IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 6244/Del/2019 : Asstt. Year : 2011-12
ITA No. 6245/Del/2019 : Asstt. Year : 2012-13
ITA No. 6246/Del/2019 : Asstt. Year : 2013-14
ITA No. 6247/Del/2019 : Asstt. Year : 2014-15

M/s B R Agrotech Ltd., 1505, Vikram Tower, Rajendra Place, New Delhi-110008	Vs	ACIT, Circle-4(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCB3432F		

Assessee by : Sh. S. S. Nagar, Adv.
Revenue by : Ms. Alka Gautam, Sr. DR

Date of Hearing: 28.06.2021		**Date of Pronouncement: 02.09.2021**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of ld. CIT(A)-2, New Delhi dated 24.04.2019.

2. Since, the issues involved in all these appeals are identical, which were heard together.

3. In ITA No. 6244/Del/2019, following grounds have been raised by the assessee:

> *"1.0 That on the facts and circumstances of the case, Ld. CIT(A) erred in passing ex-party order without providing an opportunity of being heard.*

1.1 That on the facts and circumstances of the case, Ld. CIT(A) erred in passing the ex-order without appreciating the fact that no notice of hearing was received by the appellant and hence the order passed by LD. CIT(A) is without jurisdiction and illegal and need to be quashed.

2.0 Without prejudice to the Ground No. 1.0 & 1.1, the Ld. CIT (A) was not justified and grossly erred in non-considering the fact and rejecting the appeal by stating that appellant agitated a debatable issue which is not a subject of rectification u/s 154.

2.1 That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified and grossly erred in non-considering the claim of excise duty subsidy as capital receipt in computing the total income under the normal provision of the Act as well as in computing book profit u/s 115JB.

2.2 That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified and grossly erred in non-considering the claim of excise duty subsidy as capital receipt as the issue is squarely covered by the decision of Hon'ble Apex Court wherein on the same scheme and same factual scenario, it was held that the excise duty subsidy is capital receipt.

2.3 That on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified and grossly erred in non-considering the Circular No. 68 dated 17-11-1971 wherein the issue raised in the appeal has been squarely covered

3.0 That on the facts and in the circumstances of the case, the Ld' CIT(A) was not justified and grossly erred in non-considering the claim of Focus Product Scheme/Focus Market Scheme as capital receipt in computing the total income under the normal provision of the Act as well as in computing the book profit u/ sll5JB.

4.0 That on the facts and circumstances of the case, the Ld. CIT(A) was not justified and grossly erred by

not following the High Court decision for admissibility of additional grounds of appeal before Ld. CIT(A), since Ld. CIT(A) has jurisdiction to consider new/or additional claims/deductions subsequently which through inadvertence error not claimed in return of income or before the AO.

5.0 That on the facts and circumstances of the case, the Ld. CIT(A) was not justified and grossly error in neglecting the Form 35, in which date of filing of rectification application before the Ld. AO was properly mentioned and the Order of the Ld. AO was passed beyond the time limit as prescribed in the Income Tax Act."

4. Ground Nos. 1 & 3 are not pressed during the arguments.

5. The assessee filed the return of income declaring total income of Rs.8,14,50,536/- under the normal provisions of the IT Act and book profit of Rs.14,67,75,360/- u/s 115JB of the Act.

6. Brief facts of the issue before us are that the assessee filed a rectification application u/s 154 before the Assessing Officer seeking to consider the issue of Excise Duty subsidy and Focus Product Scheme (FTS)/Focus Market Scheme (FMS) as capital receipts. The Assessing Officer rejected the application on the grounds that allowing of such claim will lead to lowering of total income and the claim of the assessee is not mistake apparent from the record. The Assessing Officer held that,

- An error of fact
- An arithmetic mistake
- A small clerical error
- An error due to overlooking compulsory provisions of the Act

are only rectifiable u/s 154 and since the claim of the assessee is a debatable issue and hence it is not a mistake apparent from record.

7. The ld. CIT (A) held that the excise refund is not claimed as capital receipt in their return of income and after accepting the returned income by the AO, the claim of the assessee to exclude the excise duty refund and to re-compute the income cannot be accepted.

8. Heard the arguments of both the parties and perused the material available on record.

9. The assessee is in the business of manufacturing of pesticides and insecticides having manufacturing units in the state of Himachal Pradesh and Jammu and Kashmir. The said units due to their presence in the notified area have availed the benefit in the form of excise duty subsidy. The objective of the scheme granting the said subsidy is to generate employment and development of industries in the state of Himachal Pradesh & Jammu and Kashmir.

Whether issue falls u/s 154 or not?

10. The assessment u/s 143(3) was completed on 29.01.2014 wherein the said subsidy was claimed as revenue receipt. However, later on in 2016 when the SC in identical Scheme has announced the said subsidy as capital receipt, the assessee filed application u/s 154 to treat the said subsidy as capital receipt not chargeable to tax.

11. Now a question arises as to what constitute mistake apparent from record, whether, a Supreme court judgment delivered at later point of time after passing or order can constitute mistake apparent from record or not, whether income tax authority can amend any order, if there is any mistake apparent from record with relevance to a later judgment.

12. We find that CBDT Circular No. 68 dated 17.11.1971 wherein the issue raised in the appeal has been covenanted. The entire clarification of the CBDT is reproduced for the sake of ready reference:

Circular : No. 68 [F.No. 245/17/71-A&PAC], dated 17-11-1971.

"899. Mistakes apparent from records - Whether can be treated as such on the basis of subsequent decision of Supreme Court

1. The Board advised that a mistake arising as a result of a subsequent interpretation of law by the Supreme Court would constitute "a mistake apparent from the records" and rectificatory action under section 35/154 of the 1922 Act/the 1961 Act would be in order. It has, therefore, been decided that where an assessee moves an application under section 154 pointing out that in the light of a later decision of the Supreme Court pronouncing the correct legal position, a mistake has occurred in any of the completed assessments in his case, the application shall be acted upon, provided the same has been filed within time and is other-wise in order. Where any such applications have already been rejected and the assessee files fresh applications within the statutory time limit, the same may also be treated on par with the applications which may either be pending or received after the issue of this circular.

2. The Board desire that any appeals or references pending on the point at issue may please be withdrawn.

JUDICIAL ANALYSIS (by the CBDT)

EXPLAINED IN - In ITO v. Smt. Manini Niranjanbhai [1992] 41 ITD 324 (Ahd.-Trib.) (SMC) it was observed that as per Circular No. 68, dated 17-11-1971, it is now a well established position that the Supreme Court does not declare the law with effect from the date of its order and the law declared by the Supreme Court has effect not only from the date of the decision but from the inception of the statutory provision. It has been mentioned therein that the Board have been advised that the mistake arising as a result of subse-quent interpretation of law by the Supreme Court would constitute a mistake apparent from record and rectificatory action under section 154 would be justified."

13. We find that the Co-ordinate Bench of ITAT Amritsar in the case of DCIT vs. M/s Kashmir Steel Rolling Mills in ITA No. 130/(Asr.)/2014 held on identical facts that non consideration of order of jurisdictional high court constitute mistake apparent from record. Further, the Co-ordinate Bench of ITAT Mumbai in the case of Nulux Engineers vs. DCIT in ITA No. 2073/Mum/2017 held that non-consideration of the decision of Hon'ble Supreme Court as well as subsequent interpretation of law by Hon'ble Supreme Court and its non-consideration by Revenue in its order constitute mistake apparent from record which can be rectified u/s 154 of the Act.

14. The Hon'ble Supreme Court in the case ACIT vs. Saurashtra Kutch Stock Exchange Ltd. [173 Taxman 232] held that non consideration of a decision of Jurisdictional High court or Supreme court can be said to be a 'mistake apparent from record' which can be rectified under section 254(2).

After considering the above circular and judicial pronouncements, we hold that the petition submitted by the assessee falls within the scope of section 154 of the Act.

Whether Excise Duty refund is capital or revenue receipt ?

15. The Hon'ble High Court of J&K in the case of Shree Balaji Alloys vs. CIT (198 Taxman 122) held that Excise duty refund, Interest subsidy and Insurance subsidy received with the object of creating avenues for perpetual employment, to eradicate the social problem of unemployment in the state by accelerated industrial development is capital receipt.

16. The relevant portion of the order of the Hon'ble Court is as under:

"24. A close reading the Office Memorandum and the amendment introduced thereto with para No. 3 appearing in the Central Excise Notification Nos. 56 and 57 of 11-11-2002, thus, makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu and Kashmir and the generation of employment, so contemplated, was not only casual or temporary; but was on the other hand, of permanent nature.

25. Considered thus, the paramount consideration of the Central Government in providing the incentives to the New Industrial Units and Substantial Expansion of the existing units, was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self-employment, hence a purpose in Public Interest.

26. In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assessees alone.

27. Thus, looking to the purpose of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the Public Interest, the incentives provided by the Office Memorandum and statutory notifications issued in this behalf, to the appellants-assessees, cannot be construed as mere Production and Trade Incentives, as held by the Tribunal.

28. Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bona fide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.

29. The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be

decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

30. For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel & Press Works Ltd.'s case (supra) and Ponni Sugars & Chemicals Ltd.'s case (supra).

31. The finding of the Tribunal that the incentives were Revenue Receipt is, accordingly, set aside holding the incentives to be Capital Receipt in the hands of the assessees."

17. In Civil appeal No. 10061 of 2011 dated 19.04.2016 filed by department against the order in the case of Shree Balaji Alloys vs. CIT has been dismissed by the Hon'ble Apex court holding that the issue raised in the appeal is covered against the revenue by the decision of the Hon'ble Supreme Court in CIT Vs. Ponni Sugars & Chemicals Ltd. 306 ITR 392 or in the alternate, in CIT Vs Meghalaya Steels Ltd. 3 ITR 217.

18. The policy of Shree Balaji Alloys and the appellant is identical.

19. Thus, we find no dispute that the Excise Duty refund received by the assessee is to be treated as capital receipt.

Exclusion of capital receipts in computing Book profit u/s 115JB

20. The concurrent reading of Section 2(45), Section 4 and Section 5 reveals that tax is payable on the total income as per Section 2(45) which means total amount of income referred in Section 5 and computed in the manner prescribed by the Act. In the context, the provisions of Section 115JB are examined. The head notes start with "special provision for payment of tax by a certain companies". It provides for a substituted mechanism to compute tax with the regard to the companies which are actually having net profits as per the books but whose taxable income is less or Nil owing to certain beneficial provision. The provision of Section 5 which kicks off with "subject to the provisions of this Act, the total income of ....." thus encompasses, the provisions of Section 115JB. The fundamental principles laid down by various Courts is that all receipts cannot be treated as income and hence cannot be taxed under the Income Tax Act. Only that receipt which forms part of the "income" are to be taxed. The capital receipts which are otherwise not subject to tax under the normal provisions of the Act are not envisaged to be taxed under the provisions of "Minimum Alternate Tax". Once a receipt is not considered as income, the same cannot be subjected to tax under this Act as such receipt naturally classified under capital receipt. Which was never meant to be taxed cannot be taxed even u/s 115JB.

21. The Hon'ble Supreme Court in the case of Apollo Tyres Ltd. 255 ITR 273 held that the revenue cannot go beyond the net profit shown in the P&L account except to the extent provided in

the Explanation to Section 115J. The Hon'ble High Court of Karnataka in the case of Hariram Hotels Pvt. Ltd. in ITA No.53/2009 dated 16.12.2015 held that the capital receipts are not subjected to the provisions of Section 115JB.

22. We also find that the Hon'ble Court of Calcutta in the case of Pr. CIT Vs Ankit Metal & Power Ltd. 416 ITR 591 held as under:

"Second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit under Section 115 JB of the Income Tax Act, 1961 as contended by the revenue by relying on the decision in the case of Apollo Tyres Ltd. Vs. CIT reported in 225 ITR 273 (SC).

In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961."

23. The similar view has been taken by various Co-ordinate Benches of ITAT, to mention a few, ITAT Delhi in the case of Montage Enterprises Pvt. Ltd. vs. DCIT in ITA No 5124/Del/2011, in the case of Malana Power Co. Ltd. in ITA No. 3957 & 1550/Del/2015 and ITAT Mumbai in the case of Shivalik Venture Pvt. Ltd. vs. DCIT in ITA No. 2008/Mum/2012 wherein it was held that capital subsidy shall be excluded in computing book profit u/s 115JB of the Act.

24. To conclude,

a. Not considering the subsequent interpretation of law through the judgment of the Hon'ble Supreme Court or the Hon'ble jurisdictional High court would constitute a mistake apparent from record.
b. The Excise subsidy refund is to be treated as capital receipt.
c. Capital receipts are liable to be excluded for the purpose of computation of book profit u/s 115JB.

25. In the result, all the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 02/09/2021.

Sd/-	Sd/-
(Amit Shukla)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 02/09/2021

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR