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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 2nd July, 2012.

\+ ITA 312/2012

CIT ..... Appellant
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

versus

DEUTSCHE POST BANK HOME FINANCE LTD ..... Respondent
Through: Mr. Rajiv Tyagi and Mr. Ajay Kumar, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT,J: (OPEN COURT)

1. The Revenue seeks to appeal against the impugned order of the Income Tax Appellate Tribunal (hereinafter called 'ITAT') in Income Tax Appeal No.1405/Del/2010 dated 14.10.2011.

2. The substantial question sought to be urged by the Revenue is as follows: -

> "Whether the amount of ₹11,22,38,874/-, infused by BHW Holding AG, Germany to the assessee by way of subvention assistance, is taxable as a revenue receipt and therefore falls within the definition of 'income' under Section 2 (24) of the Income Tax Act, 1961."

3. The facts necessary for the determination of the question are that the assessee is a 100% subsidiary of one BHW Holding AG, Germany (hereinafter called 'Holding Company') and is engaged in the activity of housing finance. By two letters dated 24.09.2004 and 04.02.2005, the Holding Company granted

subvention assistance to the assessee to an extent of Euro two million i.e. equivalent to ₹11,22,38,874/-. This was done on the evaluation of the Holding Company, that the assessee was likely to, on account of its business activity, incur losses which would be substantially if not entirely eroded. The Assessing Officer held that the disbursement of incentive (i.e. subvention receipt in this case) was by way of casual receipt in order to assist the assessee to continue its business operation and therefore rejected the assessee's contention. The assessee preferred an appeal to the Commissioner of Income Tax (Appeals) (hereinafter called 'CIT (A)') who by order dated 20.12.2009 accepted the assessee's contention holding that the money received could not be taxed. The CIT (A) was of the opinion that the money received by the assessee company cannot be taxed as it was akin to a gift, and Gift Tax had been abolished. The Assessing Officer treated it as a casual receipt. In this regard the relevant para is extracted herein below: -

> *"6. The money received by the assessee company cannot be taxed as a nature of gift as Gift-tax Act is abolished. The AO treats it as a casual receipt which is also not a correct view because of the circumstances under which the assessee has received the amount from its parent company. The income shall not be chargeable to tax u/s 28 of the I.T. Act. The nature of receipt by the bank does not fall in any of the categories defined u/s 28 of the Act. Considering all the aspects of the provisions of the I.T. Act, I find that the receipt of the appellant company from its parent company will be treated as capital receipt not chargeable to income-tax as money was provided by the parent company to recoup the financial health of the Indian subsidiary company. The addition of ₹11,22,38,874/- is hereby deleted."*

4. The Revenue appealed to the ITAT. The ITAT, at the request of the Revenue, considered the following points: -

> *"1. On the facts and circumstances of the case and in law, the order of the CIT (Appeals) is wrong, perverse, illegal and against the provisions of law which is liable to be set aside;*

2. On the facts and circumstances of the case and in law, the ld. CIT (Appeals) has erred in deleting the "subvention receipt" of ₹11,22,38,874/- by treating it as Capital receipt instead of revenue."

5. The ITAT rejected the Revenue's appeal, *inter alia*, holding that: -

"8. We have heard both the parties and gone through the material available on record. We have also gone through the balance sheet and profit and loss account as on 31st March, 2005. During the year under consideration the assessee had operational income of ₹47,92,05,285/- and other income of ₹3,07,75,900/- totaling to ₹50,99,81,185/-. The assessee has incurred expenditure of ₹61,04,33,338/-, which includes depreciation of ₹1,34,50,656/-. Thus, the loss suffered by the assessee during the year under consideration was ₹10,04,52,153/- if the depreciation claim of ₹1,34,50,656/- (a notional loss) is excluded even then the loss suffered by the assessee will be about ₹8.7 crores. The holding company vide their letter dated 24th September, 2004 and informed the assessee that a sum of Euro 2 Million will be paid to Birla Home Finance Ltd. as subvention payment towards restoration of the net worth of the company expected to be partly eroded by the losses suffered/ projected by the assessee company for the financial year 2004-05. The holding company remitted a sum of Euro 14,99,980 and the balance amount of Euro 5,00,000 was remitted vide letter dated 04.02.2005. In this letter also it has been clearly mentioned that the amount was paid for the purpose of restoration of net worth of the company expected to be partly eroded by the losses suffered by the company for financial year 2004-05. In certificate of inward remittance issue by UTI Bank Ltd. the purpose of remittance has been mentioned as subvention payment towards restoration of net worth of the company eroded by the suffered company. Further the assessee had filed copy of confirmation received through email wherein the holding company has certified that they have not claimed the subvention payment as expenditure in their return of income and no tax benefit has been received by them in respect of subvention payment. BHW Holding AG has capitalized the amount in their books of accounts. From these facts, it is clear that the amount of subvention money was received by the assessee to recoup the losses expected to be suffered by the assessee during financial year 2004-05.

9. In the case of Handicraft & Handloom Corporation (supra), the assessee, a wholly subsidiary company of STC incurred loss in its business of export of handloom, etc. for assessment year 1970-71. The STC recouped the losses and gave cash assistance at 6 per cent of the foreign earnings of the assessee. Hon'ble High Court has held that there is a basic difference between the grants made by a Government or from public funds generally to assessee in a particular line of business or trade, with a view to help them in the trade or to supplement their general revenues or trading receipts and not ear-marked for any specific or particular purpose and a case of a private party agreeing to make good the losses incurred by an assessee on account of a mutual relationship that subsists between them. The former are treated as a trading receipt because they reach the trader in his capacity as such and are made in order to assist him in carrying on of the trade. The latter are in the nature of gifts or voluntary payments motivated by personal relationship and not stemming from any business considerations. The amount received from parent company was not grants received from an outsider or the Govt. on such general grounds. The amounts were paid by STC to the assessee in order to enable it which was its subsidiary and was incurring losses year after year, to recoup those losses and to enable it to meet its liabilities. The amounts received by the assessee from STC could not be treated as part of the trading receipt.

9.1 In Lurgi India Company Ltd. (supra) the assessee received a sum of ₹13 crores from its parent company M/s. Lurgi Company AG, which was credited to profit and loss account by way of capital grant. However, in computation, this amount was also appended to the return stating, inter alia, that in the relevant previous year assessee received ₹13 crore from Lurgi AG for re-couping of its losses. The amount so received was held to be capital grant not chargeable to tax under the Act in view of decision of Hon'ble Delhi High Court in the case of Handicrafts & Handloom Export Corporation of India Vs. CIT (supra).

10. If the facts of the case before us are examined in the light of the decision of Hon'ble Delhi High Court in the case of Handicrafts and Handloom Export Corporation of India Ltd. (supra), we find that the amount subvention money was received by the assessee from

its holding company not as trader, but to recoup the losses likely to be suffered by it. The amount was received by virtue of their relationship of parent and subsidiary company. These are voluntary payments arising out of personal relationship of parent and subsidiary company. These are voluntary payments arising out of personal relationship of parent and subsidiary company and not stemming from any business considerations. Therefore, the assessee's case is squarely covered by the decisions of Hon'ble Delhi High Court in the case of Handicraft & Handloom Export Corporation (supra) and the ITAT in the case of Lurgi India (supra). The decisions relied upon by the Revenue are distinguishable on facts and hence not applicable to the facts of the assessee's case. Accordingly, we do not find any infirmity in the order of the ld. CIT (A) deleting the addition made by the assessing officer".

6. It is urged on behalf of Revenue that the ITAT fell into error in deciding that the subvention receipt received from the Holding Company was not income and relied on Section 2(24) of the Income Tax Act, 1961 (hereinafter called 'Act'). It was urged that the definition of income includes receipts of this kind and would fulfill the character of income, whose definition is inclusive.

7. Learned counsel urged that the decision in ***Handicrafts & Handloom Export Corporation of India v. CIT***, (1983) 140 ITR 532 which was relied upon by the ITAT is not applicable, since the facts of this case were different. Counsel submitted that the facts of that case showed that funds were public in nature and the cash assistance given by the holding company to STC, was not subject to taxation. Learned counsel relied upon two decisions ***Ratna Sugar Mills Co. Ltd. v. CIT***, (1958) 33 ITR 644 and ***(V.S.S.V.) Meenakshi Achi v. CIT***, (1963) 50 ITR 206 of Allahabad and Madras High Courts respectively which were eventually considered by the Supreme Court. It was held that where public funds are used as an incentive or in order to assist, or give subsidy to recoup a unit's losses or to provide against or financial liability, the Courts have taken the view that such an assistance would not qualify as income. Learned counsel stressed that the true and correct test to be applied is to be the purposive test, spelt out in the decision of ***Commissioner of***

Income Tax v. Ponni Sugars and Chemicals Ltd. (2008) 306 ITR 392. Counsel submitted that if the real purpose of the assistance is rendered to protect investment or to ensure that the liabilities which may adversely implicate the accounts of the company are to be met then and then only the assistance would fall outside the ambit of taxation.

8. Learned counsel for the assessee, on the other hand, submitted that the view taken by the CIT(A) as confirmed by the ITAT are predominantly based upon the decision of this Court in the *Handicrafts & Handloom Export Corporation of India* case(supra). He therefore submitted that there is in fact no substantial question of law which requires to be answered since the issue has been settled by the previous decision in *Handicrafts & Handloom Export Corporation of India* (*supra*).

9. In view of the above discussion the question which this Court is confronted with is whether assistance given by the assessee's holding company is a capital receipt or a revenue receipt in the hands of assessee.

10. Both the CIT(A) as well as the ITAT in the present case noticed and relied upon the decision of *Handicrafts & Handloom Export Corporation of India* (*supra*). A brief account of that judgment would be essential. In that case cash assistance of ₹11.70 lakhs given by the STC. The question formulated was whether such cash assistance amounted to income. The Court noticed previous rulings of the Allahabad and Madras High Court respectively in *Ratna Sugar Mills Co. Ltd.* (*supra*) and *Meenakshi Achi* (*supra*) the reasoning of which were confirmed by the common judgment by the Supreme Court in *Meenakshi Achi* (*supra*). The Court held that the amounts given by the STC to the assessee i.e., Handicrafts & Handloom Export Corporation of India in order to recoup its losses which were incurred year after year were akin to assistance by a father to ensure the business

survival of his child. The Court held that the amount given by the father will only be in the nature of gifts/or voluntary payment and not stemming from any business consideration. The position is similar here.

11. The Revenue had urged the decision in Handicrafts & Handloom Export Corporation of India (*supra*) is not applicable to this case because the nature of funds were public in character. It was urged that the appropriate criteria is the purposive test which determines the character of funds in a given case. The relevant passage in *Ponni Sugar and Chemicals Ltd.* (*supra*) is as follows: -

> *"In our view, the controversy in hand can be resolved if we apply the test laid down in the judgment of this court in the case of Sahney Steel and Press Works Ltd. In that case, on behalf of the assessee, it was contended that the subsidy given was up to 10 per cent. of the capital investment calculated on the basis of the quantum of investment in capital and, therefore, receipt of such subsidy was on capital account and not on revenue account. It was also urged in that case that subsidy granted on the basis of refund of sales tax on raw materials, machinery and finished goods was also of capital nature as the object of granting refund of sales tax was that the assessee could set up new business or expand his existing business. The contention of the assessee in that case was dismissed by the Tribunal and, therefore, the assessee had come to this court by way of a special leave petition. It was held by this court on the facts of that case and on the basis of the analyses of the scheme therein that the subsidy given was on revenue account because it was given by way of assistance in carrying on of trade or business. On the facts of that case, it was held that the subsidy given was to meet recurring expenses. It was not granted for production of or bringing into existence any new asset. The subsidies in that case were granted year after year only after setting up of the new industry and only after commencement of production and, therefore, such a subsidy could only be treated as assistance given for the purpose of carrying on the business of the assessee. Consequently, the contentions raised on behalf of the assessee on the facts of that case stood rejected and it was held that the subsidy received by Sahney Steel could not be regarded as anything but a revenue receipt.*

Accordingly, the matter was decided against the assessee. The importance of the judgment of this court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that 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 at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt in 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 the existing unit 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 the incentive subsidy. The form or the mechanism through which the subsidy is given are irrelevant."

12. This Court is of the opinion that there is no shift in the nature of the determinative test, to decide whether a receipt is revenue or capital. The Revenue is undoubtedly correct in urging that the income under Section 2(24) makes no difference between the nature and character of receipt. It is however the individual facts of each case which are decisive. The decision in *Handicrafts & Handloom Export Corporation of India (supra)* of this Court spelt out the relevant test i.e. whether the subsidy or the assistance is in order to ensure the recouping of losses. In that case the facts were sparker and the assessee was incurring losses year after year. STC as holding company and also the trading arm of the Government decided and infused cash assistance. No doubt there are observations in that judgment stating that the character of public funds was an important factor which persuaded the Court to hold that such assistance did not fall within the definition of

income. However, we see no difference in a present case. It is not in dispute that the assessee did incur losses a fact noticed by the ITAT in its narration of facts. In fact the assistance was given at point of time when the losses were anticipated, through the letters which were relied upon. So far as the decision in *Ponni Sugar and Chemicals Ltd. (supra)* is concerned, no doubt the Court clarified how a subsidy should be treated i.e. by purposive test. The Court presciently held if the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is to the revenue account. On the other hand under the subsidy scheme, if the object is to enable the assessee to set up a new unit or expand it then the receipt of the subsidy is to the capital account. Therefore, it is the assessee's action which determines whether subsidy is to avoid losses and liabilities or boost its profits. On a proper application of the above test we see no difference between the facts of the present case and those in *Handicrafts & Handloom Export Corporation of India (supra)*. The assessee was inevitable on the road to incurring losses; its holding company decided to intervene and render assistance. The ITAT has also recorded that, keeping aside the depreciation which the assessee would have been entitled to actual losses amounted to ₹8.7 crores.

13. Having regard to all these circumstances, this Court is of the opinion that the impugned order of the ITAT is based on sound reasoning and does not call for any interference.

The appeal is dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

JULY 02, 2012
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