M/S. Shriniwas Engineering Auto ... vs Pr. Commissioner Of Income-Tax-3,, ... on 28 February, 2019

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IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

, . ,
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

. / ITA No.777/PUN/2018
/ Assessment Year : 2013-14

M/s. Shriniwas Engineering Auto
Components Pvt. Ltd.,
Office No.5, Mansara Apartments,
Near LIC Building, Shivajinagar,
Pune.

PAN : AAJCS8944F .... /Appellant

Vs.

Pr. CIT-3, Pune. .... / Respondent

/ Appellant by : Shri Hari Krishan
/ Respondent by : Shri Shashibhushan Prasad

/ /
Date of Hearing : 13.12.2018 Date of Pronouncement: 28.02.2019

/ ORDER

PER D. KARUNAKARA RAO, AM :

This appeal is filed by the assessee against the order of Pr. CIT-3, Pune dated 30.03.2018 passed u/s 263 of the Act for the Assessment Year 2013-14.

2. The background facts of the case include that the assessee is engaged in the business of manufacturing of auto spares, supply of automobile castings, parts, engineering work of automobile goods etc. The assessee filed the return of income for the assessment year 2013-14 declaring total income of Rs.9.60 crores (rounded off). Subsequently, the assessee revised the returned income downwards to Rs.7.25 crores (rounded off). At the end of the assessment proceedings u/s 143(3) of the Act dated 23.03.2016, the Assessing Officer assessed the total income at Rs.10.77 crores (rounded off). In the assessment, the Assessing Officer made couple of additions i.e. (i) the disallowance on account of depreciation involving the provisions of the Explanation 10 to section

43(1) of the Act amounting to Rs.3.48 crores; and (ii) the addition of Rs.4,00,004/- in view of the discrepancy between the figures in TDS/Forms and in the Form No.26AS.

3. During the assessment proceedings, the Assessing Officer noted the assessee received subsidy and the assessee claimed the same as the capital receipt. After due verification, the Assessing Officer allowed the claim of the assessee. Having held, the Assessing Officer invoked the Explanation 10 to section 43(1) of the Act and mentioned that when the subsidy is a capital nature, the same should be reduced from the "actual cost" of the assets and claimed the depreciation on the reduce value. In the process, the Assessing Officer distinguished the Supreme Court judgement in the case of CIT vs. Ponni Sugars & Chemical Ltd. vide Civil Appeal No.5694 of 2008 dated 16th September, 2008. Further, the Assessing Officer discussed the provisions of clause (xviii) to section 2(24) of the Act read with the said Explanation 10 in support of the above finding. Relevant portion of the assessment order is extracted as follows :-

"4.2 Submission of the assessee is seen and the same is not acceptable for the reasons mentioned here:

> a. A subsidy can be either Revenue receipt of Capital receipt depending upon the facts of the case. If a subsidy is revenue receipt then the question of section 43(1) and its explanation 10 which is in the instant case does not arise. However in the instant case assessee has treated the same as Capital receipt. If it is treated as capital receipt then provisions of section 43(1) of the Act, which defines "Actual Cost" for the purpose of allowing depreciation, subsidy received from the Government or any other person, to meet the cost acquisition of asset on which depreciation is claimed should be reduced from the actual cost of the said asset for the purpose of allowing depreciation. b. Regarding the case laws relied by the assessee it is seen that judgment of Apex court in the case of CIT v. Ponni Sugars & Chemicals Ltd. has held that, it is the object for which subsidy/assistance is given, that truly determines nature of subsidy. The character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases one has to apply the 'Purpose Test'. The point of time when the subsidy is paid is not relevant. The source is immaterial; the form of subsidy is also immaterial.
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> If the object of the subsidy scheme was to enable the assessee to run the business more profitably, then the receipt was on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand its existing units, then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant. In the instant case assessee relying on this case as treated the subsidy as Capital receipt. Automatically, the assessee fails under the purview of section 43(1). Thus for the purpose of calculation of depreciation assessee should have reduced the value of subsidy from the cost of the asset as defined under section 43(1) and its explanation 10. c. Amendment in section

2(24) clause (xviii) and explanation 10 to section 43(1) itself intended towers taxing capital subsidy by reducing it from WDV over the period of time. Accounting standard 9 also clearly intends this.

d. This issue has been also upheld in the following cases:

i) In the case of Limtes Tea & Industries Ltd. Hon'ble Kolkata ITAT Bench B has stated held that "Section 2(24) read with section 43(1) of the Income-tax Act, 1961 - Income - Definition of (subsidy) -

Assessment year 2006-07 - Whether insertion of sub-clause (xviii) in section 2(24) by Finance Act, 2015, with effect from 1-4-2016, does not have retrospective effect - Held yes - During relevant year, assessee received subsidy from Tea Board and Ministry of Commerce & Industry, Government of India - Assessing officer treated said subsidy as revenue in nature and brought same to tax - He also reduced value of subsidy from 'actual cost' of machinery on which depreciation had to be allowed in accordance with Explanation 10 to section 43(1) - Whether prior to aforesaid amendment, if a subsidy was regarded as revenue subsidy, it would be taxable besides value of subsidy getting reduced from actual cost of depreciable assets for purpose of allowing depreciation, if conditions laid down in Explanation 10 to section 43(1) were satisfied - Held, yes - Whether, since, there was no dispute that other conditions laid down in Explanation 10 to section 43(1) were satisfied in instant case, impugned order passed by Assessing Officer did not require any interference - Held, yes [Para 21]"

ii) Hon'ble High Court in the case of Commissioner of Income Tax, Circle-

2, Vs Shree Renuka Sugars Ltd. [2012] 28 taxmann.com 268 (Kar.) has held that "Section 43(1) read with section 32, of the Income-tax Act, 1961 - Actual cost - Subsidy - Assessment years 2001-02 and 2006- 07 - Whether in view of Explanation 10 and proviso to sub-section (1) of section 43, amount of subsidy received by assessee towards power generation plant was to be reduced from actual cost of asset for purpose of allowing depreciation - Held, yes [Para 7].

iii) In the case of Exband (India) (P) Ltd. vs. ACIT Circle 2(2) Hyderabad ITAT Bench - A has held that "Section 43(1), read with section 32, of the Income-tax Act, 1961 - Actual cost - Assessment year 2003-04. Whether where State Government granted subsidy to assessee as reimbursement to meet a part of cost of fixed assets as provided in Explanation 10 to section 43, that portion of subsidy had to be reduced from cost of fixed assets while granting depreciation - Held, yes"

4.3 For the reasons mentioned above, assessee should have reduced the subsidy given by the State Government to that extent of Rs.23,18,12,203/- and should have calculated the depreciation accordingly. However, assessee has failed to do so. As such there is an excessive depreciation allowed in the instant case to the extent of working given by the assessee which comes to Rs.3,47,71,830/- is added to the total income of the assessee within the meaning of section 43(1) r.w.s. 32 of the IT Act. Penalty proceedings u/s 271(1)(c) are initiated for furnishing inaccurate particulars of

income."

4. Subsequently, the Pr.CIT examined the records for this year and found the necessity of invoking the provisions of section 263 of the Act. The Pr.CIT opines that the Assessing Officer did not treat the 'subsidy receipts' as per the law. Therefore, the Pr.CIT issued a show-cause notice on 23.01.2018 and communicated the same to the assessee with the intention to cancel the assessment (supra). The relevant lines of the said show-cause notice are extracted hereunder :-

> "3.1. ..... Thus in view of the above facts and after considering various case laws related to the subsidy availed by the assessee. A.O. treated the subsidy as a revenue receipt and accordingly finalized the assessment after making an addition of Rs.37,84,89,268/- as a revenue receipt. However, for A.Y. 2013-14, the assessment in the case was finalized after considering the subsidy as a capital receipt. The Assessing Officer did not verify the true nature of subsidy in light of facts and judicial pronouncement laid down by the Hon'ble Supreme Court in the case of Sahney Steel and Press Work Ltd. correctly and therefore, the assessment order passed by the Assessing Officer is found erroneous and prejudicial to the interest of revenue.
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> 3.2 Further, the CASS reason for selection of case for scrutiny for the A.Y. 2013-14 was "Large Share Premium Received". During the course of assessment proceedings, the erstwhile A.O. while examining the parties who had introduced the share premium, had not verified the creditworthiness and genuineness of the parties in the said transactions. It would not be irrelevant to mention that the assessee had received huge share premium of Rs.67.25 crores in aggregate. Further, share premium per share is of Rs.900 on face value of Rs.100. The Assessing Officer failed to examine the reasonableness of premium @ 900% along with creditworthiness of parties from whom huge share premium was received.
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> 3.3 In view of the above facts, the assessment order passed by the A.O. on 23.03.2016 for the A.Y. 2013-14 is found to be erroneous and prejudicial to the interest of the revenue."

5. From the above, it is evident that the verification of issue relating to

(i) the true nature of the "subsidy" on one side and (ii) the verification of the claims relating to the "share premium" received by the assessee on the other, are the two issues. In response to the show-cause notice, the assessee furnished the written submissions dated 28.03.2018 and argued that the subsidy, being under the Package Scheme of Incentives, 2007, constitutes a "capital receipt". The assessee relied on the Pune Bench decision of the Tribunal in the case of M/s. Innoventive Industries Limited vs. DCIT vide ITA No.601/PUN/2013, order dated 24.03.2017 and requested for dropping of proceedings u/s 263 of the Act. The written submissions of the assessee are extracted by the Pr.CIT in his order from page 1 to 9. In the said submission, the assessee submitted that the Assessing Officer examined both the issues and therefore, the jurisdiction assumed by the Pr.CIT u/s 263 of the Act is not valid. These issues were already examined by the

Assessing Officer and a view was taken after due consideration of the documents/ evidence and submissions filed before the Assessing Officer. After considering the above written submissions of the assessee, the Pr.CIT rejected the same and set-aside the assessment order dated 23.03.2016. the Pr.CIT directed the Assessing Officer to pass a fresh assessment order. In this regard, pare 5 of the order of the Pr.CIT is relevant to extract and the same is extracted hereunder :-

> "5. As discussed in Para 3 and 3.1, in the present case, the Assessing Officer did not enquire into all relevant issues to deduce correct taxable income and therefore, the order passed by the assessing officer is found to be erroneous in so far as it is prejudicial to the interest of revenue. It would be fair and just to restore the matter back to the Assessing Officer for proper inquiries on issues indicated in the show cause notice as well as Para 3 and 3.1 of this order. Therefore, I set aside the assessment order u/s 143(3) of the I.T. Act, 1961 dated 23.03.2016 passed by the Assessing Officer for A.Y. 2013-14. The Assessing Officer is directed to give adequate opportunity of being heard to the assessee, call for relevant evidences/ details/ information/ explanation on various issues from the assessee and after examining the assessee's submission/ explanation/ evidences and conducting necessary enquiries, if any, pass a fresh assessment order in accordance with applicable provision of the law."

In para 3 and 3.1 of the order of the Pr.CIT, the Pr.CIT considered various judgments on the issue of capital nature of the subsidy given under the Package Scheme of Incentives, 2007.

6. Further, on the issue of 'share premium' related addition, the Pr.CIT was of the opinion that the Assessing Officer did not verify the genuineness and creditworthiness of the parties and took a special reference to the contributors of members i.e. (i) Giridhari S. Kale, (ii) Prajakta G. Kale and

(iii) Alok G. Kale. These subscribes share the common address at C-10, Abhimanshree Society, Baner Road, Pune - 411007. Further, Pr.CIT is of the opinion that the Assessing Officer should have applied the provisions of section 56(2)(viib) of the I.T. Act r.w. Rule 11UA of the I.T Rules. 6.1 Further, referring to the Auditor Report furnished u/s 44AB of the Act, the Pr.CIT held that the said report dated 21.02.2014 is not proper. In this regard, Pr.CIT suggested the Assessing Officer to take appropriate action applying the provisions of section 271B r.w.s. 44AB of the Act.

7. Aggrieved with the above decision of the Pr.CIT, the assessee is in appeal before the Tribunal. Grounds of appeal are extracted as under :-

> The following grounds of appeal are taken independently and without prejudice to one another.
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> 1. The Learned Pr. Commissioner of Income Tax-3, Pune has erred on facts and in law in passing the order u/s 263 of the Income Tax Act.

2. The Learned Pr. Commissioner of Income Tax has set aside the assessment order inter-alia for the reason that the Assessing Officer has not examined the true nature of subsidy of Rs.23,18,12,203/-, received by the assessee from the Maharashtra Government for mega projects under the Package Scheme of Incentives 2007, in the light of the judgement of the Hon'ble Supreme Court in the case of M/s Sahney Steel and Press Works Ltd. 94 taxman 368(SC).

The Learned Pr. Commissioner of Income Tax has failed to appreciate that the Assessing Officer has thoroughly examined the nature of the said subsidy received under the Package Scheme of Incentives 2007 and has come to the conclusion that the subsidy was of capital nature and has therefore gone to reduce the same from the cost of acquisition of capital assets and has consequently disallowed depreciation to the extent of Rs.3,47,71,830/- by applying explanation-10 to section 43(1) of the Income Tax Act. The Learned Pr.

Commissioner of Income Tax has himself noted this fact on page 10 para 3 of his order. The Learned Pr. Commissioner of Income Tax has also noted on page 11 of his order that the Assessing Officer has applied the judgement of the Hon'ble Supreme Court in the case of M/s Panni Sugars & Chemicals Ltd. 306 ITR 392(SC).

3. The Learned Pr. Commissioner of Income Tax has erred on facts and in law in holding that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue for the reason that the Assessing Officer has not examined the genuineness and creditworthiness of the parties and reasonableness of the share capital and share premium of Rs.74,69,47,OOO/-, for application of section 68 and section 56(2)(viib) of the Income Tax Act read with rule 11UA of the Income Tax Rule.

The Learned Pr. Commissioner of Income Tax has failed to appreciate that in the first place the share capital and share premium was received in Assessment Year 2011-12 and was therefore not relevant for the Assessment Year 2013-14 under consideration. Secondly the Assessing Officer has also examined the genuineness and creditworthiness of the parties in the assessment proceedings u/s 143(3) of the Income Tax Act for Assessment Year 2011-12.

4. The Learned Pr. Commissioner of Income Tax has erred on facts and in law in holding that it is necessary to examine the applicability of section 271B r.w.s 44AB of the Income Tax Act as the Assessing Officer did not inquire in to this aspect. The Learned Pr. Commissioner of Income Tax has ignored the fact noted by himself on page 18 of his order that the tax audit report dated 21-02-2014 was The Learned Pr. Commissioner of Income Tax has failed to appreciate that available on record. The Learned Pr. Commissioner of Income Tax has failed to appreciate the issue was not the subject matter of the show cause notice issued by him u/s 263 of the Income Tax Act. Therefore, in view of the judgement of Delhi High Court in the case of Krishak Bharati Co-operative Ltd. 80 taxmann.com 326{Delhi) and the judgements of the Hon'ble Income Tax Appellate Tribunal in the case of M/s Geometric Software Solutions Co. Ltd. 32 SOT 428 (Mum) and M/s Wind World India Infrastructure Pvt. Ltd. 86 taxmann.com 279{Mum) the Pr. Commissioner of Income Tax had no jurisdiction to pass revisional order u/s 263 of the Income Tax Act on this issue

5. The appellant craves leave to add to or amend/modify or delete any or all of the above grounds of appeal.

8. Referring to the grounds, ld. AR submitted that the assessee raised above four grounds stating that the order passed by the Pr.CIT u/s 263 of the Act is not valid (ground no.1). In ground no.2, the assessee mentioned that the "issue of subsidy" under the Package Scheme of Incentives, 2007 was thoroughly examined by the Assessing Officer during the original assessment order. In ground no.3, on the issue of share premium receipts, the assessee aggrieved against the direction of the Assessing Officer for examining the genuineness and creditworthiness of the parties on one side and reasonableness of the share premium on the other. On this ground, Ld. AR for the assessee argued that the issue relates to the applicability of the provisions of section 56(2)(viib) r.w. Rule 11UA. These arguments are not borne out of the show cause notice (supra) issued by the Pr.CIT. In ground no.4, the assessee questioned the direction of Pr.CIT for invoking the provisions of section 271B r.w.s. 44AB of the Act. He also argued that the penalty issue u/s 271B of the Act is outside the scope of section 263 of the Act as the same is deeply connected to the assessment proceedings.

9. From the above narration of facts as well as decision of Pr.CIT, we find it is an inescapable conclusion that there are three issues considered by the Pr.CIT in his order. They are (i) the subsidy under Package Scheme of Incentives, 2007, (ii) the treatment of Share premium u/s 68 of the Act -cum- the applicability of the provisions of section 56(2)(viib) of the Act read with Rule 11UA of the I.T. Rules; and (iii) the applicability of the provisions of section 271B r.w.s. 44AB of the Act qua the provisions of section 263 of the Act.

10. Referring to the issues at Sl.No. 1 and 2 (above), ld. Counsel argued that these issues were scrutinized at length by the Assessing Officer during the original assessment proceedings and, therefore, the opinion of the Pr.CIT constitutes a case of substituting his opinion with that of the opinion of the Assessing Officer. In that case, the revisional order of the Pr.CIT is unsustainable in law in view of the binding Hon'ble Supreme Court judgement in the case of Malabar Industrial Co. Ltd. vs. CIT (109 Taxman 66).

11. At the outset, ld. Counsel submitted that the issues at Sl. No.3 and 4 (above) are not borne out of the show cause notice dated 21.03.2018 and these issues were decided without finding place in the said show cause notice. Relying on various decisions, ld. Counsel submitted that these issues are required to be dismissed as outside the purview of the provisions of section 263 of the Act.

12. We shall now deal with each of these issues in the following paragraphs.

I. Subsidy Issue - PSI, 2007

13. The assessee received subsidy of Rs.23,18,12,203/- from the Maharashtra Government and under the PSI Scheme 2007, the assessee treated the same as capital receipt. The Assessing Officer accepted the claim of the assessee after elaborate discussion and relied on various discussions in the process.

14. Further, the Assessing Officer examined this issue and, to the utter dissatisfaction of the assessee, Assessing Officer invoked the provisions of Explanation 10 to section 43 r.w.s. 2(24) clause (xviii) of the Act and amendments thereof. After due deliberation and the reasoning, the Assessing Officer disallowed the claim of depreciation to the tune of Rs.3.48 crores (rounded off). The Assessing Officer reduced the subsidy amount from the "actual cost" of the depreciable assets and calculated the allowable depreciation u/s 32 of the Act.

15. Explaining the facts of the issue relating to the true nature of subsidy, ld. AR submitted that the subsidy received under "Package Scheme of Incentives 2007" (in short 'PSI, 2007') of Maharashtra Government, is of capital nature. Reliance is placed on the order of the Tribunal in case of Innoventive Industries Limited Vs. DCIT, ITA No.601/PUN/2013 & ITA No.215/PUN/2014, order dated 24.03.2017 for the assessment year 2009-2010 and 2010-2011. The contents of para 28 of the order is relevant and the same is extracted as under :-

> "28. Thus, in the facts of the case and in the light of various decisions discussed above, we hold that the incentive received by the assessee under the PSI, 2007 scheme in the form of refund of sales tax is Capital receipt, not liable to tax."

16. Thus, in the facts of the case and in the light of the various decisions discussed above, we find that the subsidy received by the assessee under PSI, 2007 Scheme in the form of refund of sales tax, is of capital receipt and the same is not liable to tax. For this proposition, we rely on the decision of the coordinate bench decision of the Tribunal in the case of Rasiklal M. Dhariwal (HUF) Vs. DCIT in ITA No.575/PUN/2007, decision of Hon'ble Bombay High Court in the case of CIT Vs. Chaphalkar Brothers, 351 ITR 309 and the Special Bench decision in the case of DCIT Vs. Reliance Industries Ltd., 88 ITD 273 and others. The decision of the Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd., 306 ITR 392 and the decision of Hon'ble Jammu and Kashmir High Court in the case of Shree Balaji Alloys and Others Vs. CIT, 333 ITR 335 (J&K) were discussed in the said order of the Tribunal. While this being the law on this issue of treatment of subsidy, the Assessing Officer rightly treated the subsidy as a capital receipt in the assessment order dated 23.03.2016 by discussing it elaborately in para 4 to 4.4 of the said order.

17. As per ld. AR, after much of scrutiny of the issue by Assessing Officer, the issue of show-cause notices/questionnaires, discussions etc. it is not proper to allege that the Assessing Officer failed to conduct due verification into the issue. As the issue was verified and an opinion is framed, the issue under consideration stands outside of the scope of section 263 of the Act. The ld. AR read out the contents of para 4.4 of the order of the Assessing Officer. The same read as follows :-

> "4.4 For the reasons mentioned above, assessee should have reduced the subsidy given by the State Government to that extent of Rs.23,18,12,203/- and should have calculated the depreciation accordingly. However, assessee has failed to do so. As such there is an excessive depreciation allowed in the instant case to the extent of working given by the assessee which comes to Rs.3,47,71,830/- is added to the total income of the assessee within the meaning of section 43(1) r.w.s. 32 of the I.T. Act. Penalty proceedings u/s 271(1)(c) are initiated for concealment of income."

18. Further, referring to the differing stands of the Assessing Officers on similar issue of subsidy and its treatment in various assessment years, ld. AR submitted that in the assessment year 2012-13, in own case, the same issue was analysed and the claim was allowed by the Assessing Officer. Referring to next assessment year 2014-15, ld. AR brought our attention to page 318 of the Paper Book, (the ground of appeal before the Tribunal), ld. AR submitted that the said subsidy is treated as a capital asset and the same has to be reduced for allowing proportionate depreciation u/s 32 of the Act. Further, ld. AR filed written submissions and the same is extracted as under :-

> "(i) The Assessing Officer has allowed the claim of the assessee that the subsidy of Rs. 23,18,12,203/- was of capital nature, after due examination of the facts of the issue and the due examination of the 'Package Scheme of Incentives 2007', and by application of the judgements of the Hon'ble Supreme Court in the case M/s Sahney Steel and Press Works Ltd. 94 taxman 368(SC) and M/s Ponni Sugars & Chemicals Ltd.306 ITR 392(SC).
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> (ii) More detailed findings about such examination are given in the scrutiny assessment order passed u/s. 143(3) of the Income Tax Act for A.Y. 2012-13.

Therefore in view of the judgement of Hon'ble Pune Bench in the case of Suyojit Infrastructure ITA No. 850 and 859/PUN/2016 (Para 13 &

19), M/s Torrent Pharmaceuticals Ltd 97 taxmann.com 671(AHD} and K. Raheja IT Park 36 ITR (TRIB) 632 (HYD) the acceptance of the assessee's claim even without examination in the next following A.V. 2013-14 cannot be said to be erroneous and prejudicial to the interest of the revenue, because the claim has been allowed in A.V. 2012-13 after proper examination, and there was no need to examine the same issue again.

(iii) It is submitted that the department has itself taken a stand in its appeal for A.Y.2014-15 filed before the Hon'ble ITAT, that the subsidy received under (Package Scheme of Incentives 2007' is related to acquisition of capital assets and has to be reduced from the cost of assets for disallowing depreciation, the revenue in the same breath cannot say that the assessment order passed allowing the claim of the assessee that the subsidy received was of capital nature, is erroneous and prejudicial to the interest of the revenue.

(iv) In any case the Hon'ble Pune Bench of the Tribunal in the case of Innoventive Industries Ltd. 601/PUN/2013, after examination of the 'Package Scheme of Incentives 2007' of Maharashtra Government has held that the subsidy received under the said scheme is capital in nature.

In the background of this legal position, even if the Hon'ble Tribunal comes to the conclusion in the present case that the Assessing Officer has not examined correctly, the nature of the subsidy before accepting the claim of the assessee that it was of capital nature, and the revision order of the CIT passed u/s 263 of the Act is to be upheld on this account, ultimately while passing the consequential assessment order, the Assessing Officer, will have to hold that the subsidy received by the assessee under the 'Package Scheme of Incentives 2007', was of capital nature. In view of this, upholding of

the revision order of the CIT will result in avoidable multiplication of litigation/appeals."

19. Leaving the merits of the issue, ld. Counsel submitted that the issue relating to the subsidy was scrutinised by the Assessing Officer and the assessment order bears witness to the said observations. It is the claim of the learned counsel of the assessee before us that the Assessing Officer verified the issue after calling for the details and formed an opinion/view in the matter. On these facts, the Pr.CIT cannot assume the jurisdiction u/s.263 of the Act for taking a view, which is different from that of the Assessing Officer. For this proposition, he relied on various binding judgments.

20. On the other hand, ld. DR for the Revenue defended the order of Pr. CIT vehemently.

21. Decision of the Tribunal on issue of subsidy : We heard both the parties on this issue and perused the orders of the Revenue and the papers filed before us. It is a settled legal proposition that the subsidy, received by the assessee under the PSI Scheme, 2007 from Maharashtra Government, is capital in nature. The Assessing Officer is categorical in accepting the same. However, the Assessing Officer altered the claim of depreciation u/s 32 of the Act qua the changes made in the actual cost qua the subsidy. The Assessing Officer is of the opinion that the assessee falls within the purview of the provisions of Explanation 10 to section 43(1) of the Act. The Assessing Officer took this view after due deliberations and also after relying on the Hon'ble Apex Court judgment cited in para 4 of his order. We find this view of reducing the subsidy from the cost of assets for disallowing depreciation was accepted by the Revenue for the assessment year 2014- 2015 in the assessee's own case. To that extent, considering the consistency, we find no mistake in the order of the Assessing Officer for the assessment year under consideration. Similar claim was allowed by the Revenue in the assessment year 2012-2013 also, in which case, the examination of the issue for establishment of true nature of subsidy shall only breed the multiplication of the proceedings. The same issue need not be examined every year, wherever subsidy is received by the assessee. Further, there is an amendment to the provisions of section 2(24) clause (xviii) of the Act by the Finance Act, 2015. The subsidy is an income after the amendment. The said clause was further amended in 2017. After the amendment, the subsidy segment, which is capitalized to the actual cost is not the income and the assessee is allowed to claim the depreciation u/s 32 of the Act. These amendments do not apply to the assessment year 2013- 14 under consideration as the amendments apply prospectively only. In-fact, the Assessing Officer examined all these issues before treating the subsidy as capital receipt. From this point of view merely based on the ground of verification of the issue by the Assessing Officer, invoking of the provisions of Section 263 of the Act is uncalled for and unsustainable under law. We find merit in the same and uphold the view taken by the Assessing Officer in regular assessment order. Accordingly, the ground no.1 and 2 raised in the appeal on this issue are allowed.

II. Issue relating to Share Premium & Application of Section 56(2)(viib) of the Act.

22. Regarding the requirement of verification of the share premium received by the assessee the facts include that the assessee raised the share capital and the share premium from concerns and the details of which are extracted as under :-

(a) Share Capital of Rs.5,80,00,000/-

(b) Share Premium of Rs. 52,20,00,000/-.

Received from Tata Capital Special Situation Fund.

(c) Share Capital of Rs. 44,30,000/- and

(d) Share Premium of Rs 3,98,70,000/-

Received from the promoters Mr. G.S. Kaley, Ms. Prajakta G. Kaley and Mr. Alok G. Kaley.

(e) Share Capital of Rs 1,20,00,000/- and

(f) Share Premium of Rs 11,06,47,000/-.

Credited on issue of shares to M/s Tata Capital Special Situation Fund by converting 1200 unsecured 0% Optionally Convertible Bonds (OCB) into Optionally Convertible Preference Shares.

23. The genuineness of the capital was the issue which the Pr. CIT felt was not verified by the Assessing Officer in the regular assessment proceedings. The Pr. CIT mentioned that the AO did not apply the provisions of Section 68 of the Act and also the provisions of Sect8ion 56(2)(viib) of the Act to the said transaction. In this regard, the ld. Counsel filed written submissions and the same are extracted as below :-

> "Since the share application money including the share premium was actually received in Financial Year 2010-11 relevant to A.V. 2011-12, the assessment order passed for A.V. 2013-14 cannot be said to be erroneous and prejudicial to the interest of the revenue, on the ground that the genuineness of the share capital and the share premium and reasonableness of the share premium has not been examined by the Assessing Officer.
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> Indirect way of extending the limitation period for revision u/s. 263 for A.V. 2011-12 is not justifiable.
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> (ii) The Assessing Officer has duly examined the genuineness of the share application money and the share premium in the scrutiny assessment proceedings for A.V. 2011-12, when the share application money & share premium was received.
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> (iii) CIT has not issued show cause notice for Share Capital. Therefore the directions of the CIT to the A.O. to verify the genuineness of the share capital are not sustainable in law, as held in Geometric Software Solutions Co. Ltd. 32 SOT 428 (Mumbai), Krishik Bharti Co-Operative Ltd 80 Taxmann.Com 326 (DEL) and Wind World India Investment P Ltd 86 Taxmann.Com 279 (MUM).

> (iv) CIT has not issued show cause notice for application of S. 56(2) (viib) to share premium. Therefore the directions of the CIT to the A.O. to examine the applicability of section 56 (2) (viib) is unsustainable in law, as held in Geometric Software Solutions Co. Ltd. 32 SOT 428 (Mumbai), Krishik Bharti Co-Operative Ltd 80 Taxmann.Com 326 (DEL) and Wind World India Investment P Ltd 86 Taxmann.Com 279 (MUM).

24. From the above, it is evident that the share premium was actually received by the assessee in the year relevant to the assessment year 2011- 2012. In that case, no addition could be made by invoking the provisions of Section 68 of the Act in the assessment year 2013-14 under consideration. It is the submission of the assessee that detailed verification was undertaken by the Assessing Officer during the assessment proceedings for the assessment year 2011-2012. Mentioning that the Pr.CIT failed to issue any show cause notice on this issue of share capital/share premium, ld. AR submitted that cancellation of the assessment order of Assessing Officer on this account is unsustainable in view of the decision in the case of Geometric Software Solutions Co. Ltd. 32 SOT 428 (Mumbai), Krishik Bharti Co-Operative Ltd 80 Taxmann.Com 326 (DEL) and Wind World India Investment P Ltd 86 Taxmann.Com 279 (MUM). Further, it is the submission of the assessee that the Pr. CIT never issued a show cause notice u/s 263 of the Act calling for assessee's Explanation on the applicability of the provisions of Section 56(2)(viib) of the Act.

25. Ld. DR relied heavily on the order of the Pr.CIT.

26. After hearing both the parties on this issue, we find that the Pr. CIT failed to issue show cause notice undisputedly. Therefore, in our opinion, the order of the Pr.CIT requires to be reversed on this issue. As such, ld.DR could not make out a case that the issue of share premium and the share capital relate in the assessment year 2013-2014 under consideration. The assessee's claim of receiving share capital/share premium in the assessment year 2011-2012 stand undisputed. Therefore, the assessee wins on this ground too. Accordingly, the ground no.3 stands allowed.

III. Issue of Levy of Penalty u/s 271B r.w.s. 44AB of the Act.

27. Regarding direction of the Pr. CIT in the matter relating to initiation of penalty proceedings u/s.271B of the Act for failures u/s.44AB of the Act, it is the submission of the ld. Counsel for the assessee that such penalty matters are outside the scope of Section 263 of the Act in view of the decision of the Pune bench of the Tribunal in the case of Shri Nandkumar Bhalchandra Bhondve Vs. ACIT, ITA No.943/PUN/2014, order dated 17.08.2016. The written submission of the assessee in this regard are extracted as follows :-

> "The CIT is not justified in holding that the assessment order was erroneous and prejudicial to the interest of the revenue on the ground that the Assessing Officer has failed to initiate penalty proceeding u/s 271B of the Act when there was delay in filing of the tax audit report u/s 44AB of the Act.

(i) Since the CIT has not raised the issue of delay in filing of tax audit report u/s 44AB of the Act, in the show cause notice issued u/s. 263 of the Act, the CIT has no jurisdiction to hold that the assessment order was erroneous and prejudicial to the interest of the revenue on this ground as held in Geometric Software Solutions Co. Ltd. 32 SOT 428 (Mumbai)1 Krishik Sharti Co-Operative Ltd 80 Taxmann.Com 326 (DEL) and Wind World India Investment P Ltd 86 Taxmann.Com 279{MUM).

(ii) The Hon'ble Pune Bench of the Tribunal has held in the case of Nandkumar Shalchandra Shondve ITA No. 943/PUN/2014 that non initiation of penalty does not render the assessment order as erroneous and prejudicial to the interest of revenue, because initiation of penalty proceedings is not a part of the assessment order.

(iii) It is submitted that penalty u/s 271B of the Act is leviable only for non-

filing of the tax audit report u/s 44AB of the Act and not for delay in filing of the tax audit report. The T.A.R. can be filed upto completion of assessment as held in K.K. Spun Pipe 284 ITR 301 {P.H.)I Apex Laboratories 384 ITR 364 (MAD)I Prachin Group ITA No 877/PN/20151 (2017) and Magick Woods Exports (P.) Ltd. 81 Taxmann.Com 231 (CHEN)."

28. On hearing both the sides on this issue, we find that the order of the Tribunal in case of Shri Nandkumar Bhalchandra Bhondve (supra) was decided in the context of the Assessing Officer's failure to initiate penalty proceedings u/s.271(1)(c) of the Act. The Pr.CIT assumed jurisdiction u/s.263 of the Act for making good of the said lapses of the Assessing Officer. On these facts in para 8 & 9 the Tribunal held that the Pr. CIT cannot initiate the penalty proceedings. The Assessing Officer should initiate such penalty proceedings during the assessment proceedings. For the sake of completeness, the said para 8 & 9 are extracted as under :-

"8. We have carefully heard the rival submissions and perused the record. In exercise of power conferred under section 263 of the Act, the Commissioner has set-aside the assessment for framing it afresh inter-alia on the ground that the Assessing Officer has failed to initiate penalty proceedings under section 271(1)(c) of the Act on the addition of Rs.2,20,72,000/- to the total income. The other ground for invoking power under section 263 namely assessment done in haste has not been seriously challenged on behalf of the assessee. Accordingly, the limited question to be decided in the present case is whether the Commissioner is empowered under section 263 to set-aside the assessment where the Assessing Officer has failed to initiate penalty proceedings under section 271(1)(c) of the Act in the assessment proceedings ? We find that this question has been deliberated upon in large number of judicial precedents and is no longer res integra. In the case Addl. CIT v. J.K. D'Costa [1982] 133 ITR 7 (Delhi) followed in ACIT v. Achal Kumar Jain (142 ITR 606) and CIT v. Nihal Chand Rekyan [2000] 242 ITR 45 (Delhi) and in Addl.CIT v. Sudarshan Talkies (1993) 200 ITR 153 (Delhi); also by Hon'ble Madras High Court in CIT v. C.K.K.Swami (254 ITR 158); Sarda Prasad Singh v. CIT (173 ITR 510 (Gauhati), it has been held that if the Commissioner finds, while examining the records of an

assessment order under section 263, that the Assessing Officer has not initiated penalty proceedings, he cannot direct initiation of penalty proceedings because penalty proceedings are not a part of assessment proceedings. The Commissioner cannot pass an order under section 263 pertaining to penalty. Hon'ble Supreme Court has dismissed special leave petition against the Delhi High Court decision in Addl.CIT v. J.K.D'Costa [reported in (1984) 147 ITR (St) 1)]. In the case of CIT v. Dr. Suresh G.Shah (289) ITR 110 (Gij) following its earlier judgement in the case of CIT v. Parmanand M.Patel (2005) 198 CTR (Guj) 641/278 ITR 3 (Guj), Hon'ble Gujarat High Court has held that while exercising powers under Section 263, CIT is not competent to direct initiation of penalty proceedings under s.271(1)(a) or s.273(2)(c) of the Act. In the case of CIT v. Parmanad M.Patel (supra), Hon'ble jurisdictional High Court has held that the CIT is not empowered to record satisfaction by invoking s.271(1)(c) of the Act and if he is not entitled to do so, on his own, he cannot do it by directing the assessing authority. The Court observed that in other words, what the CIT himself cannot do, he cannot get it done though the assessing authority by exercising revisional powers.

9. In view of large number of cases decided in favour of the assessee as noted above, we are inclined to respectfully follow the ratio of these decisions in preference to the observations made by the Hon'ble Allahabad High Court in the case of Associated Contractors Corporation (supra). In view of the above, the direction of the Commissioner to initiate penalty proceedings under section 271(1)(c) of the Act while setting-aside the assessment requires to be cancelled. We do so accordingly. ....."

29. Considering the above settled legal proposition at the level of Pune Bench of the Tribunal and also others (supra), the findings of the Pr. CIT in the matters relating to initiation of penalty proceedings u/s.271B of the Act is not approved. Accordingly, we allow ground no.4 of appeal of the assessee.

30. In the result, the appeal of the assessee is allowed.

Order pronounced on this 28th day of February, 2019

Sd/-	Sd/-
(SUSHMA CHOWLA)	(D. KARUNAKARA RAO)
/ JUDICIAL MEMBER	/ ACCOUNTANT MEMBER

/ Pune; Dated : 28th February, 2019.
Sujeet/PKM

/Copy of the Order is forwarded to :

1. / The Appellant;
2. / The Respondent;
3. The Pr. CIT-3, Pune;

4. ¡ ¢ , , " " / DR 'A', ITAT, Pune;

5. ¢ £ / Guard file.

// True Copy //

/ BY ORDER,

//True Copy// Senior Private Secretary
, / ITAT, Pune