आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VP AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.1490/Mum/2019
(**निर्धारण वर्ष /** Assessment Year: 2015-16)

DCIT-11(1)(2) GF, Room No.1 Aaykar Bhavan, M.K. Road Mumbai-400 020	**बनाम**/ Vs.	**M/s. Sangam India Ltd.** 306, 'B' Wing Dynasty Business Park J.B. Nagar, A.K. Road Andheri (E), Mumbai-400 059
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. **AACCS-0486-K**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

CO No.01/Mum/2021
(**निर्धारण वर्ष /** Assessment Year: 2015-16)

M/s. Sangam India Ltd. 306, 'B'Wing Dynasty Business Park J.B. Nagar, A.K. Road Andheri (E), Mumbai-400 059	**बनाम**/ Vs.	**DCIT-11(1)(2)** GF, Room No.1 Aaykar Bhavan, M.K. Road Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. **AACCS-0486-K**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Dharmesh Shah-Ld. AR
Revenue by	:	Shri Ajit Kumar Shrivastava-Ld. CIT-DR

सुनवाई की तारीख**/ Date of Hearing**	:	02/07/2021
घोषणा की तारीख / **Date of Pronouncement**	:	26/07/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 The revenue assails the order of learned Commissioner of Income-Tax (Appeals)-18, Mumbai, {CIT(A)} dated 26/12/2018 for Assessment Year (AY) 2015-16 on following grounds: -

(i) Whether on the facts and circumstances of the case and in law, Ld. CIT(A) erred in considering the contention of the assessee that subsidy has been offered by them as revenue receipt which is not evident from the accounts of the assessee and the audit report.

(ii) Whether on the facts and circumstances of the case and in law, Ld. CIT(A) erred in relying the case laws which are distinguishable to the instant case of the assessee. In case of CIT vs. Ponny Sugars 306 ITR392 SC, the subsidy was given in form of excise duty rebate to be used for repayment of loan taken for purchase of plant and machineries, whereas in assessee's case the issue pertains to the receipt of certain percentage as interest subsidy incentive. Revenue is placing reliance on Sahney Steel & Press Works Ltd vs CIT (SC) (1997) 228 ITR 253 and The JCIT vs. Colourman Dyechem Pvt. Ltd. (Gujarat HC)2015 ITL 1036.

(iii) Whether on the facts and circumstances of the case and in law , Ld. CIT(A) erred in giving relief to the assessee without appreciating the fact that the Finance Bill 2015 has been enacted to further enlarge the scope of the definition of 'Income' by inserting clause (xviii) to Sec. 2(24) to provide that any subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement received from the Central Government or State Government or any authority or body or agency in cash or kind shall be treated as income of the assessee.

As evident, the revenue is aggrieved by the fact that certain subsidy received by the assessee has been held by Ld. CIT(A) to be capital receipt not chargeable to tax.

1.2 The Ld. Authorized Representative for Assessee (AR), at the outset, submitted that the issue in revenue’s appeal is squarely covered in assessee’s favor by the decision of this Tribunal in assessee’s own case for AYs 2012-13 to 2014-15, ITA Nos.6197 to 6199/Mum/2017 common order dated 07/09/2020. The copy of the order has been placed on the record. Though the said fact could not be controverted, however,

Ld. CIT-DR pleaded for restoration of assessment framed by Ld. Assessing Officer (AO). In the above background, our adjudication to the subject-matter of revenue's appeal would be as given in succeeding paragraphs.

2.1 The material facts are that during assessment proceedings, it transpired that the assessee had received two subsidies viz. (i) 2.5% interest subsidy under Rajasthan Government Promotion Scheme 2003 of Rajasthan with respect to Bhilwara Unit; & (ii) interest subsidy under Technology Upgradation Fund Scheme (TUF) by Ministry of Textiles, Government of India.

2.2 These subsidies were initially offered in the return of income but the same were claimed as deduction in revised return of income. The Ld. AO noted that there was an amendment by Finance Act, 2015 in the definition of income u/s 2(24) w.e.f. 01/04/2016 by way of insertion of clause (xviii). As per the amendment all subsidies, whether revenue or capital, was to be treated as income of the assessee. However, the above subsidies were revenue in nature and therefore, the same were otherwise taxable in this year. The amendment was only further expansion of the definition of income.

2.3 The assessee defended its stand by submitting that the test to determine the character of receipt has to be with respect to the purpose for which the subsidy is given and the point of time at which the subsidy is paid, source thereof and the form of subsidy would not be relevant as per the decision of Hon'ble Supreme Court in **Ponni Sugars & Chemicals Ltd. V/s CIT (306 ITR 392)**. By applying the purpose test, the subsidies would be capital receipts and hence, not chargeable to the tax.

2.4 However, rejecting assessee's submissions, Ld. AO formed an opinion that the subsidies were revenue in nature and accordingly, added the same to the income of the assessee.

2.5 The Ld. CIT(A), relying upon appellate orders for AYs 2012-13 to 2014-15, held that the receipts were capital in nature and hence, not taxable prior to amendment which was effective only from AY 2016-17. Aggrieved, the revenue is in further appeal before us.

3. We find that Ld. CIT(A) has followed appellate orders for AYs 2012-13 to 2014-15 while adjudicating the issues. The revenue challenged the appellate orders for AYs 2012-13 to 2014-15 before this Tribunal vide ITA Nos.6197 to 6199/Mum/2017 common order dated 07/09/2020 wherein the appeals of the revenue were dismissed by the coordinate bench with the following observations: -

> 3.3. We find from the above that the ld. CIT(A) had categorically made it clear that the aforesaid subsidies were given to the assessee for promoting capacity expansion, globalization of textile trade and employment generation and would be squarely governed by the ratio decidendi laid down by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. vs. CIT reported in 306 ITR 392 and accordingly, held that the subsidies received by the assessee in the instant case would be capital receipts not chargeable to tax. We find that the ld. CIT(A) had also observed that by this treatment of subsidy as capital receipts, the assessed income would become below returned income which is permissible as the legitimate claim of the assessee should not be denied and there is no estoppel against the statute.
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> 3.4. We find that the ld. CIT(A) had duly examined the subsidy scheme of the Central and State Government and had reproduced the contents there on in his appellate order. From the perusal of the same, we find that the purpose of granting subsidy to the assessee in the instant case is for setting up of the industry in particular location. Hence, the purpose test as contemplated by the Hon'ble Supreme Court in the case of Ponni Sugars & Chemicals Ltd. vs. CIT reported in 306 ITR 392 is fully satisfied by the assessee in the instant case and accordingly, the subsidies granted thereon had been rightly considered as capital receipts by the ld. CIT(A). We find that since this issue is a legal issue, the ld. CIT(A) had rightly admitted the additional ground of appeal raised before him and had adjudicated the same in detail. This is not the case of ld. CIT(A) merely accepting to the statements of the assessee without recording his independent findings in the appellate order.
>
> 3.5. On the contrary, we find that the ld. CIT(A) having co-terminus powers with that of the Assessing Officer had duly examined the entire scheme and brought out the final nuances of the schemes in his appellate order and examined all the contents of the scheme with the its purpose of granting. After due examination of the scheme in

> detail, we find that the ld. CIT(A) had rightly treated the subsidy received by the assessee as capital receipt. Hence, we are not inclined to accept the ground of the revenue that there is violation of Rule 46A on the ground that assessee had filed additional evidence before the ld. CIT(A). It is not in dispute that the subsidy granted by the Central and State Government in the instant case are already in public domain and same cannot be construed as additional evidence filed by the assessee before the ld. CIT(A).

We find that the aforesaid decision is squarely applicable to the issue. Therefore, finding no infirmity in the impugned order, we dismiss the appeal of the revenue.

Assessee's Cross-Objections

4. The assessee has filed cross-objections pleading for dismissal of revenue's appeal. The assessee has also filed certain additional grounds in its cross-objections wherein the assessee is seeking certain further relief with respect to issues which were not contested before lower authorities. For the same, the assessee has also preferred an application under Rule-27 of the Appellate Tribunal Rules. In this application, the assessee has raised additional grounds of appeal seeking similar relief with respect to issues which were not contested before lower authorities.

Issue of Condonation of Delay

5.1 The registry has noted a delay of 633 days in the cross-objection, the condonation of which has been sought by the assessee on the strength of condonation petition which is supported by the affidavit of the director of the assessee. During hearing, Ld. AR submitted that the notice of appeal filed by the Department was received on 06/11/2019 which is evident from the acknowledgement of the appeal filed by the department. The Ld. AR further submitted that after receipt of notice, the cross-objection was filed by the assessee on 05/01/2021. However, due to inadvertent error, while filing the memorandum of cross-objection, the

date of receipt of notice was incorrectly mentioned as 14/03/2019 as a result of which the period of delay was incorrectly determined as 633 days. Considering the correct date as 06/11/2019, the period of delay was only 397 days as counted from expiry of 30 days from the date of receipt of notice which would be 05/12/2019. The Ld. AR tabulated the actual period of delay as under: -

Sl. No.	**Particulars**	**Date**	**Period of Delay**
1.	Date of Receipt of Notice of appeal filed by the Assessing Officer	06.11.2019	
2.	Due Date for filing of Cross-objection	05.12.2019	
3.	Date of filing of Cross Objection	05.01.2021	
4.	**Total Days Delay**		**397 Days**
5.	Period of Delay	05.12.2019 To 14.03.2020	100 Days
6.	Balance Period due to Covid-19 Pandemic	15.03.2020 To 05.01.2021	297 Days

5.2 Drawing attention to the condonation petition, Ld. AR submitted that delay in filing the cross-objection was on account of genuine and reasonable cause. The delay from the period 15/03/2020 to 05/01/2021, i.e. 297 days deserve to be condoned on account of the fact that the entire country was suffering from Covid-19 Pandemic. During this period, the company management and its staff were not regularly attending the office. As a result, the assessee was unable to prepare the documents and file the cross-objection in time. For the same, Ld. AR took support of the order of Hon'ble Supreme Court in suo-moto writ petition (Civil) No. 3/2020 dated 23/03/2020 which held that the period of limitation in all the proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not, shall stand extended

w.e.f.15/03/2020 till further orders. In terms of the aforesaid order of Hon'ble Supreme Court, as extended from time to time, the period from 15/03/2020 till 05/01/2021, shall stand excluded from the limitation period and hence the delay on part of the assessee in filing the cross-objection to that extent may kindly be excluded and / or the same may kindly be condoned. The Ld. AR also referred to the recent judgment dated 08/03/2021 of the Hon'ble Supreme Court in the aforesaid case wherein it has been held that the period from 15/03/2020 till 14/03/2021 shall stand excluded in computing the period of limitation for instituting proceedings, outer limits and termination of proceedings. The copy of the orders has been placed on record.

5.3 Regarding the delay of 100 days, Ld. AR submitted that the appellate order was in favor of the assessee. This order was sent to the tax consultant for further advice / necessary action. In the meantime, the department filed an appeal against appellate order. At that point of time, the regular tax consultant advised that there was no action required to be taken since the appellate order was in assessee's favor. However, later on, during March, 2020 and just before the period of Covid-19 Pandemic started, the assessee had to meet his counsel in respect of its group concern's case. At that time, he advised that a decision was rendered by Hon'ble Bombay High Court on 28/02/2020 in the case of **Sesa Goa v. JCIT (117 taxmann.com 96)** wherein the amount of education-cess paid by the assessee was held to be an allowable deduction. On further perusal of the relevant documents, it was also noted that over and above the various subsidies received and disputed in the impugned order by the Ld. Assessing Officer, even the incentives under Focus Market Scheme (FMS) Scheme were taxed as revenue receipt though the same

represented capital receipt not chargeable to tax. The counsel also brought to the notice of the respondent the decision of Hon'ble Rajasthan High Court in the case of **Pr. CIT Vs. Nitin Spinners Ltd. (2020; 116 taxmann.com 26)** which held that subsidy received under FMS was capital receipt not chargeable to tax. It was also advised that the book-profits have also not been correctly computed while determining the income of the assessee. Accordingly, the assessee was advised to file a cross-objection raising the said issues. Immediately upon receiving the advice from the counsel, the assessee requested their consultant to prepare the documents and accordingly, the cross-objection was filed before the Hon'ble Tribunal on 05/01/2021. In the said background, Ld. AR submitted that delay in filing of cross-objection was on account of genuine and reasonable cause which is duly supported by the affidavit of the director of the assessee. The Ld. AR also relied upon various judicial pronouncements including the decision of Hon'ble Bombay High Court in **Vijay Vishin Meghani V/s DCIT (ITA Nos. 493 of 2015 dated 19/09/2017)** wherein the period of delay, under similar factual matrix, was condoned. The copies of these decisions & judgments have been placed on record. The other decisions as relied upon by Ld. AR include the following: -

(i) Hon'ble Supreme Court in the case of N.Balakrishnan V/s M.Krishnamurthy (1998 t SCC 123)
(ii) Hon'ble Supreme Court in Collector, Land Acquisition V/s Mst.Katiji & Ors. (167 ITR 471)
(iii) Hon'ble Supreme Court in Ram Nath Sao alias Ram Nath Sahu and others v. Gobardhan Sao and others (AIR 2002 SC 1201)
(iv) Hon'ble Bombay High Court in Sonerao Sadashivrao Patil & anr. V/s Godawaribai w/o Laxmansingh Gahirewar & ors. (1999;(2) Mh.L.J. 272)
(v) Hon'ble Gujarat High Court in Jayvansinh N Vaghela v. ITO (2013; 40 taxmann.com 491)
(vi) Mumbai Tribunal in Angela J. Kazi v. ITO (2006; 10 SOT 139)
(vii) Chandigarh Tribunal in Emsons Organics Ltd. v. DCIT (2020; 113 taxmann.com 269)

(viii) Mumbai Tribunal in Earthmetal Electricals (P.) Ltd. v. ITO (2005; 4 SOT 484)
(ix) Mumbai Tribunal in Anand Kumar Jain V/s ITO (ITA No.4192/Mum/2012 dated 20/08/2019)
(x) Mumbai Tribunal in National Bank for Agricultural & Rural Development V/s Addl. CIT (ITA No.5310/Mum/2019 dated 30/08/2019)

5.4 The Ld. CIT-DR, on the other hand, vehemently opposed the admission of additional ground as well as condonation of delay. It was pleaded that delay was not fully explained by the assessee. It was the submission of Ld. CIT-DR that it was only after the favorable decision rendered by the Hon'ble Courts, the assessee decided to agitate the issues in the cross-objections. The Ld. CIT-DR submitted that the facts of all these issues are not available on record and therefore, the same ought not to have been admitted by the Bench. The Ld. CIT-DR also submitted that it is the duty of the assessee to explain the delay and that the discretion to condone the delay should be exercised judicially. There should be a sufficient cause for condonation of delay and the same should reflect bona-fide of the assessee, which are not present in this case. The assessee has to prove due care, attention and diligence and should demonstrate that the delay was beyond its control. For the same, Ld. CIT-DR referred to the decision of Hon'ble Madras High Court in **Madhu Dadha V/s ACIT (317 ITR 458)** to support the contention that there is a requirement of sufficient cause to explain the delay. Reliance has similarly been placed on various other judicial pronouncements.

5.5 The Ld. AR, on the other hand, submitted that the decisions as referred to by Ld. CIT-DR would not be applicable to the facts of the case. It was submitted that the decision in the case of Madhu Dadha (Supra) would be inapplicable since upon perusal of Para-8 of the decision, it could be seen that there were factual inaccuracies in the

submissions of the assessee and the assessee did not properly explain the delay. The affidavits filed by the assessee did not provide proper details and particulars of the dates and events leading to delay. However, no such facts are there in assessee's petition for condonation of delay. On the stated facts, the assessee could not have acted earlier since the decisions by Hon'ble High Courts were rendered during February, 2020. Further, the appellate order was in assessee's favour.

The decision in **JCIT v. Tractors & Farms Equipments Ltd. {104 ITD 149 (Chennai)(TM)}** as referred to by Ld. CIT-DR was sought to be distinguished in the background of the fact that in the present case, the assessee has not taken any longer time to file the appeal once he was made aware of the favourable decision rendered on 28/02/2020. The Ld. AR pleaded that a liberal construction of the limitation provisions has to be adopted in order to advance substantial justice. Similar distinction has been sought in the decision of Chandigarh Tribunal in **ACIT v. Ranbir Chemicals {114 ITD 121 (Chd)}** as well as in the decision in **CIT v. Grindlays Bank {208 ITR 700 (Cal.)}.** In the case of **J. B. Advani & Co. Ltd. v. CIT {72 ITR 395 (SC)}**, the assessee did not explain the delay for part of the period.

5.6 While distinguishing all these decisions, Ld. AR placed reliance on the decision of the Mumbai Tribunal in **Anand Kumar Jain v. ITO {ITA No.4192/Mum/2012 dated 20/08/2019}** wherein the appeal was filed after a delay of 420 days. In the said case, the issue involved was with respect to deduction u/s. 80HHC of the Act. Since the said issue was initially decided against the assessee by Hon'ble Bombay High Court in the case of Kalpataru Colours [192 taxman 435], the assessee did not file appeal against the order of Ld. CIT(A). However, subsequently, when

the Hon'ble Supreme Court in the case of Topman Exports v. CIT (342 ITR 49) reversed the said decision of the Hon'ble High Court, the assessee filed the appeal before the Hon'ble Tribunal after a delay of 420 days. In respect of the delay in filing the appeal, the assessee pleaded that the appeal was not filed earlier solely because as per the advice given by tax consultant, no fruitful purpose would have been served in view of the adverse decision of the Hon'ble Bombay High Court. The appeal was filed only due to subsequent decision of Hon'ble Apex Court reversing the decision of Hon'ble Bombay High Court. On these facts, the Hon'ble Tribunal condoned the delay stating that the delay in filing the appeal was solely due to bona-fide and genuine belief and no mala-fide intentions were involved. On similar facts, the delay was also condoned by the Hon'ble Tribunal in the case of **National Bank for Agriculture and Rural Development v. Addl. CIT {ITA No. 5310/Mum/2010 dated 30/08/2019}.**

5.7 The Ld. AR drew attention to the observations of Hon'ble Supreme Court in the case of **N. Balakrishnan v. M. Krishnamurthy (7 SCC 123)** as under: -

> "11. Rule of limitation are not meant to destroy the right of parties.
> They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.
> 12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the

Court is always deliberate. This Court has held that the words 'sufficient cause' under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749].

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

The Ld. AR submitted that even though there is a lapse on part of the litigant concerned, however, that alone is not sufficient to turn down his plea if the explanation rendered by him does not smack of mala-fides or it is not put forth as part of the dilatory strategy.

5.8 The Ld. AR also referred to the following guiding principles laid down by Hon'ble Supreme Court in **Collector, Land Acquisition v. Mst. Katiji & Ors. (167 ITR 471): -**

"It is common knowledge that this court has been making a justifiably liberal approach in matters instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common sense and pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

> 6. It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

5.9 Similar is stated to be decision of Hon'ble Bombay High Court in the case of **Vijay Vishin Meghani v. DCIT {ITXAL 493 of 2015 dated 19/09/2017}** wherein the Hon'ble Bombay High Court, while adjudicating the issue of condonation of delay of 2984 days and dealing with the principles of condoning the delay, observed as under:

> "19. Way back in the year 1979, in a decision reported in AIR 1979 SC 1666 {M/s. Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and others}, the Hon'ble Supreme Court has held that a legal advice tendered by a professional and the litigant acting upon it one way or the other could be a sufficient cause to seek condonation of delay and coupled with the other circumstances and factors for applying liberal principles and then said delay can be condoned. Eventually, an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in bona fides. These are, therefore, some of the relevant factors. Those factors should therefore necessarily go into an adjudication of the present nature."

On the strength of all these decisions as well as arguments, Ld. AR sought condonation of delay.

6. After careful consideration of factual matrix, we find that the facts as narrated before us by Ld. AR are duly supported by the sworn affidavit of the director of the assessee company. In the said affidavit, it has been confirmed that the notice of appeal filed by the department was received by the assessee on 06/11/2019 as reflected on the acknowledgement of filing of the appeal provided to the assessee. In the absence of any contrary record / evidence, the said submission is to be accepted. Counted from this date, the cross-objection was required to be filed by the assessee by 05/12/2019 as against actual filing date of

05/01/2021. Counting from this date, the period of delay would be 397 days.

7. So far as the period of 297 days (15/03/2020 to 05/01/2021) is concerned, the same is certainly the period when the whole country was in lockdown state due to adverse situation arising out of Covid-19 Pandemic. Taking cognizance of the same, Hon'ble Apex Court vide suo-moto writ petition (Civil) No. 3/2020 dated 23/03/2020 held that the period of limitation in all the proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not, shall stand extended w.e.f.15/03/2020 till further orders. In terms of the aforesaid order of Hon'ble Supreme Court, as extended from time to time, the period from 15/03/2020 till 14/03/2021 would stand excluded. Therefore, delay on part of the assessee in filing the cross-objection for that period was to be excluded / condoned beyond any doubt and no further explanation is required from the assessee in this regard.

8. So far as the period of 100 days (05/12/2019 to 14/03/2020) is concerned, we concur with Ld. AR's submissions that the favorable decisions of Hon'ble Bombay High Court and Rajasthan High Court were rendered during February-March. 2020 and they were made available only after those dates. On the basis of those decisions, the benefit accrued to the assessee. Accordingly, the assessee is claiming relief in its cross-objection (this aspect could be seen in later part of the order while adjudicating the issues on merits). The Ld. CIT-DR has cited certain decisions to oppose the condonation of delay. We find that the same has rightly been distinguished by Ld. AR and are not applicable to the facts of the case. On the other hand, the guiding principle laid down by Hon'ble Supreme Court as well as Bombay High Court in the cited

decision as enumerated in preceding paragraphs would support the assessee's case for condonation of delay. Therefore, respectfully following the same, the bench is inclined to condone this period of delay and accordingly, proceed for adjudication of the cross-objection. The delay in filing of cross-objection stands condoned and the cross-objection is admitted.

9. Grounds of Cross-Objections

9.1 The ground raised in the cross-objection read as under: -

1. On the facts and circumstances of the case, the respondent prays that deduction of Education Cess on income tax and dividend distribution tax ought to have been allowed in computing tax liability under the normal provisions of the Act.
2. On the facts and circumstances of the case, the respondent prays that Ld.CIT(A) ought to have appreciated that export incentive received under FMS scheme were not liable to tax in computing the tax liability under normal provision and under section 115JB of the Act.
3. On the facts and circumstances of the case, the respondent prays that the deduction of Interest Subsidy under TUFS and Incentive received under RIPS be allowed in computing tax liability under the provisions of Section 115JB.
4. On the facts and circumstances of the case, the respondent prays that Ld. CIT(A) ought to have appreciated that Depreciation due to change in the method to useful life was to be adjusted with General Reserve while computing tax liability under the provision of Section 115JB of the Act.
5. On the facts and circumstances of the case, the respondent prays that the Ld. CIT(A) ought to have allowed the disallowance made u/s 14A of the Act.

9.2 The Ld. AR, on the strength of various subsequent judicial pronouncements rendered by Hon'ble High Courts, submitted that the above claims are allowable to the assessee and therefore, the same may be allowed after verification by lower authorities. The Ld. AR also pleaded that there was no bar on the appellate authorities to entertain a new claim of the assessee during appellate proceedings as per the decision of Hon'ble Supreme Court in **National Thermal Power Corporation Ltd. V/s CIT (1998 229 ITR 383)** as well as the decision in **Goetz India Limited V/s CIT (284 ITR 323).** The Ld. AR submitted that

since the relief is being sought on the basis of subsequent favorable decisions, these grounds could not have been raised earlier. The Ld. CIT-DR has opposed admission of additional grounds at this stage.

9.3 We are of the considered opinion that as per the ratio of cited decisions, there is no bar on the appellate authorities to entertain new claim at the stage of appellate proceedings particularly when these grounds could not be raised earlier. For the same it would be pertinent to quote the relevant extract from the recent decision of Hon'ble Bombay High Court in **Ultratech Cement Ltd. V/s Addl. CIT (81 Taxmann.com 74; 18/04/2017)** wherein the Hon'ble Court held as under: -

> **22.** Mr.Agarwal then placed reliance upon the Full Bench decision of this Court in *Ahmedabad Electricity Co. Ltd.* v. *CIT* [1993] 199 ITR 351/66 Taxman 27. In the above case, the issue involved was whether an additional ground could be raised before the Tribunal with regard to deductibility of the sums transferred to the contingency reserve and dividend control reserve. During the proceedings before the Assessing Officer for the AY 1962-63 to 1971-72, the appellant - assessee did not claim the deductions on account of sums transferred to contingency reserve and dividend control reserve. However, when the matter was pending before the Tribunal, this Court in the case of *Amalgamated Electricity Co.Ltd.* v. *CIT* [1974] 97 ITR 334 held that the amounts transferred to contingency reserve and dividend control reserve are allowed as deductions on revenue account. It is in view of the decision of this Court in the case of *Amalgamated Electricity Co. Ltd.* (*supra*) that the assessee sought to raise additional grounds before the Tribunal. However, the Tribunal refused to grant leave to the assessee to raise such an additional ground. As there was difference of opinion between various decisions of this Court, the matter was placed before the Full Bench to resolve the controversy. The Full Bench of this Court held that the parties are allowed to raise additional grounds before the Tribunal so long as they arise from the subject matter of the proceedings and not necessarily from the subject matter raised in the memo of appeal. The reliance was also placed upon the decision of the Apex Court in *Jute Corpn. of India Ltd.* v. *CIT* [1991] 187 ITR 688/[1990] 53 Taxman 85 wherein the Apex Court permitted the appellant to raise an additional ground for the first time before the appellate authority claiming deduction of purchase tax liability because the same had become liable to payment subsequent to the assessment order. The Full Bench observed that the Apex Court in *Jute Corpn. of India Ltd.* (*supra*) made reference to the decision of the Apex Court in *Addl. CIT* v. *Gurjargravures (P.) Ltd.* [1978] 111 ITR 1, and held that it does not prohibit the raising of an additional ground before the appellate authority, when the ground so raised could not have been raised before the Assessing Officer or the ground now becomes available in view of changed circumstances such as a decision of a Court allowing a particular deduction.

23. Therefore, before an additional ground is allowed to be raised, the appellate authority must be satisfied that the ground raised could not have been raised earlier for good reasons. The underlying basis for allowing the raising the additional ground in the case of *Ahmedabad Electricity Co. Ltd.* (*supra*) was the subsequent decision rendered by this Court in *Amalgamated Electricity Co. Ltd.* (*supra*) when appeal was pending. As held by the subsequent decisions of the Apex Court in *National Thermal Power Corpn. Ltd.* (*supra*), a judicial decision when an appeal is pending will entitle raising of additional ground.

24. In any view of the matter, the aforesaid decision does not deal with the situation which arises for consideration in this case viz. relying upon the evidence on record for a subsequent assessment year to hold that the assessee is entitled to a benefit of deduction u/s 80IA of the Act for an earlier assessment year. A deduction under Chapter VIA of the Act under which Section 80IA of the Act falls would depend, as pointed out above, upon the satisfaction of the facts necessary for claiming a deduction. The allowing of a deduction in a subsequent year's assessment order cannot determine the facts as existing in the earlier assessment year, such as in this case so as to allow the deduction.

25. In fact, the issue with regard to the raising of new grounds in the absence of any evidence on record is no longer *res integra* in view of decision of the Apex Court in *Gurjargravures (P.) Ltd.* (*supra*). In the above case, it has been held that an additional ground cannot be raised before the appellate Authority when no claim for a particular deduction was made before the original authority nor was there any material on record to support such a claim. Further the Court held that merely by allowing the deduction for a subsequent assessment year, it could not be held that conditions for availing the deduction in the subject assessment were also satisfied. In the present facts also, the claim for deduction under Section 80IA of the Act was not made before the Assessing Officer or the CIT(A) but was made for the first time only before the Tribunal nor was there any evidence in support of the claim for the subject assessment year on record. Thus it stands covered by the above decision in *Gurjargravures (P.) Ltd.* (*supra*). The aforesaid decision of the Apex Court was subject matter of consideration in *Jute Corporation of India Ltd.(supra)* wherein the Court while distinguishing *Gurjargravures (P.) Ltd.* (*supra*) held that the additional ground could also be raised before the appellate Authority if such ground could not have been raised at the earlier stage i.e. when the return of income was filed. This is only when the assessee is able to satisfy the appellate Authority that the ground now raised was bona fide and the same could not have been raised earlier for good reasons. In such cases, the raising of additional ground could be allowed. In this case, there is nothing on record to indicate as to what was the reason which prevented the appellant assessee from raising a claim for deduction under Section 80IA of the Act for subject assessment year during the proceedings before the Assessing Officer and the CIT(A). Therefore, in the above facts , the view taken by the Tribunal in not allowing the appellant to raise additional ground in appeal is in line with the decision of the Apex Court in *Gurjargravures Pvt. Ltd.* (*supra*), *National Thermal Power Corpn. Ltd.* (*supra*) and *Jute Corporation of India Ltd.*

26. None of the decisions cited by the appellant would render the decision of the Supreme Court in *Gurjargravures Pvt. Ltd.* (*supra*), read with *Jute Corpn. of India Ltd.* and *National Thermal Power Corpn. Ltd.* (*supra*) inapplicable to the present facts.

27. There can be no dispute that whether or not to allow an additional ground to be raised before the appellate authority is to be decided by the appellate authority in

exercise of its discretion considering the facts and circumstances of the case before it. Where only a pure question of law arises from facts which are already on record, then there is no reason why the appellate authority should not consider the question of law so as to determine the correct tax liability of an assessee in accordance with law. However, where evidence is to be examined and that is not on record, then it will be considered only if the parties seeking to raise the additional ground satisfies the authority concerned that for good and sufficient reasons, the ground could not be raised before the lower authorities. In the present facts, no such ground has been made out by the assessee before the Tribunal. In the present facts, as pointed out above and being reiterated once more, the additional ground, which is raised, is not a pure question of law, but would depend upon the satisfaction of the authority as to the facts existing in the subject assessment year for allowing the benefit of Section 80IA of the Act. The additional ground is being raised for the first time before the Tribunal without relevant evidence being on record.

28. In the above view, the substantial question of law is answered in the negative i.e. in favour of the respondent-revenue and against the appellant-assessee.

Upon combined reading of para-22 & 23, it could be gathered that there was no prohibition on raising of an additional ground before the appellate authority, when the ground so raised could not have been raised before the Assessing Officer and the ground now becomes available in view of changed circumstances such as a decision of a Court allowing a particular deduction. Respectfully following the same, the additional grounds are admitted and adjudicated on merits in succeeding paragraphs.

Adjudication on Merits

10. Ground No.1 : Deduction of Education Cess on income tax and dividend distribution tax while computing tax liability under the normal provisions of the Act.

10.1 The Ld. AR submitted that the assessee has paid cess on Income Tax and dividend distribution tax on the dividend so distributed during the year which is an allowable deduction as per the decision of Hon'ble Bombay High Court in the case of **Sesa Goa Ltd. Vs. JCIT {117 Taxmann.com 96}.** In this case, it has been held that held that while the

income tax is not allowable as deduction in view of Sec. 40(a)(ii) of the Act, the expression 'Cess' cannot be read into the said provisions and hence the amount of education cess and higher and secondary education cess are allowable as deduction in computing the income of the assessee. An identical view is stated to have been taken by Tribunal in various decisions, following the same.

10.2 We concur that this issue is covered by the cited decision of jurisdictional High Court. Therefore, Ld. AO is directed to verify the claim of the assessee and allow the deduction in terms of the cited decision. This ground stand allowed for statistical purposes.

11. Ground No.2 : Exclusion of export-incentive received under FMS scheme not liable to tax in computing the tax liability under normal provision and under section 115JB of the Act.

11.1 The Ld. AR has submitted that the assessee has received export incentives under the Focus Market Scheme (FMS) issued by Ministry Of Commerce & Industries, Directorate General of Foreign Trade. The copy of the said scheme has been enclosed in the paper-book. The Ld. AR submitted that the scheme was floated with the objective to off-set high freight cost and other externalities to select international market with a view to enhance India's export competitiveness in these countries. The exporters were therefore, entitled to duty credit equivalent to 3% of the F.O.B. value of exports. It is submitted that the said receipt is in the nature of capital receipt and that the same cannot be brought to tax as income of the assessee as per the decision of **Hon'ble Rajasthan High Court in the case of PCIT v. Nitin Spinners Ltd.(2020; 116 taxmann.com 26).** The copy of the decision has been placed on record.

11.2 The Ld. AR further submitted that the receipts being capital in nature, would also not be taxed as part of the book-profits while computing tax u/s 115JB of the Act as per various decisions of the Tribunal, few of which are as follows: -

(i) ITO v. Su-raj Jewellery (India) Ltd. [2008] [21 SOT 79 (Mum.)] (Para 12 of decision) [Page 197-202 of PB No. 2]
(ii) Shivalik Venture (P.) Ltd. v. DCIT [2015] [60 taxmann.com 314 (Mum.)] (Para 28 of decision) [Page 203-214 of PB No. 2]
(iii) DCIT v. Degree Orchards Pvt. Ltd [ITA No. 4613/Mum/2016 & CO No. 166/Mum/2018] dated 08.08.2018. (Para 14 of decision) [Page 215-223 of PB No. 2]
(iv) ITO v. Frigsales (India) Ltd. [2005] [4 SOT 376] (Para 3 of decision) [Page 224-226 of PB No. 2]

11.3 We concur with the submissions that the aforesaid decisions are squarely applicable to the facts of the case. Therefore, we direct Ld. AO to verify the claim and allow deduction thereof while computing income under normal provisions as well as while computing book-profits u/s 115JB of the Act. The ground stand allowed for statistical purposes.

12. Ground No.3 : Adjustment of Interest Subsidy received under TUFS and Incentive received under RIPS u/s 115JB

12.1 By way of this ground, the assessee has prayed for exclusion of the interest subsidy received under Rajasthan Government Promotion Scheme, 2003 and under Technology Up-gradation Fund Scheme (TUFS) while computing the book-profits u/s. 115JB of the Act. It has been submitted by Ld. AR that since these subsidies are in the nature of capital receipt and therefore the same would be excludible from computation of Book-Profits u/s 115JB in terms of various decisions rendered by Tribunal as cited for ground no.2.

12.2 We find that in department's appeals, these receipts are held to be capital receipts not chargeable to tax under normal provisions. It is the

submission of Ld. AO that the same would be excludible while computing Book Profits u/s 115JB also as per the various decisions of Tribunal. Accordingly, Ld. AO is directed to verify the claim and allow the same in terms of the cited decisions while adjudicating the claim of the assessee. This ground stand allowed for statistical purposes.

13. Ground No.4 : Adjustment of depreciation due to change in the method of useful life under with General Reserve while computing tax liability under the provision of Section 115JB of the Act.

13.1 In this ground, the assessee has prayed that while computing the book profits, deduction should be granted on account of depreciation due to change in the method of useful life which was adjusted against general reserves. It has been submitted that pursuant to the introduction of Companies Act, 2013 in place of the erstwhile Companies Act, 1956, the assessee was required to re-compute the quantum of depreciation and the written down value of the various assets in accordance with the Companies Act, 2013. Upon re-computation of written down value (WDV) of the assets as per Companies Act, 2013, the excess amount of WDV was adjusted against the general reserves in the balance sheet of the assessee (as evident from assessee's balance sheet on record). The perusal of Note No.2 of the Balance Sheet (Page 11 of the paper-book) would show that depreciation impact due to change in the method of useful lives amounting to Rs.182 Lacs was adjusted against the general reserves. The method of calculating the depreciation is also described in the significant accounting policies in the Balance Sheet of the company. It was submitted by Ld. AR that depreciation allowable under the Act was adjusted against the general reserve as against charging the same against the profits of the company and therefore, book-profits u/s 115JB

ought to have been computed after taking into the account the depreciation so adjusted against the general reserves in the Balance Sheet. For the same, Ld. AR referred to the decision of Hon'ble Delhi High Court in the case of **CIT v. Sain Processing & Wvg. Mills (P) Ltd. {325 ITR 565 (Del)}** wherein the Hon'ble Court has allowed current year's depreciation, though not charged to profit and loss account but disclosed in the notes to accounts. Similar is stated to be ratio of Kolkata Tribunal in the case of **Bata India Ltd. v. DCIT (180 ITD 464).** The copies of the decisions have been placed on record.

13.2 We find strength in the aforesaid arguments of Ld. AR. Therefore, we direct Ld. AO to verify the facts and allow the claim as per law in terms of cited decisions. This ground stand allowed for statistical purposes.

14. Ground No.5 : Disallowance u/s 14A

14.1 Since the assessee had made investments during the year, Ld. AO opined that disallowance u/s Sec.14A would be attracted. The assessee had not earned any exempt income during the year. It was also submitted that no expenditure was incurred to earn any exempt income. However, Ld. AO worked out aggregate disallowance of Rs.4.01 Lacs in terms of Rule 8D which include interest disallowance u/r 8D(2)(ii) for Rs.0.59 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.3.42 Lacs. Though the assessee has not agitated this issue before Ld. CIT(A), however, the assessee has assailed this disallowance before us.

14.2 We find that now it is settled law that in case no exempt income is earned by the assessee during the year, then no disallowance u/s 14A could be made. Therefore, we direct Ld. AO to verify that the assessee has not earned any exempt dividend income during the year. If so, the

disallowance shall stand deleted. This ground stand allowed for statistical purposes.

Conclusion

15. The revenue's appeal stand dismissed whereas the assessee's appeal stands partly allowed for statistical purposes.

Order pronounced on 26th July, 2021.

Sd/-	*Sd/-*
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
उपाध्यक्ष **/ Vice President**	लेखा सदस्य **/ Accountant Member**

मुंबई Mumbai; दिनांक Dated : 26/07/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai.**