Form No. J(2)

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction [Income-Tax]

ORIGINAL SIDE

ITAT No. 19 of 2017
With
GA 413 of 2017

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA.

Versus

M/s. THE STATE FISHERIES DEVELOPMENT CORPORATION LTD.

BEFORE:
THE HON'BLE JUSTICE ANIRUDDHA BOSE
THE HON'BLE JUSTICE AMITABHA CHATTERJEE

Date : 14th May, 2018.

For Appellant: Ms. Smita Das Dey, Advocate
Mr. Abhratosh Majumdar, Learned Additional Advocate General

For Respondent: Mr. Avra Majumder, Advocate.

ANIRUDDHA BOSE, J.:-

1. We admit the appeal on the following point, which in our opinion, involves substantial question of law:-

> *"Whether the amount of Rs.4,60,00,000/- received in the assessment year 2006-07 by the Assessee from the State Government in the form of grant-in-aid ought to be treated as revenue receipt, on the basis of application of funds so received, which was utilized for clearing salary, Provident Fund dues and flood relief?"*

2. The Assessee in this case is a government company wholly owned by the Government of West Bengal. The assesse is engaged in business of pisciculture. The assessment year involved in this appeal is 2006-07. The assessee in the relevant previous year received Rs.4,60,00,000/- as grants-in-aid. Out of that sum Rs.3,00,00,000/- was received for payment of salary to its employees, Rs.60,00,000/- for payment of Provident Fund dues and Rs.1,00,00,000/- for the purpose of flood relief. The Assessing Officer found the same to be revenue receipt, rejecting the assessee's claim for deduction of the said sum from its income on the plea that the same constituted capital receipt. The Assessing Officer found that the fund was being applied for items which were revenue in nature. The Assessing Officer recorded in his order that such receipts were consistently treated in the past by the assesse as revenue receipt. The assessee's contention on that count, however, is that in the preceding assessment year, i.e. 2005-06 also similar claim was made by the assessee, and assessment of that year is also subject of another appeal before this Court.
3. For the subject-assessment year, the assessee failed in its appeal before the Commissioner of Appeals on this point. The assessee thereafter preferred an appeal before the Tribunal. The Tribunal, however, did not solely rely on the nature of application of the funds received through grant-in-aid and the accounting treatment which formed the basis of the finding of the Assessing Officer and the first Appellate Authority. The Tribunal

examined the character of the assessee as a Government company as well as the character of grantor, being the State Government itself, the financial status of the assessee and certain other factors. Relying on a judgment of the Delhi High Court in the case of ***CIT –vs- Handicrafts & Handlooms Export Corporation of India Ltd.*** *[(2014) 360 ITR 130 (Delhi)].* The Tribunal declined to isolate the grant received as well as its accounting treatment for the purpose of Income Tax assessment from the factual perspective in which the grant in aid was given and allowed the appeal of the assessee. The assessee, before the decision was delivered Tribunal in respect of the subject-assessment year on 16th September 2016 was successful before the Tribunal on near-identical claim for deduction in respect of the earlier assessment year. The Tribunal, in its decision in ITA 1281/Kol/2009 delivered on 19th April, 2016 had sustained the assessee's claim that grant-in-aid in that year towards provident fund dues constituted capital receipts. In the decision against which this appeal has been preferred, the Tribunal followed its earlier decision in ITA 1281/Kol/2009. We are informed that the said decision is also under appeal before a coordinate Bench of this Court. Learned counsel appearing for the parties, however, agreed to disposal of this appeal independently on merit and this appeal has been argued on the points involved at length before us. Hence, we are also addressing the point of law involved in this appeal independently.

4. The fundamental principle for distinguishing capital receipt from revenue receipt in relation to government grant has been laid down by the Supreme Court in the case of ***Sahney Steel and Press Works Ltd. Vs. CIT [(1997) 228 ITR 253 (SC)]***. That was a case involving government subsidy in the form of certain time bound incentives and facilities. These incentives and facilities included refund of sales tax on raw materials, machineries and finished goods. The Supreme Court found that the incentives and facilities under a subsidy scheme to enable the assessee to acquire new plant or machinery for expansion of manufacturing capacity or set up new industrial undertaking could constitute capital receipt. In that case, however, the scheme contemplated for refund of sales tax on purchase of machinery and raw materials, subsidy or power consumption and certain other exemptions on utilities consumed. The Supreme Court rejected the plea of the assessee for treating such facilities and incentives as capital receipt on the reasoning that such subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Three earlier authorities carrying the same reasoning were cited before us by Ms. Das Dey, learned Counsel for the Revenue. These were (i) ***Ratna Sugar Mills Co. Ltd. Vs. Commissioner of Income Tax***, being a judgment of the Allahabad High Court reported in XXXIII ITR644, (ii) ***V.S. SV. Meenakshi Achi Vs. Commissioner of Income Tax***, a judgment of the Madras High Court reported in 50 ITR 206 and (iii) the case of ***Ludhiana Central Co-op Consumers' Stores Vs. C.I.T.***, a Punjab and

Haryana High Court decision reported in 122 ITR 942. In all these authorities, the Court primarily examined the character of the receipt and held that if the receipt was to recoup the revenue expenditure, it would take the same colour and shall be deemed to be revenue receipts in the hands of the assessee.

5. In a later decision, ***C.I.T. Vs. Ponni Sugars & Chemicals Ltd. [(2008) 306 ITR 392]***, the Supreme Court examined the same question in respect of certain subsidy schemes for sugar mills. One of the features of the said scheme permitted the mill owners to realize additional price by reason of enhancement of free sale sugar quota. Such additional price had to be utilized only for repayment of loan and benefits of the scheme were available only to new units and to substantially expanded units. On these factors, the Court found the receipt to be capital in nature. The Supreme Court, in the case of ***Mepco Industries Ltd. Vs. C.I.T [(2009) 319 ITR 208 (SC)]*** had considered the ratio of ***Sahney Steel & Press Works Ltd.*** (supra) for in testing the nature of receipts in the hands of the assessee. Though the main dispute involved in ***Mepco Industries*** (supra) was whether in the order against which appeal was preferred there was a "rectifiable mistake" enabling the department to invoke Section 154 of the Act, the question of treatment of government grant in the form of different types of subsidies was considered in that case. The decision of ***Sahney Steel & Press Works Ltd.*** (supra) was also examined. While analyzing the aforesaid decision along with the case of ***Ponni Sugars & Chemicals Ltd.***

(supra), the Supreme Court observed that in each case, one has to examine the nature of the subsidy.

6. So far as assessee's case in this appeal is concerned, Rs.3,60,00,000/- was received as grant-in-aid in the relevant previous year towards salary and provident fund dues. On surface test, receipt under these heads no doubt has the attributes of revenue receipt. But there are two factors which distinguish the character of the grant-in-aid which the assesse wants to be treated as capital receipt. The said sum was not on account of any general subsidy scheme, as was in the case of ***Sahney Steel & Press Works Ltd.*** (supra). Secondly, the sum was given by the State to a wholly owned company which was facing acute cash crunch. The financial status of the company appears from the submission of the assessee's representative recorded in the order of the first Appellate Authority and there is no denial of this fact in any of the materials placed before us.

7. In the case of ***Siemens Pub. Communication Network P. Ltd. Vs. Commissioner of Income Tax and Another [(2017) 390 ITR 1(SC)***, certain sum was received by the assessee from its principal shareholder termed as "subvention payment". This sum, the assesse claimed was capital receipt. Such claim was disallowed by the Assessing Officer. The said sum was paid to the assessee company for two reasons. First was that the company was potentially sick company and that its capacity to borrow had reduced substantially leading to shortage of working capital. It was sought to be explained by the assesse to the tax authorities that its parent

company had agreed to infuse further capital by reimbursing the accumulated loss. The Appellate Authority as well as the Tribunal however found the monies received to be capital receipt. The department was successful in its appeal before the High Court. The High Court found that the financial assistance was not extended by the parent company for setting up any unit or for expansion of its existing business or acquiring any asset. On the other hand, the High Court observed that it was a case where financial aid was extended by the parent company not only to make good the loss but to see that the company is run more profitably.

8. On further appeal before the Supreme Court, the assessee was successful. The Supreme Court held :

> *"The question of law that was presented before the High Court, namely, whether subvention was capital or revenue receipt, was sought to be answered by the High Court by making a reference to two decisions of this court in* ***Sahney Steel and Press Works Ltd. v. CIT*** *and* ***CIT v. Ponni Sugars and Chemicals Limited.*** *The view expressed by this court that unless the grant-in-aid received by an assessee is utilized for acquisition of an asset, the same must be understood to be in the nature of a revenue receipt was held by the High Court to be a principle of law applicable to all situations. The aforesaid view tends*

> *to overlook the fact that in both **Ponni Sugars** (supra) and **Sahney Steel** (supra) the subsidies received were in the nature of grant-in-aid from public funds and not by way of voluntary contribution by the parent company as in the present cases. The above apart, the voluntary payments made by the parent company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment of the assessee-company. If that is so, we will have no hesitation to hold that the payments made to the assessee-company by the parent company for assessment years in question cannot be held to be revenue receipts. We also find such a view in a recent pronouncement in **CIT v. Handicrafts and Handlooms Export Corporation of India Ltd.** with which we are in respectful agreement."*

9. The concept of parent to son grant had been highlighted in the case of ***Handicrafts & Handloom Export Corporation of India Vs. Commissioner of Income Tax, Delhi-II [140 ITR 532]*** by the Delhi High Court, which was followed by the same High Court in a subsequent case, ***CIT Vs. Handicrafts & Handloom Export Corporation of India Ltd. [(2014) 360 ITR 130 (Delhi)]***. The latter authority has been referred to in

the case of ***Siemens Pub. Communication Network P. Ltd.*** (supra). In the decision of the Delhi High Court reported in ***140 ITR 532***, the assessee was given assistance by its parent company, State Trading Corporation, a public sector undertaking at seven per cent of the existing turnover and five per cent on the additional turnover. The total sum received in the previous year to the Assessment Year 1970-71 was Rs.11,70,000/-. This kind of subsidy or assistance was the subject of recurring dispute pertaining to several assessment years in the past and in this judgment it was observed by the Delhi High Court:-

> *"In all the years it is only a case of a cent. per cent holding company coming to the rescue of its subsidiary which has incurred losses and enabling it to recoup those losses and continue to carry on the business in spite of such losses. In the circumstances, what we have said in our earlier judgment in ITR Nos. 17 and 94/74 (Addl. CIT v. Handicrafts & Handloom Export Corpn. [1982] 133 ITR 590) will equally apply in regard to the assistance received by the assessee from the STC during the current year."*

10. The Delhi High Court further held :

> *"There is, in our opinion, a basic difference between grants made by a Government or from public funds*

generally to assessees in a particular line of business or trade, with a view to help them in the trade or to supplement their general revenues or trading receipts and not earmarked for any specific or particular purpose and a case of a private party agreeing to make good the losses incurred by an assessee on account of a mutual relationship that subsists between them. The former are treated as trading receipts because they reach the trader in his capacity as such and are made in order to assist him in the carrying on of the trade. The amounts with which we are concerned are different. They are not grants received from an outsider or the government on such general grounds. As found by the Tribunal, these are specific amounts paid by the STC to the assessee in order to enable the assessee, which was its subsidiary and was incurring losses year after year, to recoup those losses and to enable it to meet its liabilities. These amounts, we are of opinion, cannot form part of the trading receipts of the assessee. As stated in our order for the earlier year, the position will be clear if we consider the case of a father agreeing to recoup the losses incurred by a

> *son in his business. The amounts given by the father will be only in the nature of gifts or voluntary payments motivated by affection or personal relationship and not stemming from any business consideration. The position is similar here"*

11. The issue came up again for consideration for the assessment year 1985-86 concerning the very same assessee before the Delhi High Court, which was examined in the case reported in ***360 ITR 130***. In the relevant previous year, grant of Rs.25,00,000/- was received by the assessee. This grant was given to recoup losses incurred by the assessee. Considering the entire range of authorities on this point. The Delhi High Court held:-

> *"In the present case, Rs.25 lakhs was not paid by a third party or by a public authority but by the holding company. It was not on account of any trade or a commercial transaction between the subsidiary and holding company. The holding company was a shareholder and the shares partake of and were in the nature of capital. Share subscription money received in the hands of the respondent-assessee was a capital receipt. The intention and purpose behind the said payment was to secure and protect the capital investment made by STC Ltd. in the respondent. The payment of grant by STC and receipt*

> *thereof by the respondent was not during the course of trade or performance of trade, thus, could be categorized or classified as a gift or a capital grant and did not partake of the character of a trading receipts."*

12. As we find from these authorities, distinction has been made between the broad principles for dealing with grant-in-aid as laid down in the case of ***Sahney Steel & Press Works Ltd.*** (supra) and money extended for assistance to subsidiaries by the parent company on stand-alone basis, not as a part of any general scheme. In the case of the assessee, though it is not a grant from a parent company to a subsidiary company, the grant is from the State Government, which was in effect, hundred per cent shareholder of the assessee. Rs.3,60,00,000/- was meant for payment of staff salaries and provident fund dues. As we have already observed, these item heads may bear the label of revenue receipt on the surface, it is apparent that the actual intention of the State was to keep the company, facing acute cash crunch, floating and protecting employment in a public sector organization. There is no separate business consideration on record between the grantor, that is the State Government and the recipient thereof being the assessee. The principle of law as laid down in the case of ***Siemens Pub. Communication Network P. Ltd.*** (supra) is that voluntary payments made by the parent company to its loss making Indian subsidiary can also be understood to be payments made in order to protect

the capital investment of the assessee company. Though the grant-in-aid in this case was received from public funds, the State Government being 100% shareholder, in our opinion, its position would be similar to that of, or at par with a parent company making voluntary payments to its loss making undertaking. No other specific business consideration on the part of the State has been demonstrated before us in this appeal. The assistance extended appears to us to be measures to keep the assesse company floating, the assessee being, for all practical purposes an extended arm of the State. Though large part of the funds were applied for salary and provident fund dues, the object of extension of assistance, it was argued before us, to ensure survival of the company.

13. As regards the funds extended for flood relief, the same cannot constitute revenue receipt. Flood relief does not constitute part of business of the assessee. We accordingly answer the question in favour of the assessee and confirm the finding of the tribunal. The appeal is dismissed.

14. There shall be no order as to costs.

(ANIRUDDHA BOSE, J.)

(AMITABHA CHATTERJEE, J.)