

(1999) 03 CAL CK 0002

Calcutta High Court

Case No: Income-tax Reference No. 29 of 1997

Commissioner of Income Tax

APPELLANT

Vs

Balarampur Chini Mills Ltd.

RESPONDENT

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**Date of Decision:** March 30, 1999**Citation:** (1999) 154 CTR 323 : (1999) 238 ITR 445 : (1999) 105 TAXMAN 200**Hon'ble Judges:** Y.R. Meena, J; Barin Ghosh, J**Bench:** Division Bench**Advocate:** D.K. Shome, for the Appellant; D. Pal, J.P. Khaitan and A.K. Dey, for the Respondent

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### Judgement

1. In compliance of direction of this court on an application u/s 256(2) of the Income Tax Act 1961, the Tribunal has referred the following question for the opinion of this court :

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that realisation through additional free sale of sugar quota under the Sampat Incentive Scheme was in the nature of capital receipt ?"

2. At the outset it is brought to our notice that the question is covered by the order of this court dated March 31, 1998, in the case of this assessee whereby the application of the Revenue u/s 256(2) of the Act has been rejected. Therefore, this application could be rejected outright or the question can be answered in favour of the assessee. Learned counsel for the Revenue has not controverted this fact. The Tribunal has decided the issue in favour of the assessee on two counts firstly that incentive receipts have overriding obligation, the additional profits will only be used to pay off the loans taken from Government financial institutions, for expansion of sugar factory, in other words, the receipt on account of incentive will be used to pay off capital loan. Secondly, when the receipt is for payment of loan taken for capital asset, it is a capital receipt. The first finding of overriding obligation has not been challenged, therefore, the question regarding the second finding has become only

of academic interest, so long as the finding of the Tribunal regarding diversion of income remains, the incentive receipts cannot be taxed as revenue receipt.

3. Though the question is covered in favour of the assessee but when the reference has been made as per our direction on application u/s 256(2), therefore, we would like to answer the question on the merits also. On the merits also we do not find force in the case of the Revenue.

4. As to overcome the problem of shortage of sugar for public, the Government had introduced a Scheme in 1975, which is modified on November 15, 1980. Under the Scheme, the Government has given two incentives : first to increase the free sale of sugar quota and, secondly, a concession was given in excise duty, if there is an expansion in the existing sugar factory or new factory is set up.

5. To have the benefit of the Scheme, the assessee has taken the loan to the tune of Rs. 243 lakhs from Government financial institutions for expansion of the factory and by expansion raised the capacity of the factory from 1,219 tons crushing per day to 1,600 tons crushing per day. The expansion in the factory has been approved by the Directorate of Sugar, Ministry of Food, Government of India, under the Scheme.

6. On the basis of the expansion of the existing sugar factory, the assessee was held eligible for the incentive by way of release of additional free sale sugar quota, under the Incentive Scheme of the Government of India, Directorate of Sugar, dated November 15, 1980, read with the earlier Scheme dated December 6, 1975.

7. The salient features of the Scheme under which the factory is eligible of the benefit of Scheme have been conveyed by the letter of Directorate of Sugar, dated November 15, 1980, the relevant part of which reads as under :

"To mitigate the hardship caused to the sugar industry, in the establishment of new sugar factories and for effecting substantial expansions in the existing sugar factories, caused by steep rise in the cost of plant and machinery needed for such sugar projects, the Government sanctioned a Scheme in November, 1975, to provide incentives to the new sugar factories and expansion scheme. The incentives consisted partly of higher percentage of sale of sugar quota and partly of concessions in the excise duty. The scheme came into effect from November 1, 1975, and envisaged that new factories and expansion projects should, over a period of five years from the date of commencement of production/completion of expansion, be compensated for the shortfall likely to be incurred on account of the burden imposed by higher capital cost."

8. Under the scheme, the assessee has expanded his sugar factory by investing Rs. 243 lakhs and claimed the benefit of the scheme. The claim of the assessee was examined, it was found eligible for the benefit of higher free sale quota of sugar and conveyed to the assessee by letter dated August 20, 1982, which reads as under :

"With reference to your incentive claim for expansion submitted to this Directorate for expansion from 1219 to 1600 TCD, I am to inform you that your claim has been examined in this Directorate and you are found eligible for incentives for the above expansion as per revised Incentive Scheme, vide Directorate's letter No. F. 17(8)-PC, dated November 15, 1980." "

9. The admitted facts are that the assessee had taken loan to the tune of Rs. 243 lakhs for expansion of his plant and machinery for more production of sugar.

10. The additional free sale quota of sugar is available to the assessee only in case the assessee pays the term loans taken from the Central financial institutions, out of the realisation of sale on additional free sale of sugar quota. The relevant part of the scheme reads as under :

"The beneficiaries of the Scheme should ensure that the surplus funds available by way of incentives are utilised only for the payment of term loans, if any, outstanding from the Central financial institutions. The factories should submit a certificate to this effect annually duly certified by their statutory auditors. Failure to submit the above certificate will result in the holding up of release of extra free sale quota for the succeeding years."

11. There is no dispute on the facts also that additional free sale quota is available to the assessee only in case he pays the loan taken by him from the Central financial institutions for expansion of his existing unit or for setting up of new unit. Rs. 243 lakhs were taken from the Central Government financial institutions for expansion of its existing units, i.e., plant and machinery for manufacturing of sugar. Whatever the additional realisation by way of sale on additional free sale quota, the assessee has to pay back the loan of the Central financial institution, taken for expansion of plant, for more production of sugar.

12. Though the finding of the Tribunal regarding diversion of income has not been challenged by the Department, but to answer whether the additional realisation is a revenue receipt or capital receipt, we would like to refer to the facts and law on the question whether the additional realisation out of sale of additional free sale quota, diverted to be paid under a particular obligation, before it is actually received by the assessee can be said a diversion of income ?

13. In [Poona Electric Supply Co. Ltd. Vs. Commissioner of Income Tax, Bombay](#) , it has been held that Income Tax is a tax on the real income, i.e., the profits arrived at on commercial principles subject to the provisions of the Act. The real profit can be ascertained only by making the permissible deductions. There is a clear-cut distinction between deductions made for ascertaining the profits and distributions made out of profits. Their Lordships further observed at page 531 as under :

"They were a part of the excess amount paid to it and reserved to be returned to the consumers. They did not form part of the assessee's real profits. So, to arrive at the

taxable income of the assessee from the business u/s 10(1) of the Act, the said amounts have to be deducted from its total income."

14. Any amount received under obligation, that determines the issue whether it is income of the assessee or a capital receipt or revenue receipt. As there is diversion of receipt and that receipt should be treated according to diversion. As that receipt before it is actually received has overriding obligation.

15. Admittedly, the incentive has been received for payment of the loan which was taken for expansion of sugar factory. That amount is received against the capital investment, expenditure. How that can be a revenue receipt ?

16. In view of the facts of this case and law on the point, we fully agree with the Tribunal the additional realisation under the scheme, for payment of loan is a case of diversion of income.

17. Now it brings us to consider whether this additional realisation is a revenue receipt.

18. Whether the receipt in question is a capital receipt or revenue receipt ? A similar question has been considered by their Lordships in the case of [M/s. Sahney Steel and Press Works Ltd., Hyderabad etc. etc. Vs. Commissioner of Income Tax, Andhra Pradesh-I, Hyderabad](#) . Their Lordships analysed and discussed at page 262 as under :

"It is not the source from which the amount is paid to the assessee, which is determinative of the question whether the subsidy payments are of revenue or capital nature. The first proposition stated by Viscount Simon in Ostime's case [1946] 14 ITR 45 is that if payments in the nature of subsidy from public funds are made to the assessee to assist him in carrying on his trade or business, they are trade receipts. The sales tax upon collection forms part of the public funds of the State. If any subsidy is given, the character of the subsidy in the hands of the recipient- whether revenue or capital--will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as trading receipt. The source of the fund is quite immaterial."

19. In page 266, their Lordships further clarify and observe as under :

"... the subsidies have not been granted for production of or bringing into existence any new asset. The subsidies were granted year after year only after setting up of the new industry and commencement of production. Such a subsidy could only be treated as assistance given for the purpose of carrying on of the business of the assessee. Applying the test of Viscount Simon in the case of Ostime [1946] 14 ITR 45, it must be held that these subsidies are of revenue character and will have to be taxed accordingly."

20. Making this distinction finally their Lordships concluded at page 267 which reads as under :

"The Madhya Pradesh High Court, however, failed to notice the significant fact that under the scheme framed by the Government, no subsidy was given until the time production was actually commenced. Mere setting up of the industry did not qualify an industrialist for getting any subsidy. The subsidy was given as help not for the setting up of the industry which was already there but as an assistance after the industry commenced production. The view taken by the Madhya Pradesh High Court is erroneous."

21. Thus their Lordships made it clear that whether it is a revenue receipt or capital receipt, it is to be seen for which purpose it has been given to the assessee ? If it is given for running the day-to-day business, that is a revenue receipt. If it is given to meet the capital cost of asset, then it is a capital receipt. The admitted fact in this case is that the incentive has been received by the assessee for payment of the loan, which was taken for expansion of plant and machinery--a capital asset.

22. Therefore, in view of the decision of their Lordships, the receipt is a capital receipt.

23. Accordingly, we answer the question in the affirmative, that is, in favour of the assessee and against the Revenue.