IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 2677 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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GARDEN SILK MILLS LTD....Petitioner(s)
Versus
COMMISSIONER OF INCOME TAX-I & 1....Respondent(s)

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Appearance:
MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1
MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 29/07/2016

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed to quash and set aside the order of the respondent-authorities of holding that the sales tax collected but not paid to the State Government was a taxable revenue receipt and not capital receipt.

2. The facts in brief are that the petitioner is a Public Limited Company having its registered Office at Surat. On 16.10.1990 the State Government declared a new industrial policy whereunder it promulgated a scheme for special incentives to certain units.

3. The petitioner got registered under the said scheme and therefore, became entitled to recover from the Government a sum of Rs.51.15 Crores by way of subsidy, which it could recover by recovering sales tax and not paying the same to the Government. The petitioner started recovering sales tax from A.Y. 1995-96. However, the Assessing Officer, respondent no.2 herein, treated it as revenue receipt. Being aggrieved by the same, the petitioner moved seven different applications for the A.Y. 1995-96 to 2001-02

before respondent no.1 inter alia stating that subsidy by way of sales tax exemption was a capital receipt and not taxable revenue receipt. However, all the applications were disposed of by a common order dated 17.11.2004 passed u/s.264 of the Act. Being aggrieved by the said decision, the present writ petition has been preferred.

4. Mr. Manish J. Shah, learned counsel for the petitioner, submitted that the petitioner had invested more than Rs.100 Crores in a new industrial Unit, according to the new industrial policy / scheme of the State Government dated 16.10.1990. The said Unit fulfilled all the criteria mentioned in the Scheme. Under the Scheme, the petitioner was entitled to choose between sales tax exemption and sales tax deferment. The petitioner chose sales tax exemption. Pursuant to the implemention of the Scheme, the petitioner began to retain sales tax from A.Y. 1995-96, being the first year of the total period of 08 years, for which the petitioner was entitled to retain under the Scheme. It was submitted that the said receipt of sales tax was a payment of subsidy by the State Government in the form of incentive to encourage entrepreneurs to go to backward areas and establish industries. Therefore, the said receipt is a capital receipt and not revenue receipt.

4.1 In support of his submissions, learned counsel Mr. Shah placed reliance upon a decision of the Bombay High Court in the case of **CIT-3, Mumbai v. Reliance Industries Ltd., [2011] 339 ITR 632 (Bom)** wherein, it has been held that where the object of subsidy in form of sales tax incentive was to set up a new unit in a backward area to generate employment, then such receipt was a capital receipt.

4.2 Reliance was also placed on a decision of this Court in the case of **Dy. CIT v. Inox Leisure Ltd., [2013] 351 ITR 314 (Guj)** wherein, it has been held that the character of receipt of a subsidy in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is granted. In other words, one has to apply the purpose test. The point of time at which the subsidy is 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 on revenue account. On the other hand, if the object of the assistance under the scheme is to enable the assessee to set up a new unit or expand the existing unit, then the receipt of subsidy would be on capital account.

4.3 Learned counsel Mr. Shah also placed reliance upon another judgment of this Court in the judgment rendered in **CIT v. Birla VXL Ltd., [2013] 32 taxmann.com 330 (Guj)** wherein similar principle has been laid down.

5. Mr. Sudhir Mehta, learned Standing Counsel for the Revenue, submitted that the petitioner has not complied with the requirement of Explanation 10 to Section 43(1) of the Act, which itself shows that the petitioner did not consider it as subsidy and considered it revenue receipt. Salex tax incentives were available to the assessee after the company had begun production. No incentives were available prior to setting up of industrial unit. It was also submitted that the assessee had made divergent claims before the Assessing Officer and CIT(A), which proves that the claim made by the assessee is not sustainable. Hence, the authorities below were justified in passing the impugned orders.

6. We have heard learned counsel for both the sides and perused the documents on record. It is not in dispute that the petitioner had made investment in a new industrial unit under a Scheme framed by the State Government. The petitioner had set up the unit in an area, which

made it entitled to receive 75% of the capital investment over a period of 08 years from the date of commencement of commercial production. It transpires that the petitioner was issued the Permanent Registration Number, which pre-supposes that the new Unit had commenced its commercial production and had completed its project. The petitioner was also issued the Eligibility Certificate, which was amended from time to time and lastly, by amendment dated 12.04.1999, the sales tax exemption was fixed at Rs.50.07 Crores being 75% thereof. The petitioner, therefore, started to retain sales tax from A.Y. 1995-96 onwards.

7. On an analysis of the Scheme, it appears that the Scheme is oriented towards and was subservient to the investment in fixed capital assets. The sales tax incentive was envisaged only as an alternative to the cash disbursement and by its very nature, was to be available only after production had commenced. Thus, in effect, the subsidy in the form of sales tax incentive was not given to the assessee for assisting it in carrying out the business operations but, to encourage the setting up of industries in the backward area.

8. In our opinion, the judgment rendered by the

Bombay High Court in *CIT-3, Mumbai v. Reliance Industries Ltd.* (supra) would govern the issue on hand. Since the object of the subsidy in the form of sales tax incentive was to set up a new Unit in a backward area so that employment could be generated, it is a capital receipt and not revenue receipt. Hence, the revenue authorities committed serious error in holding it as revenue receipt.

9. For the foregoing reasons, the petition is allowed. The impugned order dated 17.11.2004 passed by the CIT-I, Surat u/s.264 of the Act is quashed and set aside and it is held that subsidy in the form of sales tax incentive is a capital receipt and not taxable revenue receipt. The petition stands disposed of accordingly. Rule is made absolute.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

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