

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 226 of 2010****With****TAX APPEAL NO. 1214 of 2005****With****TAX APPEAL NO. 504 of 2012****With****TAX APPEAL NO. 345 of 2014****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI****Sd/-****and****HONOURABLE MR.JUSTICE G.R.UDHWANI****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

COMMISSIONER OF INCOME TAX-III....Appellant(s)**Versus****NIRMA LTD....Opponent(s)****Appearance:****MR NITIN K MEHTA, ADVOCATE for the Appellant(s) No. 1****MRS SWATI SOPARKAR, ADVOCATE for the Opponent(s) No. 1**

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

Date : 08/06/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of these appeals, the department has challenged different judgments and orders of the Tribunal for different assessment years, however, the issues involved in these appears are identical, they are taken up for hearing and disposal together.

2. The question of law framed at the time of admitting Tax Appeal No.226 of 2010 reads as under:-

“Whether the Appellate Tribunal is right in law and on facts in reversing the order passed by CIT (A) and thereby holding that amount of Sales-tax incentive received by the assessee is a capital receipt?”

3. The questions of law framed at the time of admitting Tax Appeal No.1214 of 2005 reads as under:-

“1. Whether the Appellate Tribunal was right in law and on facts in upholding the decision of the CIT (A) to compute deduction u/s.80 HHC on export profits arrived at on the basis of the export turnover and the total turnover exclusive of Excise duty and Sales-tax?

2. Whether the Appellate Tribunal was right in law and on facts in upholding the decision of the CIT (A) and in

directing the Assessing Officer to consider the Sales-tax exemption benefit of Rs.5,45,81,171/- as capital receipts after verification with regards to fact and figures involved in the issue?"

4. The question of law framed at the time of admitting Tax Appeal No.504 of 2012 reads as under:-

"2. Whether the Tribunal is right in holding that the interest u/s. 234D of the Act is leviable only from A.Y.2004-05 and accordingly deleting the levy of interest u/s. 234D of the Act"

5. The question of law framed at the time of admitting Tax Appeal No.345 of 2014 reads as under:-

"2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law and on facts in reversing the order passed by CIT(A) and hereby holding that amount of Sales-tax Incentive of Rs.1,17,45,309/- received by the Assessee is a capital receipt ?"

6. Mr.Amin, learned counsel for the appellant submitted that so far as issue with regard to deduction under Section 80 HHC on export profits arrived at on the basis of the export turnover and the total turnover exclusive of Excise duty and Sales-tax is concerned, the same is squarely covered by the decision of the Apex Court in the case of **Commissioner of Income Tax v. Lakshmi Machine Works** reported in **[2007] 290 ITR 667 (SC)**.

7. So far as second issued as to Whether the Appellate Tribunal was right in law and on facts in upholding the decision of the CIT (A) and in directing the Assessing Officer to consider the Sales-tax exemption benefit of Rs.5,45,81,171/- as capital receipts is concerned, Mr.Mehta contended that in view of the decision of the Calcutta and Punjab High Court, the Tribunal has committed an error in reversing the view taken by CIT (Appeals) so far as Tax Appeal No.226 of 2010 is concerned, wherein the CIT (A), after discussing the evidence has held in favour of the department. In this regard, he has relied upon the decision of High Court of Bombay in the case of **Commissioner of Income Tax v. Reliance Industries Ltd., (2011) 339 ITR 0632**, wherein it is held that object of subsidy being to set up new units in backward area is a capital receipt and another decision of High Court of Calcutta in the case of **Commissioner of Income Tax v. Chhindwara Fuels, 245 ITR 0009**, wherein it is held that subsidy in the form of refund of sales-tax received after commencement of production cannot be treated as capital receipt.

8. On the other hand, Mr.Soparkar, learned counsel appearing for the respondent contended that so far as Tax Appeal No.226 of 2010 is concerned, after discussing the evidence on record, the Tribunal has followed earlier decision and discussed the issue in detail in para 54 and 55 of its decision, which reads as under:-

“54. Per contra, the learned D.R. Supported the orders passed by the Assessing Officer and the learned CIT (A). Referring to the judgment in Sahney Steel and Press

Works Limited v. CIT, 228 ITR 253 (SC), he submitted that the impugned sales tax exemption increased the profits of the assessee by eliminating the expenses which the assessee would have had to incur later and therefore the impugned receipts were in the revenue field. He also referred to Explanation (10) to Section 43 (1) of the Income Tax Act inserted in with effect from 01/04/99 to emphasise that the action of the assessee in not reducing the cost of assets by the amount of subsidy for working out the Written Down Value was indicative of the fact that the impugned receipts were not in the nature of capital receipts.

55. We have heard both the parties and considered their rival submissions. Perusal of the scheme extending the aforesaid incentives to “prestigious” units announced by Government of Gujarat on 26/07/91 makes it amply clear that the scheme was announced to attract investment in core sector industry having potential, to spur industrial growth in ancillary, tertiary and secondary sector of the economy. The other scheme announced by the Government of Gujarat as Capital Investment Incentive Scheme on 11th September 1995 was intended to attract investments to generate greater employment in less industrially developed areas of Gujarat and also to secure balanced development of industries in Gujarat through dispersal of industries in the most backward area and backward areas. It is thus clear that the object of both the scheme was to ensure development of backward areas or for development of core sector industries in the State or for generating the employment. Perusal of both

the schemes shows that the incentives extended to the eligible units were, inter alia, through exemption from payment of Sales Tax. Thus, the object of both the schemes was to attract capital investment to ensure development of backward areas and the modality or mechanism chosen to attract such investment was, inter alia, through exemption from payment of sales tax."

9. He further contended that in view of decisions of this Court in **Commissioner of Income-tax v. Birla VXL Ltd.** reported in **(2013) 32 Taxmann.com 330 (Gujarat)** and in **Deputy Commissioner of Income-tax v. Munjal Auto Industries Ltd.** reported in **(2013) 37 Taxmann.com 115 (Gujarat)** the issue is squarely covered and the decisions which are sought to be relied upon by learned advocate for the appellant are not applicable in the facts of the present case. In the case of **Commissioner of Income-tax v. Birla VXL Ltd. (supra)**, this Court has observed as under:-

"12. It can thus be straightaway seen that the benefit, though computed in terms of the Sales Tax liability in the hands of the recipient, the same was not mean to give any benefit on day-to-day functioning of the business, or for making the industry more profitable. The principle aim of the scheme was to cover the capital outlay already made by the assessee in undertaking special modernization of its existing industry.

13. In a recent decision dated 28th January 2013 in Tax Appeal No. 450 of 2012 and connected appeals, we had an occasion to examine the nature of incentives received

by the assessee from the State Government in the form of entertaining tax waiver for setting up multiplexes. In such context, we had in wake of the revenues contention that the receipt was revenue in nature, held and observed as under :

"From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit or a unit undertaking expansion or diversification. Fixed capital investment has been defined as to include various investments in land under use, new construction, plant and machinery etc. The entitlement was related to percentage of fixed capital investment.

It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax reported in 228 ITR 253, the Apex Court held and observed that the 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 fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. But, if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade."

14. *In the result, we do not find that the Tribunal has committed any error. No question of law, therefore, arises. Tax Appeals are therefore dismissed."*

10. In the case of **Deputy Commissioner of Income-tax v. Munjal Auto Industries Ltd. (supra)**, this Court has observed as under:-

"7. From the provisions of the said scheme, it clearly emerges that the subsidy though computed in terms of sales tax deferment or waiver, in essence it was meant for capital outlay expended by the assessee for set up of the unit in case of a new industrial unit and for expansion and diversification of an existing unit. As noted, such subsidy was available only to a new industrial unit or a unit undertaking expansion or

diversification. Fixed capital investment has been defined as to include various investments in land under use, new construction, plant and machinery etc. The entitlement was related to percentage of fixed capital investment.

8. *It is undoubtedly true that such subsidy was computed in terms of sales tax deferment and necessarily therefore, would accrue to an industry only once the commercial production commences. However, this by itself would not be either a sole or concluding factor. In case of **Sahney Steel and Press Works Ltd. and others v. Commissioner of Income-tax** reported in 228 ITR 253, the Apex Court held and observed that the 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 fund is quite immaterial. If the purpose is to help the assessee to set up its business or complete a project the monies must be treated as having been received for capital purposes. Such But if monies are given to the assessee for assisting him in carrying out the business operations and given after the satisfaction of the conditions of commencement of production, such subsidy must be treated as assistance for the purpose of the trade."*

11. He also submitted that in view of above decisions, these appeals may not be entertained.

12. We have heard both the learned counsel and perused the record. We have also gone through the decisions cited before us. After considering the material on record, we are of the view that the issues involved in these appeals are squarely covered

by the decisions of this Court in **Commissioner of Income-tax v. Birla VXL Ltd.** reported in **(2013) 32 Taxmann.com 330 (Gujarat)** and in **Deputy Commissioner of Income-tax v. Munjal Auto Industries Ltd.** reported in **(2013) 37 Taxmann.com 115 (Gujarat)**. Therefore, the questions of law posed for our consideration in these appeals are answered in favour of the assessee and against the department. Accordingly, all these appeals are dismissed.

Sd/-
(K.S.JHAVERI, J.)

Sd/-
(G.R.UDHWANI, J.)

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