

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'D' BENCH, CHENNAI**

श्री धुव्वुरु आर.एल रेड्डी ,न्यायिक सदस्य एवं श्री जीमंजुनाथ ., लेखा सदस्य के समक्ष  
**BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपीलसं./I.T.(TP).A.No.10/CHNY/2020

(निर्धारण वर्ष / Assessment Year: 2015-16)

**M/s. Hyundai Motor India Ltd.,**  
Plot No.H-1, SIPCOT Industrial Park  
Irrungattukottai,  
Sriperumbudur Taluk  
Kancheepuram Dist.  
PIN: 602 117.

**PAN: AAACH 2364M**

Vs **The Asst. Commissioner**  
**of Income Tax,**  
LTU-2,  
Chennai - 34.

(प्रत्यर्थी/Respondent)

(अपीलार्थी/Appellant)

अपीलार्थी की ओर से/ Appellant by : Shri K.R. Sekar, CA &  
Shri S.P. Chidambaram, Advocate  
प्रत्यर्थी की ओर से/Respondent by : Shri B. Jayaragavan, CIT  
Smt. R. Anita,Addl.CIT

सुनवाई की तारीख/Date of hearing : 13.09.2021  
घोषणा की तारीख /Date of Pronouncement : 17.09.2021

**आदेश / ORDER**

**PER G. MANJUNATHA, AM:**

This appeal filed by the assessee is directed against final assessment order passed by the Assessing Officer u/s.143(3) r.w.s 144C(13) of Income Tax Act, 1961 dated 18.11.2019, in pursuant to the directions of the learned DRP-2, Bengaluru dated 05.09.2019 u/s.144C(5) of Income Tax Act, 1961 (hereinafter the 'Act') for the assessment year 2015-16.

## 2. The assessee has raised following grounds of appeal:-

1. *“The Appellant objects to the order dated 18 November 2019 issued under Section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (‘Act’) by the Assistant Commissioner of Income-tax, Large Taxpayer Unit - 2, Chennai (‘Assessing Officer’/ ‘AO’) for the aforesaid assessment year on the following grounds:*

| Sl. | Description                                            | Ground ref. |
|-----|--------------------------------------------------------|-------------|
| a)  | Transfer pricing adjustment                            | 2           |
| b)  | Disallowance u/s 14A of the Act r.w.r. 8D of the Rules | 3           |
| c)  | Disallowance of capital subsidy                        | 4           |
| d)  | Disallowance of performance reward                     | 5           |

### **TRANSFER PRICING GROUNDS**

2. *The directions of the Dispute Resolution Panel (DRP), the Transfer Pricing Order and the Final Assessment order are erroneous in so far as the following issue/adjustment:*

#### ***Attribution of notional income towards deemed brand development***

2.1 *The DRP failed to appreciate the fact that the Transfer Pricing Officer (TPO) exceeded his jurisdiction by analysing brand building as a separate international transaction though the Assessing Officer (AO) has not referred the same for determination of arm’s length price (ALP).*

2.2 *The DRP ought to have held that the order of the TPO is vitiated inasmuch since it is based on a show cause notice that is void ab initio, as it has not established a prima facie case of brand promotion activity undertaken by the Appellant.*

2.3 *The DRP ought to have held that the TPO has acted in excess of jurisdiction by suo-motto considering the incurring of advertisement expenses as an “international transaction” though the AO has not referred the same.*

2.4 *The AO/TPO erred in facts and circumstances of the case and in law in attributing notional income of Rs. 212,26,60,000/- to the Appellant as income for deemed brand building activity and compensation for depriving the Appellant from developing its own brand.*

2.5 *The AO/TPO erred in facts and circumstances of the case and in law by stating that the Appellant failed to report the “Advertisement Marketing and Promotion (“AMP”) expenses” in the Form 3CEB when the same is*

*not per se an international transaction as per Section 92B of the Income Tax Act, 1961 ("the Act").*

*2.6 The AO/TPO erred in facts and circumstances of the case and in law in making an adjustment for AMP expenses, without appreciating that such adjustment cannot be made to a full-fledged manufacturer.*

*2.7 The AO/TPO erred in facts and circumstances of the case and in law by not considering the fact that the Honourable Chennai Bench of the Income Tax Appellate Tribunal ("ITAT"), in the Appellant's own case, for AYs 2009-10 to 2011-12 held that there is no International transaction between the Appellant and the AE, for AYs 2007-08 to 2011-12, the adjustment on Brand building/AMP expenses has been consistently deleted, while the facts and circumstances of the case being similar in all the previous years.*

*2.8 The DRP, while acknowledging that the facts and circumstances are similar to the previous years, erred in not following the binding order of this Honourable Tribunal in the Appellant's own case from AY 2007-08 to AY 2011-12 wherein the adjustment on Brand building/AMP expenses have been consistently deleted.*

*2.9 The AO/TPO erred in facts and circumstances of the case and in law by not considering the findings of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd [ITA No.110/ /2014 & ITA No.710/2015] wherein it was held that "Brand promotion/AMP expenses" is not an international transaction.*

*2.10 The AO/TPO failed to appreciate that the Appellant has not rendered any brand building services to its Associated Enterprise (AE).*

*2.11 The AO/TPO failed to appreciate that in the absence of contract among the parties (i.e. Appellant and AE) deeming rendition of brand building service is void.*

*2.12 The AO/TPO failed to appreciate that in view of the rights granted in the agreement between the Appellant and the AE, the former gets the right to use the "Brand".*

*2.13 The AO/TPO failed to appreciate that as per the principles laid down in Chapter VII of the OECD TP Guidelines, 2017, the incidental benefits if any arising out of the AMP expenses incurred by the Appellant to the AE does not require any compensation.*

*2.14 The AO/TPO erred in facts and circumstances of the case in having admitted that Hyundai is a global brand, ought to have appreciated that there is no necessity for the Appellant to further promote the brand.*

2.15 *The AO/TPO has failed to appreciate that the Appellant is not restricted from creating its own brand through the agreement and it is the prudent business decision of the Appellant to use the Brand name of the AE so as to increase its sales in India.*

2.16 *The AO/TPO failed to appreciate that even an independent entity would have charged for brand building service only if the brand building activity has been actually agreed to/ undertaken as the primary activity and not where the promotion of brand name is ancillary to the core business activity of manufacture and sale of vehicles.*

2.17 *The AO/TPO failed to appreciate that the AMP expenses incurred by the Appellant is purely to promote the sales of the cars manufactured and not towards promotion of Brand.*

2.18 *The AO/TPO erred in facts and circumstances of the case and in law in not appreciating that the Appellant is the economic owner of the brand name and uses the brand for its own benefit.*

2.19 *Without prejudice to the above and assuming without admitting that the Appellant has been providing brand building service, the AO/TPO failed to appreciate that the income, if any, can be attributed only when brand is alienated at a future date and as such the question of attributing a notional income for the deemed brand building service does not arise for AY 2015-16.*

2.20 *The AO/TPO erred in facts and circumstances of the case and in law in holding that, the Appellant has developed marketing intangibles for the holding company in India.*

2.21 *The AO/TPO failed to appreciate that he is precluded from dictating/ questioning the business strategies of the Appellant.*

2.22 *The AO/TPO erred in facts and circumstances of the case and in law by not providing any cogent reasons/basis of allocating 50% of the AMP expenses incurred by the Appellant to be recovered from the AE towards brand promotion.*

2.23 *Without prejudice to the above, the AO/TPO failed to appreciate that the excess margin earned by the Appellant over that of comparable companies indicates that it is the Appellant who has benefited from the use of the brand name and has offered more income for tax in India.*

2.24 *Without prejudice to the above, the AO/TPO erred in facts and circumstances of the case and in law by incorrectly adopting "Other*

*Method” as the most appropriate method and by not providing any justification for adopting the said method for determination of arm’s length price of “Brand Promotion” as per Section 92C(1) of the Act.*

*2.25 Without prejudice to the above argument, even if the claim of the TPO that the AE is benefitted by the AMP expenses incurred by the Appellant is accepted, allocating 50% as the benefit attributable to the AE is arbitrary and highly unreasonable.*

*2.26 The AO/TPO erred in conducting a fresh search and identifying the comparable companies to determine the mark-up to be added to the AMP expenses incurred by the Appellant to charge the AE.*

*2.27 Without prejudice to the above, the AO/TPO failed to appreciate that the core business activity of the Appellant is manufacturing of passenger cars and not brand promotion whereas the comparable companies identified are engaged in the business of advertisement and media and as such, the comparables are functionally dissimilar.*

*2.28 Without prejudice to our above arguments, even if the TPO wishes to propose adjustment in respect of the brand promotion, ought to have compared the AMP to sales ratio of the Appellant with that of the comparable companies to determine the ALP of the transaction.*

*Without prejudice to our above arguments, the Appellant while submitting the quantum of advertisement expenses has inadvertently included expenses which are not in the nature of Advertisement and that if the revised quantum of AMP expenses is considered the transfer pricing adjustment will be reduced to Rs. 161.10 crores as against Rs. 212.26 crores proposed by the TPO.*

*The Appellant craves leave/reserves its right to adduce additional grounds or produce further documents/explanation before or during the course of hearing.*

### **CORPORATE TAX GROUNDS**

#### **3. Disallowance of expenditure under section 14A of the Act r.w.r 8D of the Rules**

*3.1 The AO / DRP erred in disallowing a sum of Rs.86,57,636 under section 14A of the Act by applying the provisions of Rule 8D of the Rules.*

*3.2 The AO / DRP ought not to have made disallowance under section 14A of the Act when the Appellant has not claimed any exempt income during the year.*

3.3 *The DRP erred in holding that mere earning of dividend income would suffice to attract disallowance under Section 14A of the Act.*

3.4 *Without prejudice to the above, the DRP having held that dividend income earned during the subject AY however it did not issue direction to the AO to grant exemption but independently sought to make disallowance under Section 14A r.w.r 8D, which is erroneous and unsustainable as the total income does not contain any exempt income.*

3.5 *The AO / DRP ought to have appreciated that the Assessee has not incurred any expenditure which may be attributable towards earning of exempt income.*

3.6 *The AO, having acknowledged the fact that the Assessee had sufficient surplus funds in earlier AY's to make the investments, ought not to have resorted to making ad hoc disallowance under section 14A r.w.r 8D of the Rules.*

3.7 *The AO / DRP ought to have appreciated that merely because there are investments (for strategic purposes) and payment of interest (towards purchase of fixed assets), it cannot be assumed that loan funds have been utilized for the purpose of making investments.*

3.8 *The AO / DRP erred in presuming that the Appellant had incurred a portion of personnel expenses, rent, salaries, communication, travel, printing & stationery, interest, etc. debited during the subject AY towards carrying out investment transactions / earning income from investments without appreciating that the nature of Assessee's investments (in wholly owned subsidiaries) does not require any continuous monitoring and as such the presumption of the AO is misconceived.*

3.9 *The AO erred in not following the binding decision of the Hon'ble Tribunal in the Appellant's own case for AY 2007-08 wherein the Tribunal had held that no disallowance can be made under section 14A of the Act if there is no exemption claimed in respect of dividend income.*

3.10 *Without prejudice to the above, the AO ought not to have considered interest on long term loans, working capital, dealers advances/deposits, and bank/financial charges while computing the quantum of disallowance under clause (ii) of Rule 8D(2) of the Rules.*

3.11 *Without prejudice to the above, the AO / DRP ought to have excluded the investments which did not yield exempt income during the subject AY while computing the quantum of disallowance under Rule*

*8D(2)(ii) and (iii) of the Rules.*

*3.12 Without further prejudice to the above, the disallowance under section 14A of the Act by applying Rule 8D of the Rules is erroneous, high and arbitrary.*

*3.13 Without prejudice to the above, the disallowance should be restricted to Rs.70,000/- being the amount of dividend received during the subject AY.*

*3.14 The AO / DRP ought to have appreciated that the provisions of section 14A of the Act r.w.r. 8D of the Rules is not applicable while determining book profits under section 115JB of the Act.*

#### **4. Disallowance of depreciation to the extent of subsidy**

*4.1 The AO / DRP erred in reducing the subsidy granted by SIPCOT from the cost of the fixed assets for the AY 2003-04 and consequently disallowing depreciation amounting to Rs.1,46,570 in the subject AY .*

*4.2 The AO / DRP ought to have appreciated that SIPCOT had given the subsidy for setting up the mega project and not for the purpose of meeting any liability towards acquisition of assets and as such the subsidy is a capital receipt, which cannot be adjusted against the cost of the asset.*

*4.3 The AO / DRP ought to have appreciated that utilization of the subsidy cannot be the basis for deciding the tax treatment of its receipt.*

*4.4 The AO / DRP failed to appreciate that in the year of receipt of subsidy, i.e. AY 2003-04 the AO has verified the claim and deleted the disallowance on depreciation by passing the order giving effect to the CIT(A) order and for AY 2006-07 the same issue was deleted by the Honorable ITAT and therefore the question of disallowance of depreciation on subsidy in subsequent AY's does not arise.*

#### **5 Disallowance of performance reward under section 43B of the Act**

*5.1 The AO / DRP erred in disallowing performance reward amounting to Rs.13,63,08,261 under section 43B of the Act.*

5.2 *The AO / DRP ought to have appreciated that the expenditure incurred towards performance reward is not in the nature of “bonus” and therefore the provisions of section 43B(c) of the Act is not applicable.*

5.3 *The AO / DRP failed to appreciate that the performance reward is not on the nature of “commission” since the reward is based on the performance of the employee.*

5.4 *Without prejudice to the above, even assuming without conceding that the expenditure is in the nature of “bonus”, the AO / DRP ought to have appreciated that the Appellant is not covered by the provisions of Payment of Bonus Act, 1965 and as such no disallowance can be made under section 43B r.w.s. 36(1)(ii) of the Act.*

5.5 *Without further prejudice to our argument that the performance reward is not in the nature of “bonus”, suitable directions should be issued to be AO to allow the expenditure in the year in which the amounts are paid in order to avoid double taxation.*

5.6 *The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra as also all consequential relief thereto.*

3. The assessee had filed a petition for admission of additional grounds on three occasions i.e., 27.01.2020, 09.06.2020 and 25.02.2021. The relevant additional grounds of appeal raised by the assessee are reproduced as under:-

*“ Without prejudice to the main grounds of appeal, the Appellant prefers the following additional grounds among other grounds of appeal:*

**1. Subsidy received from Govt. of Tamil Nadu in the form of refund of output/input VAT is a capital receipt not chargeable to tax.**

*1.1 The DRP ought to have appreciated that the subsidy (refund of VAT) was granted for the purpose of setting up of Phase II manufacturing*

*facility and as such the said subsidy should be treated as a capital receipt' not chargeable to tax.*

*1.2 The DRP ought to have appreciated that the object of the subsidy (refund of VAT) was not to enhance the profitability of the Appellant or to fund the cost of fixed assets and as such the said subsidy should be treated as a 'capital receipt' not chargeable to tax.*

*1.3 The DRP ought not to have rejected the Appellant's objections in limine without adjudicating the case on merits since taxability of subsidy for income tax purposes is a legal issue.*

*1.4 The Hon'ble Tribunal may issue suitable directions to the AO to treat the subsidy (refund of VAT) as a capital receipt not chargeable to tax and re-compute the total income by reducing the amount of subsidy for the subject AY 2015-16.*

***2. Education cess and secondary & higher education cess is allowable as revenue expenditure***

*2.1 The AO ought to have appreciated that education cess and secondary & higher education cess amounting to Rs.13,03,01,954 is an allowable expenditure under section 37(1) of the Act.*

*2.2 The AO ought to have appreciated that the education cess and secondary & higher education cess paid by the Appellant is not covered within the provisions of section 40(a)(ii) of the Act and as such allowable under section 37(1) of the Act.*

*2.3 The AO ought to have appreciated that the CBDT vide Circular No.91/58/66 ITJ (19) has clarified that omission of the word "cess" is to disallow only "taxes" section 40(a)(ii) of the Act and not education cess.*

*2.4 The AO ought to have appreciated that 'education cess and secondary & higher education cess' is not in the nature of 'tax' as envisaged in section 40(a)(ii) of the Act and cannot be disallowed.*

*2.5 The AO ought to have appreciated that taxes are levied on profits whereas 'cess' is levied only on taxes and not profits and as such 'cess' is*

*not covered within the meaning of taxes under section 40d a)(ii) of the Act.*

*2.6 The AO ought to have appreciated that cess cannot be construed as tax since it is levied for the specific purpose of providing universalized quality basic / secondary and higher education whereas tax is towards the general collection of the Union of India.*

*2.7 The Hon'ble Tribunal may issue suitable directions to the AO to treat the education cess and secondary & higher education cess as an allowable expenditure under section 37(1) of the Act and re-compute the total income for the subject AY 2015- 16.*

***3. Export incentives under the Focus Market Scheme is a capital receipt not chargeable to tax***

*3.1 The AO/DRP ought to have appreciated that the export incentives under the Focus Market Scheme amounting to Rs. 177,83,10,104 is a capital receipt not chargeable to tax.*

*3.2 The AO/DRP ought to have appreciated that it is a well settled principle that the "purpose" for which an incentive is granted should be considered to determine whether the nature of subsidy / incentive is revenue or capital.*

*3.3 The AO/DRP ought to have appreciated that the export incentive under the Focus Market Scheme was provided to enhance India's export potential in the international market and not for running the business of the Appellant more profitably and as such the export incentive is capital in nature.*

*3.4 The Hon'ble Tribunal may issue suitable directions to the AO to treat the export incentive under the Focus Market Scheme as a capital receipt not chargeable to tax and re-compute the total income by reducing the amount of incentive for the subject AY 2015-16.*

*4. The Appellant craves leave to add/ modify/alter any additional grounds.*

*The Appellant submits that the omission to raise the aforesaid Additional Grounds of Appeal in the original grounds of appeal was neither*

*deliberate nor willful and prays that the Hon'ble ITAT may consider it as part of the original Grounds of Appeal."*

4. Brief facts of the case are that the assessee M/s. Hyundai Motor India Ltd., is wholly owned subsidiary of M/s. Hyundai Motor Company Ltd., South Korea. The assessee is engaged in the business of manufacturing and selling passenger cars in domestic and export market. The assessee company has filed its return of income for assessment year 2015-16 on 30.11.2015 admitting total income of Rs.1329,21,15,480/- under normal provisions of the Act and book profit u/s.115JB of the Act at Rs.1496,25,75,490/-. The assessee had entered into various international transactions with its AEs and international transactions were duly reported in Form 3CEB filed in accordance with provisions of Indian Transfer Pricing Regulations contained in section 92, 92A to 92F of the Income Tax Act, 1961. The case was taken up for scrutiny and during the course of assessment proceedings; a reference was made to JCIT (Transfer Pricing) for determination of arm's length price of international transactions of the assessee with its AEs. The learned TPO vide its order dated 31.10.2018 has suggested upward adjustment for brand development services.

5. The Assessing Officer, in pursuant to TPO order, has passed draft assessment order u/s.143(3) r.w.s 144C(1) of the Income Tax Act, 1961 on 21.12.2018 and made transfer price adjustments as suggested by the TPO at Rs.212,26,60,000/-. The Assessing Officer had also proposed certain corporate tax adjustments including disallowances u/s.14A, r.w.r 8D of IT Rules, 1962, disallowance of subsidy received towards capital expenditure, disallowance of focus marketing scheme expenses, disallowance of additional depreciation claimed on fixed assets for regional offices, disallowance of guarantee charges paid to HMC and disallowance of bonus / performance reward u/s.43B(c) of the Act. The assessee has filed objections before learned DRP against draft assessment order, but the learned DRP vide its directions dated 05.09.2019 has rejected objections filed by the assessee. The Assessing Officer in pursuant to the directions of the learned DRP has passed final assessment order incorporating directions of the Id. DRP. Aggrieved, the assessee has filed present appeal before the Tribunal.

6. Ground no.1 filed by the assessee is general in nature and does not require specific adjudication and hence, the same is dismissed.

7. The next issue that came up for consideration from ground no.2 of assessee appeal is transfer pricing adjustment made towards brand development services. During the year under consideration, the learned TPO has made upward adjustment of Rs.212,26,60,000/- in relation to brand fees receivable from its AEs towards enhancement of brand value of assessee parent company. The learned TPO used Spearman's Rank Correlation method to conclude that there is positive correlation between the brand value of Hyundai Motor India Limited and market capitalization of Hyundai market Corporation, South Korea. Therefore, by applying Spearman's Rank Correlation method, the Id. TPO has computed incremental brand value and attributed a portion of the same to the assessee in proportionate to its sales.

7.1 The Id.AR for the assessee, at the time of hearing submitted that this issue is covered in favour of the assessee by the decision of ITAT., Chennai in assessee's own case for the

assessment years 2009-10 to 2013-14 in ITA Nos.853/Chny/2014, 563/Chny/2015, 842/Chny/2016 & 3192/Chny/2017, and hence, addition made by the Assessing Officer towards brand development services should be deleted.

7.2 The Id. DR on the other hand, fairly agreed that this issue is covered in favour of the assessee. But strongly supported Id. TPO/DRP order.

7.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021, wherein the Tribunal held that learned TPO as well as learned DRP were erred in making transfer pricing adjustments towards brand services by adopting Spearman's Rank Correlation method and concluded that there is positive accretion between brand value and market capitalization of HMC Korea and hence, directed the AO/TPO to delete transfer pricing adjustment made towards brand development services. The relevant findings of the Tribunal are as under:-

“28. We have heard both the parties, perused material available on record and gone through orders of the authorities below. Admittedly, additions made by the TPO towards brand development services is recurring issue, which was subject matter of deliberations from the Tribunal right from assessment year 2009-10 to assessment year 2011-12. The Tribunal in the assessee’s own case for assessment year 2009-10 to 2011-12 had considered an identical issue and held that in absence of mutual agreement or arrangement between two or more AEs for allocation, apportionment or contribution to any cost or expenses for a benefit, service or facility, it cannot be held that there is an international transaction for brand development. The Tribunal further held that increase in brand value due to use of foreign AEs brand name in HMIL’s products cannot be considered as provision for services, as per international transaction definition u/s.92B of the Income Tax Act, 1961. The Tribunal further held that the expression ‘benefit’ and ‘service’ have different connotations. A service has to be a conscious activity and not a passive exercise. Not all benefits arise as a result of services rendered by someone and further all services do not result in benefits to the other parties. For the purpose of definition of international transaction, in Indian context rendering of service is what needs to be considered and not benefits. Since, there is no formal agreement or arrangement between the assessee and its AEs for rendering of service in the alleged brand promotion activity, the accretion in global brand value of its parent company cannot be attributable to the assessee by adopting some theory. In this case, facts are identical and *pari materia* to the facts already considered by the Tribunal for earlier years. Therefore, consistent with a view taken by the coordinate Bench in assessee’s own case for earlier assessment years, we are of the considered view that the learned TPO as well as learned DRP were erred in making transfer pricing adjustments towards brand services by adopting Spearman’s Rank Correlation method and concluded that there is positive accretion between brand value and market capitalization of HMC Korea and hence, we direct the Assessing Officer/TPO to delete transfer pricing adjustment made towards brand development services.”

In this view of the matter and consistent with view taken by the Co-ordinate Bench, we direct the AO/TPO to delete transfer pricing adjustment made towards brand development charges.

8. The next issue that came up for our consideration from ground no.3 of assessee appeal is disallowances u/s.14A r.w.r 8D of Income Tax Rules, 1962, amounting to Rs.86,57,636/-. The facts with regard to impugned dispute are that during the year under consideration, the assessee has earned dividend income from mutual funds, which is exempt from tax amounting to 72,059/-, however, did not made any suo-motto disallowance of expenditure relatable to exempt income. Therefore, the Assessing Officer has invoked provisions of Rule 8D of Income Tax Rules, 1962, and determined disallowances of Rs.86,57,636/- u/s.14A of Income Tax Act, 1961.

8.1 The Id.AR for the assessee, at the time of hearing submitted that this issue is also covered in favour of the assessee by the decision of ITAT., Chennai in assessee's own case for the assessment year 2013-14 in ITA No.3192/Chny/2017, wherein it was held that disallowance u/s.14A should be restricted to the

extent of exempt income earned for the impugned assessment year.

8.2 The Id.DR on the other hand, fairly agreed that this issue is covered in favour of the assessee.

8.3 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021, wherein the Tribunal by following the decisions of Hon'ble Supreme Court in the case of Pr.CIT vs. State Bank of Patiala, 99 taxmann.com 286 and Hon'ble Madras High Court in the case of Marg Ltd., vs. CIT, (2020) 120 Taxmann.com 84, directed the AO to restrict disallowances u/s.14A of the Act, to the extent of exempt income earned for the impugned assessment year. The relevant findings of the Tribunal are as under:-

“10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is well settled principles of law that disallowances u/s.14A cannot exceed amount of exempt income. The Hon'ble Supreme Court in the case of Pr.CIT Vs State Bank of Patiala (supra), while dismissing SLP filed by the Revenue against order of the Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs State Bank of Patiala, held that disallowance u/s.14A could be restricted to amount of exempt income only. The Hon'ble Jurisdictional High Court of Madras in the

case of Marg Ltd Vs.CIT (2020) 120 Taxmann.com 84, has taken a similar view and held that disallowances under Rule 8D r.w.s 14A can never exceed exempt income earned by the assessee during particular assessment year. In this case, admittedly, exempt income for impugned assessment year was Rs.57,826/-, whereas the Assessing Officer has determined disallowance u/s.14A at Rs.86,54,491/- contrary to settled principle of law. Therefore, considering facts and circumstances of this case and also by following the decisions of Hon'ble Supreme Court and Hon'ble Madras High Court, we direct the Assessing Officer to restrict disallowances u/s.14A to the extent of exempt income earned for the impugned assessment year.”

In this view of matter and consistent with view taken by the Co-ordinate Bench, we direct the AO to restrict disallowance u/s.14A to the extent of exempt income earned for the impugned assessment year.

9. The next issue that came up for our consideration from ground no.4 of assessee appeal is disallowance of depreciation on capital subsidy. During the financial year 2002-03, the State Industrial Promotion Corporation of Tamil Nadu (SIPCOT) had granted subsidiary of Rs.100 lakhs to encourage and recognize huge investments made for setting up of mega project viz., passenger car manufacturing unit in Irungattukottai. The assessee has treated subsidy received from SIPCOT as capital receipt and did not reduce the same from cost of assets, as it was not directly or indirectly used to purchase any asset. The Assessing Officer has

held that capital subsidy received from SIPCOT being utilized by the assessee for capital expenditure, same ought to have been reduced from the cost of asset added in that year by contending that subsidy was directly or indirectly used to purchase of asset and as per explanation (10) to section 43 the same needs to be deducted from cost of assets and consequently, reworked depreciation by reducing amount of subsidiary and disallowed a sum of Rs.1,46,570/-.

9.1 The learned AR for the assessee submitted that this issue is covered in favour of the assessee by the decision of ITAT., Chennai, in assessee's own case for assessment years 2006-07 & 2013-14 in IT(TP)A.No.14/Chny/2018 & ITA No.3192/Chny/2017, where it was held that subsidiary received from SIPCOT is capital receipt not liable for tax.

9.2 The learned DR, on the other hand, fairly agreed that this issue is covered in favour of the assessee, however strongly supported AO/DRP orders.

9.3 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. An

identical issue has been considered by Tribunal in assessee's own case for the assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021, wherein the Tribunal following the decision of the Tribunal in assessee's own case for assessment year 2006-07 in IT(TP)A No.14/Chny/2018 and after considering nature of subsidy has allowed claim of the assessee by observing that for earlier years, the CIT(A) has allowed claim of the assessee and the AO has accepted decision of the CIT(A) and deleted additions, while passing order giving effect to the order of the CIT(A). Therefore, consistent with the view taken by the coordinate Bench, we direct the AO to delete addition made towards disallowance of depreciation on capital subsidy received from SIPCOT.

10. The next issue that came up for consideration from ground No.5 of assessee appeal is disallowance u/s.43B(c) of the Act, in respect of performance incentive paid to employees. Facts with regard to impugned dispute are that for the financial year relevant to the assessment year 2015-16, the assessee has paid performance reward to employees in the cadre of executives and senior executives. The assessee has provided for expenses for the year ended March, 2015. However, payment was made only after

due date of filing return of income for assessment year 2015-16. The Assessing Officer has disallowed performance incentive paid to staff u/s.43B(c) r.w.s. 36(1)(ii) of the Act, amounting to Rs.13,63,08,261/- on the ground that as per section 43B(c), any sum referred to in clause (ii) of sub-section (1) of section 36, shall not be allowed as deduction, unless the same is paid on or before due date for furnishing return of income u/s.139(1) of the Act. The Assessing Officer further noted that as per section 36(1)(ii), any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profit or dividend, if it had not been paid as bonus or commission is covered. Therefore, he opined that any payment made to an employee which is in the nature of bonus or commission for services rendered is covered u/s. 36(1)(ii) of the Act, and thus, if such payment is not made on or before due date of filing of return of income u/s.139(1) of the Act, then same cannot be allowed as deduction, as per section 43B(c) of the Act.

10.1 The assessee has filed objections before learned DRP and challenged additions made by the AO. The learned DRP vide its directions dated 05.09.2019 has rejected objections filed by the

assessee and confirmed additions made by the AO. The relevant findings of the Id. DRP is as under:-

*“The Assessing Officer erred in disallowing performance reward under section 43B of the Act*

*8.1 Ground of objection 7 –*

*7.1 The learned AO erred in disallowing “Performance reward” amounting to Rs.13,63,08,261 /- under section 43B of the Income-tax Act, 1961 (‘Act’).*

*7.2 The Assessing Officer ought to have appreciated that the expenditure incurred towards “performance reward” is not in the nature of “bonus” and therefore the provisions of Section 43B(c) of the Act is not applicable.*

*7.3 Without prejudice to the above, the Assessing Officer ought to have appreciated that the Assessee is not covered by the provisions of Payment of Bonus Act, 1965 and as such the said expenditure cannot be disallowed under Section 43B r.w.s. 36(1) (ii) of the Act.*

*7.4 Without prejudice, the Hon'ble DRP may issue suitable directions to allow the claim in the year in which the amounts are paid.*

*8.1 Panel: The AO found that the amount of Rs 13,63,08,261/- has been debited in P&L account as performance reward/bonus. But it is certified in audit report in form 3CD that the amount remained unpaid. The AO disallowed this amount holding that since the amount has not been paid till the due date of filing return of income, the same cannot be allowed as per section 43B. The assessee contends that the expenditure incurred is towards performance reward and not in nature of bonus. Hence, provisions of section 43B are not applicable.*

*8.2 The arguments of the assessee have duly been considered. Section 43B mandates that certain deductions are to be allowed only on actual payment basis, even though under the mercantile system of accounting income and out go are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. The section, which is a non-obstante provision, provides a condition of payment for the deduction of the liabilities specified therein, so that the deduction is deferred to the year of payment. The only exception is the year in which the liability accrues or arises, for which the time for payment gets*

*extended to the due date for furnishing the return of income for that year. This non-obstante section means that certain deductions even if allowable as per the provisions of any other section of this Act will not be allowed unless the conditions of section 43B are satisfied. Section 43B(c) provides that any sum referred to in section 36(1)(ii) will not be allowed as deduction unless actually paid.*

*Section 36(1)(ii) reads as under:*

*“any sum paid to an employee as bonus or commission for services rendered where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission”*

*8.3 It is seen that the provision applies for payment of ‘bonus’ or ‘commission’ to the employees. The assessee claims that the expenditure incurred is towards ‘performance reward which is not in the nature of bonus and hence, will not be covered in section 36(1) (ii). This argument of the assessee is not correct. The payment to the employees on account of performance or payment as commission is in the same nature. It is immaterial if the assessee terms it performance reward. This sum would not have been paid to the employees as profits or dividend had it not been paid as commission or performance reward. Hence, this Panel is of the considered opinion that the provision of section 36(1)(ii) is squarely applicable in case of the assessee and consequently the mischief of section 43B will kick in to disallow the claim of deduction by the assessee. It may also be mentioned that the objection of the assessee on identical issue for AY 2011-12, 2012-13, 2013-14 and 2014-15 has not been accepted by the DRP. In view of above the objection of the assessee is rejected.”*

10.2 The learned A.R for the assessee submitted that the learned DRP erred in sustaining additions made by the AO towards disallowance of performance incentive paid to employees u/s.43B(c) of the Act, without appreciating fact that said payment is neither bonus nor commission and thus, same cannot be brought within the ambit of provisions of section 36(1)(ii) r.w.s.43B(c) of the Income Tax Act, 1961.

10.3 The Id.DR on the other hand strongly supporting order of the Id.DRP submitted that this issue is covered against the assessee by the decision of ITAT., Chennai in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, where the issue has been decided against the assessee.

10.4 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case for assessment year 2013-14, where under identical circumstances, the Tribunal has held that payment made to an employee which is in the nature of bonus or commission for services rendered is covered u/s. 36(1)(ii) of the Act, and thus, if such payment is not made on or before due date of filing of return of income u/s.139(1) of the Act, then same cannot be allowed as deduction, as per section 43B(c) of the Act. The relevant findings of the Tribunal are as under:-

*“23. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, none of the employees of the assessee are covered under payment of Bonus Act, because all employees' salary is above threshold limit fixed under payment of Bonus Act. It is also an admitted fact that the assessee is paying performance incentive/reward to employees regularly and such incentive has been paid for services rendered by the employees. Therefore, it is*

*necessary to examine performance incentive paid to employees in light of provisions of section 36(1)(ii) read with section 43B(c) of the Income Tax Act, 1961. As per section 36(1)(ii) of the Act, any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend, if it had not been paid as bonus or commission is allowable as deduction. The provisions of Section 43B(c) provides that any sum referred to in section 36(1)(ii) will not be allowed as deduction, unless actually paid. Therefore, from a combined reading of provisions of section 36(1)(ii) read with section 43B(c), it is seen that provisions of section 36(1)(ii) is not only covers for payment of bonus to staff, but it also applies to commission paid to the employees for services rendered. The assessee claims that expenditure incurred is towards performance reward, which is not in the nature of bonus and hence, will not be covered u/s. 36(1)(ii) of the Act.*

24. *We have given our thoughtful consideration to facts brought out by the ld. AO in light of arguments of the ld. AR for the assessee and we do not ourselves subscribe to the arguments of ld. AR for the assessee, for simple reason that once performance incentive is paid for rendering services, then such payment is in the nature of bonus or commission which comes under the provisions of section 36(1)(ii) of the Act. It is immaterial whether the assessee terms it as performance reward or bonus. But, what is relevant is nature of payment and purpose of payment. In this case, it is in the nature of bonus or commission and such payment is for services rendered by employees. Just because nomenclature was changed to some other name, a particular expenditure would not change its original character. In this case, sum was paid to employees for services rendered and further, this sum would not have been paid as profits or dividend had it not been paid as commission or performance reward. Therefore, we are of the considered view that provisions of section 36(1)(ii) of the Act is squarely applicable and consequently, mischief of section 43B(c) would come into play, if such payment is not made on or before due date of furnishing of return of income. In this case, admittedly, the assessee has paid performance incentive*

*only after due date of filing of income-tax return. Insofar as case laws relied upon by the assessee, we find that facts those case laws are different from facts of present case and has no application to case of the assessee. Therefore, we are of the considered view that there is no error in the reasons given by the Assessing Officer as well as learned DRP to disallow performance reward u/s.43B(c) of the Act. Hence, we are inclined to uphold the order of Assessing Officer as well as directions of learned DRP and reject ground taken by the assessee.”*

In this view of matter and consistent with view taken by the Co-ordinate Bench, we are inclined to uphold the order of the AO as well as the directions of Id.DRP and reject ground taken by the assessee.

11. The next issue that came up for our consideration from additional ground no.1 of assessee appeal is addition towards VAT incentive received from Government of Tamil Nadu. During the year under consideration, the assessee has received refund of output VAT amounting to Rs.58,40,12,807/- from Govt. of Tamil Nadu and credited to profit and loss account under the head income from other sources. The assessee has treated above incentive as revenue receipt both for its books of account and its tax returns. However, during the course of assessment proceedings, the assessee has raised a fresh claim to treat incentive as capital receipts not chargeable to tax. The AO has not

adjudicated fresh claim made by the assessee. The learned DRP has rejected objections filed by the assessee without giving any specific direction.

11.1 The learned AR for the assessee submitted that this issue is also covered in favor of the assessee by the decision of ITAT., Chennai in assessee's own case for assessment year 2013-14, where under identical circumstances, the Tribunal has remanded the matter to the file of the AO to consider the issue in accordance with law.

11.2 The learned DR, on the other hand, fairly agreed that this issue has been set aside to the file of AO for earlier years and hence, this year also the issue may be remanded back to the file of Assessing Officer.

11.3 Having heard both the parties and considered material on record, we find that the Tribunal had considered an identical issue for assessment years 2011-12 & 2013-14 in ITA Nos.853/Chny/2014 & 3192/Chny/2017, where the issue has been remanded back to the file of AO to consider the issue denovo on merits in accordance with law. Facts being identical for the year under consideration, by following the decision of Tribunal in

assessee's own case for assessment years 2011-12 & 2013-14, we set aside the issue to file of the AO and direct him to reconsider the issue in accordance with law.

12. The next issue that came up for our consideration from additional ground no.2 of the assessee appeal is deduction towards education and secondary education cess u/s.37(1) of the Act.

12.1 The Id.AR for the assessee submitted that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of Sesa Goa Ltd. Vs JCIT (2020) 423 ITR 426, where the Hon'ble Bombay High Court after considering various facts including Select Committee of Parliament report on exclusion of word 'cess' from the word 'tax' has held that education cess and secondary education cess is an expenditure deductible u/s.37(1) of the Act. He further submitted that an identical issue has been considered by the Tribunal in assessee's own case for assessment year 2013-14 and had set aside the issue to the file of the AO.

12.2 The learned DR, on the other hand, strongly opposing additional ground filed by the assessee submitted that the

assessee has not made any claim by debiting cess into profit & loss account and hence, claim of the assessee by filing additional ground on the basis of subsequent decision of the court cannot be entertained.

12.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, wherein the Tribunal held that there is merit in the additional ground filed by the assessee requesting deduction for education cess & secondary and higher education cess as business expenditure deductible u/s.37(1) of the Act and had set-aside the issue to the file of the Assessing Officer. The relevant findings of the Tribunal are as under:-

“38. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that the Hon'ble Bombay High Court has considered an identical issue in the case of Sesa Goa Ltd.(supra) and held that education cess & secondary and higher education cess are liable for deduction in computing income chargeable under head of 'profits and gains of business or profession'. The Hon'ble Rajasthan High Court in the case of Chambal Fertilizers & Chemicals Ltd. Vs. JCIT 107 Taxmann.com 484 has taken a similar view and held that education cess is not disallowable expenditure under the provisions of section 40(a)(ii) of the Act. Therefore, we are of the considered view that there is merit in the additional grounds filed by the assessee requesting deduction

for education cess & secondary and higher education cess, as business expenditure deductible u/s.37(1) of the Act. But, fact remains that assessee has taken up this issue for the first time by filing additional grounds and the Assessing Officer does not have any occasion to examine claim of the assessee. Therefore, we are of the considered view that issue needs to go back to file of the Assessing Officer and hence, we set aside the issue to file of the Assessing Officer and direct him to re-examine claim of the assessee in light of our discussions given herein above and also by considering ratio laid down by the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court in the cases cited above.”

In this view of matter and consistent with view taken by the Co-ordinate Bench, we are of the considered view that education cess, secondary and higher education cess is deductible u/s 37(1) of the Act. However, the issue emanates from additional grounds of appeals filed by the assessee, we set-aside the issue to file of the AO to re-examine the issue as per the directions given by the Tribunal for the assessment year 2013-14 and also direct him to follow the ratio laid down by Hon'ble Bombay High Court decision in the case of CIT vs. Sesa Goa Ltd(supra).

13. The next issue that came up for our consideration from additional ground no.3 of assessee appeal is amount received from Focus Market Scheme to be treated as capital in nature and exclude from total income. Facts with regard to impugned dispute are that Government of India with an intention to promote exports to certain regions / countries introduced Focus Market Scheme

which provides incentive of 2.5% of FOB value for each licensing year commencing from 1<sup>st</sup> April, 2006. The export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. During the year under consideration, the assessee was eligible for above scheme, as it makes export to specified markets. Accordingly, the assessee has received an amount of Rs.177,83,10,104/- as incentive from Govt. of India. The license under the scheme was given only for exports to potential new markets / specified products and not for all exports or all products to all markets. The assessee has treated amount received under Focus Market Scheme as revenue in nature and has offered to tax. Based on certain subsequent decisions, the assessee has raised additional ground and argued that subsidy received under Focus Market Scheme is capital in nature and not chargeable to tax.

13.1 The Id.AR for the assessee submitted that the character of receipt has to be determined with respect to purpose for which subsidy is given and in the present case, if you consider the purpose for which subsidy was given, it is clearly in the nature of capital receipts, because said subsidy was given to explore new

market across the globe. Therefore, the same is in the nature of capital receipt and not chargeable to tax. In this regard, he relied upon the decision of ITAT Chennai, in the case of Eastman Exports Global Clothing Pvt. Ltd. in ITA No.47 & 48/Chny/2016, where the issue relating to taxability of licenses received under Focus Market Scheme was held to be capital in nature.

13.2 The Id.DR, on the other hand, strongly supporting order of learned DRP submitted that the issue is covered against the assessee by the decision of ITAT., Chennai for the assessment years 2007-08 & 2013-14 in ITA Nos.2157/Chny/2007 & 3192/Chny/2017, where the issue has been decided against the assessee.

13.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. An identical issue has been considered by the Tribunal in assessee's own case for assessment year 2013-14 in ITA No. 3192/Chny/2017, wherein the Tribunal held that duty credit scrips received from Govt. of India under Focus Market Scheme is revenue in nature. The relevant findings of the Tribunal are as under:-

“32. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The Government of India, Ministry of Commerce and Industry has come out with Foreign Trade Policy for the period 1<sup>st</sup> September, 2004 to 31.03.2009 and as per the said policy, it has announced a scheme for exporters of certain goods to certain regions called Focus Market Scheme . As per said scheme, export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. The assessee being eligible exporter had received licenses/duty credit scrip/ market linked focus scrips amounting to Rs.150.57 crores for the year under consideration. The assessee has considered amount received under focus market scheme as revenue receipt and offered to tax. However, based on some subsequent decisions of appellate authorities has filed an additional claim seeking exclusion of said receipt from taxation on the ground that it is in the nature of capital receipt and not exigible for tax. Therefore, in order to understand whether amount received from Focus Market Scheme is revenue in nature or capital receipt, which is exempt from tax, one has to understand objectives of Focus Market Scheme announced by Govt. of India. As per Foreign Trade Policy document, the objective of the scheme is to offset high freight cost and other disabilities to select international market with a view to enhance our competitiveness to these countries. On the basis of objectives of the scheme alone, it can be easily concluded that amounts received under the scheme is revenue in nature, because it is primarily focusing to reduce cost of our exporters to compete with other export markets to these regions. However, various courts including Hon'ble Supreme Court in number of cases has examined nature of subsidy received from Govt. of India on the basis of purpose test and has held capital or revenue in nature depending upon purposes for which said subsidy was given. In our considered view, this controversy can be resolved if we apply test laid down in the judgement of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. Vs. CIT (228 ITR 253). The importance of judgement of Hon'ble Supreme Court in the above case lies in the fact that it has discussed and analyzed the entire case laws on the issue and it has laid down basic test to be

applied in judging the character of subsidy. That test is the character of 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 purpose for test. The point of time at which subsidy paid is not relevant. The source is immaterial. The form of subsidy is immaterial.

33. Therefore, in the light of decision of the Hon'ble Supreme Court, in the case of Sahney Steel & Press Works Ltd. Vs. CIT(supra), if we examine facts of the present case, we are of the considered view that duty credit scrips received by the assessee from Govt. of India for export of certain goods to some specified regions is certainly in the nature of revenue receipt, because which is primarily given to offset higher freight cost and other disabilities to select international markets, with a view to enhance our export competitiveness to these countries. We further, are of the opinion that this subsidy was given by way of assistance in carrying on of trade or business and to meet recurring expenses, but it was not for acquiring any capital asset. It was not to meet part of the cost to manufacturing activity. It was not granted for production or bringing into existence any new asset. The subsidy was given year after year only after setting up of industry and only after commencement of production and therefore, such subsidy could only be treated as assistance given for the purpose of carrying on business of the assessee. It is well settled principles of law that any subsidy given for the purpose of offsetting part of cost of setting up of new industry, as per industrial policy of various State Governments or Govt. of India is considered as part of capital contribution and capital in nature, whereas subsidy given after commencement of production of products and further for enhancing profitability of the assessee is certainly in the nature of assistance given for running of business of the assessee more profitable and hence, it is definitely revenue in nature.

34. In this case, on perusal of facts available on record including foreign trade policy of Government of India, it is very clear from documents that main objective of Focus Market Scheme is to offset

high freight cost and other disabilities of exporter to select international market with a view to enhance our export competitiveness to these countries. The expenditure incurred by the assessee under this scheme for exploring new market across the globe is mainly freight cost and other recurring expenses like sales promotion expenses, including manpower cost of staff employed in marketing department. Those expenses are generally in the nature of revenue expenditure and thus, can be considered as revenue expenditure. Since, the assessee got duty credit scrip benefit to offset cost incurred for exploring new market including higher freight cost and further, said expenditure is in the nature of revenue expenditure, then any subsidy including duty credit scrips given by Govt. of India for such purpose is definitely in the nature of revenue receipt. Thus, at any stretch of imagination, the amount received under Focus Market Scheme cannot be considered as capital in nature, which is given to offset cost or part of cost of any asset or facility created by the assessee. Moreover, in this case, the assessee itself had considered amount received under Focus Market Scheme as revenue receipts and offered to tax, considering nature and purpose of receipt of subsidy from the Govt. of India. It is a well known fact that the assessee is best judge to decide a particular item of income or expenditure, because it is well aware facts of its case. In this case, the assessee, after considering nature and purpose of amount received under Focus Market Scheme, has very well considered the same as revenue receipt and offered to tax. Therefore, based on some judgements of higher forum making a claim for excluding said receipt from tax by claiming that it is in the nature of capital receipt is not correct, unless the assessee demonstrates that facts of those case laws considered by appellate forum and facts of assessee's case are similar in nature. As regards various case laws relied upon by the assessee including the decision of ITAT., Chennai in the case of Eastman Exports Global Clothing Pvt.Ltd. in ITA No.47 & 48/Chny/2016, we find that the ITAT, Chennai Bench in above case has not apprised facts in right perspective of law and hence, the judgment of Chennai Bench is not considered. As regards decision of Hon'ble Rajasthan High Court in the case of Pr.CIT Vs. Nitin Spinners Ltd. in Income Tax Appeal No.31 of 2019, we find

that facts of case before Hon'ble High Court and facts of present case are different and hence, same is not considered.

35. In this view of the matter, and considering facts and circumstances of the case, we are of the considered view that duty credit scrips received from Govt. of India under Focus Market scheme is revenue in nature and further, same was given to offset higher cost of freight and other disabilities of exporters to be more competitive in exports to certain regions. Thus, the same cannot at any stretch of imagination be considered as capital in nature. Hence, we reject the ground taken by the assessee.”

In this view of matter and consistent with view taken by the Co-ordinate Bench, we are of the considered view that subsidy received from Govt. of India under Focus Market scheme cannot be considered as capital in nature and hence, we reject ground taken by the assessee.

14. In the result, appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the court on 17<sup>th</sup> September, 2021 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

**(Duvvuru RL Reddy)**

न्यायिक सदस्य / Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 17<sup>th</sup> September, 2021

Sd/-

(जी. मंजुनाथ)

**(G. Manjunatha)**

लेखा सदस्य /Accountant Member

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |