Jcit, Spl. Range 23 vs Dalmia Cement (Bharat) Ltd. on 8 July, 2005

Equivalent citations: (2006)99TTJ(DELHI)1109

ORDER

S.C. Tiwari, Accountant Member

1. These two appeals have been filed by the revenue on 1.3.1999 and 7.8.2000 against the orders of the ld. CIT (Appeals)-XXI and CIT (Appeals)-II, New Delhi dated 24.12.1998 and 29.3.2000 in the case of the assessee in relation to assessment orders under Section 143(3) for assessment years 1993-94 and 1996-97 respectively.

2. First ground in revenue's appeal for assessment year 1993-94 is directed against deletion of disallowance of Rs. 40,01,911/- made by the Assessing Officer in relation to the assessee's claim of deduction by way of remuneration paid to field/sales organizers and sales promoters for sale of non-levy cement. According to the ld. Assessing Officer, facts of the case for assessment year 1993-94 in this behalf are on the same lines as in the earlier years. Following the reasons mentioned in the assessment orders of earlier years, the ld. Assessing Officer disallowed the assessee's claim of deduction of the sum of Rs. 40,01,911/-. On assessee's appeal, the ld. CIT (A) following the order of ITAT in assessee's own case for assessment year 1986-87 deleted the disallowance as made by the ld. Assessing Officer. Aggrieved revenue is in appeal before us.

3. During the course of hearing before us, the ld. counsel for the assessee pointed out that similar issues arose in the case of the assessee in earlier assessment years and IT AT Delhi Bench 'C' as per his order dated 28.2.1997 in ITA No. 4430/Del/91 for assessment year 1986-87; IT AT Delhi Bench 'E', New Delhi vide its order dated 29.9.2000 in ITA No. 5696/Del/92 for assessment year 1987-88 and ITAT Delhi Bench 'B', New Delhi as per its order dated 11.2.2003 in ITA No. 3926/Del/94 for assessment year 1988-89 upheld the deletion of similar disallowances in the case of the assessee. Respectfully following these orders of the Tribunal, we reject this ground of appeal.

4. Ground of appeal No. 2 in this appeal is directed against deletion of the addition of Rs. 88,99,000/- made by the Assessing Officer in relation to value of unsaleable dust. Facts of the case leading to this dispute briefly are that as per Note 10 to the balance-sheet, the assessee disclosed that liability for excise duty on closing stock of finished goods lying at the factory of the assessee amounting to Rs. 88.99 lacs had not been included in the value of closing stock. During the course of assessment proceedings, the assessee submitted that excise duty was chargeable only at the time of removal of manufactured goods from the factory premises and so long as the finished goods were lying in the factory, no demand for payment against those goods could be made by the excise department. For that reason, the assessee had held that excise duty on closing stock should not be considered for valuation of closing stock. The ld. Assessing Officer, however, held that under the provisions of Excise Law, the taxable event was manufacture and not sale of goods. For that

purpose, the ld. Assessing Officer relied upon the judgement of Hon'ble Supreme Court in the case of Union of India v. Delhi Cloth and General Mills Limited . The ld. Assessing Officer also referred to the judgement of Hon'ble Supreme Court in the case of Ujager Prints v. Union of India 179 ITR 317 (SC). According to the Assessing Officer, because the assessee was following mercantile system of accounting, it had to necessarily include the value of excise duty that the assessee was liable to pay on its closing stock of finished goods, in the valuation of closing stock. The assessee had himself admitted the liability to the tune of Rs. 88.99 lacs. The ld. Assessing Officer, therefore, increased the value of closing stock of finished goods by the sum of Rs. 88.99 lacs.

5. During the course of hearing before the ld. CIT (A), the assessee submitted that the ld. Assessing Officer had made addition of notional amount of excise duty. Such excise duty was leviable only at the time of removal of finished goods by the assessee from the factory premises. The assessee had been consistently valuing closing stock of finished goods without taking into account the element of central excise duty that had not crystallized. The assessee argued that if the ld. Assessing Officer insisted upon making the addition of Rs. 88.99 lacs to the value of closing stock, in fairness he should have reduced the value of opening stock by a sum of Rs. 80.77 lacs on the same basis. The ld. CIT (A) held the view that amendment of the Act by way of the provisions of Section 145A inserted by the Finance (No. 2) Act, 1998 with effect from 1.4.1999 signified that prior to assessment year 1999-2000, the Assessing Officer was not justified in not accepting the value disclosed by the assessee as per the past history. He, therefore, deleted the addition made by the Assessing Officer. Aggrieved, revenue is in appeal before us.

6. During the course of hearing before us, the ld. DR argued that the assessee was following mercantile system of accounting. For that reason, there was under-valuation of closings took as pointed out by the ld. Assessing Officer. The ld. CIT (A) erred in deleting the addition made by the Assessing Officer merely because of past history. The ld. counsel for the assessee relied in this respect on the orders of the Tribunal in the assessee's own case for assessment years 1986-87, 1987-88 and 1988-89 (supra). It is seen that when the matter came up before the Tribunal for the assessment year 1986-87, the Tribunal, following the decision in the case of Food Specialty Limited, decided the issue in favour of the assessee. For assessment years 1987-88 and 1988-89, the Tribunal deleted the additions following the order in the case of the assessee for assessment year 1986-87. We find it to be essentially a question of accounting. Whether this amount should be included in the value of closing stock is directly linked with the question as to at what stage the corresponding excise duty has been claimed as deduction by the assessee. The contention of the assessee before us is that no excise duty is paid or claimed as deduction in the computation of income by the assessee until such time the finished goods are removed from the factory premises of the assessee. If the assessee has not claimed deduction of the amount until the end of the previous year, the question of inclusion of the same in the valuation of closing stock does not arise. We, therefore, do not see any reason to interfere in the impugned order of the ld. CIT (A) excepting that the ld. Assessing Officer would be entitled to include in the valuation of closing stock that much amount of excise duty pertaining to the closing stock as has been actually allowed by him in the computation of assessee's total income for assessment year 1993-94.

7. Ground of appeal No. 3 is directed against the order of ld. CIT (A) allowing the assessee deduction of Rs. 9,35,885/- in relation to the amount payable by the assessee on redemption of debentures. It is seen that the ld. CIT (A) has decided the issue on the basis of the judgement of Hon'ble Calcutta High Court in the case of CIT v. Thungabhadra Industries Limited 207 ITR 553 (Cal.). However, in the case of Madras Industrial v. CIT 225 ITR 802 (SC), Hon'ble Supreme Court held that such expenditure is required to be allocated in accordance with the entire period of debenture. We, therefore, restore this issue to the file of the ld. CIT (A) for decision afresh according to the legal principle laid down by the Hon'ble Supreme Court.

8. Ground of appeal No. 4 is directed against deletion of the disallowance of Rs. 5,26,001/- claimed by the assessee on account of cost of presentation articles. According to the assessee, this amount did not represent expenditure on advertisement and, therefore, monetary limits laid down under Rule 6B did not apply. The ld. Assessing Officer found that the expenditure included cash gifts to various persons as well as gifts of various fancy items of household nature. All the gifts had not been made to the employees but various other outside persons with respect to whom details of individual names etc. could not be provided by the assessee company. The assessee only argued that the expenditure had been incurred on account of business expediency. The ld. Assessing Officer held that under the provisions of Section 37(1), only expenditure incurred wholly and exclusively for the purpose of business could be allowed. The items of gifts were more in the nature of personal expenses. He, therefore, disallowed the sum of Rs. 5,26,001/- entirely. On assessee's appeal, the ld. CIT (A) relying on the decision of the Tribunal in assessee's own case for assessment year 1986-87 deleted the disallowance made by the Assessing Officer.

9. During the course of hearing before us, the ld. DR pointed out that this issue has been decided against the assessee by the decision of ITAT Delhi Bench 'E' dated 28.10.1994 in the assessee's own case for assessment year 1986-87 in ITA No. 3883/Del/1991. In that year, the Assessing Officer had made disallowance of presentation articles and after consideration of the matter, ITAT directed the Assessing Officer to recompute the allowance insofar as the expenditure on an individual item exceeded the sum of Rs. 50/-. The ITAT at the same time held that the presentation articles could not be considered expenditure on entertainment.

10. The ld. counsel for the assessee relied upon the orders of the Tribunal in assessee's own case in appeal Nos. 3883/91 for assessment year 1986-87; 5346/92 for assessment year 1987-88 and 3698/94 for assessment year 1988-89. The ld. counsel averred also that expenditure incurred by the assessee during this year was well within Rule 6B limits.

11. We have carefully considered the rival submissions. It is not the case of the assessee that the expenditure is on articles of advertisement. The ld. Assessing Officer has also not made disallowance on that basis. The basis of disallowance is that in the opinion of the ld. Assessing Officer, the expenditure has not been wholly and exclusively incurred for the purpose of business. We find that for assessment year 1986-87, the Tribunal considered the expenditure allowable only to the extent of expenditure of Rs. 50/- on each item. For assessment year 1988-89, the issue has been restored to the Assessing Officer for decision afresh after taking into consideration the orders of the Tribunal for various assessment years. In our view, having regard to the magnitude of the business of the

assessee, the total expenditure of Rs. 12,29,650/- by way of business promotion and sales promotion expenses cannot be said to be unjustified. At the same time, we see force in the contention of the ld. Assessing Officer that the assessee has not been able to establish that the expenditure has been incurred wholly and exclusively for the purpose of business. We, therefore, sustain the disallowance made by the Assessing Officer to the extent of 10% of expenditure on presentation articles.

12. The fifth ground of appeal is directed against the order of the ld. CIT (A) deleting the disallowance made by the ld. Assessing Officer in relation to following sub-heads of expenditure :

(a) Reimbursement of staff recreation clubs;

(b) Temple maintenance and puja expenses; and

(c) Construction of Bus Depot.

13. In relation to staff recreation activities, the assessee claimed deduction of Rs. 4,95,185/-. The ld. Assessing Officer asked the assessee as to why the provisions of Section 40A(9) be not applied. The assessee stated that the expenditure was in the nature of reimbursement of expenses and not any contribution made by the assessee to the clubs, which were in-house clubs of the assessee company. The assessee also contended that the expenditure was allowable under the provisions of Section 37(1) of the Act. The ld. Assessing Officer held the view that the deduction claimed by the assessee was not the reimbursement of actual expenses incurred by the recreation clubs. He held that the recreation clubs incurred expenditure on their own and later on, the assessee had made certain contributions. The ld. Assessing Officer further held that the deduction could not be allowed on the grounds of commercial expediency also because no specific instance of commercial expediency was shown. The assessee had incurred the expenditure in a general way.

14. On assessee's appeal, the ld. CIT (A) relying upon the orders of his predecessors for the earlier assessment years deleted the disallowance as made by the ld. Assessing Officer. During the course of hearing before us, the ld. DR argued that the expenditure was hit by the provisions of Section 40A(9). The assessee had wrongly claimed that the expenditure was reimbursement. There was no material to show that the club incurred the expenditure at the direction of the assessee and in the manner specified by the assessee. The assessee had merely made contribution to these clubs so as to bear part of the cost of running the clubs. The ld. DR relied upon the judgement of the Hon'ble Supreme Court reported in 103 ITR 66 (SC). He further argued that on facts the case of the assessee was not covered by earlier years Tribunal decisions. The ld. counsel for the assessee relied upon the decisions of the Tribunal in assessee's own case for assessment years 1986-87 and 1988-89 in ITA Nos. 4430/91 and 3926/94.

15. It is seen that for assessment year 1986-87, the Tribunal followed its orders for assessment years 1984-85 and 1985-86. As far as assessment year 1984-85 is concerned, the issue relating to the assessee's claim of deduction by way of reimbursement of expenses to recreation clubs was not before Hon'ble Tribunal. For assessment year 1985-86 also, no such issue was considered by the Tribunal. It is seen that for assessment year 1988-89, the Tribunal found that the ld. CIT (A) had

restored the issue to the Assessing Officer to verify whether the expenditure was based on actual reimbursement of expenses or was it a contribution to the club and thereafter to decide the issue on merits after giving the assessee an opportunity of being heard. The Tribunal, therefore, declined to interfere in the order of the ld. CIT (A).

16. On consideration of the matter, we are of the view that the language of provisions of Section 40A(9) is quite clear and unambiguous. Hence, no rule of interpretation is to be pressed into service. If the payments made by the assessee are to be treated as contribution, the same are clearly hit by the provisions of Section 40A(9). However, the case of the assessee is that he has not made any contribution but reimbursed certain expenses. In other words, the expenditure was incurred by the clubs at the behest and on behalf of the assessee and the same was subsequently reimbursed by the assessee. No such facts have been proved. We, therefore, respectfully following the order of the Tribunal for assessment year 1988-89 restored the issue to the file of the ld. Assessing Officer for decision afresh after allowing the assessee reasonable opportunity of being heard to establish that the assessee's claim of deduction is not hit by the provisions of Section 40A(9).

17. Next item of expenditure relates to expenditure on temple maintenance and puja expenses. The assessee claimed deduction of Rs. 4,57,084/-, Rs. 30,654 and Rs. 36,990/- on temple maintenance and puja expenses at Dalmiapuram, Salem and Hospet respectively. The ld. Assessing Officer held that the expenditure did not represent business expenditure of the assessee and in any case, the expenditure could not be said to be wholly and exclusively for the business of the assessee. The ld. Assessing Officer relied upon the judgements reported in 119 ITR 387 (Bom.) and 160 ITRT 203 (Kar.) in support of his view. The ld. Assessing Officer held that the assessee could not step into the shoes of the employees and incur expenses on their behalf. Besides, the assessee company being an artificial juridical person could not profess any religion or following. On assessee's appeal, the ld. CIT (A) following the orders of his predecessors allowed the deduction as claimed by the assessee.

18. During the course of hearing before us, the ld. DR strongly relied upon the reasoning of the ld. Assessing Officer as contained in the assessment order. The ld. counsel for the assessee relied upon the orders of the Tribunal in ITA No. 4430/91 and 3926/94 for assessment years 1986-87 and 1988-89 respectively. The ld. counsel placed reliance on the judgement of Punjab & Haryana High Court 134 ITR 458 (P&H). He argued that the judgement of Hon'ble Bombay High Court in the case of Kolhapur Sugar Mills Limited 119 ITR 387 (Bom.) was distinguishable on facts because that was not the case of maintenance of temple. The expenditure had been incurred on the last day of the sugar working season on puja and entertainment/feeding of the workers and cane-growers.

19. We have carefully considered the rival submissions. We do not agree with the ld. Counsel for the assessee that the decision of Hon'ble Bombay High Court in the case of Kolhapur Sugar Mills Limited is not applicable on facts. The ratio of the judgement appears to be against the claim of deduction by the assessee. At the same time, the judgement of Punjab & Haryana High Court supports the assessee's claim of deduction. It is seen that for assessment year 1986-87, the Tribunal followed its orders in the earlier assessment years 1984-85 and 1985-86. In those orders, the amount of deduction claimed by the assessee was very small. Even in subsequent assessment years, the amount of deduction claimed was very small. For assessment year 1987-88, deduction had been

claimed of a sum of Rs. 11,113/- only. Having regard to this aspect, we consider it necessary to restore this issue to the file of the ld. Assessing Officer. In the case of Atlas Cycle Limited only depreciation allowance was granted in relation to a temple constructed by the assessee. The ld. Assessing Officer shall, therefore, exclude all items of capital expenditure and allow the deduction to the assessee to the extent it may fall in the ratio of the judgement of Punjab & Haryana High Court in the case of Atlas Cycle Limited. We may make it clear that having regard to the past history of the case, we are following the judgment in the case of Atlas Cycle Limited and not in the case of Kolhapur Sugar Limited.

20. As to the last item construction of bus shelter, the contention of the assessee is that this construction had been made because the assessee was permitted to advertise its products on the structure of bus shelter. The ld. Assessing Officer, however, held that the expenditure was not for the business of the assessee because the construction had been made not on assessee's own property but at someone else property. Even otherwise, the expenditure was in the nature of capital expenditure. On consideration of the matter, we do not find any substance in the contention of the ld. Assessing Officer. Advertisement is an important item of expenditure of any business and advertisement site need not be the assessee's own property and since it was not on assessee's own property the same cannot be said to be capital expenditure either. We, therefore, do not see any reason to interfere in the impugned order in this respect.

22. Last ground in the revenue's appeal is against the direction of the ld. CIT (A) to allow the assessee depreciation @ 25% on plant and machinery relating to water works and water installation distribution. The ld. Assessing Officer allowed the assessee depreciation at the rate applicable to a building following the past practice whereby depreciation on a well situated within the factory premises of the assessee was held to be allowable at the depreciation rates pertaining to a building. The ld. CIT (A) held the view that in earlier years, water supply installations had been treated as plant. He, therefore, directed the Assessing Officer to allow depreciation @ 25% applicable to plant and machinery. During the course of hearing before us, the ld. DR relied upon the order of Assessing Officer. The counsel for the assessee relied upon the order of the Tribunal in assessee's own case for assessment year 1986-87 in ITA No. 4430/91. On perusal of that order, it is seen that the Tribunal followed the earlier orders for assessment years 1984-85 and 1985-86 and did not decide the issue on its own. There is no knowing that the facts of the case of the assessee after gap of nine years have remained the same as in assessment year 1984-85. Moreover in assessment year 1984-85, the issue was limited only to the bore well which had been held to be plant. After consideration of the matter, we send this issue back to the file of the Assessing Officer. The assessee has simply given a common name water distribution system. The Assessing Officer would examine as to how much of it comprises of civil constructions and how much of it comprises of actual machinery and plant. After bifurcating the cost into two, the ld. Assessing Officer shall grant depreciation accordingly at the rate applicable to a building and rate applicable to plant and machinery.

23. In the result, this appeal is partly allowed.

24. We now turn to revenue's appeal in ITA No. 3559/Del/2000 for assessment year 1996-97.

25. First ground in this appeal is directed against the deletion of the disallowance of Rs. 60,09,353/- made by the ld. Assessing Officer in relation to the deduction claimed by the assessee on account of remuneration paid to field/sales organization and sales promoters. Facts of the case leading to this dispute are identical to those in relation to revenue's first ground of appeal for assessment year 1993-94. Following the reasons given by us in para 3 of this order, we reject this ground.

26. Ground of appeal No. 2 is directed against deletion of addition on account of expenditure on welfare of employees under Section 40A (9). Facts relating to this ground of appeal are also the same as in relation to revenue's ground of appeal No. 5(a) for assessment year 1993-94 pertaining to the alleged reimbursement to staff recreation clubs. This year the ld. CIT (A) has purported to rely upon CDT Circular No. 387 dated 6.7.1984 reported in 152 ITR (statute) 1. Relying upon para 16 of the circular, the ld. CIT (A) has held that the purpose of the provision of Section 40A(9) is not to cover the expenditure claimed as deduction by the assessee in this behalf. We have discussed the facts relating to this disallowance and various aspects in para 12 to 16 of this order while considering the similar deduction of Rs. 4,95,185/- claimed by the assessee for assessment year 1993-94. We have held that the language of provisions of Section 40A(9) is quite clear and unambiguous. Hence, no rule of interpretation needs to be pressed into service. The ld. CIT (A), therefore, erred in attempting to relax rigor of the provisions of Section 40A(9) on the basis of the so-called purpose of the insertion of the provision of Section 40A(9). At any rate, we find that the assessee has not substantiated that what it paid to various clubs was not contribution but reimbursement of actual expenses incurred by the clubs at the behest and on behalf of the assessee. Following our reasoning in para 16 of this order and respectfully following the order of the Tribunal in assessee's own case for assessment year 1988-89, we restore this issue to the file of the ld. Assessing Officer for decision afresh after allowing the assessee reasonable opportunity of being heard to establish that the assessee's claim of deduction is not hit by the provisions of Section 40A(9).

27. Ground of appeal No. 3 disputes the order of the ld. CIT (A) directing the Assessing Officer to allow depreciation on water works, fittings etc. at the rates applicable to machinery and plant.

28. Similar issue has been considered by us in revenue's appeal for assessment year 1993-94 in para 22 of this order. Following the same, we direct the ld. Assessing Officer to examine as to how much of the cost comprises of civil constructions and how much it comprises of machinery and plant. After bifurcating the cost, the ld. Assessing Officer shall grant depreciation accordingly at the rates applicable to a building and rates applicable to plant and machinery.

29. Ground of appeal No. 4 is directed against the ld. CIT (A) deleting the addition of Rs. 22,82,966/- being the subsidy given by the Government to sugar mill set up by the assessee. Facts of the case leading to this ground of appeal briefly are that the assessee annexed Note No. 7 to the Statement of assessable income for the assessment year that the assessee had received Rs. 22,82,966/- on account of higher free sale quota at the sugar unit of the company and that amount had been excluded from the total income being an incentive received to be utilized for the repayment of long term loans taken from the financial institutions or Sugar Development Fund for the purpose of setting up the plant. During the course of assessment proceedings, the assessee submitted in its reply dated 11.11.1998 that the amount could be regarded as a diversion of income at

source for the purpose of repayment of loans raised by it for putting up the new unit. The ld. Assessing Officer considered the submissions of the assessee company. He found that the entire amount of sale proceeds had been credited to the profit and loss account and that showed the assessee had himself treated the funds generated by way of a higher free sale of sugar as its trading receipt. Moreover, such surplus funds could be said to be the value of benefit granted to the assessee by virtue of the provisions of Section 28(2)(iv) of the Act. Clause 12 of the Incentive Scheme stated that the beneficiaries of the scheme shall ensure that the surplus funds were utilized for the repayment of loans taken from the institutions. Thus, the surplus funds were required to be applied for the stated purposes and it was not the income diverted at source. According to the ld. Assessing Officer, the purpose of application of income was immaterial and did not affect the assessee's liability to taxation of its income. The ld. Assessing Officer, therefore, rejected the claim of the assessee that sale proceeds of free sale quota sugar should be excluded from the total income of the company.

30. During the course of hearing before the ld. CIT (A), the assessee submitted that it had set up an industrial undertaking for manufacture of sugar named and styled as Ramgarh Chini Mills at Village Ramgarh in District Sitapur of Uttar Pradesh. This sugar manufacturing unit of the company satisfied the conditions of the Incentive Scheme dated 10.3.1993 of the Government of India for facilitating the setting up of a new sugar unit or expansion of existing sugar unit involving capital outlay of a large magnitude. Under the scheme, the assessee was entitled to sale the entire quantity of sugar manufactured by them in the free market at the prevailing market price instead of being subject to the requirement of distributing a minimum specified quantity calculated at a specified percentage of the sugar production of the assessee at controlled prices in accordance with the Sugar Control Order 1966 of the Government of India. According to the assessee, the higher sugar sale proceeds received by the company in this manner gave the assessee additional funds that were specifically required to be utilized by the assessee for repayment of term loans advanced to it by the central financial institutions and the Sugar Development Fund. According to the assessee, the term loans had been advanced by the financial institutions for capital outlay for installations/expansion of production capacities of sugar mills. Therefore, the nature of receipt by way of sale of higher sugar quota in free market was capital and not chargeable to tax. In support of these contentions, the assessee relied upon the judgement of Hon'ble Calcutta High Court in the case of CIT v. Balrampur Chini Mills Limited and the order of IT AT Madras 'A' Bench in the case of Tamilnadu Sugar Corporation Limited. The assessee also referred to the judgement of Hon'ble Supreme Court in the case of Sawhney Steel and Press Works Limited 228 ITR 253 (SC). The assessee contended that the amount realized by way of higher free sale of sugar quota was predestined to be utilized for repayment of debts relating to setting up of or expansion of sugar manufacturing plant and machinery. The assessee had no discretion in the matter but to go towards liquidation of liability towards capital acquisition of assets as per the Government of India's notified scheme.

31. The ld. CIT (A) considered the arguments of the assessee. According to him, in effect it was not a subsidy in the general sense of the term. The excess realization received by the assessee over the levy price was to be utilized for discharging the loans raised by the assessee for setting up or expansion of sugar manufacturing capacity. Otherwise, the assessee had to surrender the excess price realized. Therefore, the excess price had a direct nexus with the capital goods employed by the assessee in the

setting up of the factory. Following the judgment of Hon'ble Calcutta High Court in the case of CIT v. Balarampur Chini Mills Limited and of Hon'ble Supreme Court in the case of Sawhney Steel and Press Works Limited, the ld. CIT (A) deleted the addition of the sum of Rs. 22,82,966/- made by the ld. Assessing Officer by way of revenue receipt of the assessee.

32. During the course of hearing before us, at the outset, the ld. counsel for the assessee argued that revenue's ground of appeal in respect of free sale sugar was liable to be dismissed as the matter was covered in favour of the assessee and against the revenue by several High Court judgements and Tribunal decisions. He referred to Tribunal decisions in the case of DCIT, Coimbatore v. Bannari Aman Sugars Limited being the decision of the ITAT Madras Bench 'C' dated 19.10.1993 in ITA Nos. 3434 (MDS)/89 and 2304 (MDS)/92 for assessment years 1987-88 and 1989-90. The ld. counsel also relied upon Madras Tribunal decision in the case of Tamilnadu Sugar Corporation Limited reported in 48 ITD 345 (Mad.) and Addl. CIT v. Chodavaram Cooperative Sugars Limited 86 ITD 139 (Vishakapatnam). The ld. counsel for the assessee argued that the assessee's case was also supported by the judgement of Hon'ble Calcutta High Court in the case of CIT v. Balarampur Chini Mills 238 ITR 445 (Cal.) and Madras High Court judgement in the case of CIT v. Ponni Sugars & Chemicals Limited 260 ITR 605 (Mad.). The ld. counsel for the assessee also relied upon ITAT Calcutta decisions in the case of Babhnan Sugars Mills Limited v. ACIT and Vishnu Sugars Mills Limited v. DCIT placed at pages 12 to 19 of the paper book.

33. In response to our query as to why the amount of such subsidy should not be reduced while working out "actual cost" within the meaning of Section 43(1) of the Act, the ld. counsel for the assessee argued that this issue did not arise from the order of the ld. CIT (A) under appeal. He, however, argued that Explanation 10 to Section 43(1) having been introduced w.e.f. 1.4.1999 only did not apply to assessment year 1996-97 before us. Therefore, no part of the subsidy could be reduced while working out actual cost within the meaning of Section 43(1). For supporting the facts of the case of the assessee as covered by the various High Court judgements and Tribunal decisions, the ld. counsel for the assessee pointed out to the certificate of M/s. S.S. Kothari & Company, Chartered Accountants dated 25.11.1996 placed at paper book page 535 to the effect that the surplus fund generated through sale of 11,093.10 MT incentive sugar during January, 1996 to March, 1996 amounting to Rs. 22,82,965/- had been utilized for the repayment of instalments of term loans outstanding from Industrial Finance Corporation of India Limited, Industrial Credit and Investment Corporation of India Limited and Industrial Reconstruction Bank of India.

34. The ld. DR argued that the amount of free sale sugar quota received by the assessee was an integral part of the trading activity of the assessee. The assessee was allowed to sale sugar in the open market. Sale proceeds of the assessee's stock-in-trade could not be viewed other than trading receipt. He pointed out that assessee's case was not covered by the Sugar Incentive Scheme 1993 that was for the period 7.9.1992 to 31.3.1994 only whereas in the case of the assessee sugar mill was set up and commenced production from December, 1994. Without prejudice, the ld. DR argued that if the assessee's contention was accepted the cost of assets acquired by the assessee from out of the term loans in question was required to be reduced by the amount of so-called incentive. He argued that Explanation 10 to Section 43(1) was clarificatory. He further argued that in any case, the main provision of Section 43(1) were sufficient and clearly required the cost of assets in question to be

reduced by the amount claimed by the assessee as incentive/subsidy for acquisition of those assets.

35. We have carefully considered the rival submissions. We do not see much substance in the argument of the ld. DR that Sugar Incentive Scheme 1993 did not apply to the assessment year before us. Government of India announced its sugar policy from time to time and extended benefit thereunder for various periods. Any doubts in this regard are resolved by the letter of Chief Director (Sugar), Directorate of Sugar, Food Ministry dated 27.6.1996 at page 545 of the paper book filed by the assessee. Having regard to the various High Court judgments and Tribunal decisions, we hold that the sum of Rs. 22,82,966/- cannot be assessed as part of the assessee's total income by way of trading or revenue receipt and the ld. CIT (A) is justified in holding so. However, in the impugned order, the ld. CIT (A) has proceeded as if once the amount in question is treated to be capital receipt that is the end of the matter. Under the provisions of Income-tax Act, both revenue receipt as well as capital receipt may have bearing on the computation of assessable income chargeable to tax. This aspect has been discussed at length in the judgement of Hon'ble Supreme Court in the case of CIT v. P.J. Chemicals Limited 210 ITR 830 (SC) at pages 837 to 839 in the following words :-

> "Such rebate as obtains on the point turns on the definition of "actual cost" in Section 43(1) of the Income tax Act, 1961. Section 43(1) provides definitions of certain terms and, inter alia, stipulates that for purposes of Section 28 to 41 and 43, "actual cost" means "the 'actual cost' of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority." Thus, if a portion of the cost is met directly or indirectly by any person or authority, the "actual cost" would, for the purposes of the aforesaid sections, be the cost minus the subsidies. The "actual cost" of an asset which should be given a meaning in a commercial sense, logically includes whatever even any other person or authority has met; but the legislative intent is that the assessee should not have the benefit of depreciation on the cost which he did not himself pay.
>
> Indeed, the provision for wastage of capital in the earning of income by way of depreciation was not an initially recognized concept. The Millard Tucker Committee in the United Kingdom said : "For more than a generation after the imposition of the present income tax, no relief whatever was given to the using up, in the course of carrying on a business, of any kind of fixed assets."

In Corporation of Birmingham v. Barnes [1935] 3 ITR (Eng Cas) 26; [1935] 19 TC 195, the House of Lords took the view that it was not right to deduct any sums received from any outside source from the "actual cost". Lord Atkin said (at page 215):

> "....the actual cost to the person 'by whom the trade is carried on' used in this context have no relation to the source from which that person has received the money which he has expended on the plant.
>
> But it is said that the words 'to that person' in the phrase 'actual cost to that person' plainly indicate that the section is intended to confine the relief to an aggregate equal

> to the sum of money which the person has defrayed out of his own resources, the cost of the burden which has ultimately fallen upon him. My Lords, I confess I do not think that this is the natural meaning of the words. What a man pays for construction or for the purchase of a work seems to me to be the cost to him ; and that whether someone has given him the money to construct or purchase for himself, or before the event has promised to give him the money after he has paid for the work, or after the event has promised or given the money which recoups him what he has spent."

In the Court of Appeal, Romer L. J. had observed :

> "Is it possible to say that, in view of those words, when a trader has had given to him as a present his plant and machinery, there has been any 'actual cost' to him in respect of that plant and machinery ? The question to be put to the trader is this : 'What did the plant and machinery actually cost you ?' Supposing/in this case, that the Dunlop Rubber Company, for their own purposes, had constructed a tramway at a cost of pound 54,752 and had then presented it to the Birmingham Corporation, is it possible that the Birmingham Corporation could say that the tramway had cost them anything ? Surely not. Instead of themselves constructing the tramway and then presenting it to the Corporation, the gift might have been effected in another way. The Dunlop Company might have said to the Corporation : 'You construct the tramway and then we will repay to you the cost to which you have been put.' What would be the answer of the Corporation to the question : 'What did that tramway cost you in the end ?' I should have thought the Corporation might conceivably have said : 'Well, the tramway cost us pound 54,752, but, having regard to the fact that that was repaid to us by the Dunlop Rubber Co., the actual cost to us was nil.' I find, like Lord Justice Slesser, the words in sub rule (6) too strong to enable me to say that the only object and effect of the section is to correct the anomaly that was pointed out in Rickman's case [1906] 1 KB 311). For these reasons, I think the appeal should be allowed and the decision of the Commissioners restored."

Disagreeing with the said observations, Lord Atkin said :

> ".....I myself should not have thought the answer of Birmingham Corporation to the question put by Lord Justice Romer would have been what he suggests. On the hypothesis that the Dunlop Company had recouped the Corporation the whole of the cost of the first tramway I should have thought the answer to 'What did it cost you ?' or 'What did it actually cost you ?" would have been 'It actually cost us pound 54,752 but none of the burden of that cost will fall on the Corporation, for the Dunlop Company have paid us the full amount.'....."

The view of Lord Atkin was followed by the Bombay High Court in CIT v, Poona Electric Supply Co. Ltd. [1946] 14 ITR 622 and in CIT v. Bombay Suburban Electric Supply Co. P. Ltd. , etc., arising under the 1922 Act. It is urged by Dr. Gauri Shanker, learned senior counsel for the Revenue, that as the intention of the Legislature was that depreciation should be allowed only on the "actual cost" to

the assessee, i.e., what is spent by the assessee from his own resources (otherwise the expression would have been "cost" and not "actual Cost") the Legislature intervened by proposing an amendment to nullify the effect of the decisions. The Income tax (Amendment) Bill contained an amendment proposal but it lapsed because Parliament was dissolved. It was reintroduced in 1952 and passed as the Income tax (Amendment) Act, 1953. Explaining this change, this court in Calcutta Electric Supply Corporation Ltd. v. CIT stated that : "The 1922 Act was amended by the Income tax (Amendment) Act, 1953, with effect from April 1, 1952, in this respect".

This amendment was introduced as an Explanation to the definition of "actual cost" in Section 10(5) of the Indian Income tax Act, 1922, to nullify the effect of the judicial interpretations to the contrary. Though, at the stage of the Bill, the proposal was to exclude from the concept of "actual cost", any moneys reimbursed to the assessee in this regard by any outside source, the amendment, as finally effected, permitted only a limited exclusion. The Explanation reads as follows :

> "For the purposes of this sub section, the expression 'actual cost' means the actual cost of the assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by, Government or by any public or local authority...".

The question in the present context is not whether if a portion of the cost is met directly or indirectly by any other person or authority, it should be deducted or not. Quite obviously, the plain meaning of the section is that it shall be. But the real question is as to the character and nature of a subsidy whether it was really intended to subsidise the cost of the capital or was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost which is the basis for determining the subsidy being only a measure adopted under the scheme to quantify the financial aid. The contention is that it is not a payment, directly or indirectly, to meet any portion of the "actual cost" but intended as an incentive to entrepreneurs, its quantification determined at a percentage of the fixed capital cost."

Considering the legal position as enumerated above by the Hon'ble Apex Court, we are of the view that the ld. CIT (A) erred in not determining the further question as to whether and to what extent the view held by him would affect the assessee's tax liability. In the instant case, as far as the Assessing Officer is concerned, he held the view that the amount in question constituted trading receipt of the assessee. He was, therefore, not faced with the question as to whether this amount of incentive should be deducted from the cost of asset within the meaning of Section 43(1) of the Act. However, as the ld. CIT (A) held the amount in question to be capital receipt it was incumbent upon him to consider that further question and determine the tax liability of the assessee in accordance with the view entertained by him. The ld. counsel for the assessee has argued that the Explanation 10 to Section 43(1) not being retrospective, this issue does not arise in the case of the assessee for the assessment year 1996-97. However, we find in the main provision of Section 43(1) reduction by the portion of the cost met directly or indirectly by any other person or authority has been stipulated. Hon'ble Supreme Court also in the extract from the judgement of P. J. Chemicals Limited quoted above appear to have held so. At any rate, we do not wish to record any finding on the question of the reduction of "actual cost" of the assessee's capital assets within the meaning of

Section 43(1) on account of the amount in question held by us to be a capital receipt in the hands of the assessee. Nonetheless we are of the view that as a corollary of our decision, this aspect is required to be looked into and implemented. We, therefore, restore this limited question to the file of the Assessing Officer for decision afresh after allowing the assessee reasonable opportunity of being heard in the matter.

36. In the result, the revenue's appeal for assessment year 1996-97 also is partly allowed.