

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

ITA No.2/2010 & CMP Nos.3/2010,28/2010 & 29/2010
ITA No.4/2010
ITA No.5/2010 & CMP No.4/2010
ITA No.13/2010
ITA No.6/2010 & CMP No.5/2010
ITA No.7/2010 & CMP No.6/2010
ITA No.15/2010 & CMP No.13/2010
ITA No.17/2010 & CMP No.15/2010
ITA No.16/2010 & CMP No.14/2010
ITA No.20/2010
ITA No.01/2010 & CMP 01/2010
ITA No.8/2010 & CMP No.8/2010
ITA No.9/2010 & CMP No.9/2010
ITA No.11/2010 & CMP Nos.11/2010 & 23/2010
ITA No.14/2010
ITA No.12/2010 & CMP No.12/2010
ITA No.24/2010 & CMP No.22/2010
ITA No.21/2010 & CMP No.20/2010
ITA No.22/2010
ITA No.31/2010

Date of Decision: 31.01.2011

1. M/S Shree Balaji Alloys	vs.	Commissioner of Income Tax & anr.
2. M/S Ravenbhel Healthcare Pvt. Ltd.	vs.	Commissioner of Income Tax & anr.
3. M/S Pee Ell Alloys	vs.	Commissioner of Income Tax & anr.
4. M/S Singla Cables Industries	vs.	Commissioner of Income Tax & ors.
5. Ajay Gupta	vs.	Commissioner of Income Tax & anr.
6. Rajesh Giri	vs.	Commissioner of Income Tax & anr.
7. ACR Foods Pvt. Ltd.	vs.	Commissioner of Income Tax & anr.
8. M/S Shiva Steel Rolling Mills	vs.	Commissioner of Income Tax
9. M/S Chattan Cement Industries	vs.	Commissioner of Income Tax.
10. M/S Unique Industrial Carbons	vs.	Commissioner of Income Tax & ors.
11. M/S Suntec Controls	vs.	Income Tax Officer
12. M/S Suntec Controls	vs.	Income Tax Officer
13. M/S Bhagwati Metal Works	vs.	Commissioner of Income Tax & anr.
14. Mahesh Chand Goyal	vs.	Commissioner of Income Tax
15. M/S Amar Cements, Kathua	vs.	Commissioner of Income Tax & anr.
16. M/S SPM Industries	vs.	Income Tax Officer
17. Vinod Kumar Jain	vs.	Commissioner of Income Tax & anr.
18. M/S Shiva Mint Industries	vs.	Commissioner of Income Tax & anr.
19. M/S G. Tech. Industries	vs.	Commissioner of Income Tax & anr.
20. M/S Kashmir Cement Industries	vs.	Commissioner of Income Tax & ors.

Coram:

**Mr. Justice J.P.Singh, Judge.
Mr. Justice Hasnain Massodi, Judge.**

Appearing Counsel:

For the Appellant(s) : M/s D.C.Raina, Sr. Advocate with Sachin Dogra, Advocate & Ajay Vohra, Advocate in ITA Nos.2,4,5,9 &14. M/s Kanan Kapoor, R.K.Gupta, K.Sampat & R.P.Garh, Advocates in ITA Nos.1,8,11 & 12. M/s Salil Kapoor, S.K.Anand & C.S.Anand, Advocates in ITA No.24/2010. Mr. S.S.Ahmed, Advocate in ITA Nos. 6,7,16 & 17. Mr. Rajiv Chopra, Advocate in ITA Nos. 21 & 22/2010. Mr. Subash C. Dutta & S. S.Wazir, Advocates in ITA Nos. 13/2010 & 31/2010.

For the Respondent(s): Mr. D.S.Thakur, Advocate with Ms. Aruna Thakur, Advocate.

i)	Whether approved for reporting in Press/Journal/Media	:	Yes
ii)	Whether to be reported in Digest/journal	:	Yes

J. P. Singh J:

1) Aggrieved by the orders of the Income Tax Appellate Tribunal Amritsar Bench, Amritsar, on their respective Appeals, against the orders of the Commissioner of Income Tax (A), Bathinda, upholding the orders of the Income Tax Officers, denying them deductions under Section 80-1B of the Income Tax Act, 1961, hereinafter to be referred as “the Act”, for short, on the *Excise Refund and Interest Subsidy*, etc., holding that the *Excise Refund and Interest Subsidy* etc. received by them, in pursuance to the New Industrial Policy and other Concessions announced for the State of Jammu and Kashmir vide Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion)’s Office Memorandum of June 14, 2002, was, **Revenue Receipt**, and not **Capital Receipt**, hence liable to Tax, the appellants-assessees have approached this Court by their Appeals preferred

under Section 260-A of the Act, seeking setting aside of the Income Tax Appellate Tribunal's orders of November 26, 2009, November 11, 2009, November 12, 2009, December 18, 2009, December 29, 2009, December 18, 2009, February 18, 2010 and April 09, 2010 passed in their respective Appeals, besides the orders of the Commissioner of Income Tax (Appeals) and Assessing Officers in respect of their Income Tax Returns.

- 2) Except variation in amounts, the issues involved in the Appeals, being identical, these were heard together, finding that the case projected by the appellants involved Substantial Questions Of Law.
- 3) The issues that arise for determination in the Appeals, are these:-

1) Whether the amount of EXCISE REFUND and INTEREST SUBSIDY received by the appellants-assesseees, in pursuance to the incentives announced and sanctioned vide Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion)'s Office Memorandum No.1(13)2000-NER dated 14.6.2002 and

Central Excise Notification Nos. 56 and 57 dated 14.11.2002 and other Notifications issued on the subject, pertaining to the Industrial Policy introduced in the State of Jammu and Kashmir, is *Capital Receipt* and, thus, not liable to tax under the provisions of the Act, or *Revenue Receipt*, as opined by the authorities under the Act ?

- 2) **Whether the appellants-assesseees are entitled to deductions under Section 80-1B of the Act on the *Excise Duty Refund* and *Interest Subsidy* etc., being the income derived from the industrial undertaking, in case the *Excise Refund* and *Interest Subsidy* were found to be *Revenue Receipt*?**
- 4) We have considered the submissions made on behalf of the appellants-assesseees and the Revenue, on the issues dealt with by the Income Tax Appellate Tribunal, in the light of the case law referred at the Bar.
- 5) Before coming to the issues, which need determination, regard needs to be had to the salient features of the New Industrial Policy, Amendment introduced thereto and the Statutory Central Excise Notifications issued in this respect governing the refund of *Excise Duty* and *Interest*

Subsidy, as incentives to the Industrial Units, pursuant to the New Industrial Policy.

The Statement and Objects, which had lead to the New Industrial Policy and other Concessions for the State of Jammu and Kashmir floated vide Office Memorandum of June 14, 2002 and the salient features thereof, may, in a nutshell, be stated thus:-

Considering the request of the Government of Jammu and Kashmir for a special package for development of the Industries in the State on the lines for the North East Industrial Policy notified by the Central Government vide Ministry of Industry's OM No.EA/1/2/96-IPD dated 24.12.1997, discussions were held by the Central Government on *Strategy and Action Plan* for **Development of Industries and generation of employment** in the State of Jammu and Kashmir with various related Ministries on the issues, *interalia*, of **infrastructure development, financial concessions and easy market access**, pursuant whereto, the Government of India,

Ministry of Commerce and Industry (Department of Industrial Policy & Promotion), issued its Office Memorandum dated June 14, 2002 whereby it was provided that keeping in view the fact that the State of Jammu and Kashmir had lagged behind in industrial development, there was need for structured interventionist strategies to accelerate the industrial development of the State boosting investors' confidence.

The new initiatives, in terms of the Memorandum, were aimed at providing requisite incentives as well as enabling environment for industrial development, improving availability of *Capital* and increase in market access so as to give a fillip to *private investment in the State*.

These Fiscal Incentives were to be provided to the *New Industrial Units* and *substantial expansion of existing units*.

The new industrial units and existing industrial units on their substantial expansion, as defined, set up in growth center, industrial infrastructure development centers and other

locations like industrial estates, parks, export processing zones, commercial estates, etc., as notified by the Central Government, **were entitled to 100% excise duty exemption for a period of 10 years from the date of commencement of commercial production.**

All new industries in the notified locations were eligible for Capital Investment Subsidy @ 15% of their investment in Plant and Machinery, subject to a ceiling of Rs.30 lakhs whereas the existing units were entitled to subsidy on substantial expansion, as defined. **Besides these, and other concessions, interest subsidy of 3% on the working capital and insurance premium to the extent of 100% on capital investment too was permissible to the new and existing units on their substantial expansion for a period of 10 years.**

- 6) Office Memorandum dated June 14, 2002 referred to herein above was later amended vide Notification of November 28, 2003 issued by the Government of India, Ministry of Commerce and

Industry, Department of Industrial Policy & Promotion. It reads thus:-

"No.1(11)/2002-NER- In pursuance of the announcement by the Prime Minister on 19th April, 2003 at Srinagar for creation of one lakh employment and self employment opportunities in Jammu & Kashmir, the Government of India had set up a Task Force under Cabinet Secretary. The recommendations of Task Force were submitted to the Cabinet. To achieve this object of employment generation, the Cabinet has, inter-alia, approved following definition of the term 'substantial expansion' for the purpose of incentives/subsidies notified as per O.M. NO.1(13)/2000-NER dated 14.06.2002.

2. The Central Government, therefore, hereby makes amendment in the **Central Interest Subsidy Scheme, 2002** notified in the Notification of the Government of India in the Ministry of Commerce & Industry, Department of Industrial Policy & Promotion No.1(11)/2002-NER dated 22nd October, 2002. The definition of the term 'Substantial Expansion' appearing under para 5(d) of the Scheme may be substituted by the following:-

"Concessions for substantial expansion should extend to include all new investments by entrepreneurs, which leads to substantial additional employment creation by an existing entrepreneur without insisting on major expansion. However, credit under the Industrial Policy Package should not be merely for paying off old debts or for equipment already in place."

- 7) To implement the new Industrial Policy referred to herein above, requisite notifications for exemption on Excise Duty were issued under Section 5A of the Central Excise Act, 1944 prescribing therein

the procedure required to be followed by the Industrial Units before claiming incentives.

- 8) Paragraph No.3, appearing in the two Notifications i.e. Central Excise Notification Nos.56/2002 and 57/2002 dated 14.11.2002, which may be relevant to understand the issue raised in the case, needs to be noticed. It reads thus:-

“.....3. The exemption contained in this Notification shall apply only to the following kind of units namely:-

(a) New industrial units which have commenced their commercial production on or after the 14th day of June 2002.

(b) Industrial units existing before the 14th day of June 2002, but which have:-

(i) undertaken substantial expansion by way of increase in installed capacity by not less than twenty-five per cent on or after the 14th day of June, 2002; or

ii) made new investments on or after the 14th day of June, 2002, and such new investment is directly attributable to the **generation of additional regular employment of not less than twenty-five per cent. over and above the base employment limit, subject to the conditions that;**

(1) the unit shall not reduce regular employment after claiming exemption, and once such employment is reduced below one hundred and twenty-five per cent. of the base employment limit, such industrial unit shall be debarred from claiming the exemption contained in this notification in future. However, the exemption availed by such industrial unit, prior to such

reduction, shall not be recoverable from such industrial unit.

(2) The manufacturer shall produce a certificate, from General Manager of the concerned District Industries Centre to the jurisdictional Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, to the effect that the unit has created such additional regular employment.

Explanation: for the purposes of this notification;—

(a) “base employment limit” means maximum number of regular employees employed at any point of time, by the concerned industrial unit, during last five years;

(b) “regular employment” shall not include employment provided by the industrial unit to daily wagers or casual employees;

(c) “new investment” shall not include investments which are used for paying off old debts or making payments for the plant or machinery installed prior to the 14th day of June 2002, or paying salaries to the employees.

(Above Clause(b) has been substituted vide NTF No.11/2004-CE, Dt. 29/01/2004)

[OLD-

(b) Industrial units existing before the 14th day of June 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five percent on or after 14th day of June 2002.]

4. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production whichever is later.”

- 9) With the above prelude on the facts necessary for determination of the issues, we proceed to

examine the basis on which the Income Tax Appellate Tribunal has recorded its findings on the first issue.

Dealing with the issue that the Excise Refund and Interest Subsidy availed of by the assessees was *Capital Receipt* in their hands and not *Revenue Receipt*, as held by the Commissioner of Income Tax and Income Tax Officers, which the Tribunal had permitted the appellants to raise as additional ground, the Tribunal came to the conclusion that the incentives received by the appellants were **Revenue Receipt** and not **Capital Receipt**.

- 10) In taking the above view treating the incentives as Revenue Receipt, the Appellate Tribunal was influenced by the following factors:-
 - i) The Excise Refund and Interest Subsidy had not been given to the appellants to establish industrial units because the industry stood already established.
 - ii) The incentives were not available unless and until commercial production had commenced.
 - iii) The incentives were recurring in nature, in that, those were limited to a period of 10 years from the date of commencement of commercial production.
 - iv) The incentives in the form of Excise Duty Refund and Interest Subsidy were not given

- to the assessees for purchasing Capital asset or for purpose of machinery.
- v) The incentives were given for easy market accessibility and to run the business more profitably.
- 11) Relying on the above factors and referring to various paragraphs appearing in the two judgments of the Hon'ble Supreme Court of India reported as *Sahney Steel and Press Works Limited and others vs. Commissioner of Income Tax*, 228 ITR 253 and *Commissioner of Income Tax vs. Ponni Sugars and Chemicals Limited*, [2008] 306 ITA 392(SC), the Income Tax Appellate Tribunal, interpreted the incentives, in question, as Production Incentives, hence Revenue Receipts in the hands of the assessee and thus, liable to tax as such.
- 12) Learned counsel appearing for the appellants-assessees and the Revenue, relied heavily on the above two judgments of Hon'ble Supreme Court of India to project their respective view point, for and against the plea that the incentives of *Excise Refund and Interest Subsidy etc.* in the hands of the assessees was *Capital Receipt*, referring to

various paragraphs in the two judgments to support their respective submissions.

- 13) Orders passed in a case in the given facts and circumstances do not operate as binding precedent, for, it is only the *ratio decidendi* thereof that operates as precedent in law, is a position well settled in law.
- 14) We, therefore, proceed to find the *ratio* in the two Supreme Court Judgments relied upon by both the parties to support their respective view point, to examine as to whether the Tribunal had followed the ratio or was influenced by the orders passed in the two cases on the basis of the facts and circumstances of those cases.
- 15) After going through the two judgments, we find the ratio in Sahney Steel case and approval thereof in Ponni Sugars and Chemicals Limited, to have been spelt out, in the following paragraph of the judgment delivered by the Hon'ble Supreme Court of India in Ponni Sugars and Chemicals Limited case. It reads thus:-

“ 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 is 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.”

- 16) Perusal of the judgments in Sahney Steel and Ponni Sugars, therefore, reveals that the Apex

Court had applied the above quoted dictum to determine the *purpose*, which the two Schemes had intended to achieve by the *incentive subsidies*, permissible under the Schemes in question in those cases.

It was, therefore, in the context of respective *Subsidy incentive Schemes* in the two cases, that the subsidy in *Sahney Steel* was held to be *Revenue Receipt* whereas the *Subsidy* in *Ponni Sugars and Chemicals Limited* was held as *Capital Receipt*.

- 17) We are supported in taking this view by the observations made by the Hon'ble Supreme Court of India in a later decision reported as *M/s Mepco Industries Limited, Madurai vs. Commissioner of Income Tax and anr.*, 2009(7) Supreme 564, where the above dictum was reiterated as follows:-

“.....Sahney Steel and Press Works Limited & ors. (supra) was a case which dealt with production subsidy, Ponni Sugars and Chemicals Limited (Supra) dealt with subsidy linked to loan re-payment whereas the present case deals with a subsidy for setting up an industry in the backward area. Therefore, in each case, one has to examine the nature of the subsidy. The judgment of this Court in Sahney Steel and Press Works Limited and ors. (supra) was on its own facts;

so also, the judgment of this Court in Ponni Sugars and Chemicals Limited(Supra). The nature of the subsidies in each of the three cases is separate and distinct. There is no straight jacket principle of distinguishing a capital receipt from a revenue receipt.

It depends upon the circumstances of each case. As stated above, in Sahney Steel and Press Works Limited & ors.(supra), this Court has observed that the production incentive scheme is different from the Scheme giving subsidy for setting up industries in backward areas.”

- 18) Now coming to the findings of the Appellate Tribunal on the issue, we find that the Tribunal has referred to various paragraphs appearing in the two judgments to support its view that the Receipts in the hands of the assesses were Production Incentives and thus *Revenue Receipt* and not *Capital Receipt*. This, however, appears to have been done without appreciating that the observations made in those paragraphs were in the context of the Schemes as such, which the Apex Court was considering to find the *Intent* and *purpose* of the incentives under those Schemes, and not the law laid down as such.
- 19) The Tribunal has relied upon five factors to hold the incentives in question as Production Incentives but without dealing with that part of

the Scheme, whereby unemployment in the State had been intended to be eradicated creating atmosphere for accelerated industrial development to provide employment opportunities to deal with the social problem of unemployment.

This in our view is lop-sided interpretation of the New Industrial Policy and Concessions formulated by the Central Government for the State of Jammu and Kashmir vide Office Memorandum of June 14, 2002.

- 20) Therefore, in view of the clear legal position adumbrated by the Hon'ble Supreme Court of India on the issue in question, that to determine the nature and intent of the incentives as to whether those were *Revenue Receipts* or *Capital Receipts*, the *purpose* underlying the incentives was the determinative test, there may not be any necessity of referring to the judgments of other High Courts of the Country relied upon by the appellants' learned counsel, some of which had been considered by the Hon'ble Supreme Court of India in the above referred cases.

- 21) Thus, finding that the New Industrial Policy and other concessions for the State of Jammu and Kashmir has not been correctly appreciated by the Appellate Tribunal, we proceed to examine the true intent and purpose underlying the Policy and the Concessions contemplated by the Office Memorandum of June 14, 2002 and statutory notifications issued in this behalf.
- 22) Perusal of the Office Memorandum dated 14.06.2002 indicating New Industrial Policy and other concessions for the State of Jammu and Kashmir, makes it explicit that the concessions were issued to achieve twin objects viz. (i) **Acceleration of industrial development in the State of Jammu and Kashmir, which had been found lagging behind in such development** and (ii) **Generation of employment in the State of Jammu and Kashmir.**

Amendment introduced to the Office Memorandum vide Notification of November 28, 2003 of the Government of India, Ministry of Commerce and Industry (Department of Industrial

Policy and Promotion) eloquently demonstrates the Central Government's intention in extending the incentives. The Government's objective, as conveyed by Hon'ble the Prime Minister at Srinagar on April 19, 2003, was, **For creation of one lac employment and self employment opportunities in Jammu and Kashmir State.**

- 23) To achieve the purpose and objective referred to herein above, it was, *inter alia*, provided in the Central Excise Notifications that the exemptions contained in the Notifications would be available only on production of Certificate from General Manager of the concerned District Industry Centre to the Jurisdictional Deputy Commissioner of the Central Excise or the Assistant Commissioner of Central Excise, as the case may be, to the effect that the unit had **created Required Additional Regular Employment**, which would not, however, include employment provided by the industrial units **to Daily wagers or Casual employees engaged in the Units.**

- 24) A close reading the Office Memorandum and the amendment introduced thereto with para No.3 appearing in the Central Excise Notification Nos.56 and 57 of November 11, 2002, thus, **makes it amply clear that the acceleration of development of industries in the State was contemplated with the object of generation of employment in the State of Jammu and Kashmir and the generation of employment, so contemplated, was not only casual or temporary; but was on the other hand, of permanent nature.**
- 25) Considered thus, the paramount consideration of the Central Government in providing the incentives to the New Industrial Units and Substantial Expansion of the existing units, **was the generation of employment through acceleration of industrial development, to deal with the social problem of unemployment in the State, additionally creating opportunities for self employment, hence a purpose in Public Interest.**

- 26) In this view of the matter, the incentives provided to the Industrial units, in terms of the New Industrial Policy, for accelerated Industrial development in the State, for creation of such industrial atmosphere and environment, which would provide additional Permanent source of Employment to the unemployed in the State of Jammu and Kashmir, were in fact, in the nature of creation of New Assets of Industrial Atmosphere and Environment, having the potential of employment generation to achieve a social object. Such incentives, designed to achieve Public Purpose, can not, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone.
- 27) Thus, looking to the purpose, of eradication of the social problem of unemployment in the State by acceleration of the industrial development and removing backwardness of the area that lagged behind in Industrial development, which is certainly a purpose in the *Public Interest*, the incentives provided by the Office Memorandum

and statutory notifications issued in this behalf, to the appellants-assesses, cannot be construed as mere *Production and Trade Incentives*, as held by the Tribunal.

- 28) Making of additional provision in the Scheme that incentives would become available to the industrial units, entitled thereto, from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives were made available only to the bonafide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved.
- 29) The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the character of the incentive subsidies,

when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development.

- 30) For all what has been said above, the finding of the Tribunal on the first issue that the Excise Duty Refund, Interest Subsidy and Insurance Subsidy were Production Incentives, hence Revenue Receipt, cannot be sustained, being against the law laid down by Hon'ble Supreme Court of India in Sahney Steel and Ponni Sugars cases(supra).
- 31) The finding of the Tribunal that the incentives were Revenue Receipt is, accordingly, set aside holding the incentives to be Capital Receipt in the hands of the assesses.
- 32) In view of our above finding on the first issue, there is no need to opine on the second issue, which was raised in the alternative.

- 33) These Appeals, therefore, succeed and are, accordingly, allowed setting aside the orders impugned in the Appeals, made by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar on the appellants' Appeals.
- 34) The appellants' Appeals before the Income Tax Appellate Tribunal Amritsar Bench, Amritsar against the orders of the Commissioner of Income Tax (Appeals), and Income Tax Officers, shall, therefore, revive for passing appropriate consequential orders thereon, in accordance with law, in view of the findings recorded in these Appeals.

No orders as to costs.

(Hasnain Massodi)
Judge

(J. P. Singh)
Judge

Jammu:
31.01.2011

