordship has further held that after reversing the judgment of the High Court that main eligibility condition in the schemes was that the incentive had to be utilized for repayment of loans taken by the assessee to setup new units or for substantial expansion of an existing unit. Their lordship accordingly held that the subsidy received by the assessee was not in the course of trade but was of capital nature.

8. We have also carefully perused the orders of the Tribunal referred by the assessee and we find that in the case of ACIT Vs. Shree Cement Ltd ITA No. 614, 615 & 635/JP/2010 an identical fact that the interest subsidy was considered to be the capital subsidy. Therefore, in the light of aforesaid judgments, we are of the view that the CIT(A) has rightly treated the interest subsidies as a capital receipt as it was received only for repayment of loan acquired for acquisition of capital assets. Accordingly, the Revenue fails on this issue.”

12. The facts for year under consideration remain the same as for the earlier years. The case of the Department is that in ‘Sahney Steel & Pressing Works Ltd. vs. CIT’, 228 ITR 253 (SC), it has been held that in the case of subsidy, the assessee is free to use the money in its business entirely as it likes and it is not obliged to spent the money for a particular purpose. However, it has remained to be noted that this

observation was in the context of the background that the subsidy in that case was given to the new industries at the commencement of business, to carry on their business and not as an aid for setting up of the industries. It was, therefore, that the subsidy was treated as operational subsidy and not a capital one. With regard to revenue subsidy, it was held that if it is given by way of assistance to carry on trade or business, it has to be treated as a trading receipt. In the present case, the interest subsidy was given only for the payment of loan acquired for acquisition of capital assets. As such, it is a subsidy given for setting up of business. Hence, it has rightly been treated as a capital receipt.

13. For the above, respectfully following the Tribunal order (supra) dated 30.10.2015, for A.Ys. 2007-08 to 2011-12, the order of the Id. CIT(A) on this issue is upheld. Ground No.5 is rejected.

14. In the result, the appeal is dismissed.

(Order pronounced in the open court on 07/12/2018)

Sd/-
T.S. Kapoor
Accountant Member

Sd/-
(A.D. Jain)
Vice President

Aks –
Dtd. 07/12/2018

Copy of order forwarded to:

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|--|---------------------------|
| <i>(1) The appellant</i> | <i>(2) The respondent</i> |
| <i>(3) Commissioner</i> | <i>(4) CIT(A)</i> |
| <i>(5) Departmental Representative</i> | <i>(6) Guard File</i> |

By order

Assistant Registrar