

IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA
BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER, AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER

I.T.A No. 251/Agra/2014
(ASSESSMENT YEAR: 2009-10)

M/s Hardayal Milk Products Pvt. Ltd. 318, Shambhu Nagar, Shikohabad, Firozabad. PANNo.AABCH7576E (Appellant)	Vs.	ACIT, Circle-5 Firozabad. (Respondent)
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C.O. No. 22/Agra/2017
(in I.T.A No. 251/Agra/2014)
(ASSESSMENT YEARS: 2009-10)

DCIT, -2(2)(1) Firozabad. (Appellant)	Vs.	M/s Hardayal Milk Products Pvt. Ltd. 318, Shambhu Nagar, Shikohabad, Firozabad. PANNo.AABCH7576E (Respondent)
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I.T.A No. 283/Agra/2016
(ASSESSMENT YEAR: 2010-11)

M/s Hardayal Milk Products Pvt. Ltd. 318, Shambhu Nagar, Shikohabad, Firozabad. PANNo.AABCH7576E (Appellant)	Vs.	DCIT, Circle-5 Firozabad. (Respondent)
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Appellant by	Shri R. K. Agarwal & Shri. Rahul Agarwal, Advocates.
Respondent by	Shri Waseem Arshad, Sr. DR.

Date of Hearing	10.01.2018
Date of Pronouncement	16.02.2018

ORDER

PER, A. D. JAIN, JUDICIAL MEMBER:

I.T.A No. 251/Agra/2014

This is assessee's appeal and the Department's Cross objection for Assessment Year 2009-10. The only ground which has been taken by the assessee is:

“That the Ld. CIT(A) has erred in law and facts in confirming the action of the Ld. AO of reducing the cost of asset by the amount of subsidy amounting Rs. 50,00,000/-received by the appellant by restoring to the provisions of section 43(1) of the Income Tax Act without properly appreciating the facts and circumstances of the case.”

2. The Cross-objection raised by the Department is as follows:

“That the matter may be set-aside on the issue of subsidy for consideration afresh to the file of the CIT(A) since

*neither the sanction letter nor the terms thereof have
been brought to the notice of the AO or the CIT(A). ”*

3. The facts are that in this case, assessment order had been passed u/s 143(3) vide order dated 27.12.2011 determining the assessed income at Rs.43,31,880/- as against the returned income of Rs.36,45,040/-. In the assessment order, only one addition of Rs.6,86,836/- had been made. In this regard, as discussed by the AO in the assessment order, he found that the assessee had received a subsidy of Rs.50 lacs from the Ministry of Food Processing Industries, Government of India for the setting up new Food Processing Units but this amount was not found reduced from the cost of the fixed assets on which, depreciation was claimed by the assessee. On asking the assessee to clarify as to why this subsidy amount was not reduced from the cost of the asset, it had been explained by the assessee before the AO that the amount of any subsidy received was not a payment directly or indirectly to meet any portion of the actual cost of the asset, but was intended as incentive to increase the shelf life of items and reduce the post harvest losses and, therefore, in view of the decision of the Hon'ble Supreme Court in the case of 'CIT Vs. P.J. Chemicals', (1994) 210 ITR 830, this subsidy had not been deducted from the cost of asset. However, this reply of the assessee had not been accepted by the AO, giving the following reasons:-

“1. in the reply the assessee has relied on the decisions of the Hon’ble Gujarat High Court in the case of M/s CIT Vs. Grace Paper Industries (P) Ltd. 183 ITR 591 however, the same is not applicable in instant case because this decision has been given on the issue of allow ability of deduction u/s 80J of I.T. Act. Moreover the Hon’ble Court has given its decision with regard to the subsidy granted by the government for setting up industries in backward areas and not with regard to the scheme under which the assessee has been allowed a subsidy of Rs.50 lacs. Further in the case of P.J. Chemicals Ltd. etc. 210 ITR 830 (SC), the Hon'ble Apex Court has not given any finding with regard to the scheme under which the assessee has received the subsidy of Rs.50 lacs hence, the ratio of this decision con also not be applied.

2. In the reply dated 21.11.2011, the assessee has itself accepted as under:-

The scheme will provide 25% of the cost of plant & machinery and technical civil services subject to making Rs.50 lacs in general areas and 30% upto 75 lacs in difficult areas.

This reply clearly indicate that the assessee has received the subsidy to met the cost of the plant and machinery and technical civil service therefore, the same is liable to be deducted from the cost of these items in view of the provisions of section 43(1) of IT Act, 1961 Since the subsidy is in the nature of capital subsidy and the amount of subsidy is determined by the NABARAD taking into account the investment made in the plant and machinery and it has

nexus with the investment in the plant and machinery, therefore, the depreciation will be allowed after reducing the value of subsidy out of cost of plant and machinery. Following this method the cost of plant and machinery eligible for depreciation will be reduced by an amount of Rs.50 lacs consequently the amount of depreciation claimed by the assessee will and also be reduced by an amount of Rs.6,86,836.45 being the amount calculated at the rate of 15% applicable as for Plant and Machinery used for less than 180 days and 10% in case of factory building (Technical Civil Services). Therefore, depreciation to the tune of Rs. 6,86,836/- is disallowed and added to the total income of the assessee company. ”

4. In view of the above decision, the AO had disallowed depreciation to the tune of Rs.6,86,836/- and added it to the returned income of Rs.36,45,040/- to arrive at the assessed income of Rs.43,31,380/-.

5. Against the above decision of the AO, the assessee, in the appeal before the CIT(A), had taken six grounds, as reproduced in para no. 2 of his order, disputing the decision of the AO reducing the cost of assets by the amount of subsidy of Rs.50 lacs received by the assessee by resorting to the provision of section 43(1) of the Act. Charging of interest u/s 234B, 234C & 234D had also been disputed. In support of these grounds taken in appeal, a written submission had been filed by the assessee, as follows:-

“The appellant received a capital subsidy to the tune of Rs.50,00,000/- from the government which was taken to

the Capital Reserve in the Balance Sheet as per the pronouncement in the case of P.J. Chemicals 210 ITR 830 SC. The AO while framing assessment u/s 143(3) as reduced by the amount of subsidy from the actual cost be resorting to section 43(1) as result of which depreciation on Rs.50,00,000/- was disallowed resulting in an addition of Rs. 688,366/- to the disclosed income.

The appellant had given the detailed explanation as to why the cost of fixed asset should not be reduced by the amount of capital subsidy. The appellant had also referred to the Hon'ble Supreme Court pronouncement in case of P. J. Chemicals 210 ITR 830. The appellant reiterates the submission made before the Ld. AO which are reproduced in the assessment order.

While rejecting the contention of the appellant the AO has given the following arguments.

(i) The capital subsidy scheme of P.J. Chemicals is different from the scheme under which the assessee has received the subsidy of Rs. 50,00,000/- & hence the ratio of this decision cannot be applied. Here it is humbly submitted that the argument of the Ld. AO has no base in so far as it is the substance which matters and not the name of the scheme. The basic question is as to whether the subsidy is intended to subsidize the cost of asset or the objective of the government is the benefit to the public at large.

In the case in question it is the objective of the subsidy which is of paramount importance.

The subsidy is provided because:-

- (a) It will provide potential for employment generation.*
- (b) Increase the farmer's income and export growth by reducing the pest harvest losses.*
- (c) Shall increase the shelf life of the perishable items.*
- (d) The motive of the scheme is social and. economical welfare of the villages and farmers.*

Hence, the real question is as to the character and nature of a subsidy whether it was really intended to subsidize the cost of capital asset or was intended as incentive to encourage entrepreneurs to setup the industry for meeting the aforesaid objectives.

Hence, the case of P.J. Chemicals is the ground of application of the litmus test as to whether the cost of subsidy should be reduced from the cost of capital asset or should be shown as a capital reserve In the balance sheet And by applying this litmus test it is proved beyond doubt that the subsidy should not be reduced from the cost of capital asset.

(ii) The other basis of the rejection of the contention of the appellant as relied to by the Ld. AO are the excerpts from the reply of the appellant where in it was stated as under.

The scheme will provide 25% of the cost of plant & machinery and technical civil services subject to making Rs.50,00,000/- in general areas and 30% upto

Rs.75,00,000/- in difficult areas.

The Hon'ble Apex Court has clearly laid down the fact that if quantification of subsidy is determined as percentage of a fixed capital cost it is not a payment directly or indirectly to meet any portion of the actual cost.

In the scheme in question the intention of capital subsidy is clearly the litmus test and how the subsidy should be calculated is all together is a different issue, if the subsidy is calculated on the basis of investment made in Plant & Machinery then by no stretch of imagination it can be presumed that the payment is directly or indirectly to meet any portion of the actual cost.

Here the reliance is also placed on the decision of the CIT Appeals-II ,Agra in case of Smt. Charu Agarwal where subsidy provided by State Government for putting up cost storage plant was held to' be a receipt and not to be reduced from the cost of fixed asset by resorting to the provisions of section 43(1).

The said decision of the CIT Appeals-II has also been upheld by the Agra Bench of ITAT and further this decision of the Agra Bench has been followed by CIT Appeals-II, Agra in the case of T.R. Sons Business Pvt. Ltd. Hence, the Ld. AO has no basis to reject to explanation of the appellant. The ratio of the Supreme Court pronouncement is clearly applicable in the case. Keeping in view the aforesaid submissions, it is humbly

prayed that the said addition may please be deleted. ”

6. The AO filed the following Remand Report before the Id. CIT(A):

“The assessee has taken reference of the Hon'ble Supreme Court pronouncement in case of P.J. Chemical 210 ITR 830 which is the repetition of the arguments discussed at the time of assessment wherein the assessing officer had explained fully that the citation given by the assessee was not applicable in the case of the assessee. It is assessee's own misplaced and misconceived interpretation in order to avoid incidence of taxation even after introduction of explanation 10 to section 43(1) of the I. T Act, 1951. It is pertinent to mention that explanation 10 to section 43(1) of the I.T. Act, 1961 was inserted and came into force with effect from 01.04.1995 i.e. after the pronouncement of the above referred judgment of Hon'ble Supreme Court.

The AO already considered the facts at the time of assessment wherein the assessing officer fully explained as to why the depreciation on assets on the amount of subsidy was disallowed. The reliance is also placed on a decision of Hon'ble High Court of Karnataka in ACIT Circle-2, Belgaun vs. Shree Renuka Sugars Limited Camp, Belgaun wherein it has been held that "the subsidy granted by the Government shall be reduced from the cost of the assets for calculation of depreciation" and the court answered all the substantial questions of law in the favour of revenue.

The judicial pronouncements cited & relied by the assessee are misleading & misplaced and are not applicable to the present facts of the case of the assessee. The objections of the assessee are not tenable & deserve to be dismissed.”

7. In its rejoinder to the AO’s remand report, the assessee stated as follows:

*“The Ld. AO in his Remand Report has raised two issues
(1) The citation of P.J. Chemicals Ltd. 210 ITR 830 is not applicable in the case of the assessee in so far as the facts of the case.*

(2) The pronouncement of P.J. Chemicals Ltd. is prior to the insertion of Explanation 10 to section 43(1).

The Ld. AO has nowhere substantiated as to how the scheme was qualitatively different from the underlying principal laid down in P.J. Chemicals. As already mentioned that the real question is as to the character and nature of a subsidy whether it was really intended to subsidize the cost of capital or was intended as an incentive to encourage entrepreneurship to establish industry for meeting the socio economic growth of the nation. The specified percentage of plant and machinery which is the basis for determining the subsidy is only the measure adopted under the scheme to quantify the financial aid. The fact of the matter is that the subsidy is not a payment directly or indirectly to meet any portion of the actual cost but intended as an incentive to an

entrepreneur, its qualification determined at a percentage of a fixed capital cost.

In the course of the earlier hearing your honour had observed that from the notification of the scheme it is stated that, "this scheme covers the setting up, technology up gradation, modernization of food processing in fruits and vegetables, milk products, meat, poultry, fishery, oil seeds and such other agri-horticultural sectors leading to value addition and shelf life enhancement. Your honour had observed that the setting up of an industry would tantamount to the direct or indirect subsidization of an asset coming within the explanation 10 to section 43(1). Here, the appellant most respectfully and humbly wants to state that there are two aspects in any scheme one is the objective part and the other is the method of implementation of the scheme. The objective of the scheme obviously is to enhance the shelf life of perishable food products, employment generation increasing the farmer income and export growth. The mechanism of achieving the said objective that is the implementation phase is to set up an industry, technical up gradation etc. The basis of calculation of subsidy is the percentage of cost of asset. So this case is fully covered by P. J. Chemicals Ltd. Further the Hon'ble ITAT, Agra Bench has covered the subsidy given to cold storage within the parameters of P.J. Chemicals. The scheme for subsidy of cold storage is no difference from that which is awarded to the appellant.

The copy of the scheme of subsidy of cold storage is enclosed for your ready reference. As far as the second point is concerned that the pronouncement of the P.J. Chemicals is prior to the insertion of explanation 10 to section 43(1) is not a valid argument in so far as the same has been rightly clarified by the Vishakhapatnam Bench in case of Sasisri Extractions Ltd. Vs. Assistant Commissioner of Income Tax, ITA No. 10/Vizag/2007; A.Y. 2003-04. The copy of which is enclosed herewith. The said pronouncement has been relied upon by the other tribunals in plethora of cases.

Hence, the Ld. AO has stated nothing new in his Remand Report and therefore, the addition proposed by the Ld. AO made please be reversed.”

8. The ld. CIT(A) dismissed the assessee’s appeal, observing thus:

“7. I have considered the above written submission of the Ld. AR, remand report of the AO and further rejoinder filed by the Ld. AR. I have also gone through the reasoning given by the AO in the assessment order with respect to computation of cost of asset after reducing the amount of subsidy as per the provision of section 43(1). The main dispute on the issue of deducting the subsidy to determine the cost of the asset as per provision of section 43(1) is with respect to determining the nature of the subsidy. As per the Ld. AR, the nature of subsidy received by the assessee from Ministry of Food Processing Industries, Government of India is not a payment, directly or indirectly to

meet any portion of the actual cost but was intended as an incentive to increase the shelf life of item and reduce the post harvest losses and as per him, the motive of the scheme is of social and economic welfare of the villagers / farmers. By explaining the above objective of the subsidy scheme under which, the assessee (appellant) has received Rs.50 lac, the decision of Hon'ble Supreme Court in the case of CIT Vs. P.J. Chemicals ITR (1994) 21C ITR 330 and another decision of Hon'ble Gujarat High Court in the case of CIT vs. Grace Paper Industry (P) Ltd. (1990) 183 ITR 591 have been referred and it has been submitted that the subsidy amount cannot be deducted from the cost of plant & machinery and other assets because as per the Ld, AR, it is not given to meet any portion of the actual cost of plant & machinery or any other assets either directly or indirectly. The above arguments of the Ld. AR taken during the assessment proceeding has not been accepted by the AO because the scheme under which, the subsidy was provided, it has been mentioned that the amount of subsidy would be 25% of the cost of plant & machinery and technical civil services subject to making Rs.50 lacs in general areas and 30% upto Rs.75 lacs in difficult areas. In view of his above findings, the AO concluded that the assessee (appellant) has received the subsidy to meet the cost of plant & machinery and technical services; therefore, the same is liable to be deducted from the cost of these items as per the provisions of section 43(1) of the Act.

Against the above decision of the AO, the Ld. AR has reiterated

his contention about the nature of the subsidy as it was submitted during the assessment proceeding and it has been further explained that in order to decide about the nature of subsidy, the basic question to be considered is to whether the subsidy is intended to subsidize the cost of assets or the objective of the government is to benefit the public at large. In this regard, the Ld. AR has mentioned that the subsidy is provided because it will provide potential for employment generation, increase the farmers income and export growth by reducing the post harvest losses, shall increase the shelf life of the perishable items and therefore, in his view the motive of the scheme is social and economic welfare of villages and farmers, In the written submission before me also, the Ld. AR has relied upon the decision of Hon'ble Supreme Court in case of P.J. Chemicals Ltd. (supra). He has also referred to a decision of Hon'ble CIT(A)-II Agra in case of Smt. Charu Agarwal where the subsidy provided by the State Government for putting up a cold storage plant was held to be receipt and not to be reduced from the cost of fixed assets by resorting to provisions of section 43(1). It has been further mentioned that the said decision of the CIT(A)-II, has also been upheld by the Agra Bench of ITAT and further this decision of Agra Bench has been followed by the CIT(A)-II, Agra in the case of T.R. Sons Business (P) Ltd.

Against the above submission of the Ld. AR, the AO in his remand report has contended that the decision of the Hon'ble Supreme Court in case of P.J. Chemical 210 ITR 830 is not

applicable, in the present case after insertion of Explanation 10 to section 43(1) of the Act which came into force w.e.f. 01.04.1999 i.e. after the pronouncements of the above referred judgments of Hon 'ble Supreme Court. The AO has also referred to a decision of Hon 'ble High court of Karnataka in case of ACIT Circle-2 Belgaum Vs. Sri Renuka Sugars Ltd. Belgaum wherein, it has been held that "the subsidy granted by the Government shall be reduced from the cost of the assets for calculation of depreciation".

In the rejoinder, the Ld. AR has further argued that the real question in this case is as to the character and nature of subsidy whether; it was really intended to subsidize the cost of capital or was intended as an incentive to encourage entrepreneurship to establish industry for meeting of socio economic growth of the nation. As per him, the specified percentage of plant & machinery which is the basis for determining the subsidy is only the measure adopted under the scheme to quantify the financial aid. He has further emphasized that the fact of the matter is that the subsidy is not a payment, directly or indirectly to meet any portion of the actual cost but intended as an incentive to an entrepreneur, its quantification is determined at a percentage of the fixed capital cost. With regard to Explanation 10 to section 43(1) providing for deduction from the cost of the asset of any amount received by the assessee in the form of a subsidy or grant or reimbursement (by whatever named called by the Central Government or State Government) or any other authority established under any law

or by any other person to meet the cost of asset directly or indirectly, the Ld. AR has explained that there are two aspect in any scheme, one is the objective part and the other is the method of implementation of the scheme. As per him, the objective of the scheme is to enhance the shelf life of perishable food products, employment generation, increasing the farmer income and export growth. The mechanism of achieving the said objective i.e. the implementation phase is to set an industry, technical up gradation etc. The basis of calculation of subsidy is the percentage of cost of asset and therefore, considering these facts, it has been opined by the Ld. AR that the case of the assessee is fully covered by P.J. Chemicals Ltd (supra). He has also mentioned that the Hon'ble ITAT Agra Bench has covered the subsidy given to cold storage within the parameters of decision in case of F.J. Chemicals Ltd. and in his view, the scheme for subsidy of cold storage is not different from that which is awarded to the appellant. As regards to insertion of Explanation 10 to section 43(1), after the decision of the P.J. Chemicals Ltd. the Ld. AR has referred the decision of the Hon'ble Vishakhapatnam Bench in case of Sasisri Extractions Ltd. Vs. ACIT ITA No.10/Vizag/2007 for A.Y. 2003-04 and it has been mentioned that the said pronouncements has been relied upon by the other tribunals in plethora of cases.

8. *In order to decide the above dispute, it is felt necessary to examine the scheme of subsidy of Ministry of Food Processing Industry under which, the assessee (appellant) has*

received Rs.50 lacs. On examination of this scheme, as pronounced in letter no. 1-42/2005/PC dated 20.04.2007, the following objective of the scheme as envisaged under 10th Plan has been mentioned.

"The Ministry of Food Processing Industries has been operating several plan schemes for the development of processed food sector in the country during the 10th plan. One of the schemes relates to the Technology Up gradation / Establishment / Modernization of food processing industries. This scheme covers setting up, technology up gradation modernization of food processing industries in fruits & vegetables, milk products, meat, poultry', fishery oil seeds and such other agri-horticultural sectors including food flavours and colours, oleoresins, spices, coconut, mushroom, hops etc. leading to value addition and shelf life enhancement. The implementing agencies engaged in setting up, technology, up gradation modernization of food processing industries are at present required to submit their proposal to the Ministry through State Nodal Agencies (SNA) which are State Government Department / Corporations."

Subsequently, for decentralizing this scheme in 11th Plan for Technology Up, gradation / Establishment / Modernization of food processing industries while giving a guidelines on the eligibility, scope and decentralized procedure for appraisal and disbursement of grant of financial assistance and monitoring under the Scheme for Technology Up-gradation/

Establishment/Modernization of Food Processing Industries, following objectives have been mentioned.

The food processing industry in India occupies a unique position in the Indian economy in terms of its potential for employment generation, increasing the farmers' income and export growth. The Scheme for Technology upgradation/expansion/modernization/establishment being implemented by the Ministry of Food Processing Industries (MFPI) is aimed at upgradation of processing capabilities. It has been decided to decentralise the implementation of the scheme for Technology Upgradation Establishment/ Modernisation of Food Processing Industries in the 11th Plan period ie. w.e.f. 1st April 2007 through Banks/financial institutions :o provide a thrust and wider coverage for food processing industries in the country and simultaneously decentralise the procedures for appraisal, grant of assistance and monitoring.

In the above scheme, it has also been made clear that the scheme shall provide assistance only for petting up a new plant and the maximum amount provided would be to the extent Rs. 50,00,000/- or Rs. 75,00,000/- depending upon the area where such plant is being set up and it has also been clarified that the assistance shall be provided for technical civil works including civil works for functional purposes and shall exclude boundary wall, office buildings, guest house, canteen and roads. In the annexure, certain items of civil work and machineries are specifically mentioned for which such assistance would not be

provided by the Government. From such details given in the scheme, it is quite clear that in this scheme, the intention of Govt. is to provide assistance to set up new plant with technology up gradation and in order to meet the cost of certain specialized part of the plant, the assistance was being provided not for any general part of civil construction or general machinery and hence, it is very clear that the scheme is intended to provide assistance to meet part of the cost of the specialized part of the plant. For a ready reference, the relevant part of the scheme for disbursement of assistance amount is given below:

The Scheme will provide 25% of the cost of plant & machinery and technical civil works subject to a maximum of Rs, 50 lakhs in general areas and 33% up to Rs.75 lakh in difficult areas (Jammu & Kashmir, Himachal Pradesh, Uttarakhand, Sikkim, North-Eastern States, Andaman & Nicobar Islands, Lakshadv/EEP and Integrated Tribal Development Project (ITDP) areas). Only new Plant & Machinery shall be eligible. Technical civil works include civil works for functional purposes and shall exclude boundary wall, office buildings, guest house, canteen and roads. An indicative list of ineligible items of Technical Civil Works and Plant & Machinery, additional information required in case of applications for expansion/modernization of existing units and restrictions/in-eligibility of second grant in certain cases and definition of General and Difficult Areas are provided

in Annexure-VI. The application should be made by the entrepreneur before commencement of commercial production.

List of ineligible items of Technical Civil Works and Plant & Machinery as given in Annexure IV is mentioned below:-

“Eligibility of Grant:-

- a) 25% of plant and machinery and technical civil works subject to a limit of Rs. 50 lakhs in General Areas*
- b) 33.33% of plant and machinery and technical civil works subject to a limit of Rs. 75 lakhs in Difficult Areas.*
- c) The application should be made before commencement of commercial production.*

The following is an indicative list of items that are not eligible for calculation of grant admissible under:-

(1) Technical Civil Works-

- 1. Compound wall*
- 2. Approach Road*
- 3. Administrative Office Building*
- 4. Toilets*
- 5. Labour Rest Room and quarters for workers*
- 6. Sanitation Room*

7. *Security/ Guard Room or enclosure*

8. *Consultancy Fee*

- *In short, all expenditure on account of civil works that are not related to the production or processing is excluded. Construction activities on account of labour welfare are excluded totally.*

(2) Plant and Machinery-

1. *Fuel, consumables, spares and stores are not considered*
2. *Electrical fixtures not mounted on the machine are excluded*
3. *Computers and allied office furniture are excluded*
4. *Transport vehicles are excluded*
5. *Erection, installation and Commissioning charges are excluded*
6. *Second hand/ old machines are not considered*
7. *Ali types of service charges, carriage and freight charges are excluded*
8. *Expenditure on painting of machinery are excluded*
9. *Closed Circuit TV Camera and related equipment are excluded*
10. *Consultancy Fee*

- *In short, all the expenses relating to plant and machinery that are net related to the processing or production related activities are excluded completely.*

Note: The above list is only indicative in nature and not exhaustive. The grant amount is decided on a case to case basis considering the scale of operations (plant capacity), the levels of automation and the type of processing activities and the production process/ technology involved in a particular project."

In certain cases for expansion of plant, second grant has also been envisaged. However, from the above details of the criterion provided for disbursement of grant, it is clear that this grant is provided only for plant and machinery that are related to the processing or production related activities and not for other part of the plant and machinery. From these details, it is very clear that the grant given by the Govt. Under this scheme is to meet the cost of machinery that are related to the processing or production related activities. The Ld. AR in order to show the objective of the scheme being for social and economical welfare of the villages and farmers, has only picked up certain sentence from different places of the whole scheme to justify his argument instead of analyzing the whole scheme comprehensively. After analyzing the whole scheme comprehensively, it is very clearly emerged that this scheme has been formulated mainly with the objective to provide assistance to set up new plant for the purpose of technology upgradation and modernization and for this purpose, to meet the part of cost of the plant & machinery related to the processing or production related activities, grant from the Govt, is to be provided up to maximum amount of Rs., 50,00,000/- or Rs.

75,00,000/- depending upon the area where such plant is being set up. Other objectives are incidental to the above main objective.

While placing reliance on a decision of Hon'ble ITAT Agra in case of Smt. Charu Agarwal related to subsidy provided by the State Govt. to a cold storage decided to be not deducted from the cost of plant & machinery by following the decision of P.J. Chemicals Ltd. (supra), the Ld. AR has submitted in his rejoinder that the scheme for subsidy of cold storage is not different from that which is awarded to the appellant from Food Processing Ministry. In this regard, I have gone through the Capital investment Subsidy Scheme for Construction/Expansion/Modernization of Cold Storage and Storages for Horticulture Produce as given in Circular No. 16/99- 2000 dated 05.01.2000 of NABARD. The objective of the cold storage scheme is mentioned as - improving the cold storage/other storage capacity for horticulture produce of the country and disbursement of capital investment subsidy in this scheme for construction/expansion/modernization of Cold Storage has been provided as 25% of the project cost not against meeting cost of any type of plant & machinery as is the case with Technology Up gradation/Establishment/Modernization of food processing industries scheme in the present case under appeal in which grant is provided as assistance to meet part of the cost of the specialized part of the plant that are related to the processing or production related

activities and not for other part of the plant and machinery. Therefore, it is very clear that both schemes are different. In the former scheme , the capital investment subsidy is provided to encourage investment in construction of cold storage and hence, subsidy is not any type of particular plant & machinery but just as certain percentage (25%) of the cost of project in general manner but in later type of scheme , the grant is provided for the purpose of technology up gradation of food processing industry and hence, grant is provided to meet part of the cost of the specialized part of the plant that are related to the processing or production related activities and not for other part of the plant and machinery. Therefore., decision of the Hon'ble ITAT Agra in respect of subsidy given to cold storage plant not to be deducted from the cost of the plant would not be applicable in the present case under appeal because in the instant case, grant is given to meet part of the cost of the specialized part of the plant & machinery and hence, the grant received under the scheme being consideration in this appeal, has been found to be very much liable to be reduced from the cost of the plant & machinery, as provided under the provisions of section 43(1), especially after the insertion of Explanation 10 w.e.f. 01.04.1999.

9. *With regard to reliance of the Ld. AR on the decision of the Hon'ble Supreme Court in the case of CIT vs. PJ Chemicals Ltd.(supra) in support of his argument that the subsidy amount should not be deducted from the cost of the asset as provided*

u/s 43(1), I find that the AO in his remand report, has rightly pointed out that it is assessee's own misplaced and misconceived interpretation in order to avoid incidence of taxation even after introduction of Explanation 10 to section 43(1) of the Act and as per the submission made by the AO after insertion of Explanation 10 to section 43(1).w.e.f. 01.04.1999, the judgment of the Hon'ble Supreme Court in case of P.J. Chemicals Ltd. is not applicable . In support of his above opinion, he has also referred to a decision of Hon'ble Karnataka High Court in the case of Commissioner of Income-tax, Circle -2 vs. Shree Renuka Sugars Ltd. [2012] 28 taxmann.com 268 (Kar.) in which, it has been held that "According to Explanation 10 and proviso to sub-section (1) of section 43, the subsidy amount shall be deducted in the actual cost of the asset of the assessee. Thus, the contention of the assessee that the subsidy received towards the power generation plant would not be reduced from the actual cost of the assets was not correct."

The Hon'ble Delhi High Court in the case of Steel Authority of India Ltd. vs. Commissioner of income-tax [2012] 20 taxmann.com 198 (Delhi) has also held that after insertion of Explanation 10, the decision of Hon'ble Supreme Court in the case of P.J. Chemicals would not be applicable. In this regard, the relevant portion of this decision is reproduced as under:-

It is, however, necessary to refer to and distinguish the judgment of the Supreme Court in the case of PJ Chemicals Ltd. (supra). In that case, the Government gave

subsidy under the Central Subsidy Scheme to the assesseees. The subsidy was given as an incentive for industrial growth and not for the specific purpose of meeting a portion of the cost of the assets. The subsidy was, however, quantified as or geared to a percentage of the cost. The view of the income tax authorities was that the amount of subsidy represented a portion of the cost of the asset met by the government and, therefore, depreciation was allowable only on the actual cost of the asset as reduced by the amount of the subsidy in terms of Section 43(1) of the Act. Explanation 10 to Section 43(1) of the Act was not in the income Tax Act at the time material time. The Supreme Court held that the payment of subsidy did not partake of the character of a payment intended either directly or indirectly to meet the actual cost. The ratio of this ruling is not applicable to the facts of the present case. Apparent/ Explanation 10 was introduced to ensure appropriate computation of actual cost of assets in case subsidy is received. After the introduction of Explanation 10, it is no longer possible to contend that the subsidy given by the government, by whatever name called, cannot be reduced from the actual cost of the assets in terms of Section 43(1) of the Act for the purpose of allowing depreciation,

In view of the above two decisions of the Hon'ble High Courts, now it is clear that according to Explanation 10 and proviso to sub-section (1) of section 43. the subsidy amount shall be

deducted from the actual cost of the asset of the assessee and this explanation was apparently introduced to ensure appropriate computation of actual cost of assets in case subsidy is received and after the introduction of Explanation 10, it is no longer possible to contend that the subsidy given by the; government, by whatever name called, cannot be reduced from the actual cost of the) assets in terms of Section 43(1) of the Act for the purpose of allowing depreciation. Therefore, decision of the AO in the assessment order of deducting the grant of Rs. 50,00,000;- received from the Govt. against setting up the Plant & Machinery from its cost as per section 43(1) read with Explanation 10 has been found correct, I especially in the light of the fact that the grant received by the assessee under the above mentioned scheme has been found to be specifically provided for up gradation and modernization of food processing industry to meet part of the cost of the specialized part of the plant that are related to the processing or production related % activities and not for other part of the plant and machinery. Therefore, ratio of the ruling of the Hon'ble Supreme Court in the case of CIT vs. PJ Chemicals Ltd. (supra) is not applicable to the facts of the present case. As far as decision of Hon'ble Vishakhapatnam Bench in the case of Sasisri Extractions Ltd. Vs. ACIT ITA No. 10/Vizag/2007 for A, Y. 2003-04 dated 7th January 2008 reported in (2008) 122 ITD 428 is concerned, the applicability of Explanation 10 on the provision of section 43(1) has now been analysed by two High Courts in subsequent decisions as I have

already discussed above and also, the scheme “Target 2000” considered in that decision is different than the present scheme of the Food Processing Ministry for up gradation and modernization food processing industry that is under consideration in this appeal because the scheme considered by the Hon’ble ITAT Vishakhapatnam , was intended to accelerate industrial development of the State and the incentive was given for setting up of industries in Andhra Pradesh and for the purpose of determining the amount of subsidy to be given, cost of eligible investment was taken as the basis, and nothing was specifically mentioned that it was intended to subsidize the cost of the capital asset similar to the scheme of Capital Investment Subsidy Scheme for Construction/Expansion/Modernization of Cold Storage and Storages for Horticulture produce in which also, the amount of subsidy was computed as 25% of the project cost and not against meeting cost of any type of plant & machinery, while in the present scheme under consideration in this appeal, the grant is provided for the purpose of technology up gradation of food processing industry and hence, grant provided to meet part of the cost of the specialized part of the plant that are related to the processing or production related activities and not for other part of the plant and machinery. Therefore, the facts of the present case is also different than the case decided by the Hon’ble ITAT Vishakhapatnam and this case law as referred by the Ld. AR in his rejoinder would also not be applicable in the present case.

10. After considering, the facts of the case and the rulings of

two High Courts and finding that the case laws cited by the Ld. AR are not applicable on the facts of the present case as discussed in para 8 & 9 of this order, I hold that the AO is correct in \ reducing the cost, of machinery by Rs. 50,00,000/- as per the provision of I section 43(1) and consequently, the amount of depreciation reduced by him by an amount of R.s.5,86,836.45, being the amount calculated at the rate of 15% applicable as for Plant and Machinery used for less than 180 days and 10% in case of factory building (technical civil services), has been confirmed . Accordingly, disallowance of Rs.6,86,836/- out of the depreciation claimed by the assessee(Appellant) and addition to its total income is also confirmed. Accordingly, Ground no.1 to 4 taken to dispute the deduction of grant of Rs. 50,00,000/- from the cost of the plant & machinery as per the provision of section 41(1) and also to dispute the addition of Rs. 6,86,836/- are dismissed.

11. In Ground no. 6, charging of interest u/s 234B, 234C and 234D has been disputed. No argument has been taken by the Ld. AR in his written submission. Anyway, such interest charged is consequential in nature and charged on the assessed income. In respect of charging of interest u/s 234A, 234B & 234C, the Hon'ble Supreme Court in the case of CIT Vs. Anjum M.H. Ghaswala & Ors 252 ITR 7 (2001)(SC) has already held that the interest charged under these sections are not penal in nature but they are compensatory in nature and such interests should be mandatory charged on the assessed income. Therefore, the Ground No. 6 taken, challenging the

charging of interest in the above mentioned sections is dismissed.

9. The Id. Counsel for the assessee has contended that the Id. CIT(A) has erred in law and facts in confirming the action of the AO of reducing the cost of asset by the amount of subsidy amounting to Rs.50,00,000/-received by the assessee by restoring to the provisions of section 43(1) of the Income Tax Act without properly appreciating the facts and circumstances of the case.

10. On the other hand, reiterating the Cross-objection raised, the Id. DR has contended that the matter may be set-aside on the issue of subsidy for consideration afresh to the file of the CIT(A) since neither the sanction letter nor the terms thereof have been brought to the notice of the AO or the CIT(A).

11. Apropos the Cross-objection of the Department, the Id. Counsel for the assessee has produced in Court a copy of the Sanctioned Letter dated 12.10.2007. For facility of reference, this letter is being reproduced hereunder:

Dated: 12.10.2007

To
Punjab National Bank,
Shikohabad.

Subject: Decentralisation of Plan Scheme of Technology Upgradation/Setting up/Modernisation/Expansion of Food Processing Industries Forwarding of Applications received before 31.03.2007 to banks-reg.

Sir,

The Ministry has been in consultation with your Nodal regarding the decentralization of Schemes and disbursal of grants to food processing units during the 11th Plan period as well as transferring of pending cases received during the 10th Plan period for disbursement of grants to the applicant units.

2. In that regard, I- am directed to forward herewith .the proposal of M/s Hardayal Milk Products Pvt. Ltd., Vill. Budraj, Etah Road, Shikohabad, Firozabad (UP) along with the following documents.

(i) A summary sheet of details of the applicant units and the estimated amount of eligible grant to the unit, (Annexure-I)

(ii) The relevant files of the applicant units with all the documents in original alongwith a check list of the important documents available in the file. (Annexure-II)

(iii) A check list of documents to be verified by the Bank before examination and disbursal of grant in each case is also enclosed. (Annexure-III)

3. The first installment of the grant shall be due for release/ after obtaining relevant documents from the company as per Para 4(i)(A) of the guidelines dated the 20th April 2007 issued by the Ministry (which are also available on website: www.mofpi.nic.in) i.e. on utilization of 50% of both term loan and promoter's contribution by the company. However, in place of the Agreement indicated in contribution by -the company. However, in place of the Agreement indicated Para 4 (i) (A) of the guidelines, a surety Bond for the entire amount of the grant (both installments taken together) in the enclosed prescribed format (Annexure -IV) on a non -judicial stamp paper of value not less than Rs.100/- duly notarized and executed by the proprietor of unit along with the signatures of sureties/witnesses shall be obtained by the bank which shall also be countersigned by the bank official. The 2nd installment of grant will be similarly due for release after utilization of 100% of both term loan and promoter's contribution and the first installment MFPI grant by the company as per Para 4(i)(B) of the above mentioned guidelines. The Bank may also

inspect the unit along with SNA if required, to ensure that the unit has physically come up with all the Plant & Machinery installed and TCW is complete and ready for/started commercial production.

4. The Ministry will be transferring funds to you, through your Nodal Branch, for release of the installment of grant to the concerned food processing unit as soon as this Ministry receives communication, from you confirming that all necessary documents have been received and the proposal has been appraised by the Bank as per Ministry's guidelines and the grant is due for release. You are requested to take necessary action for transfer of the grant amount to the concerned beneficiary's account immediately within 24 hours on receipt of the amount from the Ministry.

5. For any further clarification that you may require in this regard, you may contact either the Nodal officer of your Bank or Shri S.K.Lohani, Director, MFPI .. (Tel:26494032, Fax:011-26492176

Yours faithfully,
Sd/-
(Dr. Jitendra P.Dongare)
Marketing Officer
Tel: 26492078

12. A perusal of the orders passed by the AO as well as the Id. CIT(A) shows that the above letter does not find any mention in either of these orders. Therefore, the Department is correct in raising its Cross-objection. As such, in the interest of justice, the matter needs to be remitted to the file of the AO, to be decided afresh in the light of the aforesaid Sanction Letter dated 12.10.2007, in accordance with law, on affording adequate opportunity of hearing to the assessee. Ordered accordingly.

The assessee, no doubt, shall co-operate in the fresh proceedings before the AO.

All pleas available under the law shall remain so available to the assessee.

I.T.A No. 283/Agra/2016

13. This is assessee's appeal for A.Y. 2010-11, taking the following grounds:

- "1. That the Ld CIT appeals has erred In law & facts in confirming an addition of Rs 5,98,104/- on account of disallowance of depreciation u/s 43(1) derived by reduction in the cost of asset.*
- 2. That the Ld CIT appeals has erred in law & facts in confirming an addition of Rs 13043/-on account of the alleged delay of EPF a/c u/s 36(1) (va) of the IT Act 1961."*

14. The ld. CIT(A), while dismissing the assessee's appeal, observed as follows:

"5.2 During the course of hearing, before me, nothing has been shown by the assessee that the order dated 20.03.2014 passed in its case for assessment year 2009-10 has been reversed by any judicial authority. I find further that the submissions made by the assessee are same as raised in appeal for assessment year 2009-10 and adequately dealt in appellate order dated 20.03.2014 and therefore there is nothing new that has been submitted by the appellant to take a different view than taken by my Id predecessor. Thus while concurring with the reasons & findings as given in the order of my predecessor in the assessee's own case for AY 2009-10, and while following

the same for adjudicating the similar issue as involved in the instant appeal , it is therefore held that the AO has rightly disallowed the assessee's claim of depreciation against 'Factory Building' & 'Plant & Machinery' at Rs.97,742/- and Rs.5,00,362/- respectively, both totaling to Rs.5,98,104/-. Therefore the disallowance of Rs.5,98,104/- is hereby confirmed. Accordingly, the Ground No. 2 taken by the assessee is dismissed.

6. With regard to Ground No. 3 relating to disallowance of Rs.13043/- on account of delay of the EPF account, no submission has been made except that same may be decided on material available on record. I find that there is nothing available on my record to take any view in the matter except for dismissing the ground. Ground no. 3 is therefore dismissed.”

15. The matter concerning Ground No. 1, it is seen, is, essentially, mutatis mutandis, exactly similar to that pertaining to ITA No. 251/Agra/2014 and C.O. No. 22/Agra/2017 (supra) to A.Y. 2009-10. Since that matter has been remanded to the AO for fresh decision, as above, Ground No. 1 in the present appeal is also remitted to the AO, with similar directions, for decision afresh, in accordance with the decision to be taken therein.

16. Apropos Ground No. 2, since the main issue stands remanded to the AO, this ground is also similarly sent back to the AO for de novo decision in accordance with law, on providing due and adequate opportunity of hearing to the assessee.

17. In the result, both the appeals of the assessee for A.Ys. 2009-10 & 2010-11 are treated as allowed for statistical purposes, whereas the Cross-objection filed by the Department for A.Y. 20-9-10 is allowed.

Order pronounced in the open court on 16/02/2018.

Sd/-
(DR. MITHA LAL MEENA)
ACCOUNTANT MEMBER

Sd/-
(A.D. JAIN)
JUDICIAL MEMBER

Dated: 16/02/2018

AKV

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT AGRA