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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 173/2022

PR. CIT -1, DELHI ..... Appellant
Through: Mr.Ajit Sharma, Sr.Standing Counsel.

versus

M/S. CRYSTAL CROP PROTECTION PVT. LTD..... Respondent
Through: None.

Reserved on: 18th July, 2022
% Date of Decision: 25th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

CM APPL. 26193/2022

In view of the averments made in the application, the delay of 40 days in filing the present appeal is condoned.

Accordingly, this application is disposed of.

ITA 173/2022

1. The present Income Tax Appeal has been filed impugning the order dated 19th December, 2019 passed by the Income Tax Appellant Tribunal (hereinafter referred to as 'ITAT') in ITA No. 1539/Del/2016 for assessment year 2011-12.

2. The facts giving rise to the present appeal are that during the course of assessment proceedings initiated by the Assessing Officer (hereinafter

referred to as 'AO') under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), the AO made an addition of Rs. 2,50,000/- under Section 14A of the Act read with Rule 8D(2)(iii) of the Income Tax Rules, 1962. The assessee opposed the aforesaid addition on the ground that since no exempt income was earned during the relevant assessment year there cannot be any disallowance, which plea was not accepted by the AO. The AO had then relied upon the CBDT Circular No. 5/2014 dated 11th February, 2014 to hold that even if in the relevant assessment year, no exempt income has been earned by the taxpayer, disallowance of expenditure is to be provided.

3. The assessee had then filed an appeal before the CIT(A)against the aforesaid order dated 11th February, 2014, which was dismissed and the aforesaid addition made by the AO was upheld.

4. The assessee being aggrieved by the order of the CIT(A) had approached the ITAT and challenged the addition made in consequence of disallowance under Section 14A of the Act read with Rule 8D(iii). Pertinently, in the said appeal, the assessee further raised an additional ground with respect to subsidy received by it from the State of Jammu & Kashmir. It was stated that the subsidy received by the assessee under the "New Industrial Policy and Other Concessions Scheme" from the State of Jammu & Kashmir is to be treated as 'capital receipt'. It was stated that the subsidy was wrongly reported as revenue receipt instead of a capital receipt in the return of income in view of the decision of the Jammu & Kashmir High Court though it was wrongly treated as 'revenue receipt' by the payer in its return of income.

5. The ITAT permitted the assessee to raise the additional ground after

considering the legislative intent of section 143 (3) of the Act and by relying upon the judgments of the Supreme Court in the case of ***National Thermal Power Co. Ltd. v. CIT (229 ITR 383)*** and ***Anchor Pressings P. Ltd. Vs. CIT 161 ITR 159***. The ITAT also placed reliance on a CBDT Circular No. 14(XL-35) dated 11th April, 1955 to note that it is the obligation of the assessing officers to make the assessee aware about any refund or relief which may be due to the assessee and not to take advantage of the ignorance of the assessee of its rights.

6. Therefore, the ITAT held that the additional ground raised by the assessee cannot be excluded from consideration as the issue to be determined is whether the amount of subsidy is taxable or not? The ITAT held that this issue has to be decided by the appellate authority notwithstanding the fact that the assessee has *suo moto* offered the amounts for taxation already. The ITAT accordingly concluded that the assessee is eligible to raise additional issues at the appellate stage.

7. The ITAT in its impugned order after relying upon the judgment of this Court reported in the case of ***Cheminvest Ltd. v. CIT (2015) 378 ITR 33*** set aside the disallowance made by the AO, holding that since no exempt income was earned by the assessee, no disallowance was called for. With respect to the Circular No. 5/2014 dated 11th February, 2014, relied upon by the AO, the ITAT relied upon the judgment dated 16th August, 2017 of this High Court in the case of ***IL&FS Energy Development Company Ltd (2017) 399 ITR 483*** wherein this Court has held that the circular of the CBDT cannot override the provisions of Section 14A of the Act. The ITAT accordingly set aside the disallowance made by the AO under Section 14A of the Act read with Rule 8D(iii).

8. The ITAT relied upon the judgment of the High Court of Jammu and Kashmir, in the case of ***Shree Balaji Alloys vs CIT, 2011 133 ITR 335*** J&K wherein it was held that Excise Duty, Subsidy, Interest Subsidy and Insurance Subsidy received by industry is a capital receipt. The ITAT noted that the Civil Appeal No. 10061/2011 filed by the department against the aforesaid order of the High Court of Jammu and Kashmir was dismissed on 19th April, 2016. The ITAT has further noted that the facts in the case of ***Shri Balaji Alloys (supra)*** and in the case of the present assessee are similar. Therefore, after allowing the assessee to raise the question in appeal, the ITAT following the judgment in the case of ***Shree Balaji Alloys vs CIT (supra)*** has allowed the Excise Duty, Subsidy and Interest Subsidy to be treated as capital receipts.

9. The ITAT has also allowed the ground raised by the assessee to claim education cess as an allowable expenditure by relying upon the CBDT Circular no. 91/58/66-ITJ(19).While allowing the said claim on account of education cess, the ITAT relied upon the decisions of the coordinate bench as well as the judgment of the High Court of Rajasthan in ***ITA No. 52/2018*** in the case of ***Chambal Fertilizers and Chemicals Ltd.***

10. In the aforesaid manner, the ITAT by its order granted the following reliefs to the assessee:-

a) Deleted the disallowance made by the assessing officer under Section 14A of the Act read with Rule 8D,
b) Permitted the assessee to treat the subsidy received from the State of Jammu and Kashmir as ‘capital receipt’ instead of ‘revenue receipt’,
c) Allowed the deduction of education cess as an allowable expenditure.

11. The department in the present appeal has challenged the order of the

ITAT. It has challenged the deletion of the disallowance made under Section 14A of the Act by relying upon circular no. 5/2014 dated 11th February, 2014. However, the said challenge of the department cannot be accepted in view of the judgment of this Court in ***Cheminvest Ltd. v. CIT (supra)*** wherein this Court has held as follows:-

> *"23. In the context of the facts enumerated hereinbefore the Court answers the questions framed by holding that the expression 'does not form part of the total income' in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year."*

12. The aforesaid judgment has held field since 2015 and has been consistently applied by the ITAT and followed by this Court in all subsequent matters.

13. The department has reiterated its objection to the ITAT admitting additional ground raised by the assessee regarding the treatment of subsidy. However, in the impugned order, the ITAT has given detailed reasoning for permitting the additional ground after relying upon the judgments of the Supreme Court, the CBDT Circular and the history of the legislative provision of Section 143 (3) of the Act. Pertinently, no submission has been advanced by the department on the merits of the claim of subsidy allowed by the ITAT. The decision of Supreme court in ***Kedarnath Jute Manufacturing Co. Ltd. V. Commercial Tax Officer, AIR 1996 SC 12*** is an authority for the proposition that tax authorities and adjudications as well as assessee are not precluded by the positions taken in returns, documents or

accounts and have the duty (and a corresponding right) to apply the correct legal principle. As noted above, no facts on merits have been brought on record to disallow the claim of subsidy.

14. In opinion of this Court, no error was committed by the ITAT by permitting the assessee to raise the additional ground at the stage of the appeal because there is no dispute raised by the department to the fact that the said subsidy given by State of Jammu & Kashmir to the assessee is liable to be treated as a capital receipt in view of the judgment of ***Shri Balaji Alloys (supra).***

15. The issue of deletion of education cess was not pressed during the course of arguments.

16. In view of the above, it is seen that no substantial questions of law arise for consideration in the present appeal. Accordingly, the same is dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

JULY 25, 2022/msh