आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1647/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

The Dy. Commissioner of Income Tax,
Circle 1, Nashik .... अपीलार्थी/Appellant

Vs.

MSS India Pvt. Ltd.,
H-8, MIDC, Ambad,
Nashik – 422010 .... प्रत्यर्थी / Respondent

PAN: AAACI5887J

अपीलार्थी की ओर से / Appellant by : Shri Shashank Deogadkar
प्रत्यर्थी की ओर से / Respondent by : Shri Nikhil Pathak

सुनवाई की तारीख / **Date of Hearing : 05.08.2019**		घोषणा की तारीख / **Date of Pronouncement: 04.09.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by Revenue is against order of CIT(A)-1, Nashik, dated 11.04.2017 relating to assessment year 2012-13 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised the following grounds of appeal:-

i) Whether on the facts and in the circumstances of the case, the Ld. CIT(A)-1, Nashik was justified in treating the incentive received by the assessee from Govt. of Maharashtra in the form of Octroi Refund of Rs.1,14,42,680/- as capital subsidy?

ii) Whether on the fact and circumstances of the case, the Ld. CIT(A) was right in treating octroi refund as capital subsidy without appreciating the fact that it was given for as on assistance for carrying on the business of the assessee and not for acquiring a capital asset.

iii) Whether on the facts and circumstances of the case, the Ld CIT(A)-1, Nashik erred in ignoring the facts that the assessee company had not filed any revised return of income to make such claim that octroi refund received from Govt. of Maharashtra is capital receipt and had made the said claim only during the assessment proceedings?

iv) The appellant prays that the order of the Ld. CIT(A)-1, Nashik may please be cancelled and the order of Assessing office may please be restored.

v) The appellant prays to adduce such further evidence to substantiate his case.

3. In the appeal filed by Revenue, the only issue raised is whether incentive received by the assessee from Government of Maharashtra under the PSI Scheme, 2007 in the form of Octroi refund was capital subsidy or not.

4. Briefly, in the facts of the case, the assessee was engaged in manufacturing and supply of fabricated electrical components, connectors, bus-bars and assemblies, etc. The assessee during the year under consideration had made claim in respect of incentive subsidy by way of Octroi refund under Package Scheme of Incentive by Government of Maharashtra, 2007. The assessee had claimed that it had received the aforesaid incentive for expansion of facilities in the form of Octroi refund from the Government of Maharashtra. The refund benefit of ₹ 1.14 crores (approx.) was reduced by the assessee from the cost of material / purchases. The assessee claimed the Octroi refund to be capital receipt not includable in its hands. The Assessing Officer did not accept the plea of assessee and held it to be revenue receipt. On without prejudice basis, the Assessing Officer also held that it was a fresh claim made during assessment proceedings without filing any revised return of income and hence, the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd.

Vs. CIT reported in 284 ITR 323 (SC) was attracted and the claim of assessee was held to be not acceptable.

5. The CIT(A) on the other hand, observed that in order to decide whether the subsidy was revenue receipt or capital in nature, the object of subsidy scheme was to be considered and the form of mechanism through which the subsidy given was held to be irrelevant. Vide para 4.14.1, it was held as under:-

> *"4.14.1 To achieve the purpose and objective referred to herein above, it was, interalia, provided in the package scheme of incentive 2007 of Government of Maharashtra that the refund of octroi duty would be available only on production of Certificate from Director of Industries for expansion of unit. As per the sanction letter assessee has invested ₹ 485.96 lacs in land building plant, machinery and preoperative expenses."*

6. The CIT(A) in turn, relying on the decision of Hon'ble Bombay High Court in CIT Vs. Chaphalkar Brothers (2013) 351 ITR 309 (Bom) held that Octroi refund was to be treated as capital in nature. It was further observed that since the subsidy received helped in reducing the actual cost of the asset, hence the same is to be reduced from the cost of asset and the depreciation to be recomputed. In the final analysis, the CIT(A) directed the Assessing Officer to disallow depreciation of ₹ 37,03,619/- after due verification.

7. The Revenue is in appeal against the order of CIT(A).

8. The learned Authorized Representative for the assessee pointed out that the issue stands covered by the order of Tribunal in assessee's own case for assessment year 2011-12 in ITA No.1909/PUN/2016, order dated 02.01.2019.

9. The learned Departmental Representative for the Revenue placed reliance on the order of Assessing Officer.

10. We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal is whether Octroi refund received in the form of subsidy by the assessee is capital or revenue in nature. We find that similar issue arose in assessee's own case in assessment year 2011-12 (supra) wherein the Tribunal in turn, relying on another decision of Pune Bench of Tribunal, held that subsidy received in the form of Octroi refund under the Government of Maharashtra PSI Scheme 2007 was capital subsidy. The relevant findings are in paras 7 to 8 of the said order dated 02.01.2019.

11. We further find that the CIT(A) in turn, relied on the decision of Hon'ble Bombay High Court in CIT Vs. Chaphalkar Brothers (supra). The Hon'ble Supreme Court has confirmed the decision of Hon'ble Bombay High Court in CIT Vs. Chaphalkar Brothers (2018) 252 TAXMAN 360 (SC), wherein it has been laid down that purpose test has to be applied to determine whether the subsidy received is on capital or revenue account.

12. Then, the Hon'ble Supreme Court in CIT Vs. Chaphalkar Brothers Pune (supra) has made reference to judgment in Ponni Sugars & Chemicals Ltd. 2008 (9) SCC 337 and it was observed as under:-

> *"The next important judgment that was referred to is the judgment in Ponni Sugars & Chemicals Limited (supra). On the facts in that case, incentives given under a scheme relating to sugar production were in the nature of a higher free sale sugar quota, and also allowing the manufacturer to collect excise duty on the sale price of free sale sugar in excess of the normal quota but to pay to the government only the excise duty payable on the price of levy sugar. Clause 7 of the aforesaid scheme was set out in para 3 of the judgment as follows:-*
>
> > *"The beneficiaries of the incentive scheme shall ensure that the surplus funds generated through sale of the incentive sugar are utilised for the repayment of term loans, if any, outstanding from the Central financial*

institutions. The sugar factories should submit utilisation certificates annually from Chartered/Cost Accountant, holding certificate of practice. Utilisation certificate in respect of each sugar season during the incentive period should be furnished on or before 31st December of the succeeding year. Failure to submit utilisation certificate within the stipulated time may result not only in the termination of release of incentive free sale quota, but also in the recovery of the incentive free sale releases already made, by resorting to adjustment from the free sale releases of future years."

The Court then referred to the background of the incentive scheme and to the fact that the Sampat Committee was set up to examine the question relating to the economic viability of new sugar factories. The Court then found in para 9 of the judgment that the Sampat Committee referred to the fact that the increase in the cost of new sugar factories was because of increase in the cost of plant and machinery. The Committee then stated that five possible incentives for making a sugar plant economically viable could be provided. It is two of such incentives referred to that was the subject-matter for decision before this Court. In Para 10 this Court found:

"We have examined in this case the 1980 and 1987 Schemes. Essentially all the four Schemes are similar except in the matter of details. Four factors exist in the said Schemes, which are as follows:

(i) Benefit of the incentive subsidy was available only to new units and to substantially expanded units, not to supplement the trade receipts.

(ii) The minimum investment specified was Rs. 4 crores for new units and Rs. 2 crores for expansion units.

(iii) Increase in the free sale sugar quota depended upon increase in the production capacity. In other words, the extent of the increase of free sale sugar quota depended upon the increase in the production capacity.

(iv) The benefit of the Scheme had to be utilized only for repayment of term loans."

After discussing the judgment in Sahney Steel case, this Court then held:

"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 the applied in judging the character of a subsidy. The 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 utilised 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 of the mechanism through which the subsidy is given is irrelevant."

Sahney Steel was distinguished, in para 16 by then stating that this Court found that the assessee was free to use the money in its business entirely as it liked.

Finally, it was found that, applying the test of purpose, the Court was satisfied that the payment received by the assessee under the scheme was not in the nature of a helping hand to the trade but was capital in nature."

13. The Apex Court in CIT Vs. Chaphalkar Brothers Pune (supra) thus, held as under:-

"What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial."

14. The Apex Court noting the facts before it observes, where the object of scheme was to encourage development of Multiplex Theatre Complexes, merely because the scheme kicks in only post construction, would not change the object of scheme to construct Multiplexes. The Apex Court also held that *We have no hesitation in holding that the finding of the Jammu and Kashmir High Court in Shri Balaji Alloys vs. C.I.T. (2011) 333 I.T.R. 335 (J&K) 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.*

15. Applying the principle laid down by the Hon'ble Apex Court in CIT Vs. Chaphalkar Brothers Pune (supra), we hold that where the purpose for which the subsidy was given for establishment of facility, then the subsidy received in this regard is capital subsidy in the hands of assessee. Accordingly, we hold so. In the present facts and circumstances, the assessee on its own motion had reduced the said subsidy from the cost of its assets. Accordingly, the

same is reduced as the said method has been adopted by the assessee. The grounds of appeal raised by Revenue are thus, dismissed.

16. In the result, the appeal of Revenue is dismissed.

Order pronounced on this 4th day of September, 2019.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 4th September, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-1, Nashik;
4. The Pr.CIT-1, Nashik;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune