IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DLEHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No. 3931/Del/2018
Assessment Year: 2013-14

Modern Papers, B-95, Wazirpur Industrial Area, Delhi.	**vs.**	**Income-tax Officer, Ward 34(3), New Delhi**
PAN : AAFQM2930H (Appellant)		(Respondent)

Appellant by : Sh. S.S. Nagar, C.A.
Respondent by: Sh. Sohail Malik, Sr. DR

Date of hearing: 31/03/2021
Date of order : 18/06/2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 19.03.2018 passed by the learned Commissioner of Income Tax (Appeals)-12, New Delhi ("Ld. CIT(A)") for the assessment year 2013-14, Modern Papers ("the assessee") filed this appeal.

2. Brief facts of the case are that the assessee is engaged in the business of Agro Chemicals and set up a manufacturing unit in the State of Jammu & Kashmir, which is notified area, entitling the assessee all the benefits of Excise Duty Refund in accordance with the Excise Notification

Nos. 56 & 57 of 2002 dated 14.11.2002 issued by the Central Excise Department and in accordance with the schemes/Policies of the Government of India, Ministry of Commerce and Industries. During the financial year 2012-13 relevant to assessment year 2013-14, the assessee received an excise subsidy amounting to Rs.14,55,88,357/-. The assessee filed their return of income for the assessment year 2013-14 on 30.11.2013 declaring the taxable income of Rs.10,08,580/- where under the assessee had offered the excise subsidy of Rs.14,55,88,357/- also. Subsequently, in view of the decisions of Hon'ble Supreme Court in the case of Poni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC) and Shree Balaji Alloys vs. CIT, 287 CTR 459, the Excise Subsidy has to be characterized as capital receipt under the "New Industrial Policy and Other Concessions Scheme" dated 14.06.2002 in the State of Jammu & Kashmir and therefore, during the course of assessment proceedings, the assessee filed a letter dated 01.02.2016 and made certain submissions in that respect on 28.11.2016, praying for the admission of the claim of assessee to treat the Excise Refund as Capital Receipts and non-taxable.

3. The Assessing Officer, however, recorded that in view of the provisions of section 139(5) of the Income-tax Act ("the Act"), in the absence of any revised return, no claim of assessee could be considered by way of a simple letter. The Assessing Officer then relied on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT, 284 ITR 323 (SC). Assessing Officer accordingly refused to consider the claim of assessee to treat the Excise Subsidy as capital receipt instead of Revenue Receipts though the assessee offered the same to tax under the mistaken impression.

4. When the assessee preferred appeal before the CIT(A), the CIT(A) referred to the observations of Hon'ble Supreme Court in the case of Goetze (India) (supra) and held that the Assessing Officer was justified in rejecting the claim of assessee to treat the Excise Refund as capital receipts which was declared as Revenue Receipt by the assessee in their return of income in view of the decision of Hon'ble Supreme Court in the case of Goetze (India)(supra). According to CIT(A) also, the decision of Hon'ble Supreme Court is applicable and both the Assessing Officer and CIT(A) have no jurisdiction to consider the modification of the claim of assessee in the absence of any revised return u/s. 139(5) of the Act whereas no such bar in so far as Income-tax Appellate Tribunal is concerned. In such circumstances, the CIT(A) also refused to consider the claim of assessee and dismissed the appeal.

5. Aggrieved by such an order, the assessee preferred this appeal originally stating that to allow the additional claim of assessee by treating Excise Duty Refund is within the power of Income-tax Appellate Tribunal. Subsequently, the assessee, however, filed additional ground preferring the claim for deduction of education cess in computing the tax liability also.

6. So far as admission of additional ground is concerned, the law is fairly settled in view of decision of Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. vs. CIT, 187 ITR 688 (SC) and National Thermal Power Co. Ltd. vs. CIT, 229 ITR(SC) and other catena of decisions from various authorities, wherein it is held that if consideration of additional grounds does not require any additional material and such additional grounds could be adjudicated with reference to the material

already available on record, it would be just and proper to entertain the additional ground for adjudication, as under the Act all the endeavour of the authorities should be to determine the just tax liability of the assessee. In this case, the facts are admitted and are not in dispute. Hence, we admit the additional ground for adjudication.

7. It could be seen from the orders of the authorities below that both the authorities below felt helpless to consider the claim of assessee preferred by way of a letter in the absence of any revised return in view of the decision of Hon'ble Supreme Court in the case of Goetze (India)(supra). Observations of Hon'ble Supreme Court are extracted by the CIT(A) in his order and they clearly exclude the Income-tax Appellate Tribunal from the bar to consider the claim of assessee in the absence of revised return, u/s. 254 of the Act. It is, therefore, clear that the duty of the authorities under the Act is to determine the just tax liability of the assessee without being deterred by any technicalities and in view of the decision of Hon'ble Supreme Court in Goetze (India), the Tribunal is free to consider such claims u/s. 254 of the Act. Learned AR of the assessee has also placed strong reliance on the decision of coordinate Bench of this Tribunal in the case of M/s. Crystal Crop Protection (P) Ltd. vs. DCIT dated 19.12.2019 (ITA No. 1539/Del/2016), wherein the identical claims of assessee stood allowed by the Tribunal.

8. In this matter, there is no dispute on the amount of Excise Duty refund. Fact of assessee's unit being located in the notified area entitling the assessee to the benefits of Excise Duty Refund in accordance with Excise Notification Nos. 56 & 57/2002 issued by the Central Excise Department under the Industrial Policy of the Government of India,

Ministry of Commerce and Industries, is also not in dispute at either of the stages before of authorities below or before us. The only dispute centres round the admissibility or otherwise of assessee's subsequent claim for treatment of Excise Duty Refund as capital in nature without filing any revised return. This issue is found squarely covered in favour of the assessee by the order of Co-ordinate Bench of This Tribunal in the case of M/s. Crystal Crop Protection (P) Ltd. vs. DCIT (supra), as rightly argued by the ld. Counsel for the assessee,where the identical claims of assessee for treating the Excise Duty Refund as capital receipt and deduction of Education cess stand allowed in the similar set of facts. Observations and findings reached by Coordinate Bench read as under :

8. Heard the arguments of both the parties and perused the material available on record.

9. In the case of Jute Corporation of India Ltd. Vs CIT vide order dated 04.09.1990, 1991 AIR 241 held that the Hon'ble Apex Court while adjudicating on the issue of additional ground held that the declaration of law is clear that the power of the Appellate Assistant Commissioner is coterminus with that of the Income Tax Officer. If that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitation if any prescribed by the statutory provisions. In the absence of any statutory provisions to the contrary the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter.

10. The Hon'ble Apex Court has also held that if the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with

law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rules can be laid down for this purpose.

11. The similar proposition has reiterated by the Hon'ble Apex Court while dealing with the similar issue in the case National Thermal Power Co. Ltd. Vs CIT 229 ITR 383. The Apex Court reiterated that

> *"6. In the case of Jute Corporation of India Ltd. v. C.I.T. this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."*

12. While dealing with the case of NTPC, the Hon'ble Apex Court enunciated that it would not be proper if the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) and it amounts to taking too narrow a view of the powers of the Appellate Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Thus, we find that the Courts have always upheld the powers of the Tribunal or rather directed the Tribunals to assess the correct tax liability of the assessees. In case the assessee has wrongly or owing to lack of knowledge pays tax on an item of amount which is not taxable in accordance with the provisions of the Income

Tax Act, the assessee would have every right to pray for right taxation of his taxable income.

13. Thus, it can be said that the claim of the assessee has to be considered based on the fact that whether the amounts in question or taxable or not, notwithstanding the fact that the assessee has suo-moto offered the amounts to taxation already. For determination of the issue whether the Assessing Officer or the Tribunal empowered to consider the plea of the assessee, the provisions of the Act are examined.

14. Year-1989 -- The provision sub-section (3) was substituted by the following provision by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1st April 1989, which read as follows "(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him on the basis of such assessment."

15. On perusal of the above provision, it is noted the Legislature specifically excluded the A.O.'s power to determine sum 'refundable' to the assessee on completion of assessment under sub-section (3) of Section 143 of the Act. The intention of the Legislature in introducing amended Section 143(3) was explained by the CBDT in Circular No. 549 dated 31.10.1989 wherein the Board stated that under the amended provisions, the Assessing Officer in an assessment order passed under section 143(3) cannot assess income at a figure lower than the returned income, nor can loss be assessed at a figure higher than the returned, and therefore no tax paid with reference to the returned income can now be refunded to the assessee on completion of regular assessment.

16. Year 1998 -- The above provision was later on substituted by the Finance (No.2) Act of 1998 and the power to determine 'sum refundable' to the assessee by the Assessing Officers in the proceedings u/s 143(3) was re-instated by the Legislature. The relevant provision, as it stands now reads as under:

> *"(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he*

has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment."

17. The CBDT Circular No. 772 dtd. 23.12.1998-- explaining the above substituted provision of Section 143(3) explicitly stated that under the erstwhile provisions, there was no provision to issue refund and the Assessing Officer was only empowered to determine the sum payable by the assessee, but under the amended provisions the A.O. is empowered to provide for determination of sum payable by the assessee as well as the refund of any amount due to him.

18. On harmonious reading of these provisions & after giving due consideration of the legislative history of Section 143(3) and the judgment of the Hon'ble Calcutta High Court in the case of CIT Vs Britannia Industries Ltd in ITA No. 03/2013 vide order dated 13.07.2017 held that even if it (accepting the fresh claim of the assessee) results in an assessment below the returned income and consequently refund arises, it is valid as per law.

19. The Hon'ble High Court has also held that there is no conflict between the Gurjargravures Private Ltd. and Goetze (India) Ltd. In the former a claim for exemption was for the first time put up before the Appellate Assistant Commissioner who rejected the claim as not made before the I.T.O. This rejection was set aside by the Tribunal with direction upon the Appellate Assistant Commissioner to entertain the question of relief under section 84, claimed by the assessee in that case. The Supreme Court held that it was not competent for the Tribunal to have done so. The distinction between the two authorities eliminating any conflict is that in Gurjargravures Private Ltd. the competence of the Tribunal to direct the Appellate Assistant Commissioner to entertain a claim not made before the I.T.O was found to be lacking. In Goetze (India) Ltd. the Supreme Court held that the assessing Authority's power was limited but not that of the Tribunal in the context of dealing with a claim of the assessee therein not put forward before the Assessing Officer. In Gurjargravures Private Ltd. (supra) the Tribunal itself did not consider to allow the claim for relief.

20. Further, the CBDT Circular No. 14(XL-35 dated 11.04.1955) wherein it is held as under:

"3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a tax payer

where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the ITA No.679/Kol/2016 Smt. Sharmila Kumar, AY- 2011-12 department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessees on whom it is imposed by law, officers should"

21. Further, we also note that the relief sought cannot be refused merely because the assessee has omitted to claim the relief as held by the Hon'ble Supreme Court in Anchor Pressings P. ltd. Vs. CIT 161 ITR 159. Hence, keeping in view the entire facts on record, the judicial pronouncements of the Hon'ble Apex Court on the issue of allowability of the claim, we hereby hold that the assessee is eligible to raise the issue at appellate levels.

22. Having said so, the issue whether the Excise Duty subsidy and interest subsidy can be treated as capital receipt is examined. The similar subsidy has been allowed as capital receipt and also the issue of computation of profits u/s 115JB has been examined by the Co-ordinate Bench of Tribunal in ITA No. 3837/Del/2016 in the case of M/s DhanukaAgritech Ltd. wherein the appeal of the assessee is allowed. The same is squarely applicable to the facts of the instant case. Further, the matter stands squarely covered by the order of the Hon'ble Jammu & Kashmir High Court in the case of Shri Balaji Alloys Vs CIT 333 ITR 335. The snippets of the order of the Hon'ble High Court and the decision of the Hon'ble Apex Court on the issue is as under:

"The assessee, pursuant to the New Industrial Policy announced for the State of J&K, received excise refund and interest subsidy, etc which it claimed to be a capital receipt. In the alternative, it was claimed that the same was eligible for deduction u/s 80-IB. The AO, CIT (A) and Tribunal rejected the claim and held the receipts to be revenue on the ground that the subsidy (i) was for established industry and not to set up a new one, (ii) it was available after commercial production, (iii) it was recurring in nature, (iv) it was not for purchasing capital assets and (v) it was for running the business profitably. On appeal by the assessee, the High Court (333 ITR 335) reversed the lower authorities and held as follows:

> *(i) The ratio of Sahney Steel 228 ITR 253 (SC), Ponni Sugars 306 ITR 392 (SC) and Mepco Industries 319 ITR 208 (SC) is that to determine whether incentives & subsidies are revenue or capital receipts, the purpose underlying the incentives is the determinative test. If the object of the subsidy scheme is to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the subsidy scheme is to enable the assessee to set up a new unit*

or to expand the existing unit then the receipt of the subsidy was on capital account. It is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy is given is irrelevant;

ii) On facts, the object of the subsidy scheme was (a) to accelerate industrial development in J&K and (b) generate employment in J&K. Such incentives, designed to achieve a public purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone. It cannot be construed as mere production and trade Incentives;

(iii) The fact that the incentives were available only after commencement of commercial production cannot be viewed in isolation. The other factors which weighed with the Tribunal are also not decisive to determine the character of the incentive subsidies in view of the stated objects of the subsidy scheme;

(iv) Question whether the subsidy receipts are eligible u/s 80- IB not decided."

23. On appeal by the department to the Supreme Court held dismissing the appeal:

"The issue raised in these appeals is covered against the Revenue by the decision of this Court in "Commissioner of Income Tax, Madras Vs. Ponni Sugars and Chemicals Ltd.", reported in (2008) 9 SCC 337, or in the alternate, in "Commissioner of Income Tax Vs. M/s Meghalaya Steels Ltd.", reported in (2016) 3 SCALE 192 (383 ITR 217 (SC)). Therefore, for the aforesaid reasons given above, the revenue's ground of appeal is dismissed."

24. The appeal of the assessee on the ground of Excise Duty subsidy and interest subsidy as capital receipt is hereby allowed.

25. Regarding the claim of education cess as an allowable expenditure, we find that the CBDT vide Circular No. 91/58/66 – ITJ(19) clarified as under:

"Interpretation of provisions of Section 40(a)(ii) of the I.T Act – clarification regarding.

Section 40(a)(ii) – Recently a case has come to the notice of the Board where the ITO has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of Section 10(4) of the old Act and Section 40(a)(ii) of the new Act.

2. The view of the ITO is not correct. Clause 40(a)(ii) of the IT Bill, 1961 as introduced in the Parliament stood as under: "(a) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the ITOs so that further litigation on this account may be avoided."

26. The similar issue of allowability of cess u/s 37 has been examined by the Co-ordinate Bench of ITAT in ITA No. 685/Cal./2014 wherein the amount of the cess paid has been held to be an allowable deduction.

27. Further, we find that the Hon'ble High Court of Judicature for Rajasthan at Jaipur in ITA No. 52/2018 in the case of Chambal Fertilizers and Chemicals Ltd. held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is acceptable. In that case, the Hon'ble High Court held that there is difference between the cess and tax and cess cannot be equated with the cess. Hence, keeping in view the provisions of the Act, Circular of the CBDT and judicial pronouncements, we hereby hold that the assessee is eligible to claim the deduction of the 'cess' as per the provisions of Section 37 of the Income Tax Act."

9. We find nothing on record on behalf of the Department to take a different view. Therefore, to preserve the consistency in view, as approved by the Hon'ble Supreme Court in the case of Radhasoami Satsang v.CIT [1992] 193 ITR 321, and respectfully following the view taken by coordinate Bench, we allow the claims of assessee.

10. In the result, the appeal is allowed.

Order pronounced in the open court on 18/06/2021

Sd/-	Sd/-
(PRASHANT MAHARISHI)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 18/06/2021
'aks'

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

Assistant Registrar
ITAT New Delhi