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ITA 37 of 2018
GA 3747 of 2017

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-I, KOLKATA

Versus

SHYAM STEEL INDUSTRIES LIMITED

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

AND

The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY

Date : 7th May, 2018.

Appearance:

Mr. Debasish Chowdhury, Advocate

Mr. J.P.Khaitan, Sr. Advocate

Ms. Swapna Das, Advocate

Mr. Sanjoy Bhowmik, Advocate

Mr. Siddharth Das, Advocate.

The Court :- An interesting question is raised in this appeal as to whether a subsidy allowed by the State Government on account of power consumption, by its very nature, will make the subsidy a revenue receipt and not a capital receipt, irrespective of the purpose of the scheme under which such

incentive or subsidy is made available to a business unit. The appeal is at the instance of the Department.

There was a difference of opinion between the judicial member and the accountant member on the Appellate Tribunal. The judicial member relied on the dictum in the Supreme Court judgment reported at 228 ITR 238 (*Sahney Steel & Press Works v. CIT*). The accountant member, however, relied on a more recent decision of the Supreme Court reported at 306 ITR 392 (*CIT v. Ponni Sugars & Chemicals Ltd.*) to hold that the purpose of the grant of the subsidy would be the overwhelming consideration in ascertaining whether the subsidy or the money was to be treated as a capital receipt or as a revenue receipt. Upon the difference being referred to a referee, the assessee's point of view was accepted and the purpose of the scheme was regarded to be one for setting up a new unit or expanding an existing unit and, as such, the subsidy had to be treated as a capital receipt notwithstanding the mode and manner of the subsidy.

The issue had been decided in *Sahney Steel* where the Court was of the opinion that when a benefit was received by an assessee for the purpose of carrying on its business, it was a benefit incidental to its business and, as such, it had to be regarded as a revenue receipt. The matter was seen from a completely different perspective in *Ponni Sugars* though, at first blush, the manner in which the subsidy or the incentive was to be utilised in *Ponni Sugars* appeared to be the distinguishing feature of that case and the dictum therein not relatable to the present facts. In *Ponni Sugars*, the incentive was in reduced duty and in larger allocation for sale of sugar. Clearly, these would amount to revenue

receipts. However, the additional amount generated by a unit by virtue of the reduced duty and larger allotment for sale of sugar was required by the applicable scheme to be exclusively utilised for the purpose of repaying the term loans obtained in setting up the unit or expanding the same. The nature of treatment of the additional revenue in the hands of the assessee, thus, made it a capital receipt since the additional money went to repay the term loans obtained for setting up the unit or expanding it.

Indeed, the relevant passage from paragraph 14 of the judgment in *Ponni Sugars* would tempt the dictum rendered therein to be confined to the manner of use of the subsidy as the law as recognised by the Supreme Court is couched in the following words:

“...That test is that the character of the 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 the *purpose test*. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units...” (Emphasis supplied).

It is easy to fall for such distinguishing feature in *Ponni Sugars* and confine the test recognised therein to cases only where the quantum of incentive is used to discharge a capital debt or a term loan or some capital expenditure or the like. However, the sweep of the “purpose test” has been expanded in a recent

judgment of the Supreme Court reported at 400 ITR 279 (*CIT vs. Chaphalkar Brothers*) where the subsidy in the form of exemption from payment of entertainment duty by newly set-up multiplex theatres for a certain number of years was regarded as a capital receipt by virtue of the very nature and purpose of the subsidy.

In the present case, the terms of the scheme under which the subsidy was made available to the appellant are of some relevance. Clause B.6.1 of the scheme made it applicable “to all large scale new units and for expansion of existing units on or after July 16, 2004...” In addition, clauses B.8.4 and B.8.5 clearly indicated that certain subsidies on account of capital expenditure could not be availed of by entities opting for the incentive under the subject scheme.

It is submitted on behalf of the appellant that since the incentive under the present scheme, as would be evident from the terms thereof, was in lieu of certain other subsidies on account of capital expenditure which may have been obtained by an assessee, the real purpose of the scheme has to be seen as augmenting the capital resources by a new or expanded unit and not to allow a lower cost of the daily functioning of an existing unit.

The difference may be in degrees but the words of a scheme and the real purpose thereof have to be discerned in assessing whether the incentive or the subsidy thereunder has to be regarded as a capital receipt or a revenue receipt. There may be a scheme, for instance, that permits every entity of a certain class to lower charges for consumption of power, irrespective of the unit being a new unit or it having expanded itself. In such a scenario, the incentive

would have to be invariably regarded as a revenue receipt. However, when the scheme itself makes the incentive applicable only to new and expanding units, the fact that the incentive is in the form of a rebate by way of sales tax or concessional charges on account of use of power or a lower rate of duty being made applicable would be of little or no relevance.

When an entrepreneur sets up a business unit, particularly a manufacturing unit, or embarks on an exercise for expanding an existing unit, the entrepreneur factors in the cost of setting up the unit or the cost of its expansion and the costs to be incurred in running the unit or the expanded unit. It is the totality of the capital expenditure and the expenses to run it that are taken into account by the entrepreneur. The investment by an entrepreneur by way of capital expenditure is recovered over a period of time and has a gestation gap. If the running expenses are made cheaper by way of any subsidy or incentive and made applicable only to new units or expanded units, the realisation of the capital investment is quicker and the decision as to the quantum of capital investment is influenced thereby. That is the exact scenario in the present case where the lower operational costs by way of subsidy on consumption of power helps in the quicker realisation of the capital expenditure or the servicing the debt incurred for such purpose.

In view of the acceptance of the wider ambit of the “purpose test” in the most recent judgment of the Supreme Court cited by the parties and the scheme in this case being available only to new units and units which have undergone an expansion, the real purpose of the incentive in this case has to be

seen as a capital subsidy and has to be regarded, as such, as a capital receipt and not a revenue receipt.

Accordingly, ITA No.37 of 2018 and GA No.3747 of 2017 are dismissed by accepting the majority view of the Tribunal that the incentive or subsidy granted to the assessee under the relevant scheme has to be regarded as a capital receipt and not a revenue receipt.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)