IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.
BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No.193/Asr/2022
Assessment Year: 2018-19

M/s Satia Industries Ltd. Malour Road, Vill. Rupana, Distt. Muktsar. [PAN:-AACCS7233A] **(Appellant)**	Vs.	National Faceless Assessment Centre, Assessment Unit, I.T. Department New Delhi. **(Respondent)**

Appellant by	Sh. Sudhir Sehgal, Sh. P.N. Arora & Ashwani Juneja, Adv.
Respondent by	Sh. Girish Bali, CIT. DR

Date of Hearing	17.05.2023
Date of Pronouncement	13.06.2023

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal of the assesseewas filed against the order of the ld. Commissioner of Income Tax (Appeals), NFAC, Assessment Unit, Delhi,[in brevity the 'CIT (A)'], order passed u/s 250of the Income Tax Act 1961, [in

brevity 'the Act'] for A.Y. 2018-19. The assessment order is framed u/s 143(3)r.w.s. 144B of the Act.

2. The assessee has taken the following grounds:

> *1. That in the facts fit circumstances of the case, the Ld. AO NFAC has erred on facts & law in assessing the income at Rs.27,39,13,236/- assessment vide order u/s 143(3) r.w.s. 144C dated 26.07.2022, in pursuance of directions of Dispute Resolution Panel dated 29.06.2022, and the amount of Rs. 4,57,32,318/- paid to ZYLO international has been wrongly treated as bogus expenditure u/s 69C and further the amount of Rs. 17,77,26,000/- received on account of sale/ transfer of Recs/ESCs has been wrongly treated as business income.*
>
> *2. That in the facts fit circumstances of the case, the Ld. AO NFAC has erred on facts fit law in making the addition of Rs. 17,77,26,000/- received on account of sale/transfer of RECs/ESCs, in pursuance of directions of Dispute Resolution Panel dated 29.06.2022, while recording the finding that the claim of the assessee u/s 115BBG is being rejected despite the fact that the claim made in the return of income was modified during the course of assessment proceedings and in the*

objections filed before the DRP that the receipts from sale/transfer of RECs/ESCs are capital receipts which are not liable to tax.

2.1. That in the facts & circumstances of the case, the Ld. AO NFAC has erred on facts fit law in making the addition of Rs.17,77,26,000/-, in pursuance of directions of Dispute Resolution Panel dated 29.06.2022, by treating the receipts from sale/transfer of RECs/ESCs as business income, and charging the tax on the same as against the claim of the assessee, based on the assessment order for A.Y 2017-18 in the case of the assessee, that the receipts from sale/transfer of RECs/ESCs are capital receipts which are not liable to tax.

2.2. The claim of the assessee before the AO NFAC & in the objection filed before the DRP that the amount received from sale/transferof RECs/ESCs is capital receipt for which judgement of various benches of ITAT (including the order of the jurisdictional benches) has been rejected by the AO NFAC and DRP without rebutting the case law relied upon by the assessee.

3. That the SCN dated 27.06.2022 issued by the DRP for enhancement of income of Rs. 4,57,32,318/-, on the basis of

information forwarded by the Principle CIT Amritsar-1 vide letter dated 21.04.2022, to submit the reply on 28.06.2022 proves that there was violation of principle of natural justice as only one day time has been allowed to submit reply to the SCN and, in view, of the judgment of Apex Court in the case of Sona Builders the directions issued by the Dispute resolution panel for enhancement of income of Rs 4,57,32,318/- deserves to be set aside/quashed.

3.1. That the Dispute Resolution Panel has erred on law in rejecting legal objection of the assessee raised during the course of the proceedings before the panel, without providing any opportunity of hearing to the assessee, that theprovisions of Section 144C(8) does not allow the DRP to issue directions to enhance the income of the assessee to the extent of Rs. 4,57,32,318/- which was not part of the subject matter of the variations suggested by the AO and the AO had not proposed any addition on this issue in the draft assessment order

3.2. That the Dispute Resolution Panel erred on law to issue directions dated 29.06.2022 regarding enhancement of Rs.4,57,32,318/- by treating the transaction of payment of commission to Zylo International as bogus u/s69C, while

relying on the judgments of High Courts of Madras and Delhi for rejecting the legal objection raised by the assessee, without confronting the above said case laws to the assessee because both the case laws are distinguishable on facts.

4. That in the facts and circumstances of the case, the Ld. AO NFAC has erred on facts fit law in making the addition of Rs. 4,57,32,318/- u/s 69C, in pursuance of directions of Dispute Resolution Panel dated 29.06.2022, by treating the payment of Rs4,57,32,318/- to ZYLO International as Bogus without appreciating the evidence filed by the assessee during the course of proceedings before the Dispute Resolution Panel.

5. That in the facts 8t circumstances of the case, the Ld. AO NFAC has erred on facts & law in making the addition of Rs.4,57,32,318/- u/s 69C, in pursuance of directions of Dispute Resolution Panel dated 29.06.2022, by treating the payment of Rs4,57,32,318/- to ZYLO International as Bogus because the DRP has issued the directions for enhancement of income without making any independent inquiry.

5.1. That the Ld. AO NFAC has erred on facts & law invoking the provisions ofsection 115BBE of the Act and charging the special rate of tax, which is highly unjustified.

6. That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed of."

3. Tersely, we advert the fact of the case. The assessee-company is manufacturer of writing and printing paper, having factory premises at village Rupana situated at Muktsar Sahib. The assessee-company has a co-generation captive power division also, in which electricity is generated from renewable sourcei.e. bio-fuel, re-include rice husk, unlike other companies which utilised fossil fuel i.e. coal and diesel and the same is consumed by the paper division. The generation of power from renewable energy resources helps in reduction of emission of carbon / heat and gases in environment.

3.1 During the impugned financial year, the Ministry of New and Renewable Energy (MNRE) issued transferable and saleable credit certificates under the Electricity Act 2003, which are generally referred to as Renewable Energy

Certificates ("RECs"). Such RECs are issued, under the Central Electricity Regulatory Commission Regulations, 2010 ("CERC") issued pursuance to section 178(1) and section 66 r.w. clause (y) of section 178(2) of the Electricity Act, 2003.

3.2 During the impugned year, the assessee earned by sale/transfer of REC/ESCs amounting to Rs.17,77,26000/-. The assessee claimed this amount u/s 115BBG of the Act and paid the tax @ 10% during filing of return U/s 139 of the Act. During the assessment proceeding the assessee amended its claim related to income earned from the sale/transfer of RECs/ESCs as capital receipt and recomputed the tax by claiming exemption of tax on said income.

The ld. AO issued a draft assessment order by rejecting the same. The assessee filed a petition before the Dispute Resolution Panel (DRP). As per the direction of DRP the said amount was taken as business income of assessee.

3.3 During proceeding in DRP, the ld. DRP recommended for addition of commission amount of Rs.4,57,32,318/- u/s 69C of the Act. Being aggrieved assessee filed an appeal before us.

3.4 During the appeal proceeding, the assessee basically agitated three grievances; -

i) RECs/ESCs is income in capital in nature not in revenue in nature. And also, it is not attracted the provision u/s 115BBG as it is not come under the carbon credit.

ii) The said claim can be amended during the time of assessment by changing the revenue income into capital.

iii) The grievance related to addition of commission u/s 69C which was paid by the assessee during the year amount to Rs.4,57,332,318/-. The matter was taken for adjudication accordingly.

Ground No. 1

4. Ground No. 1 is general in nature.

Ground No. 2

5. The ld. AR for the assessee, Mr Sudhir Sehgal, filed a written submission which are kept in the record. Mr Sehgal first placed that the assessee earned Rs.17,77,26,000/- by transferring of the RECs and ESCs credit during the impugned year which is capital in nature. Though in the return the assessee claimed it u/s 115BBG and paid the tax in special rate.

5.1 Mr Sehgal, ld. AR invited our attention in **APB pages 7 to 15**, the copy of the letter dated 26.09.2021 submitted before the revenue related to claim made in which income earned from RECs/ESCs. The relevant part of the assessee's

submission is extracted as below:

Satia Industries Limited
Assessment proceedings for AY 2018-19
Reply to Show Cause Notice

26 September 2021

The National Faceless Assessment Centre
Income Tax Department
Delhi

Dear Sir,

Ref:	**Satia Industries Limited ('the assessee' or 'the Company')**
PAN:	**AACC57233A**
Asst. Year:	**2018-19**
Sub:	**Reply of notice number - ITBA/AST/F/143(3)(SCN)/2021-22/ 1035797143(1) issued under Section 142(1) of the Income-tax Act, 1961 ('the Act')**

With reference to the captioned subject, we wish to submit that the company has received the captioned notice dated 22 September 2021 requiring the company to file its reply by 24 September 2021, thereby providing the company with merely two days' time to file the reply to a detailed show cause notice.

Be it as it may be, we wish to submit as follows:

A. **Proposed Corporate Tax addition in respect of sale proceeds of Renewable Energy Certificates ('RECs') and Energy Saving Certificates ('ESCerts')**

A.1 It is submitted that in order to encourage the use of renewable sources of energy such as wind energy, solar energy, steam energy, etc., Ministry of New and Renewable Energy ('MNRE') issues transferable and saleable credit certificates under the Electricity Act, 2003 which are generally referred to as Renewable Energy Certificates ('RECs'). Such RECs are issued under Central Electricity Regulatory Commission Regulations, 2010 ('CERC Regulations') issued pursuance to section 178(1) and section 66 read with clause (y) of section 178(2) of the Electricity Act, 2003.

A.2 Further, the Energy Conservation Act, 2001 ('the EC Act') provides for various provisions relating to the conservation of energy. The energy conservation/reduction targets are set by the Government of India in consultation with BEE under section 14(a) of the Energy Conservation Act, 2001. The Central Government in exercise of the power conferred upon it under clause (1) of section 14A of the EC Act and Rule 11 of the PAT Rules, 2012 issues the energy savings certificates to these Designated Consumers whose energy consumption is less than the prescribed norms and standards.

A.3 Further, the objective of REC mechanism is to promote renewable energy and facilitate compliance of Renewable Purchase Obligations ('RPO') through a market-based instrument aimed at addressing the mismatch between availability of renewable energy resources in state and the requirement of the obligated entities to meet the RPO.

A.4 Under the REC mechanism, the units/undertakings/entities which are not using renewable energy resources are required to purchase, at a cost, RECs, to compensate

its RPO. This mechanism helps in promoting use of renewable energy resources and in sustaining the non-renewable energy resources.

A.5 The company engaged in generation of electricity from use of renewable energy sources is required to apply for registration for issuance of certificates and thereafter, transferable certificates are issued by Central Agency of MNRE.

A.6 The CERC Regulations also provide that the certificates issued to an eligible entity can also be placed for dealing in any of the Power Exchanges as the certificate holder may consider appropriate, and such certificate shall be available for dealing in accordance with the Rules and Byelaws of such Power Exchange at a value pre-determined by the Power Exchange. Similarly, ESCerts are also issued for the conservation of energy and the same can be sold on the Power Exchange regulated by the Government.

A.7 It is submitted that RECs/ESCerts are the Indian version of Carbon Credits which are recognized internationally which are issued in order to promote the ways and means to conserve environment.

A.8 The Assessee is a public company engaged in the manufacturing of writing and printing paper having factory premises in the village Rupana situated Distt. Shri Muktsar Sahib which is an 'Agro' based area. The Company also has a co-generation captive power division in which electricity is generated from renewable energy sources i.e., biofuels which include rice husk and the electricity generated therefrom is consumed by the paper division.

A.9 The Assessee Company is engaged in the generation of electricity and uses renewable energy sources for the purpose of electricity generation. As per CERC Regulations, the Assessee receives RECs/ESCerts and sells those certificates to other entities in need of the same. The receipts generated from sale of such RECs is recognized as other income in the Profit and Loss account of the Company as per accounting requirements prescribed under IndAS.

A.10 However, it is submitted that it is a settled principle of law that the provisions of the Act need not necessarily follow the accounting principles and there can be various scenarios where the provisions of the Act are different from the provisions of Generally Accepted Accounting Principles ('GAAP').

A.11 Further, it is submitted that the RECs which are akin to Carbon Credits are in the nature of 'an entitlement' received to improve world atmosphere and environment reducing carbon, heat and gas emissions. Such entitlement earned can, at best, be regarded as a capital receipt **and cannot be taxed as a revenue receipt.** It is not generated or created due to carrying on business but it is accrued due to 'world concern'. It has been made available assuming character of transferable right or entitlement only due to world concern. The source of RECs/ESCerts is world concern and environment. Due to that the assessee gets a privilege in the nature of transfer of RECs/ESCerts. Thus, the amount received for RECs/ESCerts has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income.

A.12 It is submitted that the receipts generated from the sale proceeds of RECs/ESCerts are not liable to tax for the assessment year under consideration in terms of sections 2(24),

28, 45 and 56 of the Act. RECs/ESCerts are made available to the assessee on account of saving of energy consumption and not because of its business. Further, RECs/ESCerts cannot be considered as a by-product. Transferable RECs/ESCerts are not a result or incidence of one's business but it is a credit for reducing emissions. The persons having RECs get benefit by selling the same to a person who needs credits to fulfil one's RPO. The amount received is not received for producing and/or selling any product, by-product or for rendering any service for carrying on the business, REC is entitlement or accretion of capital and hence receipts earned on sale of these credits is capital receipt.

A.13 For this proposition, we place reliance on the judgment of the Supreme Court in the case **CIT v. Maheswari Devi Jute Mills Ltd. [1965] 57 ITR 36 (SC)** wherein it is held that transfer of surplus loom hours to other mill out of those allotted to the assessee under an agreement for control of production was capital receipt and not income. Being so, the consideration received by the assessee is similar to consideration received by transferring of loom hours. The Supreme Court considered this fact and observed that taxability of payment received for sale of loom hours by the assessee is on account of exploitation of capital asset and it is capital receipt and not an income. Similarly, in the present case the assessee transferred the RECs/ESCerts like loom hours to some other concerns for certain consideration. Therefore, the receipt of such consideration cannot be considered as business income; and the same has to be considered as a capital receipt only.

A.14 The Hon'ble Lucknow bench of ITAT has in case of **M/s L.H. Sugar Factory Ltd. [TS-7236- ITAT-2016(Lucknow)-O]** has held that the amount received on sale of carbon credits (which is akin to RECs/ESCerts) is a capital receipt and not chargeable to tax. The above judgement of Tribunal has also been affirmed by Hon'ble Allahabad High Court **[2017] 88 taxmann.com 647 (Allahabad)**.

A.15 Further, similar view has also been upheld by Hon'ble Karnataka High Court in the case of **CIT vs. Subhash Kabini Power Corporation Ltd. [2016] 69 taxmann.com 394 (Karnataka).** Hon'ble Karnataka High Court while allowing claim of the carbon credit of the assessee held as under:

Quote:

"Considering the above, we find that when the carbon credit is generated out of environmental concerns, and it is not having the character of trading activity, the Tribunal has rightly held that it is capital receipt and it is not income out of business and hence, not liable to pay income tax."

Unquote

A.16 Accordingly, it is submitted that RECs/ESCerts have not been generated in the course of business but have been generated due to environmental concerns. Credit in the form of RECs/ESCerts for reducing carbon emission or greenhouse effect can be transferred to another party in need of reduction of carbon emission. It does not increase profit of the assessee in any manner and it does not need any expense. It is a nature of entitlement to reduce carbon emission, however, there is no cost of acquisition or cost

of production to get this entitlement. Sale proceeds from RECs/ESCerts are not in the nature of profit or in the nature of income.

A.17 Therefore, it is submitted that the receipts from the sale of RECs earned by the assessee is in the nature of capital receipt and thus, not chargeable to tax at all. Therefore, it is submitted that the receipts from sale of RECs cannot be subjected to tax under the provisions of the Act and thus, the same is not required to be added to the income of the assessee.

Applicability of Section 115BBG to the sale proceeds of RECs/ESCerts

A.18 It is humbly submitted that the Assessee had offered the sale proceeds of RECs/ESCerts to tax at the rate of 10% under section 115BBG on a very conservative basis.

A.19 However, it is submitted before the office of your goodself that section 115BBG only provides for the rate of taxation on the income arising from the transfer of 'Carbon Credits'. It may be noted that section 115BBG is not a 'charging section' and does not create any kind of charge on the purported income said to be derived from the transfer of Carbon Credits.

A.20 It is a well settled principle of law that for subjecting any income to tax, a charge has to be created on such income through a charging provision in the statute. However, in the present case, only a rate of tax has been provided in section 115BBG without making any amendment to section 2(24) whereby the definition of 'income' has not been amended to include the income arising from the transfer of 'Carbon Credits'.

A.21 In the absence of any charging provisions in relation to the taxability of 'Carbon Credits', the machinery provisions of section 115BBG fail and thus, the section does not have any operational relevance.

A.22 Moreover, it is submitted that that RECs/ESCerts are similar in nature as that of Carbon Credits, but the same are issued by Indian Government rather than being issued under the United Nations Framework on Climate Change (under the Kyoto Protocol). It may kindly be noted that section 115BBG only covers the Carbon Credits granted for reduction of emission of GHGs including carbon dioxide in accordance with Kyoto Protocol of United Nations and validated under the United Nations Framework on Climate Change. The provisions of section 115BBG do not cover the RECs/ESCerts issued under the laws and regulations framed by the Government of India.

A.23 It is also apparent from the captioned show cause notice that the income tax authorities are also of the view that the RECs/ESCerts are not covered by the provisions of section 115BBG. Therefore, it is submitted before your goodself that the sale proceeds from RECs/ESCerts are not liable to tax at all under the provisions the Income-tax Act; the same being capital receipt in nature.

A.24 Without prejudice to any other submission of the Assessee, we hereby put forth our claim to treat the sale proceeds from sale of RECs/ESCerts as capital receipts which

are not liable to tax. Therefore, it is humbly requested before your learned goodself to kindly reduce the same from the income offered to tax by the Company.

Sale proceeds from transfer of RECs/ESCerts is not chargeable to tax under Minimum Alternate Tax provisions under section 115JB

A.25 As discussed above, receipts from sale of REC are capital receipts not chargeable to tax. Accordingly, proceeds from sale of REC are in the nature of capital receipt. However, the RECs/ESCerts do not fall in the category of "Capital Asset" as defined under section 2(14) of the Act and therefore, do not come fall within the purview of the Act.

A.26 For example, the profit arising on sale of personal effects is not chargeable to tax under the Act. In the similar manner, the proceeds arising on sale of RECs/ESCerts, which are not capital assets, is also not chargeable to income tax.

A.27 Hence, an item of income which is not within the purview of income tax, cannot be subjected to tax under any of the provisions of the Act. Further, the provisions of Chapter XII-B of the Act (i.e., provisions of MAT) do not, operate to extend the scope of `total income' per section 5 on which the charge to tax under section 4 of the Act is attracted; but is only toward providing an alternative basis for computing the income.

A.28 The Hon'ble Cochin Tribunal in the case of **ACIT vs. The Nilgiri Tea Estate Ltd. (37/ Cochi 2014)** held that any income, which does not fall within the purview of 'Total Income' under section 5 of the Income-tax Act, cannot be taxed under any other provisions of the Act.

A.29 Similar view has also been upheld by Hon'ble Mumbai Tribunal in the case of **Shivalik Venture (P.) Ltd. vs. DCIT [2015] 60 taxmann.com 314 (Mumbai - Trib.). The Hon'ble Tribunal held as follows:**

Quote

*"In view of the foregoing discussions, the profit arising on transfer of capital asset by assessee to its wholly owned Indian subsidiary company is liable to be excluded from the net profit., i.e., the net profit disclosed in the profit and loss account should be reduced by the amount of profit arising on transfer of capital asset and the amount so arrived at shall be taken as 'net profit as shown in the profit and loss account' for the purpose of computation of book profit under Explanation 1 to section 115JB. Alternatively, **since the said profit does not fall under the definition of 'income' at all and since it does not enter into the computation provisions at all, there is no question of including the same in the book profit as per the scheme of the provisions of section 115JB.** [Para 28]*

Unquote

A.30 Further, reliance is placed on the decision of Apex Court in the case of **Padmaraje R Kadambande vs. CIT (1992) (195 ITR 877 (SC))** wherein it was held that pure capital receipts are not 'income' within the meaning of section 2(24) of the Act and hence are not at all 'chargeable' under the Act. Accordingly, the receipts which are neither

'profit' nor 'income' cannot be part of 'profit' as per P& L a/c prepared in terms of Part II & Part III of Schedule III to companies Act, 2013 and thus, is not chargeable to tax.

A.31 Moreover, Jaipur Tribunal in the case of **Shree Cement Ltd. vs. ACIT [2014] 49 taxmann.com 274 (Jaipur - Trib.)** ruled out that while computing book profits under section 115JB, receipts from sale of carbon credits are to be excluded as such receipts are purely capital in nature and are not chargeable to tax.

A.32 Hon'ble Kolkata High Court, in the case of **Pr. CIT vs. Ankit Metal & Power Ltd. [2019] 109 taxmann.com 93/266 Taxman 237** after considering the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. held that ***when a receipt is not in the character of income as defined under section 2(24) of the I.T. Act, 1961, then it cannot form part of the book profit u/s 115JB of the I.T. Act, 1961***. In this case, the Hon'ble High Court further observed that sales tax subsidy received by the assessee is capital receipt and does not come within definition of income under section 2(24) of the I.T. Act, 1961 and when, a receipt is not a in the nature of income, it cannot form part of book profit u/s 115JB of the I.T. Act, 1961. The Court, further observed that the facts of case before the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra) were altogether difference, where the income in question was taxable, but was exempt under a specific provision of the Act, and as such it was to be included as a part of book profit, but ***where the receipt is not in the nature of income at all, it cannot be included in book profit for the purpose of computation u/s 115JB of the I.T. Act, 1961***.

A.33 The Special Bench of Hon'ble Kolkata Tribunal, in the case of **Sutlej Cotton mills Ltd. vs. Asstt. CIT [1993] 45 ITD 22 (Cal.) (SB)**, held that a particular receipt, which is admittedly not an income cannot be brought to tax under the deeming provisions of section 115J of the Act, as it defies the basic intention behind introduction of provisions of section 115JB of the Act.

A.34 Similarly, the Hon'ble Kolkata Tribunal, in the case of **Sipca India (P.) Ltd. vs. Dy. CIT [2017] 80 taxmann.com 87 (Trib.)** considered a similar issue and held that when, a particular subsidy in question is not in the nature of income, it cannot be regarded as income even for the purpose of book profit under section 115JB of the Act. Though credited in the profit and loss account, it has to be excluded for arriving at the book profit under section 115JB of the Act.

A.35 Similar principle of law has been upheld by the Hon'ble Mumbai Tribunal in the case of **ACIT vs. JSW Steel Ltd. [2019] 112 taxmann.com 55 (Mumbai)**.

A.36 Considering the above judicial precedents, and on the basis of decision of Apex Court in the case of *Padmaraje R Kadambande vs. CIT (supra)* it is submitted that the receipts from sale of REC's/ESCerts, which are not chargeable to tax being capital receipts in nature and not covered under the definition of income under section 2(24) of the Act, the same is also not liable to tax as part of the book profits computed under section 115JB of the Act.

Assessee is entitled to modify the claim during assessment proceedings

A.37 It is also submitted that the Assessee is entitled to make or modify a claim during the course of assessment proceedings

A.38 In the case of **CIT Vs. Prabhu Steel Industries Pvt. Ltd., 171 ITR 530, (Bom.)**, it was held that the A.O. was obliged to entertain and consider on merit a claim made in the course of assessment proceedings. The relevant part of the judgement is reproduced as follows:

Quote

"There is no doubt whatsoever that the Tribunal and the Appellate Assistant Commissioner were right in the view they took. The claim having been made in the course of the assessment proceedings, the Income-tax Officer was obliged to entertain it and consider it on merits. The first question is, accordingly, answered in the affirmative and in favour of the assessee"

Unquote

A.39 In the case of **CIT Vs. Bharat General Reinsurance Co. Ltd., 81 ITR 303 (Delhi)** the assessee itself had included dividend income in its return for the year in question. However, the assessee challenged the validity of taxing the dividend during the year of assessment in question. The Hon'ble Delhi High Court held that merely because the assessee wrongly includes the income in his return for the particular year, it cannot confer jurisdiction on the A.O. to tax that income in that year. The relevant part of the judgement on pp.307 & 308 of the Report, is reproduced as follows:

Quote

"It is true that the assessee itself had included that dividend income in its return for the year in question but there is no estoppel in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart from it, it is incumbent on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year".

Unquote

A.40 Further, in the case of **Pt. Sheo Nath Prasad Sharma vs. CIT, 66 ITR 647 (All.)**, it was held that it is the duty of the A.O. to determine whether a particular receipt is taxable as income or not. Just because the assessee has shown the receipt as income in his return, it does not make him liable to tax thereon. The relevant part of the judgement on pp.651 & 652 of the Report is reproduced as follows:

Quote

"It seems to me, however, that the order of the Commissioner rejecting the previous applications, on the mere ground that the petitioner had shown the income in his return,

is erroneous. The Commissioner was bound to apply his mind to the question whether the petitioner was taxable on that income. The Income-tax Officer is entitled under section 23 (1) to make an assessment on the basis of the return if he is satisfied, without requiring the presence of the assessee or the production of evidence in support of the return, that the return is correct and complete. But it may be that the assessee may have committed a mistake in treating a certain receipt as taxable. The mere circumstance that he has shown that receipt, as income in his return does not make him liable to tax thereon. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. The law empowers the Income-tax Officer to assess the income of an assessee and determine the tax payable thereon. In doing so, he may proceed on the basis that, where an assessee discloses that a certain sum of money has been received by him, the fact of that receipt may be accepted without any thing more as constituting an admission on the part of the assessee. That would be an admission as to a state of fact. But whether the receipt can be considered as taxable income is quite another matter, and consideration of that question leads into the realm of law. If the Income-tax Officer assesses an assessee upon a receipt, which is not taxable in law, it is always open to the assessee to take the case in appeal or in revision thereafter. It is then for Appellate Assistant Commissioner or the Commissioner of Income-tax, as the case may be, to examine the matter and determine whether, although the money has been received by the assessee, it is taxable in law. The assessee is then within his rights in requiring the appellate or the revisional authority to examine the validity of the assessment to tax a receipt which, though admitted by him, is not taxable in law".

Unquote

A.41 Also, in the case of DIT **vs. Pooran Mall & Sons, 96 ITR 390 (SC)** it has been observed by the Hon'ble Apex Court that a person cannot be taxed on the principle of estoppel. It has been further observed that Art. 265 of the Constitution lays down that no tax shall be levied except when authorized by law.

A.42 In the light of aforesaid decisions, it is quite evident that an assessing authority would be totally unjustified in bringing to tax an item of income which is not liable to tax or in refusing to allow a claim of deduction which is allowable under the provisions of the Act; while framing an assessment u/s 143(3) of the Act.

A.43 For the aforesaid purpose, the furnishing of a revised return of income or the time limit in respect thereof, is not relevant, as long as the relevant claim is made by the assessee before the completion of assessment. The provisions of section 139(5) will apply only to cases of omission or wrong statement. A fresh claim or modification of a claim will not fall within the term "omission or wrong statement", as contemplated under section 139(5) of the Act.

Allowance of expenses incurred in relation to the sale proceeds of RECs/ESCerts

A.44 It is submitted that the Assessee has incurred an amount of INR 41,30,074 in relation to transfer of RECs/ESCerts, which has been disallowed by the Assessee while computing its taxable income.

A.45 Without prejudice to any other submission or contention of the Assessee, it is submitted that in case the proposed addition in respect of RECs/ESCerts is made to the income of the Assessee, then the amount of INR 41,30,074 must be allowed as an expense to the Assessee.

Conclusion

A.46 Apropos the above, it is submitted that the sale proceeds from transfer of RECs/ESCerts are neither chargeable to tax under the normal provisions of the Act nor liable to be included in the book profits under the provisions of section 115JB. Therefore, it is humbly requested before your goodself to kindly exclude the amount of INR 17,77,26,000 from the income of the Assessee.

A.47 Without prejudice to any other submission or contention of the Assessee, the expenses amounting to INR 41,30,074 should be allowable in the eventuality of addition in respect of sale proceeds from transfer of RECs/ESCerts, even though the Assessee disagrees with such proposed addition.

5.2 Mr Sehgal, ld. AR further explained the details about the sale of renewable energy certificate (REC and ESCarts), the relevant part is extracted as below:

*"2. **Receipts on sale of Renewable Energy Certificates[REC] & ESCERTS [Addition made as per directions of the DRP]**:*

Before we specifically, deal with the above said ground of appeal, it is important to give the 'brief profile' of the company and the business carried on by it which is as under:

a. *The assessee is a public company engaged in the manufacturing of 'writing & printing paper', having factory premises in Village Rupana, situated in District Muktsar Sahib, which is Agro based area. The company has a co-generation captive power division also, in which, electricity is generated from renewable energy sources i.e. Bio-fuels which includes 'Rice Husk', unlike other companies which utilize fossil fuels i.e. coal & Diesel and the same is consumed by the paper division.*
b. *The generation of power from renewable energy resources helps in reduction of emission of carbon/heat and gases.*
c. *The assessee is maintaining complete record viz a viz cashbook and ledger, which are audited and no defects have been pointed by the DRP/Ld. AO in day to day of maintenance of books of accounts.*

d. *It is also an undisputed fact that the electricity so generated by use of the Bio-fuels is not being sold to any other concern, but it is wholly consumed in the manufacturing activity of the appellant and this use of Bio-fuels saves the environment being an environment friendly as it reduces the carbon/heat & gas emission like carbon credits.*

e. *It is submitted that in order to encourage the use of renewable sources of energy, such as wind energy, solar energy, steam energy, etc., Ministry of New and Renewable Energy ('MNRE') issues transferable and saleable credit certificates under the Electricity Act, 2003, which are generally referred to as "Renewable Energy Certificates ('RECs')". Such RECs are issued, under Central Electricity Regulatory Commission Regulations, 2010 ('CERC Regulations') issued pursuance to section 178(1) and section 66 read with clause (y) of section 178(2) of the Electricity Act, 2003.*

f. *Further, the Energy Conservation Act, 2001 ('the EC Act') provides for various provisions relating to the conservation of energy. The energy conservation/reduction targets are set by the 'Government of India' in consultation with BEE under section 14(a) of the Energy Conservation Act, 2001. The Central Government in exercise of the power conferred upon it under clause (1) of section 14A of the EC Act and Rule 11 of the PAT Rules, 2012 issuesthe 'energy savings certificates' to these Designated Consumers, whose energy consumption is less than the prescribed norms and standards.*

g. *Further, the objective of REC mechanism is to promote 'renewable energy' and facilitate compliance of Renewable Purchase Obligations ('RPO') through a market-based instrument aimed at addressing the mismatch, between availability of renewable energy resources in state and the requirement of the obligated entities to meet the RPO.*

h. Under the REC mechanism, the units/undertakings/entities, which are not using 'renewable energy resources' are required to purchase, at a cost, RECs, to compensate its RPO. This mechanism helps in promoting use of 'renewable energy resources' and in sustaining the non-renewable energy resources.

i. The company engaged in generation of electricity from use of 'renewable energy sources' is required to apply for registration for issuance of certificates and thereafter, transferable certificates are issued by Central Agency of MNRE.

j. The CERC Regulations also provide that the certificates issued to an eligible entity can also be placed for dealing in any of the 'Power Exchanges' as the certificate holder may consider appropriate, and such certificate shall be available for dealing in accordance with the Rules and Byelaws of such Power Exchange at a value pre-determined by the Power Exchange. Similarly, ESCERTS are also issued for the conservation of energy and the same can be sold on the Power Exchange regulated by the Government.

k. Regarding Energy Saving Certificates (ESCerts), it is issued to those plants who had over achieved the targets to reduce specific energy consumption in energy intensive industries & those plants who are under achievers of that targets are entitled to purchase ESCerts.

l. The energy saving certificates (ESCerts) are also issued as the energy saving also reduces the emission of carbon heat & gases.

m. It is submitted that the receipts generated from the sale proceeds of RECs/ESCerts are not liable to tax for the assessment year under consideration in terms of sections 2(24), 28, 45 and 56 of the Act.

RECs/ESCerts are made available to the assessee on account of reduction in emission of carbon/heat & gases & saving of energy consumption also reduces emission of carbon/heat & gases and not because of its business. Further, RECs/ESCerts cannot be considered as a by-product. Transferable RECs/ESCerts are not a result or incidence of one's business, but it is a credit for reducing emissions. The persons having RECs get benefit by selling the same to a person who needs credits to fulfill one's RPO. The amount received is not received for producing and/or selling any product, by-product or for rendering any service for carrying on the business, REC/ESCerts is entitlement & an off shoot of environmental concern & not an off shoot of business.

n. *In the case of carbon credits, the courts have repeatedly held that they are not directly linked with power generation as there are not an off shoot of business & it is a capital receipt and cannot be business receipt or income."*

6. The ld. DR vehemently argued and placed that the claim of the assessee is not related to carbon credit, so, it is not covered u/s 115BBG or as exempted income. The ld. DR argued that the revenue had properly taken it as an income from business. The ld. DR relied on the order of the ld. AO para no. 3.5.2 and 3.5.3 of the said order are extracted as below:

"3.5.2 The Panel has considered the submission. It is noticed that the AO has dealt with the assessee's submission at length in the Assessment order and has correctly rejected them. A bare perusal of Section 115BBG of Income Tax Act, 1961 makes it plan that the claim of assessee is erroneous and not in accordance with provisions of law.

Section 115BBG deals with Income from sale of Carbon Credit does not take within its ambit the income from sale of RECs/ESCs:

'115BBG, Tax on income from transfer of carbon credits. ~{i) Where the toad income of an assessee includes any income by way of transfer of carbon credits, the income-tax payable shall be the aggregate of-
(a) the amount of income-tax calculated mi die income by way of transfer of carbon credits, at the rate of ten per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).
(2) Notwithstanding anything contained in this Act mi deduction In respect of any expenditure or allowance stud! be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).
Explanation, -For the purposes of this section 'carbon credit" in respect of one unit shall mean reduction of one tonne of carbon dioxide emissions or emissions of its equivalent gases which is validated by die United Nations Framework on Climate Change and which can be traded In market at its prevailing market price.
Thus, the Panel is of the view that the assessee has wrongly claimed the Income from Sale of RECs/ESCs u/s 115BBG of Income Tax Act,

1961. Income from sale of REC/ESCs is normal business income few the assessee and needs to be included in the business income and taxed at normal tale rather than at concessional rate.

3.5.3. The AO has rightly noted that the assessee has shown the income from sale of RECs/ESCs in P&L account in the item no. 33. Other Income'. The assessee claims that income from sale of Renewable Energy Certificates end Carbon Emission Reductions is income from other sources is not tenable as toy are intrinsically connected to business of the assessee. It may be noted that the assessee is engaged in the manufacturing of writing and printing paper which is agro based. The company generated captive power through renewable energy source Bio fuel. The raw material for electricity generation m hoe husk which is also used to paper production and hence it is effectively the by-product of the paper production process. Secondly, the electricity produced the renewable energy plant is used solely for to purpose of business and not sold outside. Hence it farms an integral part of the paper making process and cannot be considered as an offshoot of environmental concern but an offshoot of business. Thirdly, gains from these REC/ESCs in India contain to right to transfer it. These credits have no other value. It must be emphasized if there is no carrying on of the business there are no RECs/ESCs The question of savings to emission arises only in to

course of the business. The REC/ESCs are an offshore to business and being carried in environmentally responsible manner. The activity of business and activity of earning REC/ESCs cannot, therefore, be divorced from each other. The core activity is business and being environmentally responsible is the manner to which the core activity is carried out. Fourthly, to activity of obtaining REC/ESCs is a systematic activity which requires careful planning and a series of actions before the RECs are obtained. For example, a project is to the first approved by the appropriate authorities which grant the REC/ESCs. The functioning of the business and the reduction in emission are to be monitored by the appropriate authorities. The RECs/ESCs ore not a windfall which appear out to the blue. A series of conscious decision are thus required to be taken by the assessee in order to get the RECs/ESCs and to considerations of REC/ESCs therefore have an integral part of the business activity. The generation of RECS is thus on account of business activity and the same must be included in business income. As per section 28 if any benefit or perquisite or credit is generated from the business, the same would be a profit from business and is taxable. Therefore, the same cannot be termed as income from other sources, but business income. Since on account of running the business of paper manufacturing for which power is an essential and compulsory requirement, RECs were earned which is marketable and is sold, therefore, it is an income out

of business. It is hereby established that the REC/ESCs are a sresult of the assessee's business. The Panel, therefore, finds no infirmity in the order of the AO.

9.2 Thus following the directions of the Hon. DRP, the addition of Rs. 17,77,26,000/- is made to the total income as business income and the assessee s claim under section 115BBG is rejected."

6.1 The ld. DR further argued and placed the order of the **High Court of Orissa** in the case of **Orissa Rural Housing Development Corpn. Ltd. v.Assistant Commissioner of Income-tax, Circle - 1(1), 2012] 17 taxmann.com 186 (Orissa**)- Held*"Section 139 of the Income-tax Act, 1961 - Return of income - Revised return - Assessment year 2006-07 - Whether an assessee can revise his return of income by way of filing a revised statement of income after filing original return other than by way of filing revised return as contemplated under section 139(5) - Held, no"*

7. The ld. AR further argued and placed that a written submission related to comparable study of comment of DRP and the assessee's submission in relation to claim of the income. The said submission is extracted as below: -

"14. The DRP has rejected this bonafide claim of the assessee at page 27 of the order by making the following comments and which are being distinguished as under:

Comments of the DRP	***Our Submissions***
It has been stated by the DRP that assessee is generating Captive Power through Renewable Energy Source i.e. Biofuel and, for which, the raw material is Rice Husk which is used for paper production and, hence, it is effectively the byproducts of paper production process and, thus, cannot be considered as an offshoot of environmental concern.	*It is a settled fact that the amount received is not for producing or selling any products, byproducts or for rendering any service. The RECs/ESCs are made available to the assessee on account of saving of energy consumption and not because of its business. Thus, they are accretion to capital. Nothing has been generated or created but it is accrued on account of 'World concern' and it is in the nature of "An Entitlement" and the source of this is World Concern and Environment that the assessee gets a privilege in the nature of RECs/ESCs. Transferable RECs/ESCs is not a result of incidence of one business, it is a credit for reducing emission, the person having RECs/ESCs gets benefit by selling the same to a person who needs RECs/ESCs to overcomes once negative point of RECs/ESCs thus the amount is received is not received for producing/or selling any product, byproduct or for rendering any service for carrying on of business.*
RECs/ESCs contain the right to transfer and these credits have no other value and the question of savings in emission arises only in the course of the business and thus, they are taxable.	*It is a settled law that a receipt, which is not in the character of income as defined in Section 2(24) of the Act and not chargeable to tax u/s 4 r.w.s. 5 cannot be brought in the ambit of tax and, thus, it is a capital receipt only. This view has been taken into consideration by the 'Jaipur Bench' of the ITAT in ITA No. 403 &404/ JP/2019 in which, the decision of the Andhra Pradesh High Court as cited supra in the case of CIT vs. My Home Power Ltd. as cited above and also of the Hon'ble Rajasthan High Court in the case of CIT vs. Shree Cement Ltd. dated 22.08.2017 and the finding has been reproduced that since the source of the Carbon Credit is the World Concern and Environment and due to this, the assessee gets a privilege in the nature of transfer of Carbon Credit and cannot be liable for tax in terms of*

	Section 2(24), (28) (45) & (56). It has further been held that the Carbon Credits are on the account of savings of energy consumption and not on business. Even while rendering this judgment, the Jaipur Tribunal has discussed the provisions of 115BBG and, thus, since as on the day also, RECs/ESCs are not part of Section 2(24) and, hence, it is a capital receipt.
It has been stated that activity of obtaining RECs/ESCs is a systematic activity which requires series of action and they are not windfall and, therefore, they have an essential role to play in the manner the business is carried out.	*RECs/ESCs do not bear the character of income u/s 2(24) and are not covered u/s 115BBG of the Act as there is a mention of only Carbon Credits and, even, the latest judgment of the Jaipur Bench of the Tribunal in the case of Ginni Global Pvt. Ltd. in ITA No. 403/JP/2019 clarifies the issues along with the other judgments which are being relied upon in the judgment set.*
It has been stated by the DRP that the benefit or perquisite or credit is generated from business and the same would be business income and is taxable.	*This finding of the Ld. DRP is against the numerous judgments as being relied upon in the judgment set and also in the amended Section 115BBG only Carbon Credit have been covered and not the RECs/ESCs.*

15. *We rely on the above judgments as cited above and also even after the amendment u/s 115BBG, the RECs/ESCs have not been included either in this section or in Section 2(24) of the Act and this issue has been elaborately discussed in the judgment of the Rajasthan High Court and of Hyderabad Bench of ITAT as cited above. Thus, the DRP has erred in not considering the bonafide submissions of the assessee and even it may be stated that for the AY 2017-18, the assessment of the company was made u/s 143(3) vide order dated 29.03.2022,as per the copy of the order attached in the paper book page 228 to 259 wherein, the receipts on account of the RECs/ESCs etc. were held to be capital receipt and similar submissions were made before the AO NFAC and point wise rebuttal was given in a page 249 to 253 and the returned income of the assessee was accepted.* ***[Judgments on the issue that carbon credits are capital receipts upto AY 2017-18 are attached in the Indexed Judgment Set]***
16. *It is also submitted herewith that consistency has to be maintained in the Income Tax Proceedings also as per the following judgments:*

a. CIT Vs/ DalmiaDadri Cement Ltd. (1970) 77 ITR 410 (P&H)

"Held also, that though as a general rule the principle of res judicata is not applicable to decisions of income tax authorities and an assessment for a particular year is final and conclusive between the parties only in relation to the

assessment for that year and the decisions given in an assessment for an earlier year are not binding either on the assessee or the department in a subsequent year, this rule is subject to limitations, for there should be finality and certainty in all litigations including litigation arising out of the Income Tax Act and an earlier decision on the same question cannot be reopened."

8. The ld. AR further respectfullyrelied on the orders of the Hon'ble Apex Court and High Court which are as follows: -

8.1. **The relincewas placed on following judgments related nature of income as capital receipt**:-

8.1.1. **Ambika Cotton Mills Ltd.v.Deputy Commissioner of Income-tax, [2013] 40 taxmann.com 171 (Chennai - Trib.)**

*"**15.** This leaves us with the issue regarding addition of Rs. 15,51,913. Undisputedly, the only strife between the parties is that per assessee it is liable to be taxed in the assessment year 2010-11 which is opposed by the Revenue who states that since it is a case of mercantile system of accounting, the amount has to be taxed in the impugned assessment year. We notice and even the Assessing Officer holds that necessary intimation of credit in question was received on October 3, 2009, i.e., in the previous year relevant to the succeeding assessment year 2010-11. The assessee also submits that it had included the amount as income for the purpose of assessment in the next assessment year instead of impugned assessment year. Faced with this situation and without going into merits of legality of the claim in hand, we deem it appropriate to observe that in case the Assessing Officer has already treated the amount as income in the assessment year 2010-11, the addition in question would stand deleted in favour of the assessee.*
***16.** Consequently, the appeal stands partly allowed"*

8.1.2. **Commissioner of Income-tax – IV v. My Home Power Ltd, [2014] 46 taxmann.com 314 (AndhraPradesh): -**

"3. We have considered the aforesaid submission and we are unable to accept the same, as the learned Tribunal has factually found that "Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns." We agree with this factual analysis as the assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

8.1.3. **Assistant Commissioner of Income Taxv.Ginni Global (P.) Ltd. [2019] 109 taxmann.com 333 (Jaipur - Trib.)**

"Thus, the income by way of transfer of carbon credit has been given a special treatment as chargeable to tax @ 10% and not as part of the normal business income of the assessee. The said amendment is prospective in nature and therefore, cannot be applied to the assessment years under consideration. In view of the above discussion as well as fact and circumstances of the case, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue"

8.1.4. **Commissioner of Income-taxv.Maheshwari Devi Jute Mills Ltd, [1965] 57ITR36 (SC)**

:Our attention was invited to a judgment of the Allahabad High Court in Maheshwari Devi Jute Mills v. Commissioner of Income-tax IT Miscellaneous Case No. 177of 1960, decided on September 13, 1962, in which a Division Bench of the Allahabad High Court answered a similar question relating to taxability of payments received for sale of "loom-hours" by the respondent in an assessment

year with which we are not concerned in these appeals. The court in that case ignoring the view in the judgments under appeal held that "loom-hours" did not form the fixed profit-making structure of the respondent and it was not correct to say that the capital structure of the business was 220 looms multiplied by the number of hours per week for which the machinery was entitled to work. The "loom-hours" had in the view of the court nothing to do with the capital structure of the business and there was nothing to show that the defect in the preparatory section which rendered the "loom-hours" un-utilisable was permanent. It was always open to the respondent to acquire the necessary yarn from outside and thereby utilise the remaining quota of "loom-hours" in manufacturing jute, ***and if the respondent preferred not to procure yarn and chose to sell the surplus "loom-hours" and thus ensure profit for itself without incurring any risk, the receipt by disposal of a commercial asset was profit of the business irrespective of the manner in which that asset was exploited by the owner of the business. In the view of the High Court the respondent was entitled to exploit the asset to its best advantage: it may do so either by utilising it personally or by letting it out to somebody else, and the sale of a part of its quota of "loom-hours" amounted to exploitation of its capital asset and the receipt obtained therefrom was income. We are unable to agree with this view. The surplus "loom-hours" were disposed of and no interest remained therein with the respondent: there was no exploitation of the "loom-hours" by permitting user while retaining ownership. Receipt by sale of "loom-hours" must therefore be regarded in this case as a capital receipt and not income.***

*In our judgment the High Court was right in holding that the receipts from sale of "loom-hours" were in the nature of capital receipts and were not taxable. The appeals fail and are dismissed with costs."***(Emphasis supplied)**

8.2. Relinace is placed on judgments related amendment of claim of deduction during assessment proceeding: -

8.2.1. **Goetze (India) Ltd. v. Commissioner of Income-tax, [2006] 157Taxman1 (SC).**

*"**4.** The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."*

8.2.2. **JSW Steel Ltd.v.Assistant Commissioner of Income-tax, Circle 11(5), Bangalore, [2017] 82 taxmann.com 210 (Mumbai - Trib.)**

*"**23.** From the perusal of aforesaid decisions, at the outset, it may appear that on similar nature of issues there are divergent views of various benches of the Tribunal, however, one common point/ratio permeating through all the decisions, which can be deduced by us is that, if an assessee company is in receipt of a 'capital receipt' which is not chargeable to tax at all, that is, it does not fall within any of the charging section or can be classified under any heads of income under the Income Tax Act, then same cannot be treated as part of net profit as per Profit & Loss account or reckoned as 'working result' of the company of the relevant previous year and consequently, cannot be held to be taxable as 'book profit' under MAT in terms of section 115JB. Accordingly, our conclusion remains the same that, the capital surplus on account of waiver of dues neither is nether taxable nor can be included in computation of book profit u/s 115JB."*

8.2.3. **Principal Commissioner of Income-tax, Central-2, Kolkatav.Ankit Metal & Power Ltd, [2019] 109 taxmann.com 93 (Calcutta)**

*"**28.** The third issue involve in the instant appeal which requires adjudication is whether the action of Tribunal entertaining / allowing the claim which was made*

by the assessee before the Assessing Officer by filing a revised computation instead of filing a revised return since the time to file the revised return was lapsed, for claiming to treat the incentive subsidies in question as capital receipts instead of revenue receipts as claimed in original return. The Assessing Officer had denied this claim. Revenue has attacked the order of the tribunal by relying on the decision in the case of Goetze (India) Ltd. (supra).

29. *This case does not help the revenue/appellant. In this case Supreme Court has made it clear that its decision was restricted to the power of the Assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under Section 254 of the Income Tax Act, 1961. The Hon'ble Supreme Court in the said decision held as follows:*

".....In the circumstances of the case, we dismiss the Civil Appeal. However, we make it clear that the issue in this case is limited to the power of the Assessing Authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961."

29.1 *This judgment was followed by our Court in the case of Britannia Industries Ltd. (supra) holding that Tribunal has the power to entertain the claim of deduction not claimed before the Assessing Officer by filing revised return. Respectfully following the aforesaid decision as well as the view already taken by us in this case that the aforesaid subsidies are capital receipt and not an 'income' and not liable to Tax Tribunal in exercise of its power under Section 254 of the Income Tax Act justified this claim though no revised return under Section 139 (5) of the Act was filed before the Assessing Officer. We answer both the question Nos. 1 and 2 in negative and in favour of assessee".*

Ground No. 3

9. Ground No. 3, not pressed.

Ground Nos. 4 & 5

10. The ld. AR argued that the assessee paidcommission during financial year Rs.4,57,32,318/- to M/s Zylo International Centre Pitampura Delhi related business transaction, Accordingly, the tax was deducted, and the certificates were issued. During hearing the assessee placed the details evidence with the written submission. The ld. AR invited our attention in paper book and following evidences are attached in paper book in relation to the transaction which are as follows:-

i) **APB page nos. 178 to 181** related to tax invoice issued to M/s Zylo International,

ii) **APB page nos. 185 to 199**proof related to payment received in bank account,

iii) **APB page nos. 201 to 206**, the copy of bank statements related to reflection of transaction, received from the party.

iv) **APB page nos. 207 to 210,** TDS Certificate in Form 16A related to deduction of tax at source.

The ld. AR fully denied that the assessee had no transaction with the RolmexInternational, as alleged by the revenue. The ld. AR placed that the details as below:

"18. ***Addition of Rs. 4,57,32,318/- on account of alleged bogus and ingenuine expenditure***

Facts

- *As stated above the assessee is a public company engaged in the manufacturing of writing and printing paper having its factory premises in village Rupana, situated in District of Sri. Muktsar Sahib [Punjab] which is a rural area.*

- *The turn over of the assessee company is in the range of 622 Crores in FY 2017-18 relevant to AY 2018-19 and for the purpose of arranging orders for sale of writing and printing paper, the assessee has engaged the services of agents to procure the orders for which the commission is paid.****[P&L Account/ balance sheet on PB-6A-6D]***

- *This is a permanent trade practice of the assessee company and commission is being paid from year to year and all the cases of assessee company has been assessed u/s 143(3) of the Act and no adverse inference has been drawn by the department in any of the assessment years prior to AY 2018-19.*

- *It is matter of record that no query had been raised by the AO NFAC, relating to the payment of commission by the assessee, during the course of faceless assessment proceedings which culminated in Draft Assessment Order dated 28.09.2021.****[Draft Assessment Order on PB-17-22]***

- *It is also a matter of record that the first notice u/s 148A(b) of the Act was issued by the Jurisdictional AO [DCIT Circle-1, Bathinda] on 24.03.2022,*

*on the basis of information flagged on the insight portal of the Income Tax Department,& in continuation of the same notices u/s 148A(b) were also issued on 01.04.2022/05.04.2022 &07.04.2022 and the last reply was filed before the Jurisdictional AO [DCIT Circle-1, Bathinda] on 7-4-2022.**[Notice u/s 148A(b) & replies are on PB-167-227]***

Crux of the matter raised by the AO in notice u/s 148A(b) of the Act

- *That as per information flagged on the insight portal of the Income Tax department as per report uploaded by ITO (Inv.) (OSD-1), Unit-8, New Delhi. The assessee had credited an amount of Rs.4,57,32,318/- in the account of Rolmex International Prop. Jaswant Singh & he is a non-filer.*

- *According to the department since M/s Rolmex International is a bogus entity the transactions entered there in were bogus and in-genuine.*

- *The information was confronted to the assessee vide notice u/s 148A(b) dated 24.03.2022 & in response to the same the assessee submitted the reply that no payment had been made to Rolmex International.*

- *Further enquiries by the Income Tax Department were made & the amount credited in the account of Rolmex International with Union Bank of India & transferred from the account of the assessee was brought to the notice of the assessee.*

- *The assessee further explained before the AO during the course of proceedings u/s 148A that the payments were made by the assessee to M/s*

Zylo International against the payment of commission & the invoices raised by the entity/bank vouchers for payment/bank statement of PNB/ledger account of the entity in the books of the assesseealongwith Form 16A issued to the above stated entity along with confirmation of Zylo International & ledger account were placed on record during the course of proceedings u/s 148.

- *The Jurisdictional AO, without making any independent inquiry, shared the information with the DRP vide letter dated 12.04.2022 but the DRP issued the SCN for enhancement, through e-mail, for the first time on 27th June, 2022 and the assessee was allowed time up to 28.06.2022 to respond to the sameand The order making enhancement was passed by the DRP on 29.06.2022."*

11. The ld AR fully relied on Explanatory notes to Finance Bill, 2012 which is reproduced as below.

"Explanatory notes to Finance Bill, 2012 clarifies the above stated view of the courts.

Dispute Resolution Panel (DRP) had been constituted with a view to expeditiously resolve the cases involving transfer pricing issues in the case of any person having international transactions or in case of a foreign company. It has been provided under sub-section (8) of section 144C that DRP may confirm, reduce or enhance the variations proposed in the draft order of the Assessing Officer.

In a recent judgement, it was held that the powers of DRP is restricted only to the issues raised in the draft assessment order and therefore it cannot enhance the variation proposed in the order as a result of any new issue which comes to the notice of the panel during the course of proceedings before it. This is not in accordance with the legislative intent.

It is accordingly proposed to insert an Explanation in the provisions of section 144C to clarify that the power of the DRP to enhance the variation shall include and shall always be deemed to have included the power to consider any matter arising out of the assessment proceedings relating to the draft assessment order. This power to consider any issue would be irrespective of the fact whether such matter was raised by the eligible assessee or not.

This amendment will be effective retrospectively from the 1st day of April, 2009 and will accordingly apply to assessment year 2009-10 and subsequent assessment years."

12. The ld. AR argued that Powers of enhancement of DRP as compared to powersof enhancement of CIT(A) as per settled principles of law. The ld. AR relied onplaced the section 251(1) of the Act which is reproduced as below: -

"Section 251(1)

In disposing of an appeal [Commissions (Appeals)] shall have the following powers-

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment"

12.1. The ld. AR respectfully relied on the case**Sh. Jagdish Narayan Sharma vs. ITO in ITA No.751/JP/2015 [Jaipur Bench]**

> *"48. The principle emerging from various pronouncements of the Supreme Court, Union Tyres observes, is that the first Appellate Authority is invested with very wide powers under Section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance and ranges over the whole assessment to correct the Assessing Officer not only regarding a matter raised by the assessee in appeal but also regarding any other matter considered by the Assessing Officer and determined in assessment.*
>
> *49. There is a solitary but significant limitation, according to Union Tyres, to the power of revision: It is not open to the Appellate Commissioner to introduce in the Assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment.*
>
> *50. In course of time, Union Tyres was doubted. In. Sardari Lal &Co.,(supra) the same issue—whether the appellate authority has the power under section 251 to discover a new source of income—was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263 of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the*

first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres."

The ld AR mentioned that the Hon'ble Delhi High Court has held in the case **of CIT vs. Sardari Lal & Co [2001] 251 ITR 864** that the first appellate authority has no power to take into account a new source of income.

12.2. Further in argument the ld. AR placed that the Hon'ble High Court of Kerela in the case of **CIT vs. B.P. Sherafudin [2017] 87 taxmann.com 330**has held that the appellate authority has no power u/s 251 of the Act to at income not considered by the AO.The Hon'ble court has relied on the following judgments on this issue:

- CIT vs. Rai Bahadur HardutoryMotilalChamaria [1967] 66 ITR 443 (SC)
- CIT vs. Shapoorji Pallonji Misty [1962]44 ITR 891 (SC)

In view of the above stated case laws on the limitation of the powers of enhancement of CIT(A) u/s 251 of the Act, the action of the DRP to adjudicate the issue of disallowance of Rs. 4,57,32,318/- is outside the scope of the power of the DRP as provided u/s 144C(8) of the Act and its explanation because the issue of disallowance u/s 69C was never taken by the AO in the assessment proceedings and draft assessment order and it was altogether a new issue.

12.3. The ld AR argued that the ld. AO should not take any decision under surmises and conjectures. Mr. Sehgal, ld. AR relied on the orders which are reproduced as below.

12.3.1. **Mobile Communication (India) (P.) Ltd.v.Deputy Commissioner of Income-tax, Circle 5(1), New Delhi, [2010] 125ITD309 (DELHI)**

*"**10.2** The learned Commissioner of Income-tax (Appeals) has also placed reliance on the judgment in the case of Lachminarayan Madan Lal v. CIT [1972] 86 ITR 439 (SC). As regards the former judgment, it will be seen that the Hon'ble Apex Court held that claim of expenditure had to be tested on the facts of the case. There is no dispute to the above proposition and since on the facts of the case, it will be seen that expenditure is duly supported by necessary evidence, the same is eligible claim of deduction. So far as the case of Lachminarayan Madan Lal (supra), it is seen that, it was noted that mere existence of an agreement would not be sufficient for allowability of claim of commission. This proposition is undisputed and in any case, however, cannot be applied to the facts of the instant case. In the instant case, claim of the appellant is not based on the solely agreement but based on the fact that payees have duly confirmed the rendering of services. Also other facts such as details of the parties for whom services have been rendered, payment of service tax and payment by account payee cheques and declaration for such sum as income by payees supports the claim of the appellant that services have been duly rendered by payees, the same is duly eligible for deduction. As regards the judgment in the case of Modi Industries Ltd. v. CIT [1993]* 200 ITR 329*1 (*Delhi*), the same is wholly inapplicable as that was a case where the assessee has claimed deduction in respect of commission paid to S.E. Corporation on account of their services. In that case, it was found that Corporation had not employed any person who was shown to possess the necessary experience and qualification that it had no godown of its own and it used to draw the goods from the sales office of the assessee and that the Corporation did not have the physical resources necessary to have carried out its duties. In the instant case, there is neither any evidence to that effect and, nor any material to support such a hypothesis. On the contrary, it is a*

case where summons were not issued to such parties and in such circumstances considering the evidence on record, it is incorrect to suggest that, services have not been rendered. Hence, such judgment too has no application to the facts of the present case."

12.3.2. **Umacharan Shaw & Bros.v.Commissioner of Income-tax, [1959] 37ITR271 (SC)**

"The Department contends that one of the unusual features was that though the balances of the partners were fluctuating as their drawings were made, the profits continued to be divided equally. This is no doubt an unusual feature, but it depends upon how the drawings were considered by others. There was an arrangement in the deed itself for such drawings, and looking at the circumstances of the family the drawings during a year could not be said to be too extensive as others had withdrawn large sums also in their turn.

Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof in these matters."

13. The ld. DR vehemently argued and invited our attention in assessment order pages 9 to 10 which are extracted as below:

> *"10. Unexplained expenditure u/s 69C*
>
> *10.1 During the DRP proceedings, an information was shared by the A.O, vide his letter bearing no 11 dated 12.04.2022 of DCIT,*

Circle-1, Bhatinda with Hon'ble DRP that as per report uploaded by the ITO (Inv.) (OSD-1), Unit-8, New Delhi on Insight Portal under high Risk/VRU cases assessee has credited an amount of Rs. 4,57,32,318/- in the account Rolmex International (Prop. Shri Jaswant Singh - PAN- HZMPS8162P). As per the said report Rolmex International is a Bogus entity and transactions entered therein are bogus and non-genuine in nature. Assessee has objected before the DRP on the issue of power of DRP for enhancement by the DRP. Hon'bie DRP has dealt with this objection as well as issue of Rs 4,57,32,318/- credited to the account of M/s. Rolmex International in detail in Para 3.8 and 3.9 of the Hon'ble DRP's order dated 29.06.2022. After considering all the facts and materials available on record, Hon'ble DRP in Para 3.9.7 of the order dated 29.06.2022 has directed the AO to make an addition of Rs. 4 ,57,32,318/- treating the entire transaction as bogus. The direction of the Hon. DRP is reproduced as under:

3.9.7 The assessee, inter alia contended that the above stated payments have been made to M/s Zylo International, whose ledger account in the books of the assessee was filed to evidence the transaction. Since the proceeding for AY 2018-19 was pending before this Panel, the AO forwarded this information to this Panel which was confronted to the

assessee. The assessee has merely reiterated the submission made before the AO. However, it is noticed from the copies of bank account wo, 171911100004049 is not in the name of Zylo International but in the name of Rolmex International. Thus, unilateral copies, of ledger account do not negate ar dilute the- evidentiary value of the bank statement and the information received. It is clear that thesetransactions are made to Rolmex International from the account of the assessee through RTGS. Therefore, there remains no doubt that the payment has been made to Rolmex international whose alleged prop, Sh. Jaswant Singh Is a labourer and man of no means. In that view of the matter, the Panel concurs with the view of the AO that the aforesaid transactions are entered by the assessee company are Rolmex International, and not with Zylo International The®, the invoices filed by the assessee in the name of Zylo International and crediting the payments in die name of Rolmex international buttress the contention of the AO that these transactions entered by the assessee company are bogus and that bills have been issued in the name of one concern and the amount has been audaciously credited into the bank accounts of another concern through RTGS. The Panel accordingly directs the AO to make an addition of Rs, 4,57,32,31.8/-, treating the entire transaction as bogus."

14. Mr. Sehgal, Advocate finally concluded that the assessee should get benefit related REC& ESCs are capital receipt and not be the part of 115BBG. The catena

of judgment is in favour of assessee. The ld. DR respectfully relied on the order of Hon'ble Orrisa High Court, but the claim is restricted before the ld. AO. Pursuing the order of the Hon'ble Apex Court in the case of **Goetze (India) Ltd**there is no impingement in power of section 254 of the Act.

Mr Sehgal further argued there is no basis for addition of commission. The revenue has actedbeyond 8jurisdiction by contravening the Section144C(8) of the Act.

15. We heard the rival submission and considered the documents available in the record. First, we consider the issue whether assessee is eligible for the income from RECs and ESCs capital in nature and shall be considered as capital receipt or revenue receipt. First to ascertain the issue related technical nitty grittyof the REC & ESC's.

15..1. CARBON CREDITS vs. RENEWABLE ENERGY SOURCESVs. ESCERTS

That in the present era global warming and environmental concerns are on the mind of everybody and all the developed/underdeveloped countries are having their meetings regularly to devise new modes to reduce the emission of greenhouse gases i.e. Carbon dioxide/Methane etc. to impede global

warming because the emission of excessive greenhouse gases primary polluter of environment.

15.2. Common Feature [Credit for reducing carbon emission or greenhouse effect]

The common features of Carbon Credits/ RECs/ ESCERTS is that these are the incentives given to reduce the Carbon footprints i.e. emission of Greenhouse gasses such as carbon dioxide/ methane etc. and the basics of all three of them and the difference are as under: -

(a) Basics of Carbon Credits

As stated above, the emission of greenhouse gases/Carbon which primarily comprises of Carbon dioxide, Methane, Nitrous Oxide and Fluorinated gases, are a primary polluter of the environment.

(i) The carbon credits are of two types. The first type of carbon credits is validated by united nation Framework on Climate Change under Kyoto Protocol and are taxable u/s 115BBG of the Act at special rate.

(ii) That under the Kyoto Protocol to the United Nations framework convention on climate change, it was mutually agreed by the participant counties to reduce emission of Green House Gases/ Carbon foot print the credit is given to the assessee reducing such emissions under the Kyoto Protocol and because of international understanding.

(iii) The second type of carbon credits are of voluntary nature & are regulated by independent body Verra which was founded in 2007 by environmental and business leaders who saw the need for greater quality assurance in voluntary carbon markets.

(iv) The assessee company is dealing in a second type of carbon credits which are of voluntary nature and are not regulated by United Nations Framework Convention on climate change.

15.3. Basics of Renewable Energy Certificates

Another way to help to reduce carbon footprints has been devised by giving credit to units generating electricity from biofuels [agriculture residue i.e.

rice husk and wheat straw] as compared to fossil fuel [Diesel/ Coal] and it is a mechanism in giving incentive to the producers of electricity from Renewable Energy Sources.

(i) The regulation has been put in place by the Central Electricity Commission [CERC] and the Renewable Energy Certificates are issued under the rules and regulation framed by a regulatory authority. The REC will be exchanged only in the Power Exchanges approved by CERC within the bank of a floor price and forbearance (Ceiling) price to be determined by CERC from time to time.

15.4. Basics of ESCERTs

The Perform Achieve and Trade (PAT) is a market-based mechanism to reduce the specific energy consumption in energy intensive industries. This is facilitated through the trading of ESCERTs which are issued to those plants who have overachieved their targets. Those plants who were under achievers of their targets are entitled to purchase ESCERTsfor the trading of

ESCERTs, Central Electricity Regulatory Commission (CERC) is the Market Regulator and Bureau of Energy Efficiency is the Administrator.

15.5. Common Features: For treating them as capital receipts not liable to tax

a) That all the above stated three modes of incentives are in the nature of an entitlement received to improve word atmosphere reducing Carbon/ Heat and gases emissions and entitlement earned can, at best, be recorded as 'capital receipt' and cannot be taxed as the 'revenue receipt'.

b) The credits in all the three modes of reduction of 'carbon footprint' are not generated or created due to carrying on business to this accrued due to concern of the word to improve emission of 'greenhouse gases' which are primary polluters of environment. Thus, the amount received for 'Carbon Credits' has no element for profit and gain and it is not subjected to tax under any head of income and it is not liable for tax in terms of section 2(24),28,45 & 56 of the Income Tax Act, 1961. [The taxability of Carbon Credits stands changed w.e.f. AY 2018-19]

c) Further the credits under all the above stated modes of reduction of carbon footprints cannot be considered as by-products because credit is given to the assessee to help the reduction in emission of greenhouse gases and the assessee, who has surplus under any of the three schemes can sell them to another assessee.

d) Moreover, transferable credits of all the three modes of incentive does not result into and are not incidence of one's business and these are credit for reducing emission.The person having credits under any of the above stated schemes get benefited by selling the same to persons who needs to offset carbon footprint because of one's negative points under any of the modes of incentives.

e) The amount is not received, in any of the modes of incentive, by producing or selling any product, by-product or rendering any services for carrying on the business and the credit under any of the three modes is entitlement or accretion of capital and hence income earned on sales of these is a capital receipt.

f) That credit under any above said modes of incentive is not an off shoot of business, but it is generated due to environmental concerns and no asset is generated in the course ofbusiness, but it is generated due to environmental concern and the credit for reducing carbon emission or greenhouse effect can be transferred to any other party to reduce carbon emission.

16. The assessee claimed the transfer value of REC/ESCs amounting to Rs.17,77,26000/-in return under section 1115BBG and paid tax. During the time of assessment, the assessee amended the claim and treated the income as capital receipt. We relied on the orders **My Home Power Ltd,**(supra)and**Maheshwari Devi Jute Mills Ltd,** (supra)the income is offshoot from environmental concern not from offshoot of business concern. The nature is fully related to environmental health. We find that said income is capital in nature and not liable to tax under business income.

16.1. The next grievance is related the amendment of claim in assessment stage. The transfer value of REC/ESCs amounting to Rs.17,77,26000/- was duly claimed as capital receipt in assessment stage. We respectfully relied on the order of

Hon'ble Apex Court in the case of **Goetze (India) Ltd**&the order of the Hon'ble Calcutta High Court in the case of **Ankit Metal & Power Ltd.** Both theorders have not impinged the power of ITAT u/s 254 to allow the claim duly amended by assessee after filing the return. Accordingly, the revised claim made by the assessee during the time of assessment is duly accepted. We set aside the order of ld. CIT(A) and restore the claim of assessee.

16.2. The commission paid by the assessee amount to Rs.4,57,332,318/- was treated as bogus and added back U/s 69C. The addition was cropped up by the recommendation of the ld. DRP.The ld. DRP issued the SCN for enhancement, through e-mail, for the first time on 27th June, 2022 and the assessee was allowed time up to 28.06.2022 to respond to the same and the order making enhancement was passed by the DRP on 29.06.2022. The grievance of the assessee is that the ld. DRP has acted beyond jurisdiction U/s 144C(8) of the Act. The ld. AR placed the explanatory note of the Finance Bill 2021.After submission of requisite documents as evidence of transaction, the ld. DRP had not considered the same. Considering the submission of assessee the Tax Invoice, transaction through bank account and the TDS certificate are duly placed before the bench as proof of transaction with M/s Zylo International. The ld. DR has not made any objection about the

assessee's submission and not able to submit any contrary judgment against the assessee. It is pertinent to mention the revenue was not able to submit any transaction with M/s Rolmex International Prop. Jaswant Singhwith the assessee. The addition cannot be on basis of surmises and conjectures. We respectfully relied on the order of Hon'ble Apex Court **Umacharan Shaw & Bros**(supra). In our considered view the addition amount to Rs. 4,57,332,318/- is quashed.

17. Considering the above discussion, the Ground nos. 1 & 6 are general in nature. The Ground no-3 is not pressed. The Ground nos. 2,4 & 5 are allowed.

18. In the result, the appeal of the assessee bearing **ITA No. 193/Asr/2022** is allowed.

Order pronounced in the open court on 13.06.2023

Sd/- Sd/-

(Dr. M. L. Meena) **(ANIKESH BANERJEE)**
Accountant Member **Judicial Member**

AKV

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)

(5) The DR, I.T.A.T.

True Copy
By order