

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI
BEFORE SHRI AMARJIT SINGH, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. Nos. 1667 to 1669/Mum/2021
(निर्धारण वर्ष / Assessment Years: 2014-15 to 2016-17)

Dy. Commissioner of Income tax Central Circle-2(2), Old CGO Building, 8 th Floor, M. K. Road, Mumbai-400020.	बनाम/ Vs.	M/s. Vinati Organics Ltd. 11 th Floor, 1102, Parinee Crescenzo, G Block, Plot No.C38/39, Behind MCA, BKC, Bandra East, Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACV6538K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri S. N. Kabra (Sr. AR)	
Assessee by:	None	

सुनवाई की तारीख / Date of Hearing: 08/03/2022
घोषणा की तारीख / Date of Pronouncement: 28/04/2022

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals) -48, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Ys. 2014-15 to 2016-17.

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2. The revenue has filed the present appeal against the order dated 26.07.2021 passed by the CIT(A)-48, Mumbai relevant to the A.Y. 2014-15.

3. The revenue has raised the following grounds: -

“1. Whether the CIT (A) was justified against the AO’s action not considering the claim of export incentive of Rs. ,66,70,644/- by



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ignoring the observation of the Assessing officer that the assessee has merely stated that the expert incentive is capital in nature and has not given any further clarification as to what was the purpose for which the subsidy has been given nor has it clarified as to the purpose for which the subsidy has been utilized.”

4. The revenue has raised the following additional ground: -

“Whether the Ld. CIT (A) was justified against the AO’s action of not considering the claim of Education Cess of Rs. 1,42,88,177/- on income tax and Dividend Distribution Tax by ignoring judgments of the Hon’ble High Courts in which Education cess was not allowed as deduction.”

5. The brief facts of the case are that the assessee filed its return of income on 25.09.2014 declaring total income to the tune of Rs.104,57,28,450/- for the A.Y.2014-15. The assessee has filed the revised return of income on 31.03.2016 declaring total income to the tune of Rs.88,23,78,030/-. The return was processed u/s 143(1) of the Act. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee company was engaged in the business of manufacturing of 1200 TPA Isobutyl Benzene (BB), an intermediate used to manufacture Ibuprofen from its plant at MIDC, Mahad, Raigad District, Maharashtra. The assessee was also having its second plant at Lote to manufacture 2 Acrylamido 2 Methylpropane Sulfonic Acid (ATBS). During the year under assessment, the assessee has credited to the P & L Account receipts aggregating to Rs.7,05,30,16,000/- on account of sale of products, interest, dividend, etc. After debiting various expenses such as cost of raw material consumed, employee benefits, finance costs etc, total income of Rs.88,23,78,025/- was



offered for taxation. The assessee claimed the export incentive in sum of Rs.3,66,70,644/- which was disallowed and assessee also claimed the Education Cess in sum of Rs.1,03,08,932/-. After some more disallowance as mentioned in the order, the total income of the assessee was assessed to the tune of Rs.94,77,38,030/- and the book profit to the tune of Rs.127,15,23,856/- u/s 115JB of the Act. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee but the revenue was not satisfied, therefore, the revenue has filed the present appeal before us.

ISSUE NO. 1

6. Under this issue the revenue has challenged the allowance of the claim in sum of Rs.1,10,01,193/- on account of export incentive. The Ld. Representative of the revenue has argued that the export incentive was not factually claimed by assessee in his return of income initially but the CIT(A) has wrongly allowed the claim of the assessee, therefore, the finding of the CIT(A) is not justifiable, hence, is liable to be set aside. On the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on these issues: -

“5.2 APPELLATE DECISION: I have considered the facts of the case, submissions of the assessee and material on record. Ground No 2 and 3 deals with treatment of Export Incentivisation Scheme. It is relevant to mention over here that, the AO in his assessment order in para3-e has discussed this issue in detail. The assessee relying on various judicial pronouncements claimed that, export incentive of Rs. 3,66,70,644/- were of capital in nature. However this claim was made during the assessment proceedings and not at the time of filing the



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return. On the other hand the AO has contended that the said claim was not made by the assessee while filing the return of income u/s. 139(1) or in the revised return of income. While dealing with this issue the AO has relied upon the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd vs CIT. Therefore, the claim for export incentive of Rs. 3,66,70,644/- being capital in nature made during the assessment proceedings was rejected by the AO and held it as revenue receipt and addition was made in the total income of the assessee accordingly.

5.3 During the appellate proceedings the assessee argued that the export incentive under the schemes MLFPS/SHIS/IEIS from the Government is actually capital receipt and the same is not liable to be taxed and that MLFPS/SHIS/IEIS is an incentive granted by Government in order to export products/sectors of high export intensity employment potential and the same would be incentivized at 2% of FOB value of exports under MLFPS/SHIS/IEIS schemes. During the year under consideration the appellant has received export incentive of Rs.3,66,70,644/under the scheme of Market Linked Focus Product Scheme from the Government. Basically the AO has not discussed about the nature of expenditure whether capital or revenue, the only stand taken by the AO is that the assessee failed to claim such incentive while filing the return of income u/s.139(1) or in the revised return of income. However various court's have taken a view that such claims can be made by the assessee at any stage of appellate proceedings as well. The Hon'ble Mumbai High Court has decided an identical issue in case of Pruthvi Brokers Pvt. Ltd 253 CTR 0515, where in it has been held that such issues can be raised before CIT(A)'s though it was not claimed at the time of filing of return.



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Similar decision has been rendered by the Hon'ble Karnataka High Court in case of PCIT vs Karnataka state co-op feberation Ltd. 128 Taxmann.com. Besides various Courts have taken similar view in the following cases:

1. NTPC Vs CIT 229 ITR 383(SC),

2. Jute Corporation of India Vs. CIT 181 ITR 688 (SC).

5-4 Coming to the export incentive schemes, it appears, that, the assessee has been given incentives under status Holder Incentive Scheme (SHIS), Incremental Export Incentivisation Scheme (IEIS) and Market Linked Focus Product Scheme (MLFPS), As regards SHIS, the incentive is given with the objective to promote investment in technology upgradation and is granted @ 1% of FOB value of Export. The investment in technology is clearly a capital expenditure. Therefore, to that extent the incremental incentive is linked to capital expenditure of the assessee company, even though it was received by the assessee @1% of export value. As regards, Incremental Export Incentivisation Scheme (IEIS), the incentive it is linked with incremental export. So if in a particular year the exports sales were more than certain percentage of export in the immediately preceding year, the assessee becomes entitled for this incentive. The assessee has agrued that inceremental incentive are once again connected to expansion on investment in new plant and machinery. The assessee argued that, this is also in a way connected to capital expenses. As regards Market Linked Focus Product Scheme (MLFPS), the incentive is granted in order to export of products of high export intensity employment potential and is incentivized at 2% of FOB value of exports. Therefore, this incentive is linked to employment generation by the Company connected to the export of goods and



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mercantile. The assessee also argued that entire expenditure is capital in nature and contended that the AO was unjustified in rejecting the claim of the assessee vide letter dated 18.11.2016 (page no. 158 to 160 Paper Book).

5.5 I have considered the facts of the case, submissions of the assessee and material on record and feel that this export incentive receipt is in someway connected to capital receipt in the form of technology upgradation and expansion of capacity of the plant. The Hon'ble Supreme Court in the case of CIT vs Ponni Sugars & Chemicals Ltd (2008) 306 ITR 392 (SC) has examined this issue in great detail and held that if the purpose of incentive or subsidy was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was of capital in nature. For clarity the relevant portion of the decision is reproduced as under:

“15. In the decision of House of Lords in the case of Seaham Harbour Dock Co. v. Crook (1931) 16 TC 333 the Harbour Dock Co. had applied for grants from the Unemployment Grants Committee from funds appropriated by Parliament. The said grants were paid as the work progressed the payments were made several times for some years. The Dock Co. had undertaken the work of extension of its docks. The extended dock was for relieving the unemployment. The main purpose was relief from unemployment. Therefore, the House of Lords held that the financial assistance given to the company for dock extension cannot be regarded as a trade receipt. It was found by the House of Lords that the assistance had on nothing to do with the trading of the company because the work CI by undertaken was dock extension. According to the House of Lords, the assistance in the form



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of a grant was made by the Government with the object that by its use men might be kept in employment and, therefore, its receipt was capital in nature. The importance of the judgment lies in the fact that the company had applied for financial assistance to the Unemployment Grants Committee. The Committee gave financial assistance from time to time as the work progressed and the payments were equivalent to half the interest for two years on approved expenditure met out of loans. Even though the payment was equivalent to half the interest amount payable on the loan (interest subsidy) still the House of Lords held that money received by the company was not in the course of trade but was of capital nature. The judgment of House of Lords shows that the source of payment or the form in which the subsidy is paid or the mechanism through which it is paid is immaterial and that what is relevant is the purpose for payment of assistance. Ordinarily such payments would have been on revenue account but since the purpose of the payment was to curtail/obliterate unemployment and since the purpose was dock extension, the House of Lords held that the payment made was of capital nature. 16. One more aspect needs to be mentioned. In Sahney Steel and Press Works Ltd. (supra) this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra) assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.



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17. Applying the above tests to the facts of the present case and keeping in mind the object behind the payment of the incentive subsidy we are Satisfied that such payment received by the assessee under the Scheme was not in the course of a trade but was of capital nature. Accordingly, the first question is answered in favour of the assessee and against the Department.”

5.6 An identical issue has been examined by Hon'ble ITAT Chennai in the case of Eastman Exports Global Clothing Pvt. Ltd. In ITA No. 47/MDS/2016 dated 17.05.2016. The said decision by ITAT considered Market Linked Focus Product Scheme (MLFPS) held as this incentive is capital receipt by observing as under:

"9. We have considered the rival submissions on either side and also perused the relevant material available on record. The Market Linked Product Scheme is a scheme promoted by the Director General of Foreign Trade wherein incentive @ 2% on the FOB value of the total export was allowed. As per the Scheme, the incentive was given to export products in a specified market. The export of products which are covered under FPS list would be given incentive of 2% on FOB value of the export. In other words, it is an incentive given by the Government for exploring the new markets across the globe. The question arises for consideration is when the assessee was given incentive for exploring the new markets across the globe, whether such incentive would be a capital receipt or revenue receipt? The Apex Court in the case of Ponni Sugars & Chemicals Ltd. (supra) had an occasion to examine an Identical situation and observed that if the object of the subsidy was to enable the assessee to carry on the business more profitably, then the receipt is on the revenue account. On the other hand, if the object of assistance was to enable the assessee to set up a new unit or expand the existing unit, then the



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receipt is on the capital account. In the case before us, the Government of India provided the incentive for exploring the new markets across the globe. Exploring a new market for a specified area would naturally expand the market area of the assessee. The incentive given to the assessee is not for running the business profitably but for expanding the market area. Therefore, this Tribunal is of the considered opinion that the incentive given by the Government to the assessee for exploring the new market is a capital receipt, hence it _ cannot be treated as income either under Section 2(24) or 28 of the Act. In view of the above, we are unable to uphold the order of the lower authority. Accordingly, the orders of the lower authorities are set aside and the addition made by the Assessing Officer is deleted."

5.7 Similarly, the Hon'ble ITAT Delhi in the case of Sutlej Textiles & Industries Ltd (ITA No. 5142/Del/2013) has held the TUF subsidy has been given for the purpose of technology upgradation and for promoting capacity expansion, globalization of textile trade and employment generation and thus applying the purpose test as laid down in Ponni sugar (Supra) held the same as capital receipt and not chargeable to tax.

5.8 Similarly, the Hon'ble Punjab & Haryana High Court in the case of Sham Lal Bansal held that the TUF subsidy received by the assessee is in the nature of capital receipt and not revenue receipt.

5.9 Further, Hon'ble ITAT, Chennai in the case of M/s. CVN Textile Pvt. Ltd. Vs DCIT in ITA No. 746/MDS/2014 vide order dated 21.11.2014 in para 8 of the order held as under:

"The assessee second ground claims TUF receipt of 7.58 lakhs are also capital receipt. The assessment as well lower authority treated it as revenue receipt. This amount represents interest subsidy @5%



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separately accounted for receipt instead of netting the same as against interest paid amount. It imerges from CIT vs Shamlal Bansal that their lordship have held that a TUF receipt is only a capital receipt”

9.10 Similarly, the issue whether the interest subsidy received under the technology up gradation fund scheme (TUF) is capital receipt or revenue receipt was came up for consideration before the Hon'ble ITAT, Kolkata bench in the case of M/s. Gloster Jute Mills Ltd vs Addl. CIT in ITA No. 687/Kol/2010 and the Hon'ble ITAT, vide order dated 02.07.2014 decided the issue in favour of the assessee with the following observation:

"9. We have carefully considered the submissions. We find considerable cogency in the submissions of the Id. Counsel of the assessee. We find that identical issue under the Technology Upgradation Fund Scheme (in short 'TUFS ') of Ministry of Textiles was considered by the Hon'ble Punjab &Haryana High Court in ITA No. 472 of 2010 vide decision dated 17.01.2011. Hon 'ble High Court has considered and held the issue as under:

"2. The assessee is engaged in manufacture and sale of woolen garments It received subsidy for repayment of loan taken for building, plant and ITA No.95/Kol/2011 M/s. Gloster Jute Mills Ltd.

A.Yr.2007-08 machinery under the Credit Linked Capital Subsidy Scheme under Technology Upgradation Fund Scheme (FUFS) of Ministry of Textiles, Government of India. The assessee claimed the said subsidy to be capital receipt but the Assessing Officer did not accept the same and added back the same to the income of the assessee holding the same to be revenue receipt. On appeal, the



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CIT(A) upheld the plea of the assessee, which view has been affirmed by the Tribunal with the following observations:

"Having regard to the aforesaid, in our view, it is quite clear that the objective of the subsidy scheme was to enhance the technology apparatus of the assessee by assisting in acquiring machinery and further that the subsidy so received was utilized for repayment of loans taken by the assessee to set up the new unit, as was the intention of the subsidy.

10. Considered in the aforesaid light, in our view, the facts of the instant case are on all fours comparable to those considered by the Hon 'ble (Supreme Court in the case of Ponni Sugars & Chemicals Ltd. (supra) and therefore, a natural corollary is that the nature of the subsidy in question is capital. Therefore, both on the issue of the objective of the scheme and on the utilization of the funds received as subsidy, the subsidy is to be viewed as capital in nature having regard to the judgment of the Hon 'ble Supreme Court in the case of Ponni Sugars & Chemical Ltd. (supra).

11. Reliance placed by the Revenue on the case of Sawhney Steels and Press Works Ltd. & others (supra), in our view, is not appropriate having regard to the aforesaid features of the scheme, which are not in dispute. Moreover, in the case of Sawhney Steel and Press Works Ltd. & others (supra), it was found as a fact that the subsidy was given to meet recurring expenditure and was not for acquiring a capital asset. Whereas in the instant case, admittedly, there is no provision in the scheme to grant subsidy to meet any recurring expenditure and neither such a case has been set up by the Department. The only objections of the Department are that the subsidy has been given after commencement of production and,



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secondly that it was for repayment of loans. Both these factors do not distract from the nature of the subsidy being treated as capital. as explained by the Hon 'ble Supreme Court in the case of Ponni Sugars Chemicl's Ltd. (supra). "

3. We have heard learned counsel for the appellant.

4. Learned counsel for the revenue submitted that the subsidy was not given at the time of setting up of the industry but after commencement of production for repayment of loan. In such situation, the amount should have been treated as revenue receipt, as per judgment of the Hon 'ble Supreme Court in Sahne Steel & Press Works Ltd. & Ors. Ve CIT 997) 228 ITR 253. ITA No.95/Kol/2011 M/s. Gloster Jute Mills Ltd. A.Yr.2007-08.

3. We are unable to accept the submission.

6. The purpose of scheme under which the subsidy is given, has been discussed by the Tribunal. To sustain and prove the competitiveness and overall long term viability of the textile industry, the concerned Ministry of Textile adopted the TUFs scheme, envisaging technology upgradation of the industry. Under the scheme, there were two options, either to reimburse the interest charged on the lending agency on purchase of technology upgradation or to give capital subsidy on the investment in compatible machinery. In the present case, the assessee has taken term loans for technology upgradation and subsidy was released under agreement dated 12.7.2005 with Small Industry Development Bank of India. The relevant clause of the agreement under which the subsidy was given is as under:

"Para 8. - to prevent misutilization of capital subsidy and to provide an incentive for repayment, the capital subsidy will be treated a non



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interest bearing term loan by the Bank/Fis. The repayment schedule of the term loan however will be worked out excluding the subsidy amount and subsidy will be adjusted against the term loan account of the beneficiary after a lock in period of three years on a pro-rate basis in terms of release of capital subsidy. There is no apparent or real financial loss to a borrower since the countervailing concession is extended 10 the loan amount. "

7. In view of above, the view taken in Sahney Steel & Press Works Ltd. & 015., could not be applied in the present case, as in said case the subsidy was given for running the business. For determining whether subsidy payment was 'revenue receipt' or 'capital receipt'. character of receipt in the hands of the assessee had to be determined with respect of the purpose for which subsidy is given by applying the purpose test, as held in Sahney Steel & Press Works Ltd. &Ors. itself and reiterated in later judgment in CIT v, Ponni Sugars & Chemicals Ltd. &ors. (2008) 3061TR 392, referred to in the impugned order of the Tribunal. 8. In view of above. since the matter is covered by judgment of the Hon 'ble Supreme Court in Ponni Sugars & Chemicals Ltd. & ors. against the revenue, no substantial question of law arises ". Thus we find that on identical issue the matter has been decided in favour of the assessee. In these circumstances, we are of the opinion that a held here in above in order to sustain competitiveness in the domestic as well as international markets and overall long-term viability of the industry, the concerned Ministry adopted the TUFs scheme envisaging Technology Upgradation of the Industry. Hence, the ITA No.95/Kol/2011 M/s. Gloster Jute Mills Ltd. A.Yr.2007-08 subsidy received in this regard falls into capital field. Hence respectfully following the precedent as above we Set aside the



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order of the Id. CIT(Appeals) and decide the issue in favour of the assessee.

5.11 Therefore, in view of the principals laid down by the Hon'ble Apex Court in the case of CIT vs Ponni Sugars & chemicals Ltd (supra), decision of Hon'ble Punjab & Haryana High Court in the case of Sham LalBansal and various decisions as given above, the export incentive is to be held as capital in nature is held as and liable not to tax.

5.12 Therefore, these grounds of appeal are decided in favour of the assessee and are accordingly treated as Allowed.”

7. On appraisal of the above mentioned finding, we find that no doubt the assessee initially nowhere raised the claim of export incentive before the AO in its return of income nor the claim was raised at the time of filing the revised return of income. The claim was raised before the CIT(A) initially and the CIT(A) was having co-terminus power as of AO who dealt with the issue on the basis of the decision of Hon'ble Bombay High Court in the case **Pruthvi Brokers Pvt. Ltd. 253 CTR 0515 and in view of the decision in the case of PCIT Vs. Karnataka State Co-op feberation Ltd. 148 Taxmann.com. The CIT(A) has also placed reliance upon the decision in the case of NTPC Vs. CIT 229 ITR 383 (SC) and Jute Corporation of India Vs. CIT 181 ITR 688 (SC).** Apparently, CIT(A) has co-terminus power to consider the issue which may not be considered by the AO and can taken the decision in accordance with law. Taking into account of all the facts and circumstances and considering this fact that CIT(A) has appreciated the law mentioned above, we are of the view that the claim of the assessee has rightly been considered at appellate stage. So far as the export incentive claim is concerned, the assessee was entitled the



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incentive under status holder incentive claim (SHIS), Incremental Export Incentivisation Scheme (IEIS) and Market Linked Focus Products Scheme (MLFPS). As regards SHIS, the incentive was given with the objective to promote investment in technology upgradation and was granted @ 1% of FOB value of Export. The investment in technology is clearly a capital expenditure. So far as the incremental incentive scheme is concerned, the incentive was linked with incremental export if a particular year, export sale was more than certain percentage of export in the preceding year, the assessee becomes entitled for this incentive. The said incentive was connected to expenses of investment in new plant and machinery, hence, the incentive is capital in nature. With regard to, Market Linked Focus Product Scheme (MLEPS) is concerned, the incentive was granted in order to export of products of high export intensity employment potential and is incentivized at 2% of FOB value of exports. This incentive was linked to employment generation by the company connected to the export of goods and mercantile. It is linked with capital in nature. The CIT(A) has placed reliance upon the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Ponni Sugars & Chemicals Ltd. (2008) 306 ITR 392 (SC)**, **Eastman Exports Global Clothing Pvt. Ltd. in ITA. No.47/MDS/2016 dated 17.05.2016** and **Sutlej Textiles & Industries Ltd. (ITA. No.5142/Del/2013)** and **M/s. Gloster Jute Mills Ltd. Vs. Addl. CIT in ITA.No.687/Kol/2010**. These issues have duly been examined and discussed by CIT(A) in his order. The copy of scheme has also been filed by Id. Representative of the assessee for examination. It is necessary to advert the contents on record: -



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“3.14.1 Objective is to offset high freight cost and other externalities to select international markets with a view to enhance India’s export competitiveness in these countries.

3.14.2 Entitlement

Exporters of all products to notified countries (as in Appendix 37C of HBPv1) shall be entitled for Duty Credit Scrip equivalent to 3% of FOB value of exports (in free foreign exchange) for exports made from 27-8-2009 onwards, unless a specific date of export/period is specified by public notice/notification.

3.14.3 Ineligible Exports Categories/Sectors for FMS The following categories of export products/sectors shall be ineligible for Duty Credit Scrip, under FMS scheme

- (a) Supplies made to SEZ units;*
- (b) Service Exports;*
- {c) Diamonds and other precious, semi-precious stones;*
- (d) Gold, silver, platinum and other precious metals in any form, including plain and studded Jewellery;*
- (e) Ores and Concentrates, of all types and in all forms;*
- (f) Cereals, of all types;*
- (g) Sugar, of all types and in all forms;*
- (h) Crude/Petroleum Oil & Crude/Petroleum based Products covered under ITC HS codes 2709 to 2715, of all types and in all forms; and*
- (i) Export of Milk and Milk Products covered under ITC HS Codes 0401 to 0406, 19011001, 19011010, 2105 & 3501.*



3.15. Focus Product Scheme (FPS)

3.51.1 Objective

Objective is to incentivise export of such products which have high export intensity/employment potential, so as to offset infrastructure inefficiencies and other associated costs involved in marketing of these products,

3.15.2 Entitlement

'Exports of notified products (as in Appendix 37D of HBPv1) to all countries (including SEZ, units) shall be' entitled for Duty Credit scrip equivalent to 2% of FOB value of exports (in free foreign exchange) for ex. porta made from 27-8-2009 onwards. unless a avecific date of export/period is specified by public notification.

However Special Focus Products, sector(s) covered under Table 2 and Table 5 of Appendix 37 D shall be granted Duty Credit Scrip Equivalent to 5% of FOB value of export (in free foreign exchange) for exports made from 27.08.2009 onwards, unless a specific date of export/period is specified by public notice/notification.

Further, Focus Product(s)/sector(s) that are notified uder Table) of Ay pend 370 shall be granted & additional Duty Credit Sump equivalent to 2% of FOB value of export On free foreign exchange over above the existing rate for that product/sector from the admissible date of export/ period specified m public notice issued to notify the product /sector.

3.15.3 Market Linked Focus Products Scrip (MLEPS);



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Expert of Products/Sectors of high export intensity /employment potential (which are not covered under present FPS List) would be incentivized at 2% of POB value of exports (in free foreign exchange) under FIN when exported to the Linked Markets (countries), which are not covered in the present FMS list, as notification in Appendix 371) of HBPv1, for exports made from 27 82009 onwards, unless a specific date of export/ period is specified by public notice/notification.

3.16 Status Holders Incentive Scrip (SHIS)

3.16.1 With an objective to promote investment in upgradation of technology of some specified sectors as dated in Para 3.16.4 below, Status Holders shall be entitled to incentive scrip @ 1% of FOB value of exports made during 2009-10, 2010-11 and during 2011-12, of these specified sectors, in the form of duty credit.

The Status Holders of the additional sectors listed in the Para 3.10.8 of HBPvi 2009-14 (RE-2010) shall be eligible for this Status Holders Incentive Scrip on exports made during 2010-11 and 2011-12.

This shall be over and above any duty credit scrip claimed /availed under this chapter. 3.16.2 Status Holders availing Technology Upgradation Fund Scheme (TUFS) benefits (under Ministry of Textiles) during a particular year shall not be eligible for Status Holders Incentive Scrip for exports of that year.

3.16.3 The Status Holders Incentive Scrip shall be with Actual User Condition and shall be used for exports of capital goods (as defined in FTP) relating to the sectors specified in Para 3.16.4 below.

3.16.4 The Status Holders of the following Sectors shall be eligible for this Status Holders Incentive Scrip –



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- (1) Leather Sector (excluding finished leather);*
- (2) Textiles and Jute Sector;*
- (3) Handicrafts;*
- (4) Engineering Sector (excluding Iron & Steel, Non-ferrous Metals in primary or intermediate forms, Automobiles & two wheelers, nuclear reactors & parts and Ships, Boats and Floating Structures);*
- (5) Plastics; and*
- (6) Basic Chemicals (excluding Pharma Products).*

The Status Holders of the additional sectors listed in the Para 3.10.8 of HBPv1 2009-14 (RE 2010) shall be eligible for this Status Holders Incentive Scrip an exports made during 2010-11 and 2011-12.”

8. The scheme is self-explanatory. There is nothing on record to which it can be assumed that the same is not in existence. No reason has been explained to which it can be assumed that the CIT(A) has granted the relief wrongly and illegally. The facts are not distinguishable at this stage. In view of the facts and circumstances and the law considered by the CIT(A), we are of the view that the finding of the CIT(A) is quite correct which is not liable to be interfered with at this appellate stage. Accordingly, we affirm the finding of the CIT(A) on this issue and decide this issue in favour of the assessee against the revenue.

ADDITIONAL GROUND

9. Under this issue the revenue has challenged the allowance of claim of the Education Cess. The CIT(A) has allowed the claim of Education Cess on the basis of the decision of Hon'ble Bombay High Court in the



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case of **‘Sesa Goa Limited Vs. JCIT (2020) 117 taxmann.com 96**. The Ld. Representative of the revenue has argued that now the situation has been become different and the Hon’ble ITAT has passed the order dated 26.10.2021 in the case of **M/s. Kanoria Chemicals & Industries Ltd.** in which it is held that the Education Cess is the part and parcel of the tax. It is also argued that the Finance Bill 2022 has also cleared the situation in which Education Cess has been treated as a part of the tax. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Taking into account of all the facts and circumstances, we observed that the Hon’ble ITAT in the case of **M/s. Kanoria Chemicals & Industries Ltd. Vs. ACIT** dated 26.10.2021 has passed the order by relying upon the decision of the Hon’ble Supreme Court in the case of **CIT Vs. K. Srinivasan (1972) 83 ITR 346**. The relevant finding in the case of **M/s. Kanoria Chemicals & Industries Ltd** is hereby as under: -

“15. The assessee has taken the following additional ground of appeal:-

Additional Ground.

I. On the facts and circumstances of the case and in law, the Assessing Officer/ CIT(A) ought to have allowed deduction of Education Cess amounting to Rs. 3,19,95,9981- in terms of law laid down by the Hon'ble Rajasthan High Court in Chambal Fertilizers and Chemicals Ltd. [ITA o. 52/Raj/2018 ruling dt. 31.7.2018] and further Hon'ble Kolkata Tribunal in case of ITC Ltd. [ITA No. 685/Koll20 14 ruling dt. 27.11.20 18]

16. As per the provisions of section 40(a)(ii) of the Income-tax Act, 1961 (in short, the ‘Act’) ‘any rate or tax levied’ on profits and gains



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of business or profession' shall not be deducted in computing the income chargeable under the head 'profits and gains, business or profession.

17. The Ld. Counsel for the assessee has submitted that 'Cess' has not been specifically mentioned in the aforesaid provisions of section 40(a)(ii) and, therefore, Cess is an allowable expenditure. He in this respect has relied upon the "CBDT Circular No. 91/58/66-ITJ(19) dated 18-05-1967", wherein it has been interpreted that the 'Cess' shall not be disallowable. The said Circular for the sake of ready reference is reproduced as under:-

"Interpretation of provision of Section 40(a)(ii) of IT Act, 1961 - Clarification regarding.-

"Recently a case has come to the notice of the Board where the Income Tax Officer 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 Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-

"(ii) 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. –



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3. The Board desire that the changed position may please be brought to the notice of all the Income Tax Officers so that further litigation on this account may be avoided. {Board's F . No.91/5B/66-ITJ(19), dated 18-5-1967.

18. The Learned Counsel for the assessee in this respect has further relied upon the decision of the Hon'ble Bombay High Court in the case of "Sesa Goa Limited Vs. JCIT" (2020) 117 taxmann.com 96 and further on the decision of the Hon'ble Rajasthan High Court in the case of "Chambal Fertilizers & Chemicals Ltd Vs. JCIT": D.B Income-tax Appeal No. 52/2018 decided on 31-07-2018, wherein, the Hon'ble High Court/s relied upon the aforesaid CBDT Circular Dt. 18-05-1967(supra) and in view of the interpretation made by the CBDT have held that 'education cess' can be claimed as an allowable deduction while computing the income chargeable under the heads of profits and gains of business or profession. The Learned Counsel has further relied upon the following decisions of the Co-ordinate Benches of this Tribunal, who have followed the aforesaid judgments of the Hon'ble High Courts:

a. Decision of Kolkata Bench of the Tribunal in the case of DCIT Vs. ITC Infotech India Ltd, ITA No. 67/Kol/2015 dt. 23-10-2019

b. Decision of Kolkata Bench of the Tribunal in the case of Tega Industries Ltd Vs. ACIT, ITA No. 404/Kol/2017 dt. 23-8-2019

c. Decision of Kolkata Bench of the Tribunal in the case of SREI Infrastructure Finance Ltd Vs.Addl. CIT, R-9, ITA No. 1318/Del/2012 dt. 31-12-2019.

19. However, with due respect to the decisions of the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court and of co-ordinate



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Benches of this Tribunal, we find that the issue is squarely covered by the decision of the Hon'ble Apex Court of the country in the case of "CIT Vs. K. Srinivasan" (1972) 83 ITR 346, wherein the following questions came for adjudication before the Hon'ble Apex Court:-

"Whether the words "Income tax" in the Finance Act of 1964 in sub-s (2) and sub-s.(2)(b) of s. 2 would include surcharge and additional surcharge."

20. The Hon'ble Supreme Court answered the question in favour of revenue observing as under:-

"In our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income tax. The meaning of the word "surcharge" as given in the Webster's New International Dictionary includes among others "to charge (one) too much or in addition " also "additional tax". Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to s. 2 of the Finance Act 1963 it would lead to the result that income tax and super tax were to be charged in four different ways or at four different rates which may be described as (i) the basic charge or rate (In part I of the First Schedule); (ii) Sur- charge; (iii) special surcharge and (iv) additional surcharge calculated in the manner provided in the Schedule. Read in this way the additional charges form a part of the income tax and super tax".

21. The Hon'ble Supreme Court, therefore, has decided the issue in favour of the revenue and held that surcharge and additional surcharge are part of the income-tax. At this stage, it is pertinent to



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mention here that 'education cess' was brought in for the first time by the Finance Act, 2004, wherein it was mentioned as under:-

“ An additional surcharge, to be called the Education Cess to finance the Government's commitment to universalise quality basic education, is proposed to be levied at the rate of two per cent on the amount of tax deducted or advance tax paid, inclusive of surcharge.”

22. The provisions of the Finance Act 2011 relevant to the Assessment Year under consideration i.e. 2012-13 are also relevant. For the sake of ready reference, the same is reproduced hereunder:-

2(11) The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", calculated at the rate of two per cent. of such income-tax and surcharge, so as to fulfil the commitment of the Government to provide and finance universalised quality basic education.

23. A perusal of the aforesaid provisions of the Finance Act 2004 and Finance Act 2011 would show that it has been specifically provided that 'education cess' is an additional surcharge levied on the income-tax. Therefore, in the light of the decision of the Hon'ble Supreme Court in the case of "CIT Vs. K. Srinivasan" (supra) the additional surcharge is part of the income-tax. The aforesaid decision of the Hon'ble Apex Court and the provisions of Finance Act, 2004 and the relevant provisions of section 2(11) & (12) of the subsequent Finance Acts have not been brought into the knowledge of the Hon'ble High Courts in the cases of "Sesa Goa Ltd" & "Chambal Fertilisers" (supra). Since the decision of the Hon'ble Supreme Court prevails



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over that of the Hon'ble High Courts, therefore, respectfully following the decision of the Hon'ble Supreme Court in the case of "CIT Vs. K. Srinivasan" (supra), this issue is decided against the assessee. The additional ground of assessee's appeal is accordingly dismissed.

10. Subsequently, the Finance Bill, 2022 has been passed in which the preposition of Education Cess has been dealt with and accordingly the Education Cess is being treated as part and parcel of the tax and the claim of expenses in connection with the Education Cess is not liable to be allowed. Accordingly, we set aside the finding of the CIT(A) and decide this issue in favour of the revenue against the assessee.

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11. The facts of the present case are quite similar to the facts of the case as narrated above while deciding in ITA. No.1667/Mum/2021, therefore, there is no need to repeat the same. However, the figure is different. The finding given above while deciding the ITA. No.1667/Mum/2021 is quite applicable to the facts of the present case also as mutatis and mutandis. Accordingly, we dismiss the appeals of the revenue bearing ITA. Nos.1668 & 1669/Mum/2021 also.

12. In the result, the appeals filed by the revenue are hereby dismissed.

Order pronounced in the open court on 28/04/2022

Sd/-
(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28/04/2022

Vijay Pal Singh (Sr. PS)

Sd/-
(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**