GAHC010269782022

2025:GAU-AS:2199-DB

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : ITA/3/2023

THE PRINCIPAL COMMISSIONER OF INCOME TAX AND ANR.
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX, AAYAKAR BHAWAN, M.G. ROAD, SHILLONG- 793001.

2: THE ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE- 1
DIBRUGARH
OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE- 1 DIBRUGARH PUSHKARA HOUSE
NATUN GAON NH-37 P.O.- MOHANGHAT DIBRUGARH- 786008

VERSUS

M/S GREENPLY INDUSTRIES LTD.
MAGGUL LOUNGE, 5TH AND 6TH FLOOR, 23 CHETLA CENTRAL ROAD, KOLKATA- 700027.

Advocate for the Petitioner : MR. S C KEYAL,

Advocate for the Respondent : B SARMA, DR. ASHOK SARAF,MR P BARUAH,MR. N N DUTTA,MR S J SAIKIA,MR P K BORA,MR. G. DUTTATRAY

Linked Case : ITA/6/2023

THE PRINCIPAL COMMISSIONER OF INCOME TAX AND ANR.
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
AAYAKAR BHAWAN M.G. ROAD SHILLONG- 793001.

2: THE ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE-1
DIBRUGARH OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-1 DIBRUGARH G.S. ROAD PUSHKARA HOUSE NATUN GAON
NH- 37 P.O.- 786008.

VERSUS

M/S GREENPLY INDUSTRIES LIMITED MADGUL LOUNGE
5TH AND 6TH FLOOR 23 CHETLA CENTRAL ROAD KOLKATA- 700027.

Advocate for : MR. S C KEYAL
Advocate for : MR P BARUAH appearing for M/S GREENPLY INDUSTRIES LIMITED

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of hearing : 25.02.2025

Date of Judgment & Order : 04.03.2025

JUDGMENT & ORDER (CAV)

(N. Unni Krishnan Nair, J.)

Heard Mr. Subhash Chandra Keyal, learned Senior Standing counsel, CBDT & Income Tax, NER, appearing on behalf of the appellants in these 2(two) income tax appeals. Also heard Dr. Ashok Saraf, learned senior counsel, assisted by Mr. B. Sarma, learned counsel, appearing on behalf of the sole respondent in both these income tax appeals.

2. The present income tax appeals being ITA No. 03/2023 and ITA No. 06/2023 have been preferred by the Revenue Department under Section 260A of the Income Tax Act, 1961, challenging the order, dated 21.06.2022, passed by the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, in ITA No. GAU 232/GAU/2019 and ITA No. 359/GAU/2019.

3. As the above-noted income tax appeals involve identical factual and legal issues; hence, these appeals were heard together and are disposed of by this common judgment & order.

4. The brief facts requisite for adjudication of the issue arising in the present proceedings, is noticed as under:

4.1. In the above-noted income tax appeals; this Court had admitted the above-noted appeals, vide order, dated 09.06.2023, on the following substantial questions of law:

> "***(1) Whether the Hon'ble ITAT was right in law in upholding the order of learned CIT (Appeals) in allowing excise duty exemption as capital receipt while the assessee has treated the same as revenue receipt in its book, return of income as well as during assessment.***
>
> ***(2) Whether the Hon'ble ITAT was right in law in allowing the excise duty exemption adjustment in computation of MAT under section 115-JB."***

4.2. The assessee, herein, in the above-noted income tax appeals viz. M/s. Greenply Industries Ltd., had filed its return of income tax electronically on 29.11.2015, for the assessment year 2014-2015, showing total income of Rs. 49,12,19,250/-. The case was selected for scrutiny through CASS under complete scrutiny category. The Assessing Officer, thereafter, passed an assessment order, under Section 143(3) of the Income Tax Act, 1961, on 29.12.2017, with an assessed income of Rs. 54,42,24,740/-.

4.3. Being aggrieved, the assessee had instituted an appeal before the Commissioner of Income Tax(Appeals), Dibrugarh. The said appeal was registered as CIT(A), Dibrugarh/10082/ 2017-18. During the pendency of the said appeal, the assessee had raised further additional grounds. The additional grounds so raised by the assessee also included the following ground:

> "***1. That on the facts and in the circumstances of the case, Excise Duty Exemption availed during the year under consideration be treated as capital receipt and hence be excluded in computing total income under the provisions of the Act."***

4.4. The said additional ground as raised by the assessee was considered by the Commissioner of Income Tax(Appeals), Dibrugarh, and the said ground was allowed. The additional ground so considered by the Commissioner of Income Tax (Appeals), Dibrugarh, pertains to the claim of the assessee for treating the excise duty exemption availed during the year under consideration, as a capital receipt and hence, to be excluded from computation of total income under the provisions of the Income Tax Act, 1961. It is to be noted that the assessee in its income tax returns filed for the year, in question, had treated the said excise duty exemption as a revenue receipt. However, the Commissioner of Income Tax (Appeals), Dibrugarh, while holding the excise duty exemption claimed by the assessee in relation to its 2(two) units viz. Rudrapur Plywood Unit and Rudrapur MDF Unit, to be a capital receipt; vide order, dated 25.03.2019, did not proceed to hold that the said income would also not be considered as a book profit for computing Minimum Alternative Tax as per the provisions of Section 115-JB of the Income Tax Act, 1961.

4.5. The assessee, thereafter, being aggrieved by the inaction on the part of the Commissioner of Income Tax (Appeals), Dibrugarh, to not exclude the excise duty exemption claimed by it, which was treated as a capital receipt, from computation of book profit as per the provisions of Section 115-JB of the Income Tax Act, 1961; instituted an appeal before the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, which was registered as ITA No. 232/GAU/2019. In the said appeal, the assessee had raised the following grounds:

> "***(1) That on the facts and in the circumstances of the case, the Id. CIT(A) was not justified and grossly erred in not allowing claim of education cess on Income Tax and Dividend Distribution Tax amounting to Rs.66,87,361/-, in computing total income under the normal provisions of the Act.***

(2) That on the facts and in the circumstances of the case, the ld. CIT(A) was not justified and grossly erred in not allowing exclusion of Excise Duty Exemption as capital receipt amounting to Rs.87,98,09,432/- availed during the year under consideration in computing book profit as per section 115JB of the Act."

4.6. However, during the consideration of the appeal i.e. ITA No. 232/GAU/2019, the Ground No. 1 relating to allowing Education Cess was not pressed and accordingly, the said ground was dismissed by the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, as not pressed. On the other hand, the Ground No. 2 pertaining to allowing exclusion of excise duty exemption availed by the assessee during the year under consideration, in computing book profit, as per the provisions of Section 115-JB of the Income Tax Act, 1961, was so considered.

4.7. The Revenue Department, being aggrieved by the order of the Commissioner of Income Tax(Appeals), Dibrugarh, dated 25.03.2019, also instituted an appeal being ITA No. 359/GAU/2019, before the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata. The Tribunal, thereafter, proceeded to consider both the appeals i.e. ITA No. 232/GAU/2019 and ITA No. 359/GAU/2019, analogously, and disposed of the same vide an order, dated 21.06.2022, allowing the appeal of the assessee on Ground No. 2, noticed above, while the appeal as preferred by the Revenue Department, came to be dismissed.

4.8. Being aggrieved, the Revenue has instituted the above-noted income tax appeals being ITA No. 232/GAU/2019, and ITA No. 359/GAU/2019, before this Court.

5. Mr. Keyal, learned Senior Standing counsel, CBDT & Income Tax, NER, has, at the outset, submitted that the assessee, in its return filed for the assessment year 2014-2015, having considered the excise duty exemption as availed in relation to its Rudrapur Plywood Unit and Rudrapur MDF Unit, as a revenue receipt and during the assessment process; there being no issue raised by the assessee asking for adjustment with regard to the said excise duty exemption as a capital receipt; the Commissioner of Income Tax(Appeals), Dibrugarh, in the appeal so instituted by the assessee against the assessment order of the Assessing Officer, ought not to have examined the additional Ground No. 1, raised by the assessee claiming treatment of the excise duty exemption availed during the year under consideration as a capital receipt and ought to have remanded the matter back to the Assessing Officer for examining the correctness of the claim made by the assessee and further, to ascertain as to whether the same would be in the nature of a capital receipt and/or a revenue receipt.

6. Mr. Keyal, learned Senior Standing counsel, CBDT & Income Tax, NER, has further submitted the Income Tax Appellate Tribunal, Guwahati Bench, Kolkata, erred in drawing a conclusion to the effect that the Commissioner of Income Tax(Appeals), Dibrugarh, having treated the excise duty exemption as a capital receipt in the hands of the assessee which was so done without there being a claim so made before the Assessing Officer by the assessee, ought not to have proceeded to further hold that the said excise duty exemption being a purely capital receipt, would also not be included as a part of book profit for computing the Minimum Alternative Tax as per the provisions of Section 115-JB of the Income Tax Act, 1961.

7. In the above premises, Mr. Keyal, learned Senior Standing counsel, CBDT & Income Tax, NER, has prayed that the order, dated 21.06.2022, passed by the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, in ITA No. 232/GAU/2019 and ITA No. 359/GAU/2019, would call for an interference.

8. Per contra, Dr. Saraf, learned senior counsel appearing for the sole respondent; at the outset, has submitted that excise duty exemption availed by the assessee for its 2(two) units viz. Rudrapur Plywood Unit and Rudrapur MDF Unit, set-up in the State of Uttaranchal, was so done in view of the policy as formulated by the Ministry of Commerce and Industry, Government of India, vide Office Memorandum, dated 07.01.2003. The learned senior counsel has further submitted that the policy as contained in the Office Memorandum, dated 07.01.2003, was so formulated for providing the required incentives as well as an enabling environment for industrial development in the State of Uttaranchal and to improve availability of capital and increase market access to provide a fillip to the private investment in the State with the view to generate local employment opportunities and also use of local resources. It was further concluded that in terms of the provisions of paragraph No. 3.1 of the Office Memorandum, dated 07.01.2003, the new industrial units and existing industrial units on their substantial expansion as prescribed were held to be entitled to 100% outright excise duty exemption for a period of 10 years from the date of commencement of commercial production and 100% income tax exemption for an initial period of 5 years and thereafter, 30% for companies and 25% for other than companies for a further period of 5 years for the entire States of Uttaranchal and Himachal Pradesh from the date of commencement of commercial production.

9. Dr. Saraf, learned senior counsel, has further submitted that although before the Assessing Officer, the claim for treating the excise duty exemption availed by the assessee under the policy contained in the Office Memorandum, dated 07.01.2003, as capital receipt, was not so raised, however, after the passing of the order by the Assessing Officer and in the appeal being instituted by the assessee being CIT(A), Dibrugarh/10082/ 2017-18, before Commissioner of Income Tax(Appeals), Dibrugarh; an additional ground to this effect was so taken by the assessee which was favourably considered in view of the decisions of the Hon'ble Supreme Court as well as various High Courts of the country, holding the field.

10. Dr. Saraf, learned senior counsel, has further submitted that by noticing the purpose for which the excise duty exemption was so granted to the assessee in respect of its Rudrapur Plywood Unit and Rudrapur MDF Unit; the Commissioner of Income Tax(Appeals), Dibrugarh, proceeded to treat the same as capital receipt and accordingly, the same was to held have an effect of reduction in claim of deduction under Section 80-1(A)(10) of the Income Tax Act, 1961. However, the learned senior counsel has submitted that the said excise duty exemption availed by the assessee for the assessment year 2014-2015 although being held as a capital receipt by the Commissioner of Income Tax(Appeals), Dibrugarh; no further direction was issued to exclude the said excise duty exemption from the computation of book profit under Section 115-JB of the Income Tax Act, 1961. Being aggrieved, the assessee had approached the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, by way of instituting an appeal being ITA No. 232/GAU/2019. The Tribunal, on consideration of the various decisions applicable to the issue, was pleased to allow the claim of the assessee, to also exclude the excise duty exemption claimed by the assessee in relation

to its Rudrapur Plywood Unit and Rudrapur MDF Unit, from computation for payment of Minimum Alternative Tax under the provisions of Section 115-JB of the Income Tax Act, 1961.

11. Dr. Saraf, learned senior counsel, has submitted that the Revenue Department, being aggrieved, had also instituted an appeal being ITA No. 359/GAU/2019, before the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata. The learned senior counsel has submitted that a perusal of the order, dated 21.06.2022, which had disposed of both the appeals viz. ITA No. 232/GAU/2019 and ITA No. 359/GAU/2019; no submission has been recorded, therein, by the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, of the Revenue Department that they had, in any manner, questioned the decision of the Commissioner of Income Tax (Appeals), Dibrugarh, towards treating the excise duty exemption claimed by the assessee and involved in the matter, as a capital receipt.

12. Dr. Saraf, learned senior counsel, has further submitted that there is no material to demonstrate that the Revenue Department had also questioned the action on the part of the Commissioner of Income Tax(Appeals), Dibrugarh, in allowing the claim of the assessee for treating the excise duty exemption involved, as a capital receipt without the same being so raised before the Assessing Officer.

13. In the above premises, Dr. Saraf, learned senior counsel appearing for the sole respondent, has submitted that the substantial question of law No. 1 so framed by this Court vide order, dated 09.06.2023, would not mandate a consideration, in-as-much as, the said issue was not disputed by the

Revenue authorities before the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, in the appeals so considered by it.

14. We have heard the learned counsels appearing for the parties and also perused the materials available on record.

15. Substantial questions of law having been framed by this Court vide order, dated 09.06.2023, in the above-noted income tax appeals; we now proceed to consider the same.

16. At the outset, the substantial question of law No. 1 is being considered. The substantial question of law No. 1, being so framed by this Court vide order, dated 09.06.2023, for convenience, is again quoted hereinbelow:

> "***Whether the Hon'ble ITAT was right in law in upholding the order of learned CIT (Appeals) in allowing excise duty exemption as capital receipt while the assessee has treated the same as revenue receipt in its book, return of income as well as during assessment."***

17. As noticed hereinabove, the excise duty exemption claimed by the assessee, is so claimed in terms of the policy decision pertaining to new industrial policy and other concessions granted by the Ministry of Commerce and Industry, Government of India, for the States of Uttaranchal and Himachal Pradesh. The said policy was so framed for local employment generation and use of local resources. To facilitate the said purpose, the Office Memorandum, dated 07.01.2003, was so issued to provide the required initiative as well as enabling environment for industrial development, improve availability of capital and increase market access to

provide a fillip to the private investment in the State. In terms of the said policy, new industrial units and/or existing industrial units fulfilling the conditions set-out, were entitled to 100% outright excise duty exemption for a period of 10 years from the date of commencement of commercial production. The assessee before the Assessing Officer in the proceedings so instituted by it under the provisions of Section 143 of the Income Tax Act, 1961; the said excise duty exemption was not claimed as a capital receipt. Accordingly, the Assessing Officer proceeded to pass its order under the provisions of Section 143(3) of the Income Tax Act, 1961, vide order, dated 29.12.2017, with an assessed income of Rs. 54,42,24,740/-.

18. The assessee, being aggrieved, had assailed the order, dated 29.12.2017, passed by the Assessing Officer under the provisions of Section 143(3) of the Income Tax Act, 1961, before the Commissioner of Income Tax(Appeals), Dibrugarh. During the pendency of the said appeal, as noticed hereinabove, the assessee had raised certain additional grounds. The additional Ground No. 1 so raised by the assessee, was a claim for treating the excise duty exemption availed during the assessment year 2014-2015, as a capital receipt and the same be excluded in computing the total income of the assessee under the relevant provisions of the Income Tax Act, 1961. The Commissioner of Income Tax (Appeals), Dibrugarh, upon considering the said issue as well as noticing the decisions applicable to the issue, was pleased vide its order, dated 25.03.2019, to allow the claim so made by the assessee. The operative portion of the said order, dated 25.03.2019, pertaining to additional Ground No. 1, raised by the assessee, being relevant, is extracted hereinbelow:

"***10.3.1. The point to be decided boils down to whether assessee's receipt on account of Central Excise Duty Refund is capital receipt or not From the notes to audited accounts, it is seen that the assessee was enjoying Central Excise duty exemption from its Units at Rudrapur (Uttarakhand) and Tizit (Nagaland). This is a matter of record. In the case of Shree Balaji Alloy (supra), Hon'ble J & K High Court after due consideration of Hon'ble Apex's Court order in the case of Sahney Steel (Supra) & Ponni Sugars & Chemicals Ltd (supra) had taken the view that Central Excise Duty Refund is a capital receipt. The decision of Hon'ble High Court was confirmed by Hon'ble Apex Court in the case of CIT Vs. Shree Balaji Alloy Ltd (supra). The matter has now reached finality. In view of decision of Hon'ble Apex Court on the matter the AO is directed to treat assessee's receipt of Excise Duty Refund as capital receipt. This will have the effect of reduction in claim of deduction u/s 80-IC.***

Additional ground No.1 is allowed."

19. The present appeal being instituted by the Revenue Department being confined to the issue of treatment of the excise duty exemption claimed by the assessee as a capital receipt, the other issues considered by the Commissioner of Income Tax(Appeals), Dibrugarh, in the appeal; is not being examined by us, in the present order.

20. The Revenue Department although had instituted an appeal being ITA No. 359/GAU/2019 against the order of the Commissioner of Income Tax (Appeals), Dibrugarh, dated 25.03.2019; a perusal of the same, would bring to the forefront that no contention with regard to the claim made by the assessee before the Commissioner of Income Tax (Appeals), Dibrugarh, for treating the excise duty exemption received by it for the assessment year 2014-2015, as capital receipt, was taken. However, a question of law having been framed; we would examine as to whether the excise duty exemption availed by the assessee, in the facts and circumstances involved, would be treated as a capital receipt and/or, revenue receipt, in the hands of the assessee.

21. The Hon'ble Supreme Court in the case of **Sahney Steel & Press**

Works Ltd. v. Commissioner of Income Tax, A.P.-I, Hyderabad, reported in **(1997) 7 SCC 764**, on discussing and analyzing the entire case law, has laid down the basic test to be applied in judging the character of a subsidy. The test is that the character of the receipt in the hands of an 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 Hon'ble Supreme Court in the said decision had further held that the point of time at which the subsidy is paid is not relevant; the source is immaterial, the form of subsidy is also immaterial.

22. The Hon'ble Supreme Court, thereafter, in its decision in the case of **Commissioner of Income Tax, Madras v. Ponni Sugars & Chemicals Ltd**., reported in **(2008) 9 SCC 337**, considered its decision in the case of **Sahney Steel & Press Works Ltd**.(supra), and held, as follows:

> "***14. 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 utilised 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 of the mechanism through which the subsidy is given is irrelevant.***
>
> ***15. In the decision of the House of Lords in Seaham Harbour Dock Co. v. Crook 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. 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 nothing to do with the trading of the Company because the work undertaken was dock extension. According to the House of Lords, the assistance in the form 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 the 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. 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 Seaham Harbour Dock Co.[2] the 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 utilise the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business.

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."

23. The High Court of Jammu & Kashmir, in the case of **Shree Balaji Alloys v. Commissioner of Income Tax, Jammu & anr**., reported in **2011 SCC Online J&K 269**, considering a policy adopted for refund of excise duty similar to the one involved in the present proceedings; applying the decisions of the Hon'ble Supreme Court in the case of **Sahney Steel & Press Works Ltd**.(supra) and **Ponni Sugars & Chemicals Ltd**. (supra), proceeded to hold that considering the policy so involved, it was amply clear that the same was so formulated for the acceleration of the development of industry in the State with the objective of generation of employment and the generation of employment so contemplated therein,

was not only casual and/or temporary, but, was, on the other hand, of permanent nature. Thereafter, the High Court of Jammu & Kashmir proceeded to interfere with the decision of the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar, holding the excise duty exemption availed by the assessee, therein, to be a revenue receipt and it was held that the said incentive so availed by the assessee, therein, to be a capital receipt in the hands of the assessee.

24. The said decision of the High Court of Jammu & Kashmir in the case of **Shree Balaji Alloys**(supra), was assailed by the Revenue Department before the Hon'ble Supreme Court in the case of reported in **Commissioner of Income Tax, Jammu & Anr. v. Shree Balaji Alloys**, reported in **(2018) 13 SCC 373**. The Hon'ble Supreme Court upheld the decision of the High Court of Jammu & Kashmir in the case of **Shree Balaji Alloys**(supra) by holding that the appeal was covered against the Revenue by the decisions of the Hon'ble Supreme Court in the case of **Ponni Sugars & Chemicals Ltd**.(supra) and in the case of **Commissioner of Income Tax v. Meghalaya Steels Ltd.**, reported in **(2016) 6 SCC 747**.

25. The Hon'ble Supreme Court, thereafter, in its decision in the case of **Commissioner of Income Tax-I, Kolhapur v. Chaphalkar Brothers, Pune**, reported in **(2018) 13 SCC 358**; had an occasion to again consider its earlier decision in the case of **Sahney Steel & Press Works Ltd.**(supra) and **Ponni Sugars & Chemicals Ltd.** (supra); and had concluded, as under:

> "***17. What is important from the ratio of this judgment in Ponini Sugars case is the fact that Sahney Steer was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.***

18. Applying the aforesaid test contained in both Sahney Steef as well as Ponni Sugars, we are of the view that the object, as stated in the Statement of Objects and Reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a complete family entertainment centre, more popularly known as multiplex theatre complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need government support in the form of incentives qua entertainment duty. It was also added that the Government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to multiplex theatre complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct multiplex theatre complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centres. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one-there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugars and Sahney Steel."

26. The decision of the Jammu & Kashmir High Court in the case of **Shree Balaji Alloys**(supra), was also considered by the Hon'ble Supreme Court in its decision in the case of **Chaphalkar Brothers**(supra) and it was upheld. The conclusions so drawn by the Hon'ble Supreme Court, in this connection, being relevant, is extracted hereinbelow:

"***19. Mr Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shree Balaji Alloys v. CIT. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production had started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machine***

20. After setting out both the Seme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr Ganesh, learned Senior Counsel, pointed out that by an order dated 19-4-201611, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponni Sugars, and the appeals were, therefore, dismissed.

21. We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialise the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference."

27. Applying the decisions of the Hon'ble Supreme Court to the facts involved in the present income tax appeals, more particularly, the purpose test as formulated by the Hon'ble Supreme Court in the case of ***Sahney Steel & Press Works Ltd***.(supra); it is seen that the excise duty exemption was so granted for the purpose of industrializing the States of Uttaranchal and Himachal Pradesh and for generation of employment in the States. Therefore, the said excise duty exemption granted to the assessee for its Rudrapur Plywood Unit and Rudrapur MDF Unit, would necessarily be a capital receipt in the hands of the assessee. Having concluded as above; the substantial question of law No. 1 is answered in negative against the Revenue authorities and in affirmative, in favour of the assessee, herein.

28. Having concluded as above with regard to the substantial question of law No. 1; the substantial question of law No. 2, so framed by this Court, vide order, dated 09.06.2023, is now being considered.

29. The substantial question of law No. 2, for convenience, is again quoted hereinbelow:

"***Whether the Hon'ble ITAT was right in law in allowing the excise duty exemption adjustment in computation of MAT under section 115-JB."***

30. The Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, on considering the said issue, had, in paragraph No. 10, after noticing the

facts involved, formulated the question arising for its consideration in the appeal preferred by the assessee being ITA No. 232/GAU/2019, as under:

> "***10. We have heard the rival contentions and perused the relevant material available on record. We note that the assessee runs two manufacturing units in the name of Rudrapur Plywood Unit and Rudrapur MDF Unit and both are covered by the Excise Notification No.50/2003 dated 10.06.2003. Both the units are located in backward areas and are eligible for 100% excise duty exemption in respect of goods manufactured and cleared from such units for a period of 10 years from the date of commencement of commercial production. The assessee has claimed the excise duty exemption from these two units at Rs.87,98,09,432/- which is in the nature of capital receipt not liable to be taxed. We also find that though the said amount is reflected in the Profit & Loss Account of the assessee and the amount being capital receipt has not been objected by the ld. CIT(Appeals) also, who has allowed deduction of the said amount vide his order dated 25.03.2019 under normal provisions of the Act, however, the order is silent on the exclusion of the said amount while computing the book profit under section 115JB of the Act, therefore, the issue is for our examination that "whether the excise duty exemption which is a capital receipt and not chargeable to tax under the normal provisions of the Act, is to be considered as a part of book profit for computing the book profit under section 115JB of the Act".***

31. The Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, after considering the decisions applicable to the matter, relied upon by the assessee, as well as noticing the order passed by the Commissioner of Income Tax (Appeals), Dibrugarh, and the provisions of the Office Memorandum, dated 07.01.2003, issued by the Ministry of Commerce and Industry, Government of India, concluded as follows:

> "***21. After going through the above referred judgments and decisions and on examining the facts of the instant case, we find that the excise duty exemption has been admittedly the capital receipt and the finding of the Id. CIT(Appeals) that the excise duty exemption is not liable to be taxed under the normal provisions of the Income Tax Act being not in dispute for us, the alleged capital receipt cannot be categorised as part of the book profit. In the case of assessee being covered by the excise duty notification, such sum collected on the goods manufactured and sold is in the nature of incentive subsidy given for establishing the units in backward areas and to generate employment opportunities. The said fact is evident from the office memorandum dated 07.01.2003 of Ministry of Commerce and Industry, which reads as under:-***
>
> > ***3.4 On perusal of the above, it can be seen that incentive in the form of Excise Duty Exemption has been given with an objective to achieve industrialization in the backward areas of Himachal Pradesh and Uttaranchal and to generate employment opportunities. The object of the assistance was not to enable the businessman to run the business more profitably but encourage a businessman to set up a new unit or expand the existing unit for overall economic development of the state. Hence, the incentives granted by the Government of India vide Office Memorandum No. 1(10)/2001-NER issued by DIPP, Ministry of***

Commerce and Industry, GOI dated 07-01-2003 read with Notification No. No.50/2003- CE dated 10-06-2003, will be treated as capital receipt and not liable to tax. In this regard, statement showing computation of excise duty exemption received during the year aggregating to Rs. 87,98,09,432/- alongwith copy of Excise Returns (in case of Rudrapur Unit 1) and copy of Form A (in case of Rudrapur Unit 2) has been enclosed (Refer Page No. 599-683 of Paper Book).

22. In the light of above decision as well as the Memorandum issued by the Ministry of Commerce & Industry, we find that the excise duty exemption is purely capital receipt and is neither chargeable to tax under the normal provisions of the Income Tax Act nor is to be included as part of the book profit for computing the minimum alternative tax as per the provisions of section 115JB of the Act. Thus Ground No. 2 raised by the assessee is allowed."

32. Dr. Saraf, learned senior counsel for the sole respondent, in this connection, has relied upon the decision of the High Court of Judicature of Bombay in the case of **Commissioner of Income Tax-IV v. Harinagar Sugar Mills Ltd**.[order, dated 04.01.2017, in Income Tax Appeal No. 1132/2014]. The High Court of Bombay, in the said decision, on consideration of a similar issue, proceeded to draw the following conclusions:

"***(a) The issue raised in this question is consequential to question no.(i). We have already held that the subsidy received by the respondent-assessee from the State of Bihar was in the nature of capital receipt. Hence the same cannot be added to arrive at book profits of the respondent-assessee under Section 115J of the Act.***

(b) However, it is pertinent to note that the question as proposed also seeks addition to book profits on account of excess depreciation along with subsidy received by the respondent-assessee. It is settled position in law as held by the Apex Court in Apollo Tyres Ltd. v/s. CIT 255 ITR 273 that the Assessing Officer while computing the book profit under Section 115J of the Act has only a power to examine whether the books of account have been maintained in accordance with the provisions of the Companies Act and have been duly audited. The book profits as reflected in the duly audited account have to be accepted by the Assessing Officer and the only limited power he has to increase/ decrease the book profit as arrived at by the assessee is only in terms of the Explanation to Section 115J of the Act.In addition to the criteria listed in ITB 35.2 (a) (d), the following criteria shall apply.

In the present case, the Revenue is not invoking the explanation to Section 115J of the Act to vary the book profit declared in the audited accounts of the respondent-assessee. Thus, the question as proposed herein does not give rise to any substantial question of law as it also stands concluded against the Revenue by the decision of the Apex Court in Apollo Tyres Ltd. (supra)."

33. It is to be noted that the present issue is also consequential to the substantial question of law No. 1, framed by this Court, vide order, dated 09.06.2023.

34. We having already concluded that the excise duty exemption availed by the assessee being in the nature of a capital receipt in the hands of the assessee; we are also in respectful agreement with the decision of the High Court of Bombay that the same also cannot be added to arrive at the book profit of the assessee under the provisions of Section 115-JB of the Income Tax Act, 1961.

35. In view of the conclusions reached by us with regard to the substantial question of law No. 1, we are of the considered view that the substantial question of law No. 2 being a consequential one; the excise duty exemption being purely a capital receipt, not chargeable to tax under the normal provisions of the Income Tax Act, 1961, it would also not be permissible to reckon the same for computation of book profit under the provisions of Section 115-JB of the Act of 1961.

36. Accordingly, the decision of the Income Tax Appellate Tribunal, Guwahati Bench at Kolkata, with regard to the Ground No. 2 raised before it by the assessee, would not call for any interference.

37. In view of the above; the substantial question of law No. 2 is answered in negative against the Revenue Department and in affirmative, in favour of the assessee, herein.

38. In view of the discussions and conclusions reached by us, hereinabove; we do not find any merit in these 2(two) income tax appeals and consequently, the same stand dismissed. However, there shall be no order as to costs

JUDGE **CHIEF JUSTICE**

Comparing Assistant