# आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।
# IN THE INCOME TAX APPELLATE TRIBUNAL
# 'D' BENCH, CHENNAI

## माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
## माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
## BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
## HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **IT(TP)A No.53/Chny/2022**
(**निर्धारण वर्ष /** Assessment Year: 2018-19)

| **M/s. Hyundai Motor India Ltd.**<br>Plot No.H-1, SIPCOT Industrial Park,<br>Irrungattukottai, Sriperumbudur Taluk<br>Kancheepuram Dist. PIN: 602 117. | **बनाम** / Vs. | **ACIT,**<br>**LTU-2, Chennai.** |
|---|---|---|
| स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AACH-2364-M** | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

| अपीलार्थी की ओरसे/ **Appellant by** | : | Shri K.R.Sekar (CA) & Shri S.P.Chidambaram (Advocate)-Ld. ARs |
|---|---|---|
| प्रत्यर्थी की ओरसे/**Respondent by** | : | Shri A.Sasikumar (CIT) –Ld. DR |
| सुनवाई कीअंतिम तारीख **/Date of final Hearing** | : | 02-02-2024 |
| घोषणा की तारीख /**Date of Pronouncement** | : | 09-02-2024 |

## आदेश / O R D E R

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by assessee for Assessment Year (AY) 2018-19 arises out of final assessment order dated 25.07.2022 passed by Ld. Assessing Officer, Assessing Unit (AO) u/s 143(3) r.w.s. 144C(13) r.w.s. 144B pursuant to the directions of Ld. Dispute Resolution Panel-2, Bengaluru-3 (DRP) u/s 144C(5) dated 17.06.2022. Since the assessee carried out certain international transactions with its Associated Enterprises (AE), the same were referred to Ld. Transfer

Pricing Officer (TPO) DCIT(TP)-2(1), Chennai for determination of Arm's Length Price (ALP). The Ld. TPO passed an order u/s 92CA(3) on 31.07.2021 proposing certain Transfer Pricing (TP) adjustment. Incorporating the same, a draft assessment order was passed on 22.09.2021 which was subjected to assessee's objections before Ld. DRP. Pursuant to the directions of Ld. DRP, final assessment order was passed against which the assessee is in further appeal before us.

2. The ground of appeal read as under: -

**TRANSFER PRICING GROUNDS**

The directions of the Dispute Resolution Panel (DRP), the Transfer Pricing order and the Final Assessment order are erroneous in so far as the following issue/adjustment:

**1. Attribution of notional income towards deemed brand development**

2.1 The NeAC/DRP erred in facts and circumstances of the case and in law in confirming the action of the TPO in attributing notional income of Rs.209,18,90,000/-on the premise that the Appellant has undertaken brand promotion/building activity for its AE i.e., Hyundai Motor Corporation, Korea.

**TPO exceeded jurisdiction**

2.2 The NeAC/DRP failed to appreciate the fact that the TPO exceeded her jurisdiction by analyzing brand promotion/building as a separate international transaction though the NeAC has not referred the same for determination of ALP as per Section 92CA of the Income Tax Act, 1961 ("the Act").

2.3 The NeAC/DRP ought to have held that the order of the TPO is vitiated since it is based on a show cause notice that is void ab initio, as it has not established a prima facie case of brand promotion activity undertaken by the Appellant.

2.4 The NeAC/DRP ought to have held that the TPO has acted in excess of jurisdiction by suo-motu considering the incurrence of advertisement expenses as an "international transaction".

2.5 The NeAC/DRP erred in facts and circumstances of the case and in law and failed to appreciate that alleged "Brand Promotion" is not an international transaction u/s 92B of the Act in the first place to be reported in the Accountant's Report in Form 3CEB.

2.6 The NeAC/DRP erred in facts and circumstances of the case and in law by stating that the Appellant failed to report the "Advertisement Marketing and Promotion ("AMP") expenses" in the Form 3CEB when the same is not per se an international transaction as per Section 92B of the Act.

2.7 The NeAC/DRP having acknowledged that the facts and circumstances are similar to the previous Assessment Years erred in not following the binding judicial precedent in the Appellant's own case from AY 2009-10 to 2011-12, AY 2013-14, AY 2015-16 and AY 2016-17 decided by this Hon'ble Income Tax Appellate Tribunal ("ITAT") holding that there is NO "International transaction" between the Appellant and the AE and deleted the adjustment on Brand building/AMP expenses.

**AMP/Brand promotion is not an international transaction**

2.8 The NeAC/DRP erred in not appreciating that the Appellant has not rendered any brand building service to its AE (i.e., Hyundai Motor Corporation, Korea) and as such there is no international transaction.
2.9 The NeAC/DRP failed to appreciate that in the absence of contract among the parties (i.e., Appellant and AE) deeming rendition of brand building service is null and void.
2.10 The NeAC/DRP erred in facts and circumstances and in law by construing the Technology and Royalty agreement entered between the Appellant and the AE to be relating to the rendition of brand building services.
2.11 The NeAC/DRP without appreciating the fact that the Appellant is an entrepreneur who manufacture and sell cars both in the domestic as well as export markets has erroneously confirmed the adjustment made by the TPO that the Appellant does Brand promotion/building activity for its AE.
2.12 The NeAC/DRP without appreciating the fact that the marketing expenses incurred by the Appellant to promote the sale of cars (licensed products) manufactured by it in the capacity of an entrepreneur has erroneously confirmed the conclusion of the TPO as a Brand promotion/building activity.
2.13 The NeAC/DRP failed to appreciate that even an independent entity would have charged for brand building service only if the brand building activity has been actually agreed to/ undertaken as the primary activity and not where the promotion of brand name is ancillary to the core business activity of manufacture and sale of vehicles.

**Separate benchmarking is void**

2.14 The NeAC/DRP failed to appreciate the fact that the TPO having accepted the Royalty transaction which is inclusive of right to use “Brand” is at arm’s length, is precluded from once again independently benchmarking the brand usage as separate international transaction.
2.15 The NeAC/DRP failed to recognize that the TPO having accepted that the overall net margin of the Appellant under TNMM method to be at arm’s length as per Section 92C(2) of the Act read with Rule 10B of the Income tax Rules, erred in independently benchmarking brand usage as separate international transaction.
2.16 Without prejudice to the above, the NeAC/DRP failed to appreciate that the excess margin earned by the Appellant over that of comparable companies indicates that it is the Appellant who has benefited from the use of the brand name and has offered more income for tax in India.
2.17 The NeAC/DRP erred in highlighting the fact that TPO despite having accepted that the Appellant also derives benefit in the form of increased sales and recognized the inability to quantify the same accurately as it could be on account of both brand value and product value, made an adjustment by separately benchmarking the deemed brand promotion/building activity.
2.18 Without prejudice to the above, the NeAC/DRP erred in facts and circumstances of the case by confirming the erroneous action of the TPO without appreciating the fact that the TPO himself have accepted that the benefits and costs incurred by the Appellant could not be accurately computed on account of brand.
2.19 The NeAC/TPO failed to appreciate that as per the principles laid down in Chapter VII of the OECD TP Guidelines, 2022, the incidental/ancillary benefits, if any, arising out of the AMP expenses incurred by the Appellant does not require any separate compensation as it is not in the nature of active service to AE.

**NeAC/TPO failed to appreciate the business prerogative of the Appellant**

2.20 The NeAC/DRP failed to appreciate that in view of the rights granted in the agreement between the Appellant and the AE, the former gets the right to use the "Brand"

2.21 The NeAC/DRP failed to appreciate that the Appellant is not restricted from creating its own brand through the agreement and it is the prudent business decision of the Appellant to use the Brand name of the AE to increase its sales in India.

2.22 The NeAC/DRP failed to appreciate that the AMP expenses incurred by the Appellant is purely to promote the sales of the cars manufactured and not towards promotion of Brand.

2.23 The NeAC/DRP failed to appreciate that in view of the rights granted in the agreement between the Appellant and the AE, the former gets the right to use the "Brand" and as such the Appellant cannot be deemed to receive income for using such brand.

**Economic Ownership**

2.24 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the Appellant is the economic owner of the brand name and uses the brand for its own benefit.

2.25 Without prejudice to the above and assuming without admitting that the Appellant has been providing brand building service, the NeAC/DRP failed to appreciate that the income, if any, can be attributed only when brand is alienated at a future date and as such the question of attributing a notional income for the deemed brand building service does not arise for AY 2018-19.

2.26 The NeAC/DRP erred in facts and circumstances of the case and in law by incorrectly analyzing the functions performed by the Appellant from the perspective of Development, Enhancement, Maintenance, Protection and Exploitation ('DEMPE') functions by drawing erroneous inference from the OECD Guidelines in relation to the principle laid down in this regard.

2.27 The NeAC/DRP erred in facts and circumstances of the case and in law in stating that the Appellant has not given due cognizance to the value it might add to the brand of the holding company in India.

2.28 The NeAC/DRP failed to appreciate that he is precluded from dictating / questioning the business strategies of the Appellant.

**Determination of ALP of alleged brand building service is grossly flawed**

2.29 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has incorrectly considered and applied "Other Method" as the Most Appropriate Method in violation of Section 92C(1) of the Act read with Rule 10AB of the Income tax Rules while determining arm's length price of deemed "Brand Promotion".

2.30 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has incorrectly considered and applied "Other Method" as the Most Appropriate Method without bringing on record uncontrolled comparable companies while benchmarking deemed "Brand Promotion".

2.31 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has not provided any cogent reasons/basis of allocating 50% of the AMP expenses incurred by the Appellant to be recovered from the AE towards brand promotion.

2.32 Without prejudice to the above ground, the NeAC/DRP ought to have appreciated that the TPO's action of allocating a mark-up of 7.10%on 50% of the AMP expenses is devoid of any merit and unsustainable in law as it is highly arbitrary and unreasonable.

2.33 The NeAC/DRP erred in confirming the action of the TPO in conducting a fresh search for identifying the comparable companies for the limited purpose of quantifying the mark-up to be added to the 50% of AMP expenses which was incorrectly considered to be incurred by the Appellant for the benefit of its AE.
2.34 Without prejudice to the above, the NeAC/DRP failed to appreciate that the comparables selected by the TPO are functionally dissimilar as they are engaged in the business of advertisement and media whereas the Appellant is engaged in manufacturing of passenger cars and not brand promotion.
2.35 Without prejudice to our above grounds, NeAC/DRP ought to have appreciated that even if brand promotion is considered as International Transaction, the TPO ought to have compared the AMP to sales ratio of the Appellant with that of the comparable companies to determine the ALP of the transaction.
2.36 Without prejudice to our above grounds, the NeAC/DRP ought to have appreciated that the TPO has reckoned incorrect quantum of advertisement expenses (i.e., including expenses not in the nature of Advertisement).

**CORPORATE TAX GROUNDS**

**2. Disallowance of expenditure under section 14A of the Act r.w.r 8D of the Rules**

3.1 The NaFAC/DRP erred in disallowing a sum of Rs.1,37,00,000 under section 14A of the Act by applying the provisions of Rule 8D of the Rules.
3.2 The NaFAC/DRP ought not to have made disallowance under section 14A of the Act when the Appellant has not claimed any exemption for the divided income amounting to Rs.1,40,827 earned during the year.
3.3 The NaFAC/DRP ought to have appreciated that the Assessee has not incurred any expenditure which may be attributable towards earning of dividend income and no exemption was claimed during the subject AY.
3.4 The NaFAC, having acknowledged the fact that the Assessee had sufficient surplus funds in earlier AY's to make the investments, ought not to have resorted to making ad hoc disallowance under section 14A r.w.r 8D of the Rules.
3.5 The NaFAC erred in law in stating that disallowance under section 14A of the Act r.w.r. 8D of the Rules is mandatory without appreciating the fact that application of Rule 8D is not mandatory/automatic.
3.6 The NaFAC/DRP ought to have appreciated that merely because there are investments (for strategic purposes) and payment of interest (towards purchase of fixed assets), it cannot be assumed that loan funds have been utilized for the purpose of making investments.
3.7 The NaFAC/DRP erred in presuming that the Appellant had incurred a portion of personnel expenses, rent, salaries, communication, travel, printing & stationery, interest, etc. debited during the subject AY towards carrying out investment transactions / earning income from investments without appreciating that the nature of Assessee's investments (in wholly owned subsidiaries) does not require any continuous monitoring and as such the presumption of the NaFAC is misconceived.
3.8 The NaFAC/DRP ought to have appreciated that the Appellant had neither made fresh investments for strategic purposes during the subject AY nor obtained any fresh loans during the subject AY and as such the NaFAC's assumption that loan funds have been utilized for the purpose of making investments during the year is invalid.
3.9 Without prejudice to the above, the NaFAC/DRP ought to have excluded the investments which did not yield exempt income during the subject AY while computing the quantum of disallowance under Rule 8D(2)(ii) of the Rules.

3.10 Without prejudice to the above, the NaFAC ought to have considered only investments which yielded dividend income and not the entire investments made for strategic purposes while quantifying the value of disallowance under Rule 8D of the Rules.

3.11 Without prejudice to the above, the NaFAC/DRP ought to have restricted the disallowance to the amount of exempt income and since the Appellant has already offered the dividend income of Rs.1,40,827 to tax without claiming any exemption, there is no requirement for any further disallowance u/s 14A.

**3. Export incentives under the Focus Market Scheme (FMS) / Merchandise Exports from India Scheme (MEIS)is a capital receipt not chargeable to tax**

4.1 The NaFAC/DRP erred in not entertaining the claim of the Assessee that incentive under MEIS amounting to Rs.189,34,43,651 should be treated as capital receipt not liable to tax.

4.2 The NaFAC/DRP ought to have appreciated that they are duty bound to assess the correct income liable to tax and as such the NaFAC/DRP itself ought to have considered the issue and treated the incentive from FMS / MEIS as capital receipt.

4.3 The NaFAC/DRP ought to have appreciated that it is a well settled principle that the “purpose” for which an incentive is granted should be considered to determine whether the nature of subsidy / incentive is revenue or capital.

4.4 The NaFAC/DRP ought to have appreciated that the purpose of the export incentive under FMS/MEIS was for promoting Indian exports to markets other than developed economies and not for running the business of the Appellant more profitably and as such the export incentive is a capital receipt not chargeable to tax.

4.5 The NaFAC/DRP ought to have appreciated that the manner of utilization of an incentive cannot determine its tax treatment.

4.6 The NaFAC/DRP erred in relying on the amendment to the definition of income by way of insertion of clause (xviii) to section 2(24) of the Act without appreciating that the said amendment does not apply to non-taxable capital subsidies as it was introduced only to align with the provisions of Income Computation and Disclosure Standards (ICDS).

**5. Disallowance of depreciation to the extent of subsidy**

5.1 The NaFAC/DRP erred in disallowing depreciation amounting to Rs.90,012 in the subject AY by considering the cash subsidy granted by SIPCOT in the AY 2003-04 as capital receipt to be adjusted against cost of assets.

5.2 The NaFAC/DRP ought to have appreciated that SIPCOT had given the subsidy for setting up the mega project and not for the purpose of meeting any liability towards acquisition of assets and as such the subsidy is a capital receipt, which cannot be adjusted against the cost of the asset.

5.3 The NaFAC/DRP failed to appreciate that in the year of receipt of subsidy, i.e. AY 2003-04 the Assessing Officer has verified the claim and deleted the disallowance on depreciation by passing the order giving effect to the CIT(A) order and therefore the question of disallowance of depreciation on subsidy in subsequent AY’s does not arise.

**6. Investment Promotion Subsidy (IPS) received from Govt. of Tamil Nadu in the form of refund of output SGST is a capital receipt not chargeable to tax**

6.1 The NaFAC/DRP erred in treating the Investment Promotion Subsidy (IPS) in the form of Output SGST amounting to Rs.98,85,43,334 as income for the previous year relevant to the subject AY 2018-19.

6.2 The NaFAC/DRP ought to have appreciated that the IPS (refund of Output SGST) granted by the Government of Tamil Nadu was for the purpose of setting up of

Phase II manufacturing facility and as such the said subsidy should be treated as a 'capital receipt' not chargeable to tax.

6.3 The NaFAC/DRP ought to have appreciated that the object of the IPS (refund of Output SGST) was not to enhance the profitability of the Appellant or to fund the cost of fixed assets and as such the said subsidy should be treated as a 'capital receipt' not chargeable to tax.

6.4 The NaFAC/DRP ought to have appreciated that it is a well settled principle that the "purpose" for which an incentive is granted should be considered to determine whether the nature of subsidy / incentive is revenue or capital.

6.5 The NaFAC/DRP ought to have appreciated that the manner of utilization of an incentive cannot determine its tax treatment.

6.6 The NaFAC/DRP ought to have appreciated that the amendment to the definition of income by way of insertion of clause (xviii) to section 2(24) of the Act does not apply to non-taxable capital subsidies as it was introduced only to align with the provisions of Income Computation and Disclosure Standards (ICDS).

3. The Ld. AR, at the outset, placed on record, issue-wise chart and submitted that substantial issues have already been adjudicated by the Tribunal in earlier years and therefore, facts being identical, the adjudication of earlier years may be followed. The same could not be controverted by Ld. CIT-DR. Having heard rival submissions and upon perusal of case records, the appeal is disposed-off as under. The assessee being resident corporate assessee is stated to be engaged in manufacturing and trading of motor vehicles and components. The assessee is manufacturing and selling cars in India as well as exporting them to its AEs and non-AEs abroad. This case was put up for clarification from time to time which was duly responded to by both the sides. The assessee also placed on record latest decision of Tribunal in assessee's own case for AY 2012-13 in IT(TP)A No.51/Chny/2021 dated 27-09-2023.

**3. Gr. No.2 and sub-grounds: Transfer Pricing (TP) Adjustment of deemed Brand Development**

3.1 The assessee aggregated all major international transactions and benchmarked the same using entity level Transactional Net Margin

Method (TNMM) method. The same was accepted by Ld. TPO. However, Ld. TPO proposed adjustment on account of expenses incurred by the assessee for brand building allegedly incurred for the benefit of its AE. This transaction was not reported by the assessee in Form 3CEB. The Ld. TPO held an opinion that the assessee was manufacturing car under license from Hyundai Korea who was the owner of brand / trade mark / trade name “Hyundai”. The assessee was permitted to use the said brand in terms of ‘Technology and Royalty agreement’ dated 30.09.2002. In terms of said agreement, the assessee had no independent choice or discretion to select or use any brand name of its choice. The assessee manufactured the cars with brand and logo of its AE and spent considerable amount for Advertising, Marketing and Promotion (AMP) expenditure which resulted into increase in brand value of its AE. Accordingly, the assessee was to be compensated for the same as held in earlier assessment years. Accordingly, Ld. TPO proposed similar adjustment in this year and put the assessee to show cause notice.

3.2 The TPO computed that the assessee’s contribution in brand building of Hyundai brand would be 6.09%. Though the assessee assailed the same, Ld. TPO held that this transaction would be an international transaction within the meaning of Sec. 92B(1) which included the provision of services. Regarding the decision of Tribunal for AYs 2009-10 to 2011-12 favoring assessee wherein it was held that this transaction do not result in a separate international transaction to be benchmarked, Ld. TPO held that those decisions were under further appeal before Hon’ble High Court of Madras. In this year, the approach of computation of brand building value was different. In earlier years

the increase in brand value was computed at the global level and the contribution of the assessee was allocated on the basis of ratio of assessee's sales to global sales and the entire increase in brand value attributed to the assessee's sales was made as an adjustment on the reasoning that the assessee had to recover this increase in brand value. However, in this year, increase in brand value was computed only to demonstrate the extent of benefits that accrued to the AE. The adjustment was being proposed only as a percentage of AMP expenses actually incurred by the assessee which could be attributed to increase in brand value. Finally, 50% of AMP expenses with mark-up of 7.1% was held to TP adjustment which resulted into an adjustment of Rs.209.18 Crores in the hands of the assessee. The Ld. DRP, following DRP directions for AYs 2009-10 to 2017-18, rejected the objections raised by the assessee.

3.3 As is evident from the orders of Ld. TPO itself, this issue stood covered in assessee's favor in all the earlier years. The bench, in IT(TP)A No.39/Chny/2021 dated 22.12.2021 for AY 2016-17 chose to follow earlier view of the Tribunal and held as under: -

> 7.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2015-16 in IT(TP) No.10/CHNY/2020, dated 17.09.2021, wherein the Tribunal following the earlier decision in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021, held that learned TPO as well as learned DRP were erred in making transfer pricing adjustments towards brand services by adopting Spearman's Rank Correlation method and concluded that there is positive accretion between brand value and market capitalization of HMC Korea and hence, directed the AO/TPO to delete transfer pricing adjustment made towards brand development services. Therefore, consistent with the view taken by the coordinate Bench, we direct the AO to delete addition made towards brand fee adjustment.

Similar view has been taken in latest decision in IT(TP)A No.51/Chny/2021 dated 27.09.2023 for AY 2012-13. Taking consistent view in the matter, we direct Ld. AO to delete impugned TP adjustment. The corresponding grounds raised by the assessee stand allowed.

**4. Gr. No.3: Disallowance u/s 14A**

4.1 Since the assessee had made considerable investments, Ld. AO proposed disallowance u/s.14A. The assessee submitted that it did not receive any income from investments and therefore, there was no question of incurring any expenses and making impugned disallowance. However, rejecting the same, the Ld. AO computed disallowance under Rule 8D(2)(ii) at 1% of average investments and computed disallowance of Rs.1,37,00,000/-. The Ld. DRP confirmed the same. Aggrieved, the assessee is in further appeal before us.

4.2 We find that this issue stood covered by earlier decisions of the Tribunal wherein the disallowance has been restricted to the extent of exempt income earned by the assessee. Similar view has been expressed in latest decision vide IT(TP)A No.51/Chny/2021 dated 27.09.2023 for AY 2012-13. Taking consistent view in the matter, we direct Ld. AO to restrict the disallowance to the extent of exempt income earned by the assessee. If no exempt income is earned, no such disallowance is called for. The corresponding grounds stand allowed for statistical purposes.

**5. Gr. No.4: Nature of Export Incentive under Focus Market Scheme / Merchandise Exports from India Scheme (MEIS): -**

5.1 The assessee received certain export incentives and contended that the same would be in the nature of capital receipt not liable to tax.

However, Ld. AO denied the same on the ground that it was a new claim which could not be entertained as per the decision of Hon'ble Apex Court in **Goetze India Ltd. Vs. CIT (284 ITR 323).** The Ld. AO also held that as per amendment to sub-clause (xviii) to Sec.2(24) as effective from 01.04.2016, any subsidy or assistance, by whatever name called, even if capital in nature, shall be treated as income chargeable to tax except where it has been taken into account for determination of actual cost of assets in terms of Explanation-10 to Sec.43(1) of the act. In the present case, the cost was not reduced from cost of assets and therefore, the said claim could not be entertained. The Ld. DRP confirmed the same on the ground that the scheme compensates to offset high freight costs and other disadvantages to select international markets with a view to enhance country's export competitiveness in foreign countries. Focus Market Scheme was launched in 01.04.2006 and it was merged with MEIS as per 2015 trade policy. The incentives were given for the purpose of revenue expenditure related to the exports to the designated countries. Therefore, these receipts were revenue in nature as already offered by the assessee to tax. Aggrieved, the assessee is in further appeal before us.

5.2 We find that this issue is covered against the assessee by the order of Tribunal for AYs 2013-14 to 2016-17. In para 13.3 of latest order IT(TP)A No.39/Chny/2021 dated 22.12.2021 for AY 2016-17, the bench followed decision in earlier years and dismissed this claim of the assessee. Similar view has been expressed in latest decision in IT(TP)A No.51/Chny/2021 dated 27.09.2023 for AY 2012-13. Taking

consistent view in the matter, the corresponding grounds raised by the assessee stand dismissed.

**6. Gr. No.5: Depreciation on subsidy**

6.1 The State Industries Promotion Corporation of Tamil Nadu (SIPCOT) provided capital subsidy of Rs.1 Crore in AY 2003-04. It was submitted by the assessee that subsidy was not relatable to any fixed asset and this was also not offered to tax. However, rejecting the submissions of the assessee, Ld. AO opined that since capital subsidy was used for capital expenditure, the value of assets should have been reduced by the subsidy amount. Accordingly, Ld. AO computed excess depreciation of Rs.0.90 Lacs and added the same to the income of the assessee. The Ld. DRP confirmed the same against which the assessee is in further appeal before us.

6.2 We find that this issue is covered in favor of the assessee by the order of Tribunal for AYs 2013-14 to 2016-17. In para 9.3 of latest order IT(TP)A No.39/Chny/2021 dated 22.12.2021 for AY 2016-17, the bench followed decision in earlier years and allowed this claim of the assessee. Similar view has been expressed in latest decision in IT(TP)A No.51/Chny/2021 dated 27.09.2023 for AY 2012-13. Taking consistent view in the matter, the corresponding grounds raised by the assessee stand allowed.

**7. Gr. No.6: Nature of Investment Promotion Subsidy**

The assessee accrued VAT incentive (investment promotion subsidy) of Rs.98.85 Crores as received from SIPCOT, Govt. of Tamil Nadu. The assessee obtained final eligibility certificate from SIPCOT under the scheme on 17.04.2014. However, the said amount was not offered to tax on the ground that the subsidy is released by appropriate

authority only on submission of proof of commodity taxation in the form of VAT among others under TN VAT Act, 2006. Till that obligation is discharged, the same would not accrue to the assessee. The Authorised authority on verification of discharge of applicable tax would issue a certificate which would entitle the assessee to claim the said subsidy subject to satisfaction of all the conditions and terms specified in the Memorandum of Understanding (MOU). The assessee submitted that appropriate authority was entitled to withhold the release of the incentives if some of the conditions were not fulfilled. However, Ld. AO brought the same to tax on the ground that the subsidy had already accrued to the assessee. The Ld. DRP confirmed the same against which the assessee is in further appeal before us.

8. Submissions on behalf of Assessee

8.1 The Ld. AR made elaborate submissions, oral as well as written, for the pleadings that the subsidy would be capital in nature and therefore, the same is not assessable to tax at all. In the written submissions, it has been contended that Investment Promotion Subsidy (IPS) as received from Govt. of Tamil Nadu in the form of refund of output SGST is a capital receipt not chargeable to tax. The Ld. AR has submitted that the assessee is engaged in manufacturing and trading of motor vehicles and components. During this year, the aforesaid subsidy has accrued to the assessee based on sales made. The same has been credited to Profit & Loss account under 'Other Operating Revenue' and treated as revenue receipt. Since the subsidy was not received during this year, the same was excluded from total income.

8.2 The Ld. AR further submitted that the IPS was received for the

purpose of setting up / expansion of manufacturing facility and therefore, the same would be capital in nature. However, Ld. AO, by virtue of the amendment made to section 2(24)(xviii) of the Act with effect from 01.04.2016, held that any subsidy / assistance by whatever name called shall be treated as income chargeable to tax except where it has been considered for determination of actual cost of assets in terms of Explanation-10 to Section 43(1) of the Act.

8.3 The Ld. AR submitted that the Government of Tamil Nadu (‘GoTN’) formulated an Ultra Mega Integrated Automobile Projects (‘UMIAP’) Policy on 26.02.2007 to bring out an exclusive policy for encouraging the setting up of major integrated automobile projects in Tamil Nadu. The UMIAP policy would cover automobile projects, either new or expansion, that will have Engine Plant, press shop, Body shop, Transmission line, Assembly line, Paint Shop, etc either on its own or in consortium / joint venture mode in the same location with an investment of not less than INR 4,000 Crores to be made in seven years from the date of Memorandum of Understanding (MoU) with the Government or any other date specified by the Government. The UMIAP was formulated by the GoTN since the erstwhile incentive package provided by the GoTN was not attractive due to which major automobile companies opted for cities in other States for housing their manufacturing facility rather than investing in Tamil Nadu. Since this trend would have led to Tamil Nadu losing its pre-eminent position in automobile and auto-component manufacture forever, the GoTN brought an exclusive policy in the name of UMIAP Policy for encouraging the setting up of major integrated automobile projects in Tamil Nadu. The policy takes note of the fact that Tamil Nadu could

not be successful in attracting large integrated automobile projects into Tamil Nadu after 1996. The announcement made in the New Industrial Policy 2003 has also not attracted any major auto projects. All these would have serious and long-term adverse impact on Tamil Nadu's capability in attracting investments, generating and sustaining employment and achieving economic growth. Therefore, the Government felt it necessary to bring out an exclusive Policy for encouraging the setting up of major integrated automobile projects in Tamil Nadu which has led to formulation of the said scheme which would attract major investment over a period of 7 years. The proposed investment includes investment in eligible fixed assets and Investment in intangibles, which form an integral part of manufacturing process. Considering various benefits accruing to State of Tamil Nadu in the form of increase in State Gross domestic Product, enhancing brand equity of Chennai, Ancillary development and Enhancement in employment potential, the policy envisages grant of subsidy to the eligible assessee. In order to avail this incentive, the assessee entered into a MoU with the GoTN on 22.01.2008 for expansion of its existing plant and to establish a new engine and transmission plant near the existing plant. The MoU envisages various obligations, support and incentives. The assessee was, inter-alia, obligated to make investment of over Rs. 4000 Crores over a period of 7 years, creation of incremental plant capacity of 3.30 Lacs vehicles per annum. The GoTN would give support by way of infrastructure support in the form of power, road, drainage, sewage and water, system of fast-track clearances and a system of effective monitoring of all clearances and various issues and extending the

fiscal incentives as applicable under relevant Government orders and as agreed in the MoU.

8.4 The aforesaid fiscal incentive has been provided in the form of Investment Promotion subsidy (‘IPS’). The same envisages refund of input VAT and gross output VAT (without set off) for a period of 21 years from the date of commencement of production or to the extent of 115% of the eligible investment whichever is earlier. The refund shall be limited to 92% (i.e., 80% of 115%) of the eligible investment made within a period of 7 years. The scheme also enables soft loan against Central Sales Tax (without setoff) repayable after a period of 14 years along with nominal interest. As per UMIAP, the IPS comprised of infrastructure support, exemption from entry tax, Octroi, Works contract tax and other state levies, flexibility in labour recruitments / operations and single window facilitation / clearances.

8.5 Pursuant to aforesaid MoU, the assessee made desired investment and received its final eligibility certificate from SIPCOT on 17.04.2014. The same provide that the assessee has fulfilled the investment conditions for setting up the Phase II manufacturing facility and accordingly, granted IPS arising from the UMIAP. Accordingly, the Appellant was sanctioned, inter-alia, refund of output gross VAT (now SGST) and input VAT paid by the Assessee. As such the IPS was quantified and the right to receive the same accrued as on 17.04.2014. The Ld. AR submitted that the purpose of the scheme was to promote investments in the state of Tamil Nadu i.e., setting up / expansion of new manufacturing facility in Tamil Nadu. The assessee has made the desired investment and fulfilled all the conditions. The right to receive the IPS legally vested in favor of

the assessee on 17.04.2014 upon issuance of eligibility certificate.

8.6 The Ld. AR further submitted that prior to the amendment to the definition of income under section 2(24) with effect from 01.04.2016, taxation of subsidy was governed by the guiding principles laid down by Apex Court. In this regard, the Supreme Court has held that "purpose test" must be adopted to determine the character of a subsidy. Further, the Supreme Court has also held that if the purpose of the subsidy is for encouraging investment, it is a capital receipt not chargeable to tax. On the other hand, if the subsidy if given for meeting any expenses, it is a revenue receipt chargeable to tax. After the amendment, the moot question is whether the principles laid down by Supreme Court would still prevail or whether the subsequent amendment has the effect of overruling those decisions.

8.7 The Ld. AR submitted that nature of amendment to income definition u/s 2(24)(xviii) was not a substantive amendment and no corresponding amendment was made in the charging provisions u/s 28. It has been submitted that the provisions of Sec.2 of the Act define various terms and phrases used in the Act and it is merely a definition provision and does not deal with the charge of income tax. As per Section 14 of the Act, the charge of income tax and computation of total income is governed under the respective heads of income. Section 2(24) of the Act was amended vide Finance Act, 2015 w.e.f. 01.04.2016 (i.e., from AY 2016-17) to include 'subsidies' within the definition of income vide insertion of clause (xviii). However, amendment was not made in the charging section i.e., Section 28 of the Act to tax the same as 'profits and gains of business or profession'. Merely because the said clause has been included in

the definition provision, it will not mean that it is automatically taxable in the absence of any change in the charging provisions of Section 28 of the Act. Therefore, this aforesaid amendment to Sec. 2(24) of the Act is not a substantive amendment since the definition is a mere explanation of a particular term or phrase used in the Act and not a charging section by itself. If the provisions of Sec.2 are considered to be charging provisions, then the provisions of section 28 of the Act dealing with the charging provisions for profits and gains from business would lose its relevance. The definition in section 2(24) has to be read along with the charging provisions u/s 28 of the Act to determine whether the incomes as per the definition section will be chargeable to tax as per the charging provisions. Wherever the legislature intended to tax any particular item of income or receipt, it has been very clearly included within the charging provisions of Sec.28 of the Act. The Ld. AR cited the example of taxation of non-compete fee received by an assessee which was brought to tax as per Clause (va) of Section 28 of the Act. Correspondingly, the said item was also included within the definition of income by way of insertion of Clause (xii) to section 2(24) of the Act.

8.8 The Ld. AR further submitted that merely because an amendment has been introduced in the definition Section without any corresponding amendment / change in the charging provisions, it will not mean that the amendment is a substantive amendment intended to bring a new income / receipt within the taxation net without there being any change in the charging provisions. For instance, “dividend” has been included within the definition of income as per section 2(24)(ii) of the Act. However, this would not automatically mean that

all dividend incomes are chargeable to tax as certain categories of dividend income enjoyed an exemption. Therefore, chargeability or otherwise of an item of income/receipt is always governed under the respective charging provisions of the Act and not by the definition as per Section 2 of the Act. The Ld. AR further submitted that even prior to introduction of Clause (xviii) in section 2(24) of the Act, subsidies which were revenue in nature were being chargeable to tax. Therefore, it cannot be said that all subsidies are being covered within the tax net only post amendment. If this position is accepted, i.e., all subsidies are taxable only post amendment to section 2(24), then it would mean that even revenue subsidies prior to insertion of the term 'subsidies' in income definition will not be chargeable to tax. Since revenue subsidies even prior to the amendment were always chargeable to tax under section 28, the above interpretation that all subsidies are covered within the tax net post amendment is not consistent with the position of law. Since there is no change in the charging provisions under section 28 of the Act, the principles laid by the Apex Court and other High Courts would still hold the field in order to interpret whether a particular receipt is capital or revenue in nature even post amendment to section 2(24) of the Act. The Ld. AR thus submitted that the taxability of subsidies is dependent on whether it is revenue or capital in nature and the determination of this is based on the "Purpose test" as laid down by several judicial precedents including the Apex Court. Considering the purpose test, these receipts should be treated as capital receipt not chargeable to tax.

8.9 The Ld. AR submitted that the purpose and objective of

amendment was only to align with Income Computation and Disclosure Standards (ICDS) provisions. The above amendment was introduced directly in the Finance Act 2015 w.e.f. AY 2016-17 (later amended to be effective from AY 2017-18). It was submitted that the ICDS was notified by the Government on 31.03.2015 u/s 145 of the Act and the same were made applicable from AY 2017-18. Accordingly, the legislature intended to do corresponding consequential / supplementary amendment to the definition section in the Act. Therefore, the intention behind amendment to section 2(24) of the Act was only to align with the then newly introduced provisions of ICDS notified under section 145 of the Act. The objective / intention of the legislature in relation to introduction of this clause could be understood from the Explanatory Notes issued vide Circular No.19/2015 [F.NO.142/14/2015-TPL] dated 27.11.2015 which read as "Alignment of provisions relating to taxation of Government Grants with the provisions of Income Computation and Disclosure Standards (ICDS)'. The above Explanatory Note explicitly states that the objective of insertion of clause (xviii) of section 2(24) of the Act was to align with ICDS. The Ld. AR submitted that the provisions of ICDSs were introduced only to aid in computation of income and for disclosure purposes and it is not a substantive law. ICDS by itself is not a taxing statute, i.e., it does not deal with the taxability or otherwise of income / expenditure under the Act. It merely lays down the principles for recognition / treatment of those items which have already been dealt with under the Act. The taxability or otherwise of income / expenditure is governed by the provisions of the Income Tax Act read with the law laid down by the Supreme Court as may be

applicable. Thus, the amendment to section 2(24) by way of insertion of clause (xviii) was only to align with the provisions of ICDS as per the stated purpose. The intention was not to tax all kinds of subsidies so as to include the non-taxable capital subsidy. Further, the amendment does not state that it is made to nullify the interpretation of law as laid down by the Supreme Court in various decisions including Sahney Steel & Press Works Ltd. v. CIT [1997] 94 Taxman 368; CIT vs. Ponni Sugars and Chemicals Ltd. [2008] (174 Taxman 87) etc. as also by other High Courts and Tribunals. Therefore, it was to be held that the intention of the amendment was not to make a substantive amendment to bring a new item of income within the charging provisions of section 28 of the Act. The intention was only to align the definition of income under section 2(24)(xviii) of the Act with the provisions of ICDS.

8.10 The Ld. AR cited instance of insertion of Explanation-10 to section 43(1) of the Act vide Finance Bill 1998. The Explanation-10 to section 43(1) of the Act states that where a portion of the cost of an asset acquired by an assessee has been met directly or indirectly by the Central Government or State Government or any authority established under any Law or by any other person, in the form of subsidy or grant or reimbursement, then in a case where the subsidy is directly relatable to the asset, such subsidy shall not be included in the actual cost of the asset. Since this is a substantive amendment, this has been introduced in the Finance Bill 1998 itself and not directly in the Finance Act 1998. Wherever a new substantive amendment was made, it was undertaken through a Finance Bill along with a Memorandum i.e., when any substantive amendment is

introduced, the intention is clearly set out in the Memorandum to the respective Finance Bill mentioning that the amendment is proposed in view of judgments of various Courts, since the Finance Bill and the Memorandum are tabled in the Parliament for discussions. The Ld. AR also drew analogy from various other amendments made in the Finance Act, 2015 which are not substantive in nature. It was the plea of Ld. AR that only non-substantive amendments are made via the Finance Act directly since it does not require any deliberations/discussions in the Houses of Parliament. In the above background, Ld. AR submitted that IPS granted to the assessee do not fall within the provisions of ICDS VII since the same deal with treatment of different kinds of Government grants and IPS so received by the assessee would not fall within the categories as mentioned therein. The Ld. AR pleaded that ICDS VII deals only with revenue subsidies i.e., government grants in the nature of revenue receipts and capital subsidies which are granted for meeting the cost of assets. The provisions of ICDS VII would not cover non-taxable capital subsidies. The impugned incentive was not given to offset the cost of any particular asset and is merely issued with an objective of accelerating the industrial development. Though, for the purpose of determining the amount of subsidy to be given, cost of eligible investment was taken as the basis, the IPS was not specifically intended to subsidize the cost of the assets. Therefore, since the amendment to section 2(24) was made only to align with the provisions of ICDS, it is clear that said amendment shall not include non-taxable capital subsidies. Nevertheless, the preamble of ICDS VII provides that the provisions of the Act shall prevail in case of any

conflict between ICDS and the provisions of the Act. The same would reaffirm the position that the amendment to section 2(24) of the Act was made only to align with ICDS, which by itself is not a substantive law, and it cannot be interpreted to mean that all forms of subsidies are henceforth taxable post the amendment.

8.11 Another plea was that if the decisions were sought to be nullified, the said intention is clearly manifested while bringing the amendment. No such expression was expressed while bringing out aforesaid amendment. The last argument was that the amended provisions of Section 2(24)(xviii) of the Act is not applicable for the IPS since the vested right to receive the subsidy was established on 17.04.2014 i.e., prior 01.04.2016. The vested rights to an assessee cannot be diluted by a subsequent amendment. The amendment would apply only to Schemes granted on or after the date of amendment i.e., 01.04.2016 and it cannot have a retrospective effect on Schemes granted/vested prior to the date of amendment. Without prejudice, Ld. AR submitted that the subsidy should be taxed only in the year of receipt.

8.12 Submissions on behalf of revenue

The Ld. CIT-DR, on the other hand, submitted that the amendment was very clear and the income would include any type of subsidies, irrespective of nature or purpose. The amendment does not leave any scope of any other interpretation. The Ld. CIT-DR also submitted that the subsidy has been credited in the Profit & Loss Account as revenue item. However, the same not offered to tax in the computation of income simply on the plea that the right to receive the same did not accrue to the assessee in this year. The Ld. CIT-DR pleaded that this

subsidy has already accrued to the assessee and therefore, rightly been brought to tax by lower authorities.

**Our findings and Adjudication**

9. From the facts, it emerges that the assessee has received investment promotion subsidy from State Government for Rs.98.85 Crores and received final eligibility certificate from SIPCOT under the scheme on 17.04.2014. However, the assessee did not offer the same to tax on the ground that subsidy is released by appropriate authority only on submission of proof of commodity taxation in the form of VAT among others under TN VAT Act, 2006. Till that obligation is discharged, the same would not accrue to the assessee. It was the submission of the assessee that as per Memorandum of Understanding (MOU), the appropriate authority was entitled to withhold the release of the incentives if some of the conditions were not fulfilled. However, Ld. AO brought the same to tax on the ground that the subsidy had already accrued to the assessee. The action of Ld. AO was upheld by Ld. DRP against which the assessee is in further appeal before us. From the submissions of Ld. AR, it becomes undisputed fact that this subsidy has already accrued to the assessee and the assessee is eligible to claim the same under the scheme. During assessment proceedings, the only plea raised by the assessee was that the same did not accrue to the assessee and therefore, not offered to tax. However, from the facts, it becomes crystal clear that the assessee has become eligible for the said subsidy on 17.04.2014 i.e., the date on which eligibility certificate was received by the assessee. We concur with the stand of Ld. AO, in this regard.

10. The prime argument of Ld. AR is that the aforesaid subsidy being capital in nature would not be taxable at all notwithstanding the fact that the definition of income as provided in Sec. 2(24) has been amended by Finance Act, 2015 with effect from 01.04.2016 wherein sub-clause (xviii) has been inserted in the definition of income. The Ld. AR has submitted that the 'purpose test' as laid down by Hon'ble Supreme Court in various decisions should still be a guiding factor to determine the taxability of the same and the amendment would not have impact on the same. The first submission of Ld. AR is that the corresponding amendment has not been in the charging Section 28 of the Act dealing with computation of Profits and Gains of Business or Profession. The Ld. AR has also submitted that the amendment in Sec. 2(24) is not substantive amendment since the definition of income is mere explanation of a particular item or phrase used in the Act and not a charging section by itself. If the provisions of Sec.2 are considered to be charging provisions, the provisions of Sec.28 dealing with charging provisions of Profits and Gains would lose its relevance. The definition of Sec.2(24) has to be read along with the charging provisions of Section to determine whether the income as per the definition section would be chargeable to tax as per the charging provisions. The Ld. AR has cited the example of 'non-compete fees which was brought to tax as per clause (va) of Sec.28 of the Act and correspondingly, the same was included in the definition of income by way of insertion of clause (xii) of Sec.2(24) of the Act.

11. To evaluate the arguments of Ld. AR, it would be useful to consider the amended definition of income w.e.f. 01.04.2016 which read as under: -

> *2(24) Income includes….*
> *xxxx*
> *xxxx*
> *(xviii) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43"*

The expression 'income' as defined in Sec. 2(24) stares with the words "income includes" and thus, it is an inclusive definition of the income. The same is not exhaustive one and leaves room for further extension of the scope of the term. This is as per the decision of Hon'ble Apex Court in the case of **CIT vs. G.R. Karthikeyan (68 Taxman 145)** wherein it has been observed by Hon'ble Court as under: -

> 6. It is not easy to define income. The definition in the Act is an inclusive one. As said by Lord Wright in Raja Bahadur Kamakshya Narain Singh of Ramgarh v. CIT [1943] 11 ITR 513 (PC) "income . . . is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation". In Maharajkumar Gopal Saran Narain Singh v. CIT [1935] 3 ITR 237, the Privy Council pointed out that "anything that can properly be described as income is taxable under the Act unless expressly exempted". This Court had to deal with the ambit of the expression 'income' in Navinchandra Mafatlal v. CIT [1954] 26 ITR 758. The Indian Income-tax and Excess Profits Tax (Amendment) Act, 1947 had inserted section 12B in the Indian Income-tax Act, 1922. Section 12B imposed a tax on capital gains. The validity of the said Amendment was questioned on the ground that tax on capital gains is not a tax on 'income' within the meaning of entry 54 of List-I, nor is it a tax on the capital value of the assets of individuals and companies within the meaning of entry-55, of list-1 of the Seventh Schedule to the Government of India Act, 1935. The Bombay High Court repelled the attack. The matter was brought to this Court. After rejecting the argument on behalf of the assessee that the word 'income' has acquired, by legislative practice, a restricted meaning - and after affirming that the entries in the Seventh Schedule should receive the most liberal construction - the Court observed thus:
>
> > "What, then, is the ordinary, natural and grammatical meaning of the word 'income'? According to the dictionary, it means 'a thing that comes in'. (See Oxford Dictionary, Vol. V, p. 162; Stroud, Vol. II, pp. 14-16). In the United States of America and in Australia both of which also are English speaking countries the word 'income' is understood in a wide sense so as to include a capital gain. Reference may be made to - 'Eisner v. Macomber', [1919] 252 US 189 (K); - 'Merchants' Loan and Trust Co. v. Smietankd, [1920] 255 US 509 (L) and - 'United States of America v. Stewart', [1940] 311 US 60

> (M) and - 'Resch v. Federal Commissioner of Taxation', [1943] 66 CLR 198 (N). In each of these cases very wide meaning was ascribed to the word 'income' as its natural meaning. The relevant observations of learned Judges deciding those cases which have been quoted in the judgment of Tendolkar, J. quite clearly indicate that such wide meaning was put upon the word 'income' not because of any particular legislative practice either in the United States or in the Commonwealth of Australia but because such was the normal concept and connotation of the ordinary English word 'income'. Its natural meaning embraces any profit or gain which is actually received. This is in consonance with the observations of Lord Wright to which reference has already been made . . . The argument founded on an assumed legislative practice being thus out of the way, there can be no difficulty in applying its natural and grammatical meaning to the ordinary English word 'income'. As already observed, the word should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power." [Emphasis supplied] (p. 764)

Since the definition of income in section 2(24) is an inclusive one, its ambit, in our opinion, should be the same as that of the word income occurring in entry 82 of List I of the Seventh Schedule to the Constitution (corresponding to entry 54 of List-I of the Seventh Schedule to the Government of India Act).

7. In Bhagwan Dass Jain v. Union of India [1981] 128 ITR 315 (SC) the challenge was to the validity of section 23(2) of the Act which provided that where the property consists of house in the occupation of the owner for the purpose of his own residence, the annual value of such house shall first be determined in the same manner as if the property had been let and further be reduced by one-half of the amount so determined or Rs.1,800, whichever is less. The contention of the assessee was that he was not deriving any monetary benefit by residing in his own house and, therefore, no tax can be levied on him on the ground that he is deriving income from that house. It was contended that the word income means realisation of monetary benefit and that in the absence of any such realisation by the assessee, the inclusion of any amount by way of notional income under section 23(2) in the chargeable income was impermissible and outside the scope of entry 82 of List-I of the Seventh Schedule to the Constitution. The said contention was rejected affirming that the expression 'income' is of the widest amplitude and that it includes not merely what is received or what comes in by exploiting the use of the property but also that which can be converted into income. Sub-clause (ix) of section 2(24) refers to lotteries, crossword puzzles, races including horse races, card games, other games of any sort and gambling or betting of any form or nature whatsoever. All crossword puzzles are not of a gambling nature. Some are; some are not. See State of Bombay v. R.M.D. Chamarbaugwala AIR 1957 SC 699. Even in card games there are some games which are games of skill without an element of gamble [See State of Andhra Pradesh v. K. Satyanarayan 1968 (2) SCR 515]. The words 'other games of any sort' are of wide amplitude. Their meaning is not confined to games of a gambling nature alone. It, thus, appears that sub-clause (ix) is not confined to mere gambling or betting activities. But, says the High Court, the meaning of all the aforesaid words is controlled by the word 'winnings' occurring at the inception of the sub-clause. The High Court says, relying upon certain material, that the expression 'winnings' has come to acquire a particular meaning, viz., receipts from activities of a gambling or betting nature alone. Assuming that the High Court is

> right in its interpretation of the expression winnings, does it follow that merely because winnings from gambling/betting activities are included within the ambit of income, the monies received from non-gambling and non-betting activities are not so included? What is the implication flowing from insertion of clause (ix)? If the monies which are not earned - in the true sense of the word -constitute income, why do monies earned by skill and toil not constitute income? Would it not look odd, if one is to say that monies received from games and races of gambling nature represent income but not those received from games and races of non-gambling nature? The rally in question was a contest, if not a race. The respondent-assessee entered the contest to win it and to win the first prize. What he got was a 'return' for his skill and endurance. Then why is it not income - which expression must be construed in its widest sense. Further, even if a receipt does not fall within sub-clause (ix), or for that matter, any of the sub-clauses in section 2(24), it may yet constitute income. To say otherwise, would mean reading the several clauses in section 2(24) as exhaustive of the meaning of 'income' when the statute expressly says that it is inclusive. It would be a wrong approach to try to place a given receipt under one or the other sub-clauses in section 2(24) and if it does not fall under any of the sub-clauses, to say that it does not constitute income. Even if a receipt does not fall within the ambit of any of the sub-clauses in section 2(24), it may still be income if it partakes of the nature of the income. The idea behind providing inclusive definition in section 2(24) is not to limit its meaning but to widen its net. This Court has repeatedly said that the word 'income' is of widest amplitude, and that it must be given its natural and grammatical meaning. Judging from the above standpoint, the receipt concerned herein is also income. Maybe it is casual in nature but it is income nevertheless. That even the casual income is 'income' is evident from section 10(3). Section 10 seeks to exempt certain 'incomes' from being included in the 'total income'. A casual receipt-which should mean, in the context, casual income -is liable to be included in the total income, if it is in excess of Rs.1,000, by virtue of clause (3) of section 10. Even though it is a clause exempting a particular receipt/income to a limited extent, it is yet relevant to the meaning of the expression 'income'. In our respectful opinion, the High Court, having found that the receipt in question does not fall within sub-clause (ix) of section 2(24), erred in concluding that it does not constitute income. The High Court has read the several sub clauses in section 2(24) as exhaustive of the definition of income when in fact it is not so. In this connection it is relevant to notice the finding of the Tribunal. It found that the receipt in question was casual in nature but - it opined - it was nevertheless not an income receipt and fell outside the provision of section 10(3). We have found it difficult to follow the logic behind the argument.

It was thus observed by Hon'ble Court that it was difficult to define income in any precise general formula. Anything that could properly be described as income is taxable under the Act unless expressly exempted. Even if a receipt does not fall within the ambit of any of the sub-clauses in section 2(24), it may still be income if it partakes the

nature of the income. The idea behind providing inclusive definition in section 2(24) was not to limit its meaning but to widen its net. The Hon'ble Court further held that the expression 'income' is of the widest amplitude and that it includes not merely what is received or what comes in by exploiting the use of the property but also that which can be converted into income. The word 'income' is of widest amplitude, and that it must be given its natural and grammatical meaning. We also observe that Income Tax is tax on income. Once a receipt is held to be the income, the natural consequences thereof would follow and the same would be taxable in the hands of the assessee unless exempted in any of the provisions under the Act. Consequently, the argument that the change in definition of 'income' was not substantive one does not find favor with us. The intention of legislature was specifically to include such receipt as the income of the assessee. The amendment was not merely to align with ICDS provisions. Further, the manner in which the amendment has been introduced by legislatures would wholly be irrelevant.

12. Proceeding further, we find that the provisions of Sec.5 provide the scope of total income. It provides that subject to the provisions of this Act, total income of a person who is resident would include all income from whatever sources derived which is received or deemed to be received in India or income which accrue or arise or deemed to accrue or arise in India. The heads of income has been carved out in Section 14 of the Act. The provisions of Sec.14 provide for heads of income under which such income would be assessable. These provisions provide that save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and

computation of total income, be classified in five distinct heads of income i.e., Salaries, Income from House Property, Profits and Gains of business or profession, capital gains or income from other sources. In other words, once an item has been found to be covered within the meaning of 'income', the same shall have necessarily to be classified in distinct heads of income and computations of tax would be made accordingly. Since the definition of income is an inclusive one, it is not necessary as well as not practical that each item of income is sclearly and distinctly spelt out in charging provisions of distinct heads of income. We also find that the provisions of Sec.28 specify the income which shall be chargeable to Income Tax under the heads 'Profits and Gains of business or Profession'. The sub-clause (i) provides that profits and gains of business or profession which was being carried on by the assessee at any time during the previous year shall be chargeable to tax under the head 'Profits and Gains of Business or Profession'. From the scheme of the Act, it could be seen that the definition of income as provided in Sec. 2(24)(xviii) is of widest amplitude and it is an inclusive definition and not an exhaustive definition. The scope of total income includes all types of income that is received or that accrues or arises to the assessee. The income has to be divided into five distinct heads one of which is 'Profits and Gains of Business or Profession'. In our considered opinion, when the definition of income is not exhaustive one, it is not necessary that to tax the income, corresponding amendment should have been made in Sec.28 of the Act. The argument that the amendment is not a substantive amendment is not correct and we do not concur with this argument.

13. It could also be observed that even before this amendment, the subsidy was not specifically spelt out in Sec.28 yet the subsidies which were of revenue in nature were always brought to tax under the head 'Profits and Gains of Business or Profession' and capital receipts were held to be non-taxable considering the 'purpose test' as laid down by Hon'ble Supreme Court in various case laws. The revenue subsidies were so brought to tax under the head 'Profits and Gains of Business or Profession' on the reasoning that subsidies primarily arose to the assessee while conducting its business and the same was to be treated as per the provisions as applicable to computation of Income under the head 'Profits and Gains of Business or Profession'. The subsidies, in our opinion, in all such cases were covered under the provisions of Sec. 28 (i) itself i.e., the 'profits and gains of any business or profession which was carried on by the assessee at any time during the year'. This being the case, the logical conclusion that would follow would be that after amendment of the definition of 'income, there was no separate requirement of bringing corresponding amendment to Sec.28 since clause (i) was wide enough or in fact, was already governing the treatment of such subsidies. Therefore, the argument of Ld. AR that there should be corresponding amendment in the charging provisions before an item could be brought to tax is not acceptable. These arguments stand rejected.

14. Upon perusal of amendment, we find that the effect of amendment made in Sec.2(24) by Finance Act 2015 w.e.f. 01.04.2016 by way of insertion of Clause (xviii) would be that income would include any assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever

name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43. The effect of the amendment, in our considered opinion, was that various concessions etc. provided by specified authorities either in cash or in kind *by whatever name called* will be included within the meaning of term 'income' and consequently, the same would be taxable under the Act. The phrase *by whatever name called* captures the essence of the amendment as brought out by the legislatures and the same in crystal clear terms expresses the intention of the legislatures. In our opinion, the distinction being *hitherto* created by judicial decisions between capital receipts and revenue receipts was done away by this amendment and the earlier case laws holding the field would cease to apply after the amendment. The intention of legislature was to bring to tax all kinds of subsidies irrespective of their nature, manner of receipt and the agency from which it was received. The only exception provided is that in case the said concessions were taken into account to determine the actual cost of an asset in terms of Explanation 10 to clause (1) to Section 43, the same would not be separately taxable since in such a case, the quantum of depreciation would be reduced. In all the other cases, irrespective of nomenclature or the manner in which the same are given, such concessions would always form part of income of the assessee notwithstanding the 'purpose' or objective of the scheme or whether the same was in capital field or in revenue field. This amendment has, thus, taken away the distinction between capital

receipts and revenue receipts or the 'purpose test' as laid down by Hon'ble Apex Court in various decisions. The amended definition provide that all sorts of assistance received by an assessee from the specified persons, irrespective of its nature as capital or revenue, shall be taxable as income of the assessee unless the same falls in the exclusion category. In such a situation, the relevant case laws as cited by Ld. AR in support of the argument that 'purpose test' must be followed are to be disregarded and it was to be held that those case laws would have no application after the aforesaid amendment. We concur with the stand of Ld. CIT-DR, in this regard.

15. In view of the foregoing, the amount of subsidies as received by the assessee has rightly been brought to tax by Ld. AO in the assessment order. Ground No.6 and all its sub-grounds as raised by the assessee, stand dismissed.

16. Our aforesaid adjudication would apply to specific ground no.4.6 also though we have dismissed other sub-grounds of Ground No.4 by following the earlier orders of the Tribunal.

**Conclusion**

17. The appeal stand partly allowed in terms of our above order.

*Order pronounced on 09th February, 2024*

| *Sd/-* | *Sd/-* |
|---|---|
| **(MAHAVIR SINGH)** | **(MANOJ KUMAR AGGARWAL)** |
| उपाध्यक्ष / **VICE PRESIDENT** | लेखा सदस्य / **ACCOUNTANT MEMBER** |

चेन्नई Chennai; दिनांक Dated :09-02-2024

*DS*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त/CIT 4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF